



# **When Good Deeds Are Punished:** Retaliation in the Workplace



Your Right to Stand Up for What's Right

# YOUR RIGHT TO STAND UP FOR WHAT'S RIGHT

**Bosses and co-workers mess up. Shocking, right? You probably wouldn't be reading this if you thought your employer were perfect!**

Sometimes it's an off-color joke or a comment that makes you uncomfortable. Sometimes it's more obvious—like blatant racism or the violation of a law.

So you point it out to your boss. You say “no.” You don't want to be a part of it. You want the comments to stop. Maybe you even report the crime to authorities, or the discrimination to the appropriate government agency

Bosses tend not to like it when employees do these things, but what they choose to do next determines whether they waded into one of the most prevalent areas of employment law violations—retaliation. Indeed, more often than not, an employer's initial misstep causing an employee complaint in the first place is not as egregious as the employer's response to your objection. You see, they simply cannot legally take revenge against you when you oppose discrimination or “blow the whistle” on a violation of a law, rule or regulation.

Laws and rules govern all businesses. Restaurants can't serve rotten food. Employers can't sexually harass their employees. Whether it's an obvious crime or business-specific regulation, most businesses make a point to follow the rules. But some employers don't. And, if breaking the rules weren't enough, some bosses fire, demote or otherwise try to “get even” with employees who stand up for themselves and others.

Picture the fast-food worker fired after refusing to serve spoiled food or the billing manager demoted for declining to file fraudulent claims with Medicare. It happens more than you'd think. In 2014, the federal government received 38,000 reports of retaliation nationwide, 3,261 in Florida alone.

Individually, these stories can be horrifying.



A man in a dark suit, white shirt, and dark tie is sitting on a cardboard box. He has a distressed expression, with his right hand covering his forehead and his head tilted down. The background is a blurred office setting. The image has a blue tint.

Battered, Bruised...then Fired

# BATTERED, BRUISED...THEN FIRED

We once represented a man who'd been the manager of a Central Florida drag race track. One day at work, he and another employee (the owner's brother) got into an argument over a piece of equipment. Sure, co-workers don't always agree, but this other employee went too far and physically threatened the manager.

The manager reported it to the company's owner. Battery is illegal, and employees shouldn't have to live in fear of being beaten by their co-workers.

Predictably, the race track owner did nothing. The next day, the threats became real. The employee attacked our client, punching him, choking him, and sending him to the hospital, bloodied and needing stitches. Our client called the police, who came out to the racetrack and made a report resulting in the attacker getting arrested.

In retaliation, rather than disciplining or terminating the attacker, the track's owner fired our client! As if blood and bruises weren't enough, this man was now without a job.

Wenzel Fenton Cabassa, P.A. represented this man all the way through trial. We did the necessary investigation, depositions and other evidence-gathering necessary to vindicate our client. And we received a winning verdict, securing a judgment for \$99,623.

The jury recognized that this company had wronged their manager. Employers can't retaliate against victims seeking help.

A woman in the foreground is looking down with a sad expression. In the background, a group of people are clapping and smiling, suggesting a celebratory or positive event. The image has a blue tint.

# What *is* Retaliation?

# WHAT IS RETALIATION?

Okay, so firing is the obvious one. But retaliation isn't just about losing your job. It includes suspensions, demotions, and other negative employment action—such as refusing to promote an employee, harassing him, or distancing the worker from his peers in the organization.

It could even include transferring the employee to another position, making threats against him, writing unjustified negative evaluations or references, increasing surveillance, or retaliating against a relative of the employee's who also works for the company.

It's basically any action that would make an employee not want to make a complaint.

For example, if you objected to how your boss treated your disabled co-worker, if your employer demoted you, reduced your pay, or started to exclude you from every staff meeting, you'd likely be protected.



A woman in a white shirt is sitting at a desk, looking down with a distressed expression, her hand resting on her forehead. In the background, a man in a dark suit is blurred. The scene is dimly lit, suggesting an office environment.

When Are You Protected from Retaliation?

