

# Non-Retaliation: The 5 Biggest Mistakes E&C Programs Make

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## Retaliation: Why It's Critical

- ❑ Retaliation is the most frequently alleged basis of discrimination since 2008 (EEOC)
- ❑ Number of discrimination findings based on a retaliation claim has outpaced other bases of discrimination (EEOC)
- ❑ Even when companies are innocent of underlying conduct, they can be found guilty of retaliation
- ❑ One of the least well-developed aspects of E&C programs

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## Understanding Retaliation: The Psychology

- ❑ Desire for retaliation is common, particularly if allegation threatens one's self image
- ❑ Retaliation begins with a perceived offense -- accused truly believes they have done nothing wrong, or behavior was somehow justified
- ❑ Retaliation is a coping mechanism -- alleviating the psychological discomfort associated with perceived injustice
- ❑ Cognitive, emotional, and social processes can override "instinct" and guide behavioral choices

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## Understanding Retaliation: Personality Traits Associated with Retaliation

- ❑ Sense of entitlement -- experiences offenses emotionally and takes them personally
- ❑ Authoritarian -- places a high value on status in groups
  - ❑ Particularly true if WB is 'subordinate' status
- ❑ Introverts - more likely to ruminate over offense
  - ❑ Extraverts more likely to seek non-aggressive resolution -- attempt to salvage the relationship

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## Understanding Retaliation: Retaliation is More Likely When . . .

- ☑ Individuals perceive the WB as intentionally malicious
- ☑ Accusation is very serious
- ☑ Accusation will negatively impact future work relationships
- ☑ Accused feels that he or she is being judged
- ☑ Accused believes that job, even perceived employability, is in jeopardy
- ☑ Accused feels the workplace is not fair -- they cannot depend on formal channels for fair or just treatment

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## The Five Biggest Mistakes

1. Retaliation is not properly defined
2. Policy/procedures are inadequate
3. Managers poorly (or not at all) prepared
4. Failure to train/educate entire employee population
5. Failure to monitor and enforce

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## #1: Not Properly Defining Retaliation

Which of the following could be considered retaliation?

- a) Change of work assignment or schedule without demotion or loss of pay
- b) Mentioning employee complaints in their personnel file
- c) Coworkers expressing feelings of distrust and concern
- d) Conduct by colleagues which occur off work time/premises
- e) Not inviting the employee to a training program
- f) Laying off a close family member (or ending a supplier contract)
- g) Not hiring a prospective employee due to a complaint against prior employer

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## #1 Not Properly Defining Retaliation

- ☑ “Formal”
  - ☑ Termination, loss of promotion, less-desirable assignments, pay reduction, etc.
  - ☑ Typically committed by managers
  - ☑ Putting notice of filed complaints in personnel file
- ☑ “Informal”
  - ☑ Coworkers expressing feelings of distrust and concern
  - ☑ Different treatment e.g., ostracizing, shunning
  - ☑ Not part of the ‘inner circle’

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## #1 Not Properly Defining Retaliation

Important Cases: Burlington Northern & Santa Fe Ry. v. White

- ❑ Retaliation claims do not require an ultimate employment decision, a demotion with loss of pay, termination etc., for the act to be considered sufficiently "adverse" to prevail in a retaliation claim.
- ❑ Retaliation can include any adverse employment decision or treatment *likely to dissuade a "reasonable worker" from making or supporting a charge of discrimination*

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## #1 Not Properly Defining Retaliation

Important Cases: United Airlines v. EEOC

- ❑ Requires the airline to revise its sexual harassment policies explicitly to include harassing conduct perpetrated through the *internet or social media* and affecting the work environment
- ❑ Conduct may occur on or off duty

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## #1 Not Properly Defining Retaliation

### Important Cases: EEOC v. IXL Learning

- ❑ EEOC claimed retaliation after an employee (who claimed discrimination) was fired after posting a broadly negative Glassdoor review, including allegations of discrimination
- ❑ Jury found for IXL: employee already planning to leave and had sent texts indicating motive for post was vengeful in nature

