



# RESOURCE MATERIALS

## “Preventing Retaliation on Your Campus”

*Roundtable Discussion, November 12, 2003*

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*\*Excerpted from the Fall 2003 issue of UE's Employment Action newsletter, currently in the mail to UE members with ELL policies. You can also find the issue in our online Members Only Library at [www.ue.org](http://www.ue.org) under the "UE Employment Action Newsletter" category.*

*These resource materials and an MP3 recording of the program will also be available in the Members Only Library under the "UE Telephone Roundtable" category.*

# PERFORMANCE APPRAISAL FORM

## *Full and Part-time Administrative Personnel*

Employee's Name: Evan H. Date: 6/15/03

Position Title: Asst. Director of Benefits: Department of Human Resources

**1) Please evaluate the employee's job performance during the previous 12 months. Note strengths, accomplishments, results achieved, and any areas where improvement is needed.**

**APPROACH TOWARD JOB / RESULTS**—the individual's knowledge of the job, results achieved as related to job requirements and department and institutional objectives

Rating 2: Evan has worked at the institution for 17 years and knows a lot about it.

**MANNER OF EXECUTION**—dependability, willingness of the employee to extend him/herself to meet demands, ability to work independently, respect for confidentiality

Rating 2: Evan shows up every day and does the work I tell him to do.

**TEAMWORK SKILLS**—the manner in which the individual related to co-workers and to other departments, willingness to cooperate in joint projects, willingness to assist others

Rating 3: Evan is a nice person and is focused on getting his work done, but sometimes I think he is not a team player.

**SUPERVISORY SKILLS** (if applicable)—the effectiveness with which tasks and responsibilities were delegated, guidance and direction was provided to develop the skills of direct reports, and problems (in task performance or interpersonal relations) were handled and resolved

Rating NA: Evan does not really supervise anyone since I have taken over direct supervision for all people in the department.

**BUDGET MANAGEMENT**—the effectiveness with which the individual used and allocated financial resources, and kept expenditures within budget

Rating NA: I review the financial aid budget closely and have taken over responsibility for making sure we stay within it.

**PROFESSIONAL DEVELOPMENT**—the extent to which the individual continued to develop relevant job skills that enhanced job performance

Rating NA: Evan had a small cancerous growth removed this year. With everything he had to worry about, I let him slide on professional development this year.

**Additional comments regarding work performance (optional):**

Evan knows a lot about the institution, but he insists on doing everything the old way. For example, he is computer phobic and so he does everything with paper forms.

**2) Performance objectives / goals for the coming year:**

**3) Development plans:**

**The rating scale for administrative personnel is as follows:**

- 4** An employee receiving this rating consistently exceeds performance standards for the position in a manner that distinguishes the employee from most other administrative employees reporting to you.
- 3** An employee receiving this rating consistently meets all performance standards for the position and periodically exceeds them.
- 2** An employee receiving this rating meets the requirements of the position.
- 1** An employee receiving this rating does not meet the requirements of the position and immediate improvement is needed.

**Overall Rating: 2**

**Employee's comments:**

Employee's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Supervisor's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Department Manager's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

General Officer's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

# **Avoiding Retaliation Claims: A Guide for Human Resources Professionals**

## **1. Inform and support the complaining employee.**

Apart from any inquiry or investigation about the complaint, have someone contact the complainant. This function might be handled by human resources. Ask the employee:

- How are things going?
- Can I help with the situation?

Explain the institution's opposition to retaliation and its internal processes for addressing it. Offer to assist the complainant should any problems occur and provide him or her with a copy of the relevant policies. Document the conversation, perhaps in a short memo to the employee.

## **2. Inform and support individuals charged with wrongdoing.**

Explain to employees charged with wrongdoing that they may experience feelings of anger, betrayal, fear, or defensiveness. They may feel that the complaint is an attack on their personal integrity. These reactions are normal, but they must not translate into retaliatory actions.

Explain the institution's opposition to retaliation and provide copies of relevant policies and procedures. Document this conversation as well, again perhaps in a short memo.

