

Retaliation and Whistleblower Claims

Retaliation occurs when an employer (either through a supervisor, manager, or administrator) fires an employee or takes any other type of adverse action against an employee for engaging in protected activity. Adverse action can be anything from an employee being fired for speaking out against unlawful practices or can be subtler like failing to promote.

A whistleblower is someone who speaks out when no one else will in order to right a wrong that many would rather turn a blind eye to. Since this employee is threatening to reveal some type of wrongdoing within their job to an authority figure outside the organization it can make employees scared to come forward because they don't want to lose their jobs.

Types of adverse actions could be:

- Making threats
- Failing to hire
- Demoting
- Firing or laying off
- Denying benefits
- Reducing pay or hours
- Reassignment to less desirable position

Massachusetts Whistleblower Statutes

1. **MA False Claims Act** (M.G.L. c. 12, s. 5) → Used to recover settlements against companies engaged in financial improprieties negatively impacting the Commonwealth's pension fund or overcharged public entities for prescription medication.
2. **MA Health Care Whistleblower Act** (M.G.L. c. 149, s. 187) → To protect health care providers who report practices of a health care facility that pose a risk to the public health from retaliation; must be filed within 2 years of the retaliation
3. **MA Public Employee Whistleblower Act** (M.G.L. c. 149, s. 185) → prohibits the Commonwealth from retaliating against an employer from any employee who reports, testifies, or refuses to participate in activities that the employee reasonably believes poses a risk to public health, safety, or environment; file within 2 years

Federal Whistleblower Statutes

1. **Affordable Care Act Section 1558** → Prohibits employers from retaliating against employees from receiving a health insurance tax credit or subsidy
2. **Federal False Claims Act**- purpose is to combat fraud against the federal government
3. **Occupational Safety and Health Act**- prohibits employers from discriminating against workers who report unsafe working conditions

4. **Sarbanes Oxley Act-** employer is prohibited from retaliating against employees who filed a complaint with OSHA within 180 days of becoming aware of the adverse employment action (preventing corporate fraud) employer threatens, terminates, suspends you in any manner because of verbal or written concerns over its fraudulent or illegal activities)

**Employer can not retaliate against an employee who opposes, reports, or speaks out against discrimination based on its protected class (age, gender, race, handicap). Further, employers can not retaliate against employees who report sexual harassment

Big step in proving retaliation is **causation**. Causation is described as a casual connection between the protected activity and the adverse employment that can be inferred from temporal proximity. Plaintiff has to show by preponderance of the evidence that the company acted with retaliatory intent. Then the burden shifts to the company to prove credible evidence in support of a legitimate, nondiscriminatory reason for his actions.

Defenses:

- Had no knowledge of the protected activity (knowledge can be imputed or inferred in several ways including the size of the employer and timing of the adverse action)

Protected activities include:

- Complaining about unpaid wages
- Not being paid overtime
- Unlawful discrimination
- Harassment
- Unsafe working conditions

Protects employees:

- 1) Exercising a lawful employee right
- 2) Whistleblowing by reporting illegal acts of an employer
- 3) Refusing to engage in illegal acts
- 4) Discrimination
- 5) Violation of an employment contract

Employer cannot terminate you for whistleblowing or opposing an illegal act **EVEN IF YOU WERE WRONG** (as long had reasonable belief the conduct was unlawful and took whistleblowing actions thought were appropriate given the circumstances, then safe)



Following characteristics are considered protected statuses and can't play any role in the reason for your termination

- Physical disabilities
- Age
- Pregnancy status
- Gender identify
- Sexual orientation
- Gender
- National origin
- Race and color

Many employers do engage in unlawful discrimination and come up with 'fake reasons' for why they were fired → "pretextual reasons"