

### When you are provoked

Typical strategies calculated to provoke you to retaliate (or just get even with the agency for perceived wrongs) include: long periods of absence; sloppy or poor work; contrived complaints ("The desk is too low," "The bathroom is too far away," "You're always watching me"), spending much of the day talking, trying to gain support for his or her case from others, complaints that co-workers have turned cold to him or her (which may be true).

Since you have work to do, but fear that any action you take may result in a retaliation complaint, you're on the spot. The best thing to do is document the problem behavior. Put a copy of the memo in the employee's personnel file, and give a copy to personnel or the appropriate superior. Apply your agency's progressive discipline as you would normally.

Remember that filing a complaint or lawsuit is not necessarily an attack on you. Often, the complaint is filed in reaction to agency policies and guidelines, or agency instructions to supervisors rather than from animosity toward the supervisors themselves, and many employees who file a complaint experience great personal stress.

Lastly, it is simply more practical to ignore a complaint of discrimination--even one filed specifically against you-- than to take it personally. Retaliation not only results in additional investigations and lawsuits, it weakens your side of the case on the original charge as well.

### Examples of Reprisal Cases

The following are examples of cases that have resulted in findings of reprisal, with identifying information changed. The first involved an individual who was given a "mid-year performance appraisal" immediately after filing an EEO complaint. The appraisal was based on a "new" Position Description and performance standards describing duties she had been performing for over two years. She was given a Level III, whereas her previous two year-end appraisals had been at Level II. Even though this appraisal was technically acceptable under

normal circumstances, the park could not give a credible, legitimate nondiscriminatory reason for taking the adverse action it did, when it did.

The second case involved someone who had filed a complaint over non-selection to a position. Subsequently, he applied for another job and the selecting official selected him, but the Superintendent overruled the selecting official and directed him to select another candidate. This was ruled to be reprisal and the agency paid several thousand dollars to the complainant for lost wages, even though the complainant eventually lost his initial complaint.

In the third case, an individual was on a one-year probationary period as a new employee. He had previously filed a complaint which was ultimately resolved. He was then given a mid-year performance appraisal and was advised that his performance was insufficient in several respects. His supervisor indicated that he would be afforded an opportunity to show improvement in his work during the next six months. However, he received a termination notice three weeks later and filed a Complaint of Reprisal, arguing that the termination was due to his use of the complaint process. The Federal Personnel Manual states that "a decision to terminate should not be made in haste or until the employee has had a full and fair trial. The length of such a trial is whatever time it takes for the agency to appraise the employee's post-appointment performance and conduct and to arrive at a considered judgement whether he/she should be retained or separated."

This Complaint was investigated and reprisal was found to have been part of the reason for the termination. It did not appear that his supervisor gave him an adequate and fair opportunity to demonstrate satisfactory performance, and there was also evidence to suggest that the supervisor bore feelings of resentment that he had engaged in EEO activities. The result was that he was offered reinstatement and back pay.

For further information, contact the National Park Service, Western Region, Equal Opportunity Office (415) 556-0968.

## AVOIDING EQUAL OPPORTUNITY COMPLAINTS OF REPRISAL

*(Tips for Supervisors)*

Many, if not all National Park Service employees are now aware that the prohibition in Title VII of the Civil Rights Act of 1964 against reprisal (retaliation) is more than a shield--it can also be a potential sword used against employers.

Although termination cases may be the most expensive kind of discrimination lawsuits when the agency loses them, reprisal cases are the hardest to live with.

The employee who filed the complaint is usually still with you, which can put the manager in a no-win situation. Acutely aware that you may be very angry, the person will now be extremely sensitive to your every action and will watch for the smallest change in your behavior.

And government agencies will probably investigate reprisal charges just as vigorously as race or sex discrimination complaints because the right to protest against discrimination doesn't mean much unless freedom from intimidation or reprisal is guaranteed.

Making it still tougher is the fact that, like the employee, the government agency investigators and the courts may expect management to be angry about such accusations. And since experience shows that attempts to get even with accusing employees may be well disguised, they may be more inclined to examine closely evidence that would otherwise be considered weak or inadequate.