Caution the individual who has been charged as well as other supervisors and managers to treat the complainant normally and exclude irrelevant information about the complaint from his or her personnel records. Explain that supporters, spouses, and the complainant's other associates must also be treated normally.

## **3. Consider restructuring the work environment.**

The work environment for the complainant and those charged with wrongdoing may need to be changed on an interim basis. Secure the complainant's written agreement to any changes that are related to the complaint. You might, for example, offer the complainant:

- A new evaluator who is not involved the complaint.
- A voluntary transfer to an equivalent position in another department.
- A temporary telecommuting arrangement.

Consult with counsel before offering or implementing any restructuring.

#### **4. Consider adopting an explicit, stand-alone policy against retaliation.**

Some institutions have statements against retaliation tucked away in corners of their discrimination, research, or grievance policies. Consider adopting an explicit, stand-alone policy stating the institution's opposition to retaliation against any individual for making or supporting a complaint against the institution. One sample text is:

“Individuals who make complaints against the institution, their witnesses, supporters, and advisors shall be protected from retaliation, regardless of the outcome of the complaint. If a member of the campus community believes that he or she is experiencing retaliation, the individual may pursue a grievance through... .”

#### **5. Check whether your policies discontinue an internal grievance if an external complaint is filed.**

Although the law is not firmly established, several courts have held that educational institutions must process an internal discrimination complaint even if the individual has filed a charge with the Equal Employment Opportunity Commission or other external agency. If your campus policies contain such a provision blocking internal grievances because of internal complaints, consult with counsel on the relevant law in your area.

#### **6. Train your supervisors and managers.**

Include discussion of complaint procedures and retaliation issues as a regular part of your training for supervisors and managers. Point out that even if they have never been involved in a complaint, one might arise at any time. Supervisors and managers should understand:

- How to treat someone who has complained or assisted with a complaint.
- The inappropriateness of referring to complainants in terms such as “troublemaker” or “whiner.”
- The normal feelings of anger and defensiveness experienced by someone accused of wrongdoing.
- The importance of avoiding retaliation.
- Campus policies and complaint mechanisms concerning retaliation.
- The critical need for factual bases for evaluations, adverse actions, and references for people who have complained.
- Resources on campus available for assistance with questions concerning employees who have filed complaints.

## **Avoiding Retaliation Claims: A Guide for Managers**

### **1. Handle the employee complaint well.**

Document all complaints, even verbal ones, about discrimination, harassment, safety, fraud, or misuse of institutional resources.

Ensure that complaints are reported to responsible administrators and that information is not carelessly spread around campus to others.

### **2. Discuss defensive or vindictive feelings.**

The following are some common reactions managers may have when an employee complains of discrimination or harassment. Although understandable, acting on any one of them may lead to a retaliation complaint. See whether you identify with any of these sentiments. If so, discuss with Human Resources, your supervisor, or counsel handling the discrimination complaint.

- This complaint makes me mad. I am getting hung out to dry, and I didn't do anything wrong.
- The complainant unfairly targets me and calls my competence into question.
- This situation is going to ruin my reputation and my future at this institution.
- I am going to give this person's work extra scrutiny in the future.
- This complainant is a troublemaker. I need to just ignore him to avoid future problems.

### **3. Channel your energy into positive approaches.**

It is not unusual to become frustrated and discouraged when dealing with an employee who has filed a complaint against you. Some managers develop a negative attitude toward work and feel as if they are the victim. If you start falling into this pattern, try some of the following approaches:

- I am not alone in this situation. I just need to take things slowly and stay in touch with HR and our legal counsel.
- There is no point in becoming angry. This is a difficult management challenge, but I can handle it.
- It is important to be patient and calm rather than letting my emotions get the best of me.

- This is not the end of the world. I will work toward reaching the best possible outcome for everyone involved.
- I need to maintain my professionalism and take the high road.