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## #2 Policy/Procedures are Inadequate

- ❑ Retaliation is poorly defined
- ❑ Be careful using “good faith:”
  - ❑ Define, e.g., “Good faith means that you believe the information is honest and accurate, even if you are later found to have been mistaken”
  - ❑ BUT recent guidance suggests EEOC may find policies that require complaints to be made in “good faith” defective
- ❑ Remove blanket provisions requiring employees to maintain confidentiality of their reports or their involvement in investigations

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## #2 Policy/Procedures are Inadequate

**Make sure policy and code of conduct match!**

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## #2: Policy/Procedures are Inadequate: Senior Executives

- ❑ Audit/Compliance charter does not outline clear procedures for executive allegations
  - ❑ When/if individual notified if complaint is found without merit
  - ❑ When/if General Counsel is notified
  - ❑ Who makes decision on who investigates and when
  - ❑ When are other committee members notified
  - ❑ When are other board members (including Chair) notified

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### #3 Poorly Prepared Managers

We spend as much training time/resources dedicated to retaliation as we do:

- a) Sexual Harassment
- b) Discrimination
- c) We do not offer specific training on retaliation

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Which of the following could be considered retaliation? (Yes/No)

- a) Change of work assignment without demotion or loss of pay
- b) Change in work schedule without demotion or loss of pay
- c) Mentioning employee complaints in their personnel file
- d) Coworkers expressing feelings of distrust and concern
- e) Conduct by colleagues which occur off work time/premises
- f) Not inviting the employee to a training program
- g) Not hiring a prospective employee because of a complaint against prior employer

How would your managers score?

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### #3: Poorly Prepared Managers (and Senior Leaders!)

- ❑ How to create a non-retaliatory environment
- ❑ How to factor whistle-blowing into performance management
  - ❑ How to manage poor performers who blow the whistle
- ❑ How to separate the complaint from the complainant
- ❑ Dos and don'ts when receiving an allegation from an employee
- ❑ How to communicate with/treat employees after a complaint
  - ❑ Do not "treat them the same"
- ❑ Do's and don'ts when complaint is about *them*

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### #4: Failing to Train Entire Workforce

- ❑ Employees need to know their role in a non-retaliatory environment
  - ❑ Why speaking up benefits everyone
  - ❑ What is retaliation
  - ❑ How colleagues can be guilty of retaliation
- ❑ What to expect after raising a concern
- ❑ Resources for raising retaliation concerns
- ❑ Do's and don'ts when complaint is about *them*

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## #5 Failing to Monitor and Enforce

- ❑ E&C should schedule periodic follow ups, e.g., 6 months, 12 months
  - ❑ KPMG non-retaliation program:
    - ❑ Proactively monitors career paths of reporters using objective data, e.g., promotions, compensation, assignments
    - ❑ Monitors for period of at least 2 years
    - ❑ May periodically contact to assess possible subtle retaliation
  - ❑ Follow up may be prioritized based on likelihood, nature of allegation, etc.

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## Checklists

### Policy/Procedures:

- ✓ Have you broadened the definition of retaliation to include possible conduct outside of work and actions by colleagues
- ✓ If you use “good faith” have you defined it?
- ✓ Have you removed blanket confidentiality requirements?
- ✓ Does the Audit/Compliance charter outline clear procedures for executive allegations?
- ✓ Do your policies/procedures promote procedural justice?  
Communicated?

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## Checklists

### Training:

- ✓ Do you have dedicated training for executives and managers?
  - ✓ Performance management
  - ✓ Dos and Don'ts for interactions with reporters
  - ✓ Responsibility for actions by reporters' colleagues
- ✓ Do you have dedicated training for all employees?
  - ✓ What is retaliation
  - ✓ How colleagues can be guilty of retaliation

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## Checklists

### Monitoring and Enforcement:

- ✓ Do you have a system of follow-up with reporters?

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Questions Now?

Questions Later?

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