

	<p>REPRISAL FOR EEO ACTIVITY In the Federal Sector</p>
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	<p>WHAT IS REPRISAL?</p>
	<p>According to employees, it's</p> <p><i>EVERYTHING</i> that happens to them AFTER The protected activity!</p> <p><small>(C) Joseph V. Kaplan 2012</small></p> 

	<p>WHAT IS REPRISAL?</p>
	<p>Obviously, not everything that happens to an employee after protected activity is reprisal.</p> <p>However, as the old saying goes: "Just because you are paranoid doesn't mean that someone is not out to get you!"</p> <p><small>(C) Joseph V. Kaplan 2012</small></p>

	KNOW THIS:
	Often, the charge of retaliation is a <i>stronger</i> case than the underlying case of discrimination.
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	PRIMA FACIE CASE
	<ul style="list-style-type: none">■ The employee engaged in protected activity;■ The agency official was aware of the protected activity;■ The employee was subsequently disadvantaged by an adverse personnel action; and■ There is a causal connection between the EEO activity and the adverse personnel action. <p><i>See Johnson v. Dept. of the Treasury, 101 FEOR 1172 (2001).</i></p> <div style="text-align: right;"><small>(C) Joseph V. Kaplan 2012</small> </div>

	PROTECTED ACTIVITY
	<ul style="list-style-type: none">■ NOT ALL CONDUCT IS PROTECTED.■ ONLY THAT CONDUCT DEEMED PROTECTED CAN GIVE RISE TO A CLAIM OF REPRISAL.■ PUT DIFFERENTLY, IT IS NOT ILLEGAL TO RETALIATE AGAINST AN EMPLOYEE FOR CONDUCT NOT PROTECTED <div style="text-align: right;"><small>(C) Joseph V. Kaplan 2012 6</small></div>

	PROTECTED ACTIVITY— OPPOSITION
	<p>"Opposing" a discriminatory practice occurs when a person communicates to her employer (either implicitly or explicitly) that some activity constitutes unlawful discrimination. Examples of opposition include:</p> <ul style="list-style-type: none">■ Threatening to file a complaint alleging discrimination■ Complaining to anyone about discrimination■ Refusing to obey an order because of a reasonable belief that it is discriminatory <p>See EEOC Directive, Ch. 8-4-8-6. <small>(C) Joseph V. Kaplan 2012</small></p> <p style="text-align: right;">7</p>

	PROTECTED ACTIVITY— OPPOSITION
	<p>Significantly, in order for the "opposition" to be protected, the manner of the opposition must be "reasonable" and there must have been a "good faith" belief that the opposed practice was unlawful.</p> <p>EEOC Directive 915.003, Ch. 8-7, 8-8. <small>(C) Joseph V. Kaplan 2012</small></p> <p style="text-align: right;">8</p>

	PROTECTED ACTIVITY— PARTICIPATION
	<ul style="list-style-type: none">■ "Participation" includes persons who filed a charge or complaint of discrimination, testified, assisted or participated in any manner in an investigation.■ Unlike "opposition," participation does not require proof that the participation was in good faith or reasonable. <p>See EEOC Directive 915.003, Ch. 8-9. <small>(C) Joseph V. Kaplan 2012</small></p> <p style="text-align: right;">9</p>

	PROTECTED ACTIVITY— PARTICIPATION
	<ul style="list-style-type: none">■ Title VII prohibits retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights. <p><i>See Graham v. Department of Justice, EEOC Hearing No. 140-95-8010X; EEOC Appeal No. 01A05188.</i></p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> <small>10</small></p>

	PROTECTED ACTIVITY— PARTICIPATION: examples
	<ul style="list-style-type: none">■ Rehabilitation Act prohibits discrimination performed in reprisal for exercising any right protected by the Act. <i>See</i> 29 C.F.R. § 1630.12(b).■ Therefore, a <u>request for a reasonable accommodation</u> constitutes "protected activity" under the Act. <i>See Keller v. Postmaster Gen'l, EEOC Appeal No. 01A03119 (2003).</i> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> <small>11</small></p>

	PROTECTED ACTIVITY— PARTICIPATION: examples
	<ul style="list-style-type: none">■ Complainant's request for official time to work on her EEO complaint constitutes protected activity <p><i>Ryder v. USPS, EEOC Appeal No. 01982818 (2001)</i></p> <ul style="list-style-type: none">■ Participation in the grievance process may be a protected activity, if allegations of discrimination are raised therein <p><i>Reavill v. Department of the Navy, EEOC Appeal No. 05950174 (1996)</i></p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> <small>12</small></p>