#### **4. When contemplating adverse action against a complainant.**

You may take an adverse action against a complainant, so long as the action is not motivated by the complaint. Proceed with great caution, as this is a treacherous area under the law, and be sure to consult with legal counsel or human resources.

**DO** make sure the adverse action is:

- Factually justified and documented in advance.
- Consistent with campus rules.
- Consistent with actions taken in other situations.

#### **DO NOT**

- Punish a complainant for activities that previously have been condoned.
- Publicize the adverse action beyond normal “need-to-know” channels.
- Be overzealous in monitoring or documenting problems with the employee so that it looks like you are “building a file” against the individual.

You may also want to review “Eight Mistakes Managers Make That Fuel Retaliation Claims.” It can help you avoid common traps and develop an effective strategy for dealing with the situation.

## **Eight Mistakes Managers Make That Fuel Retaliation Claims**

Managers are often tempted to retaliate against employees who allege harassment, discrimination, or other illegal conduct. Some managers may even retaliate unintentionally. However, retaliation only makes a bad situation worse. The following are common mistakes managers make that fuel retaliation claims:

### **1. Taking allegations personally.**

Many managers feel that a discrimination complaint means they are being called racist or sexist. They take personal offense and start treating the employee differently. Even though it is difficult, managers need to rise above any hurt feelings, act professionally, and treat the complainant as if no charge had ever been filed.

### **2. Making rash decisions.**

It is not unusual for managers to become irrational or hotheaded after they learn of a harassment, discrimination, or whistleblower charge. For many, their first instinct is to get even or blow off steam. Managers need to take a step back, cool down, and assess the consequences of what they are about to say or do.

### **3. Not obtaining help from HR or the school's attorney.**

Managers should not feel alone in dealing with a difficult employee. They need to be aware that help is available from attorneys or the human resources (HR) department. Some managers feel as if their hands are tied when an underperforming employee files a discrimination charge. If they discipline the employee for poor performance, they fuel a retaliation claim. But if they fail to discipline the employee, they create a double standard. In reality, a third party such as an attorney or HR professional can provide managers with a valuable outside perspective and help them develop coping strategies.

### **4. Lack of confidentiality.**

Managers need to be careful what they say about a complainant to others in the workplace. Some managers feel compelled to defend their reputations by bad-mouthing the individual and questioning his or her motives. Managers who do so unwittingly play into the complainant's hands by not only creating grounds for a retaliation claim but also generating a potential defamation lawsuit.

### **5. Freezing out the complainant.**

It is difficult to know how to behave around a person who has accused you of wrongdoing. Some managers react by not talking to the individual, avoiding interaction, and excluding the person from informal work gatherings. However, this kind of behavior can constitute an adverse job action sufficient to support a retaliation claim.

### **6. Focusing on the validity of the underlying complaint.**

Many managers mistakenly think that they may take action against a complainant if they believe a charge of harassment or discrimination is without merit. In actuality, courts require only that the *complainant* have a good faith belief that wrongful conduct

occurred. As a result, a retaliation claim may proceed to trial even after the underlying complaint has been dismissed.

**7. Lack of documentation of poor performance.**

Managers should have excellent documentation of performance deficiencies before taking disciplinary action against an individual who has filed a discrimination or harassment charge. The documentation does not need to be elaborate, but needs to be detailed and contemporaneous. From an employment lawyer's perspective, there is no evidence that a work problem occurred unless the manager documents it.

**8. Over-documentation of someone who has complained.**

While documentation is generally good, managers sometimes get carried away and write down every small performance deficiency in an attempt to discipline or terminate an individual who has filed a discrimination or whistleblower charge. The employee will later claim that the manager retaliated by "building a file" against him. The key question in these situations is whether the manager was consistent and treated all employees alike.

Institutions can help avoid these pitfalls by having someone sit down promptly with a manager who has been accused of harassment or discrimination and educate the individual about the institution's non-retaliation policy and the common mistakes managers make. Set up a support system to provide the manager with on-going advice over the weeks, months, or even years that the situation may last. In doing so, the institution not only decreases its potential liability but also helps the manager through a difficult situation.