Add a supervisor's or manager's natural feelings of anger or defensiveness, and it's not surprising that retaliation charges can have more merit than the original charge.

### How reprisal is defined

The wording of Title VII's ban against discrimination, which is used for virtually every

federal and state EEO law, is very specific:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made unlawful...by this title, or because he has made a charge, testified, assisted or participated in any manner in an investigation proceeding or hearing under this title." (Section 704(a), Title VII, Civil Rights Act of 1964.)

The Code of Federal Regulations on Equal Employment Opportunity in the Federal Government states in Section 1613.261, Freedom from Reprisal:

"Complainants, their representatives and witnesses shall be free from restraint, interference, coercion, discrimination or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage...or any time thereafter."

#### What to do

Here's the best way to behave after you learn that a complaint has been filed:

*\*Act as though nothing is different.* The employee may test you by asking, "Did you know I filed a complaint?" just to get your reaction. The best thing to do in these cases is to indicate that you and your organization respect the employee's right to file a complaint. You might say something noncommittal such as "I'll be interested to see the outcome."

*\*Reassure the employee that the complaint will not affect his or her working relationship with you or the company.* Explain that if (s)he ever feels (s)he is being treated unfairly, (s)he should continue to feel free to come to you and work the problem out. Make a note of your comments for your records.

*\*Avoid being drawn into any kind of discussion about the complaint or its validity.* If the employee asks you about it, stress that it is your position and the agency's that anyone has a right to complain about discrimination and that such complaints will not affect his or her employment

status in any way.

*\*Remain neutral.* If, while a hearing or investigation is underway, the employee comes to you saying (s)he has had a change of heart about the filing of the charge, being a witness, etc.--which may or may not be sincere--remain neutral. You may advise the individual that (s)he has a right to withdraw the charge or complaint, adding that "It's your personal choice and the agency respects your right to proceed or not as you wish. In any event, your decision won't affect your employment relationship with me or the agency."

*\*Avoid discussing complaints in reference checks.* If others tell you in reference checks that someone is a "troublemaker" or has been a "complainant", advise them that the employee has a right to use the EEO process and they should not disparage that use in references, nor should you do so in reference information you provide to others. The "old boy network" has no place in the National Park Service.

#### "Don'ts" of retaliation

1. Don't terminate or discipline an employee for filing a charge. This is the most obvious kind of retaliation and therefore the easiest to avoid.

2. Don't threaten the complaining employee--e.g., "You've got no future here," "You'll get yours," "You're jeopardizing your career," etc.

3. Don't assign him/her more unfavorable tasks or duties than normal for the employee previous to filing the charge, or than is normal for other employees currently. Keep the employee's job the same unless (s)he complains about having to do a disproportionate share of the undesirable work, then examine the validity of that concern.

4. Don't give the employees a bad performance review after the charge is filed when previous evaluations were good. Where performance has deteriorated, write a complete explanation of how it has changed--don't just check the box.

5. Don't fail to give a raise otherwise due, such as a step increase.

6. Don't deny a promotion which the employee was in line for. Supervisors sometimes mistakenly think there's no way to prove that the denial of a promotion is connected with the earlier filing of a complaint. But the fact is it can be proven in a number of ways: by comments the supervisor has made to others about the employee before the charge was filed, past promises of raises or promotions, promises made to the employee upon joining the agency, the pattern of positive documentation, performance appraisals, etc.

7. Don't refuse to communicate with the employee. Avoiding normal contact, even saying hello in a different manner may all be construed as retaliation--even if the supervisor is avoiding the employee because of the feeling that "anything I say might get me in trouble."

8. Don't over-supervise--unless you have documentable reasons for doing it.

9. Don't suddenly enforce work rules previously unenforced or laxly enforced.

10. Don't encourage other employees to shun the person who has filed a complaint.

11. Don't make jokes or comments about anything related to race, sex, etc., to show you have no bias. These may be read out in court in a monotone where they will sound anything but humorous.

12. Don't moralize or tell employees you are disappointed in them for filing a charge. For example: "We had great hopes for you" or "You had great future here" indicate that your evaluation of their work has changed as a result of the charge--and that is discriminatory and unlawful.

13. Don't criticize the employee for filing the charge.