# STANDING UP TO DISCRIMINATION

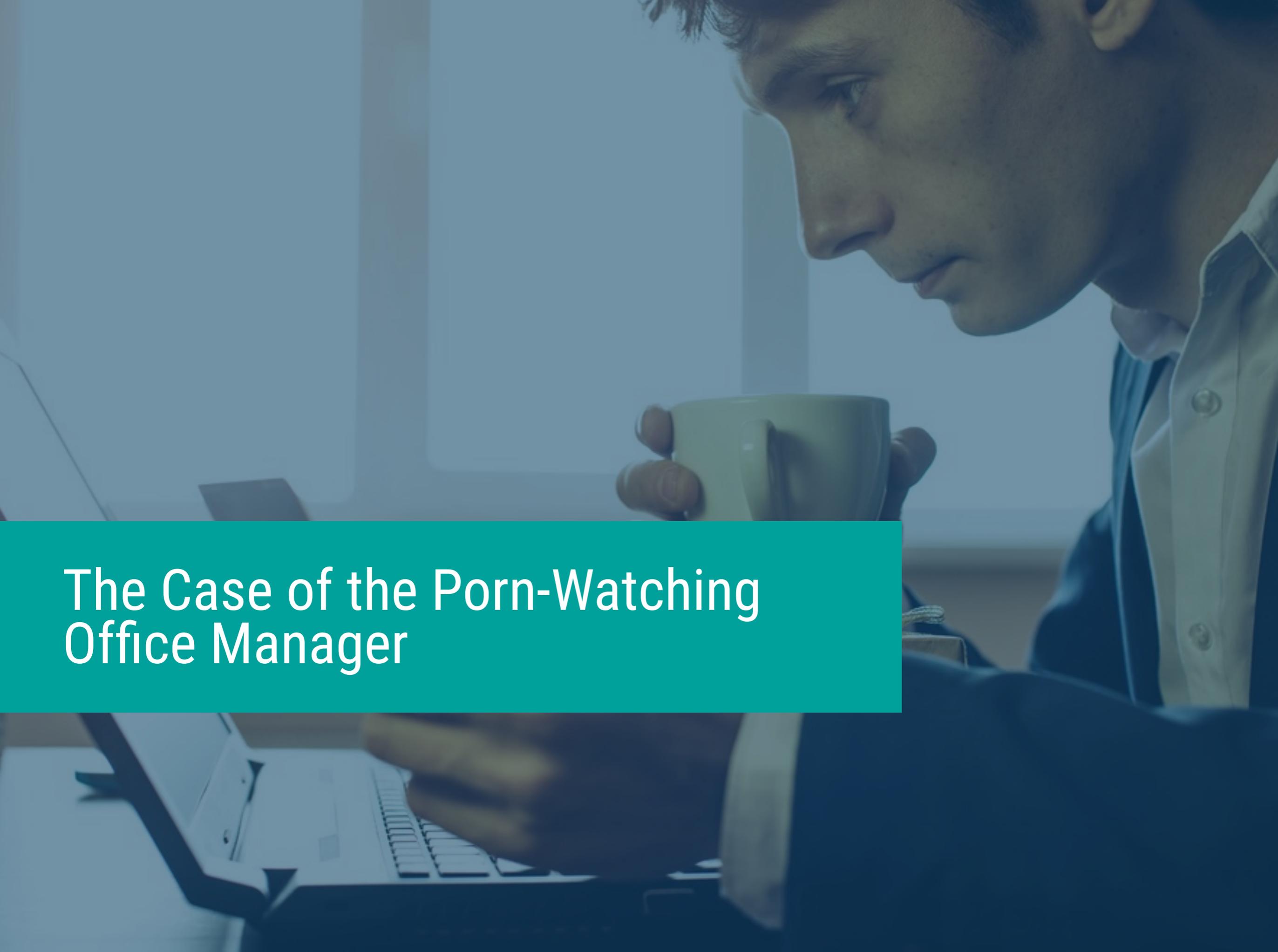
Not every complaint is a protected action (indeed, most of the complaints that employees make at work are not protected actions)—but complaints and reports about discrimination are. Employers can't treat you differently because of your race, color, national origin, sex, religion, age, or disability.

If you file a charge of discrimination with the government, participate in a discrimination proceeding or simply oppose what you in good faith believe is discrimination to yourself or others, you're likely protected.

How do you know your employer is actually discriminating against you or someone else? You'd think it'd be clear, but there are gray areas. Is an inappropriate joke enough? Well, it depends. (Sorry! That's such a lawyer answer, but it's true.) Basically, you need to have a reasonable belief that what your employer is doing violates an anti-discrimination law—and your reaction must be reasonable. So please don't take a bat to your boss' computer monitor after she makes an offensive remark.