# **Working with Your Lawyer to Avoid Retaliation**

*By Stephen L. Barker*

Imagine that a poor-performing employee files a discrimination charge just before her next scheduled evaluation. An investigation finds no credible evidence of discrimination. The evaluation proceeds as planned. Then the employee files a charge alleging that she received a poor evaluation in retaliation for reporting discrimination. What should you do if the individual continues to perform poorly? Will discipline of the employee invite a retaliation lawsuit?

These situations present difficult management challenges for both supervisors and human resource professionals. An experienced employment lawyer can not only help you steer clear of actions that could precipitate a lawsuit but also put the institution in the best possible defensive position if litigation appears inevitable. Here are some of the ways an employment lawyer can help:

## **Anticipating the employee's legal strategy**

A seasoned employment lawyer can often spot correspondence ghostwritten by an attorney working behind the scenes. Some underperforming employees decide that the best defense is a good offense and hire a lawyer to lay the groundwork for a potential lawsuit. Lawyers for employees sometimes use a discrimination claim as a “pre-emptive strike” to shift attention away from their client’s poor performance and establish the foundation for a subsequent retaliation claim. In such a situation, you need your own employment lawyer to recognize the setup.

## **Counseling managers**

It is not unusual for managers who are the subject of a discrimination complaint to take the charge personally and feel an urge to get even. If internal counseling of the manager is not effective, it may be worthwhile for your attorney to talk to the manager and explain the legal consequences of various actions. The manager may feel comforted just to know that legal counsel is available for consultation when difficult situations arise.

## **Planning strategy**

Some employees who allege retaliation believe they will not be disciplined for poor performance because the employer fears litigation. An employment lawyer can help you develop a strategy to document misconduct, give the employee a chance to improve, and discipline the employee if necessary.

## **Reviewing disciplinary documentation**

If you suspect an employee may file a retaliation lawsuit, it is important to recognize that any disciplinary letters or documentation may later become an exhibit in court. It is a good idea to have an employment lawyer review the documentation before it is sent to the employee to ensure that it does not say anything that could come back to haunt the institution in litigation.

**Reviewing adverse actions**

Ask your lawyer to review disciplinary actions before you take them. The lawyer will look at the timing of the action, quality of documentation, and justification for your action to determine whether the decision is defensible. Often, the lawyer can suggest lower risk routes to your ultimate objective.

**Establishing a defensible position**

Sometimes it is inevitable that an employee will file a retaliation lawsuit. Getting your own attorney involved early is critical to help shape the situation. After the suit is filed, there is little your attorney can do to change the facts. However, the guiding hand of a defense lawyer throughout the process can help put the institution in a stronger and more defensible position.

**Preserving confidentiality**

Documents prepared in anticipation of litigation or as communications with attorneys are usually protected from disclosure in court. For example, a draft of a termination letter that includes inflammatory language could damage your case if it is ever discovered. However, that document would be confidential if your lawyer asked you to write a first draft of the termination letter for her review and then the lawyer edited out the inflammatory language.

**Conclusion**

Experienced employment lawyers are an important ally to help you navigate the rough terrain of employee retaliation claims. They can help you avoid common mistakes, develop a strategy, and provide a valuable outside perspective from someone who understands how decisions can later play out in litigation. The time and money you spend gaining advice early in the process are a valuable investment that will bolster your defense. Good counsel may even help you avoid a lawsuit altogether.

*Stephen L. Barker is United Educators' Select Counsel for Kentucky. He is a partner in the firm of Sturgill, Turner, Barker & Moloney, where he specializes in employment and education law as well as mediation. Mr. Barker currently serves as President of the Fayette County Bar Association and is a member of the National Association of College and University Attorneys.*

# Revenge Can Be Costly

By Hillary Pettegrew and Sheila Lachs

Revenge has its temptations, but acting on those impulses—even appearing to act on them—can be a costly and time-consuming mistake. Many educational institutions have learned that lesson the hard way. They first face an employee’s claim for discrimination and then a claim for retaliating against the employee.

