

Retaliation

The Whistleblower Guide

Speaking up about unlawful conduct at work can be risky. Employers often retaliate against those who report fraud and other unlawful practices, by terminating, demoting, or harassing employees who report or refuse to engage in the conduct. If you experience retaliation, the law may provide recourse.

◆ All retaliation claims have the same basic elements.

While the particulars of what activity is covered and what remedies are available may vary by the law at issue, you must prove three elements to prevail on a retaliation claim.

- **Protected Activity** – The conduct encouraged by the underlying statute, generally activity intended to stop or report a specific kind of unlawful conduct.
- **Adverse Employment Action** – Any action that negatively affects an employee's job, including termination, demotion, pay cut, as well as actions that don't directly affect pay but do make it harder for an employee to work, such as isolation, harassment, or extreme hostility.
- **Nexus** – The connection between the protected activity and the adverse action, demonstrating the employer's *knowledge* of the protected activity and the employer's *motivation* for the adverse action.

◆ Anti-retaliation laws apply even if the employee is wrong about the employer's conduct.

An employer that retaliates will be liable for retaliation even if courts or investigators later find no wrongdoing. In other words, an employee need not be right for the employer to be guilty of retaliation. As long as the employee's belief that the conduct is unlawful is reasonable, even if that belief is ultimately shown to be incorrect, the employer who fires, demotes, or otherwise punishes the employee for acting is still engaged in unlawful retaliation. In some cases, the conduct the employee reports may not be punished for reasons having nothing to do with the lawfulness of the conduct itself. In those cases, as well, the retaliation claim may remain viable even if the underlying conduct is not punished.

◆ Many anti-retaliation provisions have very tight timelines.

If you think you have a retaliation claim, don't delay! Many retaliation laws provide very short deadlines from filing your claim—in some cases as little as **30 days** after the retaliatory act. The retaliation component of a law may have a much shorter statute of limitations than the law governing the unlawful conduct.

◆ Remedies vary.

The specific remedies available to an employee who has suffered retaliation will vary by the specific law. Typical remedies include:

- Reinstatement
- Back pay (and sometimes a multiple of back pay)
- Front pay
- Interest on back pay
- Other damages
- Costs and attorneys' fees

All of these remedies are not available under every anti-retaliation law.

South Carolina

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Federal Law

False Claims Act (31 U.S.C. § 3730(h))

The federal False Claims Act prohibits retaliation against an employee, contractor or agent for "lawful acts . . . in furtherance of efforts to stop 1 or more violations" of the False Claims Act. Federal courts in North Carolina have held that the employee need only have a reasonable belief that the conduct violates the False Claims Act to prevail on a retaliation claim. Remedies available include reinstatement, 2x back pay plus interest, costs and attorneys' fees, and sometimes other damages. Documents s

Title VII of the Civil Rights Act (42 USC § 2000e-3(a))

Title VII prohibits employment discrimination based on race, sex, national origin, or religion. An employee subjected to retaliation for opposing or cooperating in an investigation into discriminatory employment practices may sue the retaliating employer. Available remedies include back pay, compensatory damages, attorneys' fees and costs, and in some circumstances punitive damages. e

OSHA-Administered Retaliation Laws

The Occupational Safety & Health Administration administers a number of laws that have anti-retaliation provisions. Claims under these laws must first be filed with OSHA, and timelines are extraordinarily tight—as little as 30 days after the retaliatory act occurs. Remedies available differ among the various laws.

State Law

South Carolina does not have a state False Claims Act and does not have very strong protections for whistleblowers outside of a few circumstances.

S.C. OSHA Anti-Retaliation (S.C. Code Ann. § 41-15-510)

South Carolina's OSHA anti-retaliation law protects employees who file complaints under either the federal Occupational Safety and Health Act or South Carolina's OSHA. To assert a claim, the employee must file a complaint with South Carolina's Department of Labor within 30 days of the last retaliatory act. The Department of Labor then initiates suit, if it believes litigation is warranted. Available remedies include reinstatement and back pay. Punitive damages are not available.

S.C. State Employee Whistleblower Protections (S.C. Code Ann. § 8-27-10 and following)

Protects employees of state government who report fraud, waste, and abuse in state agencies. Prohibited conduct stretches only to actions that affect employee's pay—termination, suspension, demotion, pay reductions. Available remedies include reinstatement, back wages, other actual economic losses up to \$15,000. The law also provides for a whistleblower reward—the reporting employee may be eligible for up to 25% of the funds reported or saved as a result of his or her report. Statute of limitations is 1 year, and all other avenues for redress (e.g., grievance procedures) must be exhausted before suit can be filed.

Wrongful Discharge in Violation of Public Policy (Common Law)

Even if an employer's conduct doesn't fit into any of the statutory provisions, it may be actionable under the common-law doctrine of wrongful discharge. The employee must allege specific employer conduct in violation of a specific, expressed public policy. South Carolina courts do recognize "constructive discharge," but the standard is high: the employee must be able to show that the employer acted deliberately made the work environment so intolerable that a reasonable person would resign. Remedies available may include reinstatement and back pay, as well as other economic losses. Punitive damages may be available for egregious conduct amounting to "willful, wanton or reckless" behavior. The statute of limitations is 3 years.

"Common Law"

Wrongful Discharge in Violation of Public Policy is a common-law concept. That means it is based on judicial decisions rather than statutes, a constitution, or other explicitly codified law. Legislatures may override common law by passing specific statutes, but where no statute exists, common-law principles define the law.