	<p>PROTECTED ACTIVITY— PARTICIPATION: examples</p>
	<ul style="list-style-type: none">■ there is absolute protection against retaliation for <i>participating</i> in the EEO process. Even the 4th Circuit held that all testimony in a Title VII proceeding, even testimony that is allegedly unreasonable, is protected against retaliation by the employer under the participation clause of Title VII. <p><i>See Glover v. South Carolina Law Enforcement Division, 170 F.3d 411 (4th Cir. 1999)</i></p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 13</p>

	<p>PROTECTED ACTIVITY— PARTICIPATION: examples</p>
	<ul style="list-style-type: none">■ The EEOC held that an employee engaged in protected EEO activity when he stated to his supervisor that he was "going to do everything I possibly can to get this [discriminatory schedule] changed, I even plan on filing an EEO complaint." <p><i>Alston v. USPS, 99 FEOR 1032 (1998)</i></p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 14</p>

	<p>PROTECTED ACTIVITY— PARTICIPATION: examples</p>
	<ul style="list-style-type: none">■ Protected activity under the participation clause was found where the complainant informed the RMO about discrimination allegations of ANOTHER employee, and that the complainant had advised the other employee to contact the EEO office. <p><i>Saenz v. Dept. of the Navy, 98 FEOR 3108 (1998)</i></p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 15</p>

	<h2 style="margin: 0;">AWARENESS OF EEO ACTIVITY</h2>
	<ul style="list-style-type: none">■ In order to prove retaliation, the employee must show that the agency official taking the adverse action was aware of the prior EEO activity.■ This is a case-by-case determination, and may involve credibility determinations. <p style="text-align: right; font-size: small; margin-top: 10px;">(C) Joseph V. Kaplan 2012 16</p>

	<h2 style="margin: 0;">AWARENESS OF EEO ACTIVITY</h2>
	<ul style="list-style-type: none">■ <u>Silence can = an admission of awareness:</u> <p style="font-size: small; margin-top: 5px;">During the investigation of the employee's complaint alleging the transfer was retaliation, each of the three (3) managers involved in the transfer were asked in written interrogatories to identify whether each was aware of the employee's prior EEO activity. Only one of the managers answered the question. The EEOC took the "silence of these latter two officials as tacit admissions that they were aware" of the employee's EEO activity at the time they made the transfer decision.</p> <p style="font-size: small; margin-top: 5px;">See <i>Brooks v. Dept. of the Treasury</i>, 100 FEOR 1030 (1999)</p> <p style="text-align: right; font-size: small; margin-top: 10px;">(C) Joseph V. Kaplan 2012 17</p>

	<h2 style="margin: 0;">CAUSAL CONNECTION</h2>
	<ul style="list-style-type: none">■ In general, a causal connection (or nexus) may be demonstrated by presenting evidence that the adverse action followed the protected activity within such a time period and in such a manner that a reprisal motive can be inferred <p style="text-align: right; font-size: small; margin-top: 10px;">(C) Joseph V. Kaplan 2012 18</p>

	<h2>CAUSAL CONNECTION</h2>
	<ul style="list-style-type: none">■ PROOF MAY BE EITHER <i>DIRECT</i> OR <i>CIRCUMSTANTIAL</i><ul style="list-style-type: none">- DIRECT: a written or verbal statement regarding the protected activity- CIRCUMSTANTIAL: the proximity in time between the protected activity and the adverse action <p>NOTE WELL: Circumstantial evidence is the most common type of evidence used to demonstrate a causal connection</p> <p><i>See EEOC Directive 915.003, Ch. 8-15, 8-17.</i></p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 19</p>

	<h2>CAUSAL CONNECTION</h2>
	<ul style="list-style-type: none">■ How close in time must the alleged retaliatory act be?<ul style="list-style-type: none">- Adverse action occurring six (6) months after EEO activity creates a nexus. <i>Ferriter v. Dept. of Labor</i>, 100 FEOR 1045 (1999) -- nexus may be established if the adverse action occurred within one (1) year of the protected activity. <i>Johnson v. Dept. of the Treasury</i>, 101 FEOR 1172, EEOC Appeal No. 01980636 (2001) <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 20</p>

	<h2>CAUSAL CONNECTION</h2>
	<p>No nexus found where five (5) years elapsed between the time of the last protected activity and the adverse action.</p> <p><i>Hinnant v. Department of Energy</i>, EEOC Appeal No. 01992572 (2002)</p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 21</p>

	EVIDENCE
	WHAT TYPES OF EVIDENCE DOES THE EEOC LOOK AT TO FIND OR DISPROVE RETALIATORY MOTIVE? <small>(C) Joseph V. Kaplan 2012 22</small>