Federal law prohibits this kind of revenge, which it calls unlawful retaliation. Under the law, it occurs when an employer takes an “adverse employment action” against an employee because the employee took part in “protected activity.” (*See Key Terms below.*) The law requires that there be a “causal connection” between the adverse employment action and the protected activity. Since it’s often difficult to demonstrate one directly, a connection may be established by showing the adverse employment action followed closely on the heels of the protected activity. This is known as “temporal proximity.”

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## *Key Terms in Retaliation Claims*

**Adverse employment action** – In most jurisdictions, an adverse employment action means a material change in the terms, conditions, or benefits of employment. Examples include a poor performance evaluation, written reprimand, a failure to promote, or a transfer to a position with less prestige. In a few jurisdictions, the complainant must meet a higher standard and show that he or she suffered an “ultimate employment decision” such as termination, demotion, or a salary reduction.

**Protected activity** – Protected activity is virtually any kind of complaint by an applicant or employee that an employer illegally discriminated or committed some other unlawful activity, such as fraud or misuse of funds. Individuals making the second type of complaint are commonly called “whistleblowers.” A complaint usually is protected regardless of whether it is formal or informal and whether it is made internally or to a state or federal agency. Assisting someone else in pursuing a complaint, such as providing testimony, is also protected activity.

**Temporal proximity** – This term covers the time gap between the plaintiff’s protected activity and the alleged retaliatory conduct. When the alleged retaliation follows the protected activity closely (e.g., within days or weeks), that alone may be sufficient to infer causation.

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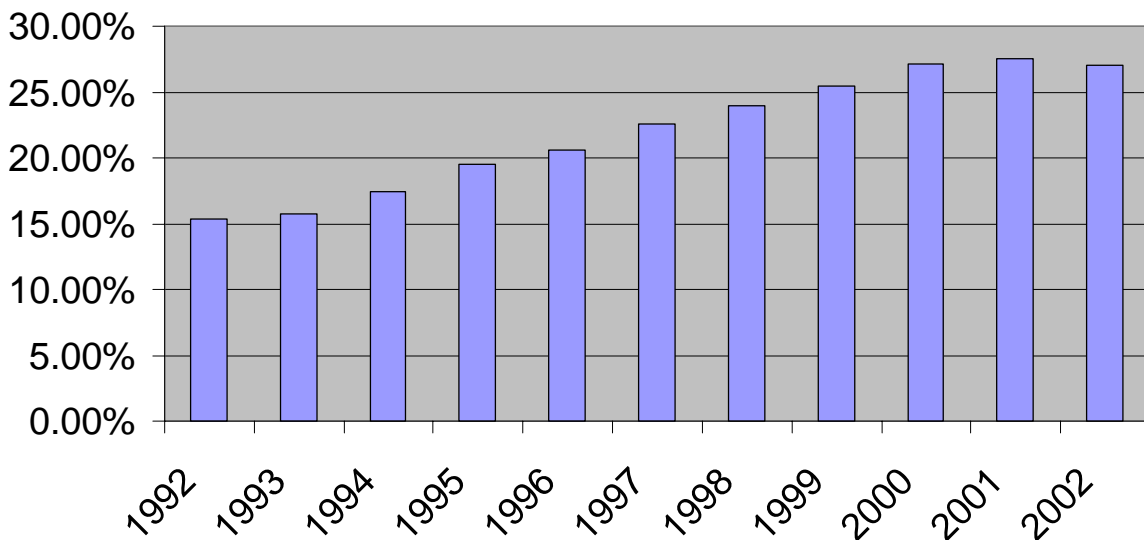
### **The frequency and staggering cost**

The number and cost of retaliation claims have increased since 1992, when 15 percent of Equal Employment Opportunity Commission (EEOC) charges included a retaliation allegation. Last year, about 27 percent of all EEOC charges included retaliation allegations. (*See chart below*) The median jury award for retaliation cases nationally

was approximately \$200,000 in 2003, according to the Jury Verdict Research Service. Some of the claims resulted in very large verdicts. Consider the following examples:

