

## **RETALIATION - WHAT IT IS AND HOW TO AVOID IT**

**By Karen Sutherland**

One of the exceptions to Washington's at-will employment status is terminations that violate public policy, and one of the key areas where a violation of public policy can be found is in the context of retaliation claims. Additionally, a retaliation claim may exist in the absence of a termination because the concept of retaliation also includes other negative acts that affect an employee's terms and conditions of employment, such as a change in hours, workload, pay, promotional opportunities, assignments, or duties. Retaliation can also take the form of conduct that affects the employee's work environment, such as taunting, teasing, failing to include the employee in workplace activities, cutting the employee off from communications that are needed for the employee to do his or her job, moving the employee's office or work area so that it is harder for the employee to do the job, or otherwise making the employee miserable enough so that the employee's working conditions are affected or the employee feels forced to quit.

In order for a retaliation claim to exist, the employee must have engaged in some sort of legally protected activity. Retaliating against someone for spreading gossip or for a bad performance review or for some other activity that is not legally protected generally does not give rise to a legal cause of action for retaliation. The types of activities for which employers cannot retaliate against employees include, among other things, the following:

- Union or other organizing activities or sharing an employee's own wage and benefits information with other employees.
- Taking time off under the Family Medical Leave Act or seeking accommodation of a disability under the Americans with Disabilities Act or state or local disabilities laws.
- Making a claim of sexual harassment or discrimination, or wage and hour violations, even if the claim is unfounded (there are some exceptions for knowingly false claims).
- Asking the employer to pay for overtime hours worked.
- Seeking L&I payments for a workplace injury or informing OSHA or the Washington Industrial Safety and Health enforcement agencies of a potential safety violation.
- Exercising First Amendment rights or other civil rights.

To prove unlawful retaliation, the employee must show a connection between the protected activity and the adverse effect on the terms or conditions of employment. Often, this connection takes the form of timing. For example, an employee who has never been disciplined before is disciplined after having engaged in a protected activity, or an employee who has engaged in a protected activity is disciplined for something that other employees are not disciplined for. This does not mean that an employee who has engaged in a protected activity can never be disciplined or never have his or her working conditions changed. It just means that the employer is going to need to be able to show some non-retaliatory reason for the discipline or the change in working conditions. In most situations, once an employer makes this showing, the burden then shifts to the employee to show that the reason offered by the employer is a mere pretext for retaliation.

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*This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at [ksutherland@omwlaw.com](mailto:ksutherland@omwlaw.com)*