Nonetheless, your boss can't retaliate against you for exercising your rights—or encouraging another in exercising their rights—under those protected categories. A big one we see is people facing retaliation for opposing sexual harassment, which is a type of discrimination.



A man in a white shirt is shown in profile, looking down at a laptop keyboard. He is holding a white mug with both hands. The background is a blurred office environment with a window. The image has a blue tint.

# The Case of the Porn-Watching Office Manager

# THE CASE OF THE PORN-WATCHING OFFICE MANAGER

Recently, we represented a woman who worked at the front desk of a dentist's office. She had worked there for a while, and then there was a change in management. A new dentist purchased the practice and kept the staff.

However, under this new management, this receptionist was subjected to a sexually hostile work environment created by the office manager. He'd mistreat other female employees, as well as the receptionist. She felt intimidated, harassed and disrespected. She reported his behavior to the dentist, but nothing happened.

One day, she noticed that the office manager had watched porn on her work computer. She was very offended and reported it to the dentist. She even showed him a picture as proof. Two days later, the dentist fired her!

The dentist's lawyer argued that she had been fired for other reasons. Her work was subpar, he told the court, and she had been making mistakes for a while. However, the fact that she was fired just two days after she complained about the porn helped prove her case. Close timing like that often helps overcome an employer's made-up reasons.

We represented her in an administrative hearing where a judge found that the dentist had unlawfully retaliated against her. The dentist was ordered to hand over \$67,000 in lost wages and attorney's fees.

Retaliation isn't just about opposing sex discrimination. You could be standing up to discrimination on the basis that you're black, you're in your 60s, or you're Muslim. Any type of racial, age- or religion-based discrimination is illegal, and believe it or not, they're all pretty common in the workplace—even in this day and age when you'd think employers would know better.





# The Truth About Disabilities in the Workplace

# THE TRUTH ABOUT DISABILITIES IN THE WORKPLACE

Another common type of discrimination is based on a person's disability or handicap. The Americans with Disabilities Act (ADA) protects people with a qualified handicap or disability. Not everything is covered, but the main idea is that someone has a disability if he or she has a physical or mental impairment that substantially limits at least one major life activity.

For example, a worker with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but a person with a minor, non-chronic condition, like a sprain, broken limb, or the flu, generally would not be covered.

The law also protects individuals with a "record of a disability," like a person who has recovered from cancer or mental illness. So, if you do have a covered disability or handicap, an employer can't discriminate against you because of it and then retaliate against you when you oppose that discrimination.

People covered under the ADA are allowed a "reasonable accommodation" to help them do their jobs. For example, this might be a flexible work schedule or an adjusted work station. Your boss can't retaliate against you for requesting such accommodations.





**When You Take Leave Due to Injury or Qualifying Health Condition**

# WHEN YOU TAKE LEAVE DUE TO AN INJURY OR QUALIFYING HEALTH DECISION

Injured and sick employees also have protection from retaliation. For instance, under Florida law you cannot be retaliated against for seeking workers' compensation benefits. This is a surprisingly common occurrence because employers get upset that their workers' compensation rates can go up after an employee makes a claim. Likewise, they do not like it that an employee is missing work.

Also, employees who are injured at work or who have a qualifying serious health condition are entitled to medical leave under the Family Medical Leave Act (FMLA), which allows qualified employees to take up to three months off work to care for themselves or a close family member.

These laws were passed to ensure entitled employees get medical care and leave to take care of themselves and their family members. You can't be retaliated against for properly taking this time.



A man in a dark suit and tie is seated at a wooden table, looking towards a woman whose back is to the camera. The man has a serious, thoughtful expression. On the table in front of him are a laptop, a glass of water, a calculator, and a pen. The background shows a window with a view of a city building. A teal banner with white text is overlaid on the image.

See Something, Say Something

# SEE SOMETHING, SAY SOMETHING: “BLOWING-THE-WHISTLE” ON WORKPLACE WRONGS

The Florida Whistleblower Act is another big area of protection under Florida law for workers who stand up to illegal things their employers are doing. Specifically, employers cannot retaliate against an employee if the employee has:

- (1) told—or threatened to tell—a government agency about a practice of their employer that violates a law, rule or regulation, after first bringing the problem to the attention of a supervisor and giving the company a chance to correct it;
- (2) provided information to or testified before a government agency that’s conducting an investigation into an alleged violation of law, rule, or regulation; or
- (3) objected to or refused to participate in a policy or practice of the employer that is a violation of a law, rule, or regulation.