- A Texas jury awarded \$36 million to two college administrators who reported theft of government property and claimed the college fired them for doing so. Even though the judge reduced the jury's original verdict, the two administrators and their lawyers eventually received more than \$2.3 million.
- A retaliation case cost the University of California almost \$3 million. A jury awarded \$1 million to an employee alleging retaliation for testifying in support of another employee who brought a sexual harassment case. The court reduced the verdict to \$700,000, but it then awarded more than \$1 million in fees to the employee's lawyers. In addition, the university spent more than \$800,000 on its own defense costs.
- A Massachusetts jury awarded \$1.2 million plus attorney fees to a Harvard University security officer who alleged national origin discrimination and retaliation for complaining about the discrimination. The case is currently on appeal.

*Percentage of EEOC Charges Alleging Retaliation*



### **Juries respond**

Juries appear to know retaliatory action when they see it, and they tend to identify more with employees than with bosses. A recent case illustrates the extent to which jurors fault an employer who they think took revenge on an employee. An employee claimed he was fired in retaliation for filing a worker's compensation claim after he was severely burned on the job. The employee offered to settle the case for \$90,000 before trial, but the company refused to offer him more than \$7,500 and decided to take its chances in court. The jury returned a verdict of \$30.4 million.

While that case may be extreme, it highlights the dangers lurking for an employer that misjudges the value of an employee's retaliation claim. Moreover, this may hold particularly true for educational institutions because juries typically hold schools, colleges, and universities to a higher standard of conduct than other employers.

### **Difficulties in defending the claim**

When an employee files a retaliation claim, it takes on a life of its own, separate from the original, underlying claim. The validity of the underlying claim is irrelevant to the later retaliation claim, provided the employee honestly and in good faith believed the employer engaged in wrongdoing. And it is very difficult to prove that an employee's motive was anything less than honest.

In a significant number of cases, the underlying claim is dismissed before or even during trial, yet the court still allows the jury to decide the retaliation issue. Many employers are eventually absolved of discrimination but get slammed on the retaliation claim. Consider some of the following examples:

- A jury found that the University of Arkansas did not discriminate against a professor because of her sex and did not create a hostile environment. Nevertheless the jury awarded the professor more than \$350,000 because it found that her department retaliated by denying her tenure after she complained about perceived discrimination and spoke out against mismanagement.
- A Seattle jury concluded there was no sex discrimination in a case filed by a female manager against Johnson & Johnson. However the jury found that after the manager alleged discrimination, the company retaliated by excluding her from top management meetings, removing important job responsibilities, changing her job title, and offering her demotions. Consequently, the jury awarded plaintiff almost \$12 million plus \$600,000 to her attorneys. A federal appellate court reduced the award to \$3.1 million plus attorney fees.
- An Indiana judge dismissed a sexual harassment claim brought by a female airline pilot but allowed her to proceed with a claim that the airline fired her for complaining about sexual harassment. The jury awarded the pilot \$3.5 million in punitive damages for the retaliation, which was later reduced because of federal damage caps applicable to that case.

### **How retaliation claims increase settlement costs**

Given the risk of a large award to the employee if a retaliation case is tried, institutions often prefer to settle these claims—especially if there is some question about the appropriateness of its response to the employee’s original complaint. Settlement avoids the uncertainty of the jury’s reaction, but it can still be expensive. Retaliation is such a potentially explosive issue that it can increase the cost of settlement significantly.

For example, in 2002 California State University at Fullerton settled a lawsuit brought by a former personnel director who charged the university with retaliation for demoting him after his sister, also an employee, sued the school for sexual harassment. The personnel director also had a whistleblower retaliation claim, since he had given state auditors information about mismanagement of funds by the university. Although the school denied the personnel director’s charges, it nevertheless paid him \$457,000 in settlement—on top of the \$447,000 it had already paid to the man’s sister to settle her sexual harassment suit.

