

Retaliation at work

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Learn about protections from retaliation at work and adverse employment actions.

1. Definitions

At will employment

Most jobs in Washington State are “**at will**.” Your employer usually can fire you at will, for any or no reason.

There are some exceptions to this. The employer may not fire you in retaliation (revenge) for exercising your legal rights as an employee.

What is retaliation?

Your employer “**retaliates**” when it takes a negative action against you because you:

- Complained about discrimination against you or a co-worker
- Filed a charge of discrimination against your employer
- Opposed illegal work practices or policies
- Participated as a complainant or witness in an investigation about employment discrimination, retaliation, or harassment
- Exercised another type of protected legal right at work like refusing to participate in mandatory employer sponsored political or religious events

Example 1: You make a complaint about sexual harassment. Your employer fires you for making the complaint. This is retaliation.

Example 2: You ask for reasonable accommodation of your disability. Your employer demotes you as a result. This is retaliation and employment discrimination.

Retaliation is prohibited under state law

State law (<https://app.leg.wa.gov/rcw/default.aspx?cite=49.60.210>) makes it **illegal** for your employer to retaliate against you for filing a complaint of discrimination, harassment, or other workplace violations. If you make a complaint that's investigated **and** your employer retaliates against you, then you can make an additional claim of retaliation against your employer. Even if the investigation determines that a discrimination violation **didn't occur** but your employer retaliated against you anyway for making the complaint, your **retaliation** claim can continue even though your discrimination claim wasn't validated.

2. Adverse employment actions

What is an adverse employment action?

Some negative actions can happen at work that might affect you in ways you don't want that are just part of working **without** qualifying as an **adverse** action. Here are some examples:

- Being fired for not showing up to work repeatedly after multiple warnings
- Being laid off because of funding cuts
- Being transferred because of necessary job changes affecting the whole company
- Having your shift changed during a seasonal shift in business that affects everyone's schedules

An otherwise common employment practice **becomes adverse**, and prohibited, **if** the action is **based on** your employer doing something retaliatory or discriminatory or is an action that's part of harassment against you or other employees.

An **adverse employment action** is a **negative or harmful action** your employer took or caused that was:

- Based on discriminating against a protected class.
- Part of harassment aimed at you or another employee.

- Retaliation against you for exercising your employee rights or protections.

Evidence of adverse actions is often how you prove retaliation. You must show that your complaint about discrimination, harassment, or other protected rights was the **main reason** why your employer acted unfairly.

Examples of adverse employment actions

Adverse employment actions can include things like:

- Being fired
- Not being hired
- Being demoted
- Being transferred (including lateral transfers – we explain these below)
- Having hours or wages cut
- Getting points taken away or not given
- Removal of preferred work schedule, shifts, clients, or assignments
- Being refused assignments that are the normal, usual and important tasks for your role
- Taking away job responsibilities or privileges
- Being suspended
- Job status downgrades or negative performance reviews that are otherwise unjustified
- Making you take an assignment or location that requires a longer commute or other hardship to you
- Other staffing and shift changes that are meant to be unfair to you

- Disciplining you unnecessarily or without any justifiable reason
- Denying you overtime that other employees like you can access when they ask for it
- Failing to protect you from hostility from other employees (or encouraging the hostility)
- Having your office, desk, or workstation moved somewhere less desirable to you
- Being forced to isolate from other staff unnecessarily
- Excluding you from meetings you should otherwise be in, or otherwise blocking you from important information you would normally have access to
- Never getting promotions you apply for when you're the most qualified internal applicant with seniority, while less qualified applicants with less seniority are often promoted internally when they **first** apply

A “**lateral transfer**” is when an employee is moved to a different job that’s at the same level of pay, skill, responsibility, or salary. It’s not a promotion.

Lateral transfers can be positive and voluntary so that you can cross-train and gain new experiences. But **some lateral transfers are retaliation**.

What if the harm from the action wasn’t substantial?

Small negative actions might not be enough for you to make a claim of retaliation. Usually the harm must be “**materially adverse**.” This means the harm must be **significant**. But retaliation doesn’t have to be the **only** reason for the action, just one of the reasons.

For discrimination claims, the harm must be harm that **would discourage a reasonable worker from making (or supporting) a complaint about**

discrimination.

If the action your employer took against you **makes you afraid to exercise** your employee rights at work, it was probably significant enough to be **an adverse action**.

If the harm isn't significant **and** you're using Title VII protections, the harm should be **related to a term or condition** of your employment being changed for **no other reason** than discrimination, harassment or retaliation.

Example: Your employer laterally transfers you to a job at the same company, solely because the employer didn't like that you'd complained about racial discrimination you experienced in the workplace. You didn't ask for and don't want the different job. Your regular position isn't going away. Even if there weren't **significant negative consequences** from the lateral transfer, such as **a lower wage**, you might have a claim under Title VII because it was a **change in your job** and **the specific job itself** that you had before the transfer **is itself** a specific "term and condition" of your employment.

