

When is My Complaint to HR or a Manager Legally Protected from Retaliation?

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If you make a complaint to a manager or Human Resources (HR) at work, are you protected from retaliation under the law? Legal terms like “retaliation” and “hostile environment” are commonly used in everyday conversations. However, retaliation for someone’s complaint to HR does not always violate their legal rights. The complaint must be conduct that the employee believes to violate a relevant law, such as those prohibiting discrimination or harassment based upon protected characteristics (including race, gender, religion, disability, age, etc.).

A worker’s complaint or report must fit within the definition of “protected activity” under applicable law to trigger legal protection from retaliation. An employee generally engages in “protected activity” under federal, state, and local laws against discrimination when they report or oppose discrimination or harassment against a coworker or themselves. A protected complaint or report should communicate that the discrimination or harassment was based upon race/ethnicity, sex/gender, LGBTQ+ status, pregnancy, religion, disability/medical condition, national origin, age, veteran’s status, or another characteristic protected by law. Employee complaints and reports about specific dangers and legal violations, such as workplace safety, risks to public or patient safety, potential fraud, violations of securities or tax laws or regulations, and other unlawful activity may also be legally protected from retaliation, depending on which laws apply to the employer and location.

Employees sometimes do not want to outright say or write that a manager or someone else is discriminating or harassing them sexually, or due to racism, or on another unlawful basis. This is understandable, as people may fear retaliation will follow. But, if you wish to ensure that you have possible legal recourse if a complaint is met with retaliation, the employer must know that the complaint concerns potentially unlawful discrimination, harassment, or another possible legal violation.

A complaint does not need to use “magic words” in order to be protected. However, a complaint that is about general unfairness, or merely disagrees with a workplace decision or policy, likely will not be legally protected. Dancing around the real issue to be polite or avoid conflict can have big disadvantages and can undermine the credibility of later reports about such conduct. There are ways to raise issues without “going there,” but they come with the risk of losing legal protection while still becoming a target for retaliation. If an employee complains, for example, that she is paid less than all of her colleagues who are white and male (and identifies her comparators or harassers as such), it is possible that the complaint could ultimately be found to be protected. This is not certain, though. Using the terms “discrimination” or “harassment” in a complaint (and what characteristics were targeted), if that is what you believe is happening, is the best way to eliminate any ambiguity and ensure your employer knows what you mean, and that the complaint is legally protected.

We all have been told since we were kids that honesty is the best policy. If you do feel that a complaint or report should be made, a full, forthright complaint usually is the way to go, not just for legal protection, but to help ensure accuracy and that the company takes the complaint seriously and may take action to

address the problem.

Briefly, how should a complaint or report be made? Preferably, a complaint or report will be in writing, such as in an email, to create an unambiguous record. Verbal complaints do count as protected activity in almost all situations, and people may be more comfortable doing it that way. Consider talking with an attorney before making your complaint or report if time permits to decide upon the best approach. In general, complaints also should state that not necessarily every single fact or incident has been included or remembered, because new information can be recalled or discovered later.

As for who to complain or make your report to, your company's policy or procedure may specify who should get employee complaints about harassment or discrimination. Of course, you may not be comfortable reporting to that specified person or would prefer communicating with someone else (especially if, say, the policy specifies your director supervisor and that is who the complaint is about). You are allowed to make your complaint or report to someone else at the company, but it needs to be someone in management, ideally senior to you or in a relevant department (such as HR or Legal) with the authority to receive employee complaints. Do not make your report only to a friend or coworker who is not a manager or in another senior position.

In order for someone to have a viable claim for retaliation, even based upon protected activity, there also must have been sufficient "adverse employment action" against the employee who made the complaint. An "adverse employment action" is a decision or act that had a significant impact on the person's terms and conditions of employment (compensation, title, duties, promotion, termination, etc.). In court, you and your attorney would work to show the relation between your protected complaint and the adverse action in retaliation for the complaint—a "causal connection."

In another post, we will also discuss what it really means, in a legal sense, to be working in a "hostile environment." In general, there must be a certain level of harassment and the harasser must be targeting the employee because of a characteristic such as gender, sexual interest, race/ethnicity, LGBTQ+ status, religion, disability, national origin, etc.

If you make a complaint or report of discrimination, harassment, or other unlawful conduct, retaliation is not inevitable. Having a lawyer also can help deter retaliation. If you or someone you know is considering making a complaint of discrimination, harassment, or about another legal violation, or believes they are being targeted for retaliation, contact an attorney. An attorney can help you identify different approaches to the situation, formulate a strategy, and evaluate whether there are any possible legal claims. Acting early can be key. Either I, Lawrence M. Pearson, or another of the attorneys at Wigdor LLP would be happy to talk with you.

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