

Retaliation: Still the Most Attractive Claim for Plaintiffs and Most Complicated for Defendants

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Retaliation is the most prevalent claim

1997 – 22% of charges

2021 – 56% of charges

2022 – 51.6% of charges

Why?

Easy to “tack on”

- Increases odds

- Does not generally increase cost

Separate path to success

- “Logically and factually distinct claims”

May bolster underlying claims of discrimination

The standard was easier to satisfy

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What standard?

Discrimination:

(1) he/she is a member of a protected group; (2) was qualified for the position at issue; (3) **was discharged or suffered some adverse employment action by the employer**; and (4) was replaced by someone outside [his/her] protected group or was treated less favorably than other similarly situated employees outside the protected group

Retaliation:

(1) he/she engaged in protected activity, (2) **he/she suffered an adverse employment action**, and (3) a causal link exists between the protected activity and the adverse employment action

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“Adverse Employment Action”

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So, what’s adverse?

...it depends.

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