If you think this sounds super particular, you’re right. How do you know when and how to object or report? As you can see, not every scenario is protected. If you tell a government agency before bringing the violation to the attention of a supervisor, you might not be covered under part (1), which requires that you first tell a supervisor and give the company a chance to correct the issue. However, advance notice isn’t required under part (3), which provides broad protection to employees objecting to or refusing to perform an illegal act. But such an objection or refusal includes some sort of affirmative action. You must say “no” to participating in an activity, policy or practice of your employer, or tell them that you object to their illegal practices. Most claims under the Florida Whistleblower Act are brought under the third subpart.

As always, when in doubt, consult with an attorney. Each situation is unique and it’s hard to offer a global rule. Nonetheless, if you know something is illegal, don’t let your boss bully you into participating. Say “no,” and only tell authorities after giving your supervisor notice and the chance to fix it. You might be surprised by their reaction and haste to fix the issue. But if your trip to management doesn’t go as you’d hoped and you face repercussions, you could have a case for retaliation.

# The Case of the Whistle-Blowing Pharmacist



# THE CASE OF THE WHISTLE-BLOWING PHARMACIST: A PRESCRIPTION FOR LAWSUIT

Once, we represented a local pharmacist who suddenly found himself as his company's scapegoat. This particular man was a staff pharmacist when state inspectors cited his store for a couple of problems. There were not enough pharmacists on duty, the state said, and the store was dirty, dusty and disorganized.

Looking for someone to blame, the company drew up some paperwork to make it appear as if our client had been the "pharmacy manager" at the time. The problem? Managers are legally responsible for their store's pharmacy.

Because of the company's lie, the state went after this innocent worker, telling him they'd settle if he would be publicly reprimanded and fined. This didn't seem fair to him. A different employee was the manager, so why would this staff pharmacist take the fall?

Months later, the company still wasn't done with him: They tried to get him to sign a letter making it appear as if he had been the manager at the time of the inspection. He refused.

That's when things got bad for our client. The company started retaliating against him. They gave him terrible shifts —ones that kept him away from his family. They started soliciting and recording customer complaints about him. They cut his pay.

Finally, they transferred this pharmacist to another store. When he showed up, he noticed the pharmacy was in disarray. Drugs were piled in boxes, instead of out on the shelves. There were more than 300 unfilled prescription orders and more than 100 calls from physicians that needed to be returned!



# THE CASE OF THE WHISTLE-BLOWING PHARMACIST: A PRESCRIPTION FOR LAWSUIT

This was a dangerous environment for both the customer and the pharmacist. As our client tried to shelve the medication, he hurt his back. He also faced a lot of emotional distress for what his company was putting him through. He saw a doctor and was put on medical leave because of his back—and that's when his company fired him.

Sometimes retaliation comes in one fell swoop, and sometimes it comes after months of bad treatment. We supported our client all the way through a jury trial, where our client won a favorable verdict. He was awarded lost wages, compensatory damages and attorney's fees and costs of \$306,000.



A photograph of two women in a modern office setting. The woman on the left has dark hair in a bun and is wearing a white blouse and dark pants. The woman on the right has blonde hair in a ponytail and is wearing a white blouse and a grey skirt. She has her hand on her lower back, suggesting a complaint or pain. The background is a bright, minimalist office space with white walls and a white ledge.

So What Can You Complain About?

# SO WHAT CAN YOU COMPLAIN ABOUT AND STILL BE PROTECTED?

The drab wall color? Your bosses tie? The fact you have to work on Fridays? An unfair workload?

If you want to blow the whistle, please know that it can be very complicated. That's because the law is pretty specific about what types of complaints are protected against retaliation. For one, you can oppose or report any activity, policy or procedure that is against a law, rule or regulation. That includes Florida or federal statutes, county ordinance and industry regulations.

Many laws are general and others are industry-specific. For example, Chapter 500 of the Florida Statutes is all about food products. A violation regarding adulterated food is under Section 500.10.

But how are you supposed to know this?

You may be a bit of an expert in your particular industry. Accountants know the laws that govern their profession. A medical office's billing manager likely understands relevant Medicare and Medicaid laws.

Or, you may have a common-sense belief that doing something is wrong. Back to that rancid meat example. You probably have a good idea that it's wrong to serve chicken that has gone bad, even if you do not know the specific statute that is being violated! Turns out, it's definitely illegal, so you'd be right.