Also in 2002, another state university paid \$1.1 million to settle a class-action lawsuit revolving around allegations of widespread anti-Semitism. The settlement included a \$50,000 payment to several dozen faculty and staff members who claimed they suffered retaliation for opposing anti-Semitic practices against others.

### **Other costs to the institution**

Although retaliation claims pose a significant financial danger to educational institutions because of their frequency and the tendency toward large jury verdicts, the monetary costs are only part of the story. Educational institutions must consider the potential damage to reputation, image, and standing that the negative publicity associated with such a case will bring. Current and potential students, alumni, donors, and the general community will probably regard with disfavor a school that is found to have retaliated against an employee for complaining about perceived illegal conduct.

The lesson for educational institutions is to treat all allegations seriously and to establish procedures to prevent retaliation against employees making claims. It can be challenging to do so if the employee making an allegation is a chronic complainer or there is reason to believe the allegation is wrong or trumped-up. But with the cost of retaliation claims so high, institutions would do well to take steps to avoid them.

### **Resources**

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Butler, Teresa L. and A. Michael Weber. “Retaliation Lawsuits Are Increasing Rapidly,” National Law Journal, January 11, 1999.

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### *Anatomy of a Retaliation Claim*

The following is based on an actual claim brought against a United Educators member, but some facts have been altered to protect anonymity.

A college employed one person as a plumber for the campus. The plumber's supervisor was hotheaded, but he also went to great lengths to help out employees. One morning, the supervisor found the plumber passed out in the cafeteria after a night of heavy drinking. The supervisor arranged for the school to pay the plumber's salary during alcohol rehabilitation and also pay part of the program's cost. In addition, the college allowed the plumber to temporarily live in an unoccupied dorm room after his marriage fell apart.

Three years after the plumber returned to work, he got into an argument with his supervisor over pipe installation. In anger and frustration, the supervisor said, "I think I liked you better when you were drinking. Maybe we shouldn't have helped you get sober." The plumber complained to the administration. An investigation determined that the comment was a single, off-handed remark, but nevertheless, the college reassigned the plumber to a new supervisor.

Eight months later, the college was looking at finances and supervisors were encouraged to suggest ways to cut costs. The plumber's former supervisor recommended that plumbing be outsourced. His recommendation was accepted by the college president, and the plumber's position was eliminated.

The plumber filed a lawsuit in federal court alleging disability discrimination based on his alcoholism. He also alleged that his position was eliminated in retaliation for complaining about the supervisor's alcoholism remark. The court dismissed the disability claim but allowed the retaliation claim to proceed to trial.

The plumber made a very sympathetic witness. He was articulate and came off as a sensitive person who had suffered a lot of bad luck. Since his position was eliminated, he had tried to find work without much success. In contrast, the former supervisor came across as ill-tempered and gruff. The jury suspected revenge when it learned that the supervisor suggested the plumber's position be eliminated after the plumber complained about the comment he made. The jury became even more suspicious when it found out that the plumber's job was the only position eliminated on the campus. The college's president, who had approved the position elimination, had no recollection of that decision and had no documentation justifying the position elimination.

The jury returned a verdict for the plumber of more than \$100,000, and the judge awarded \$120,000 to the plumber's lawyer. In addition, the college spent more than \$90,000 on its defense, for a total cost of \$310,000.

**Lesson learned:**

- Despite everything the college did to help the plumber recover from alcoholism, the plumber's termination looked to a jury like retaliation for a complaint.
- The college's lack of documentation justifying termination of the plumber significantly weakened its case.
- The college failed to objectively review the facts.

*Hillary Pettegrew and Sheila Lachs are attorneys in the United Educators claims department. They work with UE members on claims, including retaliation, under the Educators Legal Liability policy.*

**United Educators  
Two Wisconsin Circle, Suite 1040  
Chevy Chase, Maryland 20815  
(301) 907-4908  
[www.ue.org](http://www.ue.org)**