3. What is protected

Your employer can't retaliate against you for certain things you did

You might have a retaliation claim if your employer takes some kind of negative or punitive action against you because you did any of these:

- Complained about unsafe working conditions.
- Complained about not getting minimum wage or overtime.
- Filed for workers' compensation.
- Complained to DSHS about abuse or neglect of patients in a health care facility.
- Engaged in union activities.
- Did something to try to improve pay or conditions for workers at your job.
- Opposed discrimination at work.
- Made it known to enforcement agencies, courts, or the state Attorney General, that your employer has illegal practices or policies.
- Helped in an investigation against your employer for discrimination, harassment or retaliation against another employee.

If you wouldn't sign a nondisclosure agreement (an NDA) because it asked you to give up (to waive) your right to talk about treatment that you reasonably believed violated worker protections laws, your employer can't punish you. Any agreement that asks you to waive your rights to disclose discrimination, retaliation or harassment is **against state law** (<https://app.leg.wa.gov/rcw/default.aspx?cite=49.44.211>), and is **void and unenforceable**.

There's no specific anti-retaliation law in my situation. Does that matter?

Yes. If discrimination, retaliation, or harassment laws don't protect you, then you can only sue your employer if they fired you **for reasons that go against public policy**. It's illegal to fire you for a reason that goes against a public policy clearly expressed in state law.

Example: It's illegal to fire an employee for "**whistleblowing**." **This is** when you report to the government that your employer violates environmental, business or health laws. If your employer fires you for this, you can sue for "wrongful discharge in violation of public policy." The state agency that enforces state anti-discrimination (<https://www.hum.wa.gov/>) employment laws (the Human Rights Commission) also will investigate claims if you're fired for whistleblowing against a state agency.

A group of workers got together to ask for better working conditions. We didn't join a union. The employer fired us. Is this retaliation?

It could be. Workers have the right to come together to ask the employer to improve conditions without being retaliated against.

Example: Eight women work together, sewing sleeves on jackets. The room they work in is dark. They have trouble seeing their work. They ask the manager to make the lighting system brighter. Shortly after that, the employer fires them.

If you take some kind of action about a workplace issue with another employee or a group of other employees, **that is called a "concerted action"**. If you believe you were **fired** because you

took concerted action over workplace issues, contact the National Labor Relations Board (<https://www.nlrb.gov/>) (NLRB). They can investigate whether your employer has violated the National Labor Relations Act. If so, the NLRB lawyer will try to reach a settlement. They may take the case on your behalf before the Board. You may get your job back plus back pay.

What about retaliation during hiring?

State law (<https://app.leg.wa.gov/rcw/default.aspx?cite=49.60.210>) lets job applicants make a claim if a prospective employer retaliated against them by refusing to hire them if:

- The retaliation was due to the applicant's opposition to discrimination against a different or former employer **or**
- The applicant had otherwise made their opposition to violations of employment law known to the prospective employer

Example: Your final interview for a job is going well. The manager asks for an example of something you were proud of at your last job. You answer that you were a voluntary Union steward who helped make your workplace safer and fairer for employees, and that being a Union steward helped you build leadership and communication skills. After the interview, the manager says, "We won't be hiring you. We can't have troublemakers here trying to unionize everyone on our dime." **That's retaliation** against you because you took part in Union activities and making the previous workplace safer, both protected activities.

4. Proving retaliation

The employer told me their reason for taking action against me. I think the real reason is unlawful retaliation. Could I win if I sue?

Maybe, if you can show retaliation was a big factor in why the employer acted against you. When your employer says they have a **different** reason for taking action that you think was motivated by discrimination, harassment, or retaliation, that different reason offered by your employer is called "**pretext**" or "**pretextual**." Pretextual reasons can be false justifications used to hide real motivations.

Example: Susan was hurt on the job. She filed a workers' compensation claim. Soon after that, her employer fired her. The employer claims the firing was for some other reason. Susan thinks it was because she filed for workers' compensation. She should ask herself:

- What has happened to other injured workers in the same situation?

Example: Other people hurt on the job were also fired soon after their injury.

- Did the employer fire her for something that other workers routinely get away with?
- Did the employer violate its own rule? **Example:** The employer has a rule that they'll fire you only after you've gotten 3 written warnings. They fired Susan with no warning.

Written statement of reasons the employer fired you: Under state law, you have a right to a signed, written statement saying why they fired you. Your employer must give it to you within 10 working days of getting your written request.

What if I can't prove discrimination, but my employer did retaliate against me?

Even if you can't prove discrimination, if you had **an objectively reasonable belief** that your employer's actions were violating the law and that **because of that** your employer acted unfairly towards you, you may still have a retaliation claim.

If you reasonably believed the discrimination or actions violated the law when you made the complaint, you're still protected from retaliation for that belief, even if there ends up being no findings of discrimination.

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