# SO WHAT CAN YOU COMPLAIN ABOUT AND STILL BE PROTECTED?

But other than the obvious laws and ones that you're an expert in, there are still thousands more that you likely don't have memorized. This is where lawyers are helpful. (Yep, believe it or not!) It's not your job to know every applicable law, but it's ours to either know it or, through focused legal research, to discover it. If you think you've been retaliated against for objecting to something that seems like it should be illegal, seek out an attorney, preferably one experienced in employment law. Chances are, you may be right.

Also, when it comes to discrimination—being treated differently because of those protected statuses that we talked about earlier (race, color, religion, sex, etc.)—you must have a reasonable, good-faith belief that your employer is violating an anti-discrimination law. Only then will your complaint be protected from retaliation.

So what is a reasonable, good-faith belief? Well, like a lot of the law, it depends. Yeah. Sorry about that answer again.

It definitely covers employer actions that actually are violations. It also can apply to well-intentioned close calls, meaning an employee can be mistaken about the unlawfulness of the challenged practice. So, even if you cannot prove that your employer is actually discriminating against you, you are still protected if you can establish that your complaint was made with a good faith belief that they were.

Unfortunately, this determination is somewhat arbitrary and left in the discretion of the court, so this is an area where many employment cases are dismissed by courts because the judge determines that the complaint at issue was not made in good faith. Importantly, if you file a charge of discrimination with a local or federal agency, those complaints are automatically protected because they are not reviewed under the good faith standard. Therefore, while filing with a governmental agency while you are still employed ups the stakes (and the stress level!) for a current employee, it also provides a measure of anti-retaliation protection for that employee that an internal complaint does not.



A close-up photograph of a man with short dark hair and a light beard, wearing a white button-down shirt. He is holding a white mobile phone to his ear with his right hand and looking off to the side with a serious, thoughtful expression. The background is blurred, suggesting an office setting. The entire image has a light blue tint.

# Shady Things Employers Do to Avoid Retaliation Claims

# SHADY THINGS EMPLOYERS DO TO TRY AND AVOID RETALIATION CLAIMS

Usually employers know they can't fire, demote or otherwise retaliate against employees in these kinds of situations—or they figure it out shortly after hearing from us! This is where the excuses often start.

Because retaliation involves some kind of adverse effect, like a firing or demotion, oftentimes bad employers will try to pass off such actions as a reasonable reaction to some kind of fault of the employee. We've seen employers insist the worker quit on his own accord, instead of being fired, or that the firing was because of an issue with the worker, such as missing too many days, turning in subpar work, or allegedly behaving unprofessionally in the workplace. Employers will say that their employee just wasn't a good "fit," that the company had been planning to fire him or her for weeks or months, but just hadn't gotten around to it. In other words, they just make things up to cover up their retaliation.

When it comes to excuses, over the decades we've been in practice, we've heard it all, and one of the best ways to show that these are indeed empty excuses is to provide evidence of proximity in time. That means retaliation can be presumed when the adverse effect happens soon after the employee reports, testifies about, refuses to participate in, or objects to the discrimination or illegal activity—or shortly after the employee takes FMLA leave or is injured on the job.

For example, an employee likely has a good case for retaliation if he is injured on-the-job on a Tuesday and is fired within the week for "talking rudely to his boss" or "poor performance."



# SHADY THINGS EMPLOYERS DO TO TRY AND AVOID RETALIATION CLAIMS

How many days is close enough to presume that retaliation is at play? There isn't a precise requirement, but the sooner the better, at least when trying to prove retaliation in the courtroom.

If the retaliation is more remote in time from the protected action, we typically prove retaliation by showing that an employer's alleged reasons for a workplace action (typically, a termination) just do not make any sense and are not worthy of belief.