	EVIDENCE
	<ul style="list-style-type: none">■ In an appraisal case, evidence won't rebut prima facie case of reprisal where "the RMO's testimony did not suffice to provide specific, clear and individualized explanation to explain "why" the complainant received a fully successful rating." <i>Bell v. Dept. of Veterans Affairs</i>, 99 FEOR 1023 (1998) <small>(C) Joseph V. Kaplan 2012 23</small>

	EVIDENCE
	<ul style="list-style-type: none">■ <i>per se</i> violation of the EEOC regulations prohibiting retaliation when the complainant's supervisor stated that filing a complaint was the "wrong way to go" to get a promotion and that the complainant should not have filed an EEO complaint, and that the only result of filing an EEO complaint is that a lot of damage would be done <i>Binseel v. Dept. of the Army</i>, 99 FEOR 3111 (1998) <small>(C) Joseph V. Kaplan 2012 24</small>

	EVIDENCE
	<ul style="list-style-type: none">■ The supervisor stated in her affidavit that she "viewed appellant's complaints against her as harassment and that she had strong negative feelings about appellant's use of the EEO process against her." <p><i>Davis v. Dept. of Veterans Affairs</i>, 99 FEOR 1117 (1999)</p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 25</p>

	EVIDENCE
	<ul style="list-style-type: none">■ The supervisor confronted the complainant about his testimony in another employee's EEO complaint and also stated that the complainant had not been truthful in his testimony. The Commission affirmed the AJ's ruling that these comments constituted direct evidence of retaliation. <p><i>Kinnison v. Dept. of the Interior</i>, 99 FEOR 1131 (1999)</p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 26</p>

	EVIDENCE
	<ul style="list-style-type: none">■ The OFO held that a supervisor retaliated against the complainant by saying: "You have filed a complaint which means you are not happy with me . . . Find a job somewhere and go. If you do not do so, I will ask that you be transferred." <p><i>Saini v. Dept. of the Air Force</i>, 99 FEOR 1052 (1998)</p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> 27</p>

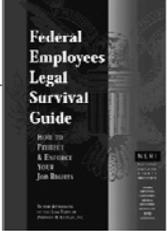
	<h2>EVIDENCE</h2>
	<ul style="list-style-type: none">the RMO against whom the complainant had filed a prior complaint noted in an evaluation form that the complainant had "filed a sex/age EEO . . . against the Postmaster" after her casual appointment ended, and that she was "very well known in the area for suing anyone for any reason." <p><i>Hillman v. USPS</i>, 98 FEOR 1279 (1998)</p> <p><small>(C) Joseph V. Kaplan 2012 28</small></p>

	<h2>EVIDENCE</h2>
	<ul style="list-style-type: none">RMO stated in affidavit that "he was annoyed with [appellant's filing of complaints because it takes up so much of [his] time, but it has no effect on the rating that he received on his performance appraisal." This was found to be evidence of retaliation. <p><i>Bien v. Dept. of Labor</i>, 98 FEOR 1315 (1998)</p> <p><small>(C) Joseph V. Kaplan 2012 29</small></p>

	<h2>TIP:</h2>
	<ul style="list-style-type: none">IT IS OK TO: ask employees to let you know of EEO activity for administrative time purposesOTHERWISE, DO NOT EVEN COMMENT ON AN EMPLOYEE'S EEO ACTIVITY <p><small>(C) Joseph V. Kaplan 2012 30</small></p>

	<p>TIP:</p> 
	<ul style="list-style-type: none">■ Don't ask: "why are you filing a complaint?" or "why are you getting involved in this?"■ Don't suggest downside of getting involved in a complaint, or filing a complaint, even if you think you are being helpful. <p style="text-align: right;"><small>(C) Joseph V. Kaplan 2012 31</small></p>

	<p>TIP:</p> 
	<p>Don't let retaliatory inclinations affect your day-to-day interaction with employees, even if you are the named responsible management official (RMO).</p> <p style="text-align: right;"><small>(C) Joseph V. Kaplan 2012 32</small></p>

	<p>VALUABLE RESOURCE!</p> 
	<p>➤ <i>The Federal Employees Legal Survival Guide</i>, by the attorneys of Passman & Kaplan, P.C.</p> <p style="text-align: right;"><small>(C) Joseph V. Kaplan 2012 33</small></p>

	<p style="text-align: center;">THE END</p>
	<p style="text-align: center;">REPRISAL: What is it? How to avoid the charge?</p> <p style="text-align: center;">JOSEPH V. KAPLAN, ESQ. Passman & Kaplan, P.C. 1828 L Street, NW Suite 600 Washington, DC 20036 Tel: 202-789-0100 www.passmanandkaplan.com</p> <p style="text-align: center;"><small>(C) Joseph V. Kaplan 2012</small> <small>34</small></p>