# The Takeaway

## THE TAKEAWAY

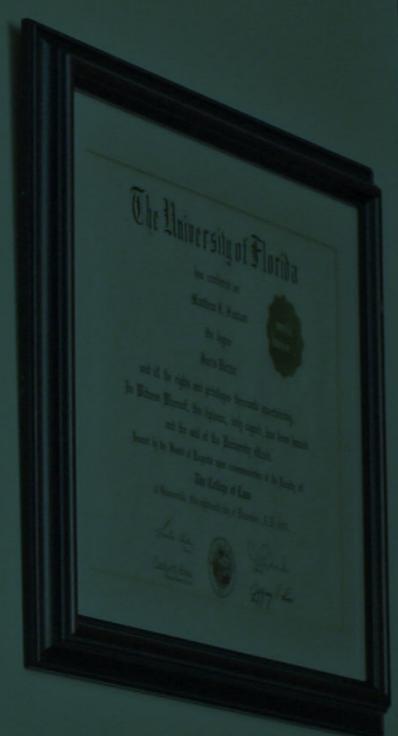
One of the key points that we want to stress here is that not all things about which employees complain at work are protected. In fact, most of them are not. Employees should be aware of the limitations under the retaliation laws so they do not get themselves into situations where they mistakenly think the law is going to have their back when it doesn't.

That said, employees do have important protections against retaliation, and employees should stand up for themselves if they believe that their rights have been violated.

The anti-retaliation laws all have statutes of limitations, some as short as sixty days, some as long as three years, but it is always our advice to act as quickly as possible while the witnesses are still available and other key evidence is still around.



# About the Author



## ABOUT THE AUTHOR



Matthew K. Fenton has been a member of the Florida Bar since 1994 and has been practicing exclusively in matters arising from the employment relationship since 1997. He received his law degree from the University of Florida, with honors, in 1993, where he served on the Editorial Board of the University of Florida Law Review. Shortly after graduation, he served as law clerk to U.S. Magistrate Judge Mark A. Pizzo from 1995 to 1997. Mr. Fenton is a trial lawyer who has tried numerous employment law cases in both state and federal courts.

He has been selected by his peers for inclusion in every edition of the Best Lawyers in America since 2009 and has been repeatedly selected by his peers as a Florida Super Lawyer in Employment Law, which denotes status as one of the top 5 percent of Florida's lawyers. He has also been selected as a member of the Legal Elite in Employment Law by Florida Trend Magazine, representing approximately 2 percent of the active Florida bar members who practice in Florida. In 2016, Mr. Fenton was selected by Best Lawyers in America as the "Lawyer of the Year" for individuals in Tampa Employment Law.

Mr. Fenton has spoken on employment law topics and authored numerous publications on employment law, most recently contributing a chapter to the American Bar Association's practice guide "Litigating the Workplace Harassment Case." Mr. Fenton is a member of several voluntary bar organizations, including the Hillsborough County Bar Association where he is a past Co-Chair of the Labor and Employment Law Section.

Mr. Fenton is active in both the Florida and national chapters of National Employment Law Association, the Tampa Bay Trial Lawyers Association and the Florida Justice Association. Mr. Fenton has been admitted to practice in all Florida courts, in the United States District Court for the Middle District of Florida, the United States District Court for the Southern District of Florida and in the Eleventh Circuit Court of Appeals.

Mr. Fenton, a lifelong resident of Tampa, Florida, is proud to be married to a first generation Cuban-American, Rebeca Fenton, and father to two wonderful boys. When he is not fighting for employee rights, Mr. Fenton enjoys traveling with his family, collecting and listening to music from a broad variety of musical genres, spending time at the beach, and watching or attending Florida Gator football and basketball.



# About the Firm

## ABOUT THE FIRM

At Wenzel Fenton Cabassa, P.A., we represent workers who have been wronged by their employers. We strive to get to know each client's unique circumstances, and we advise them on the best course of action. Our objective is to secure justice for our clients and to hold their employers accountable.

At our firm, our attorneys have decades of experience representing employees, so we are uniquely positioned to advise you on the best course of action, whether you've been fired or you're facing problems in your current job.

At Wenzel Fenton Cabassa, we know that good work doesn't always get rewarded. Our firm handles cases involving employment discrimination and harassment, whistle-blowing, civil rights, wrongful termination, the Family Medical Leave Act (FMLA), wage and overtime disputes, workers compensation issues, contract disputes, severance-related issues, EEOC mediations, government investigations, and violations of non-compete and trade secret agreements, among others.

We offer a free initial consultation, during which we will listen to your employment-related issues and discuss the steps we can take to resolve them.

**Disclaimer:** The facts and circumstances of your case may differ from the matters in which results have been provided. All results of cases handled by the lawyer/firm are not provided. The results provided are not necessarily representative of results obtained by all clients or others with the lawyer/firm. Every case is different, and each client's case must be evaluated and handled on its own merits.

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