

MANAGEMENT PRACTICES GROUP BEST PRACTICES SERIES:

**PREVENTION AND CORRECTION OF RETALIATION IN
THE US WORKPLACE**

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Retaliation – What Is It?

If the focus of employment law and good practice developments in the last decade was on sexual and other forms of harassment, this decade looks to be the decade of retaliation claims. Perhaps stimulated by the publicity given to whistleblowing in the Enron and FBI scandals, or simply the frequency of the problem or perception of the problem in the modern workplace, employees and their attorneys have discovered retaliation claims as a major new basis for challenging employer actions.

Whether it is called “reprisal,” “revenge,” “getting even,” “payback” or other term, the meaning of the word “retaliation” is well known to just about everybody. Understanding comes early in life as “tattling” on a sibling or “ratting out” a schoolmate quickly reveals that such actions can result in reprisal and often carry a price ranging from social ostracism to economic or even physical punishment. As people age, the meaning of the term becomes ever clearer and the price extracted for complaining ever more serious.

Why Should Employers Be Concerned About Retaliation?

A major reason employers need to pay attention to retaliation in the workplace is that the same human motives that drive such behavior in society at large exist at work: in fact, retaliation in the workplace, or at least the perception or belief that it is occurring, may be even a larger problem than retaliation in much of human society in general. This is in part because the stakes in workplace complaints and consequent retaliation can be quite high. Certainly, the workplace offers many opportunities for highly damaging retaliatory actions against complainants. Retaliation can result in unfavorable transfers, loss of promotion opportunities, demotion, and even job loss for the complainant not to mention a host of more subtle problems ranging from being overlooked for privileges or opportunities, being excluded from critical meetings, and withholding of information to even sabotage. Incentives to retaliate are also unfortunately high: an accused found guilty of serious misconduct may well suffer severe penalties including discipline, financial penalties and discharge. As a result, even those who are cleared of wrongdoing

often feel resentment based upon the disruption, anxiety, and embarrassment that the accusation produced.

Retaliation is also a particular problem at work because, there, the unfortunate human inclination to extract revenge for complaints or whistleblowing may be shared - or seem to be shared- by more people than just the accused wrongdoer. For example, managers in the accused individual's chain of command may take umbrage at a complaint because they feel that its nature or even existence suggests that they were not performing their own supervisory duties effectively. Or, they may take the view that the complaining individual is some kind of "all-purpose" or future troublemaker who needs to be put in place. Higher-ups outside the chain of command may also take offense at the "waste" of resources that complaints, investigation, and/or disciplinary action may entail. Even co-workers may engage in retaliatory actions because they are friends of the accused; because they, too, are afraid of becoming the target of a complaint by a "troublemaker"; or because they fear retaliation themselves if they appear to be involved with or supportive of the complainant.

In addition, while many jurors and government agency personnel have little personal experience with discrimination or other employment-related causes of action, most have experienced retaliation in some form in their lifetimes. Accordingly, retaliation claims in litigation are particularly likely to be understood, believed, and to result in liability in employment-related or whistle-blower lawsuits and prosecutions. In fact, such claims have also often proven successful even when the underlying cause of action for discrimination, harassment, or other illegal conduct is weak or even largely unproven.

Because retaliation is such well-known human behavior, retaliation claims are also easily understood and often seized upon by news media and the public. As a result, retaliation or whistleblower claims are particularly likely to result in extensive media coverage and significant reputational damage. After Enron and similar scandals, whistleblowers like Sharon Watkins have even achieved hero status in American life.

Another reason workplace retaliation is, or should be, of concern to employers is that an extremely wide variety of employment-related laws prohibit retaliation or discrimination because an individual has complained or participated in the investigation or resolution of a complaint. These include:

- Anti-discrimination laws: The major employment discrimination and harassment laws at the federal level and most at the state level prohibit retaliation for "opposing practices made unlawful by discrimination law;" for filing a complaint about discrimination; or for participating or assisting in investigation or resolution of discrimination.
- Workers' rights statutes: Leave laws, worker's compensation statutes, workplace safety laws, collective bargaining laws, refusal to take a polygraph protection, and many other laws relating to employee rights contain explicit non-retaliation prohibitions.

- Civic duty laws: Engaging in jury duty, serving as an election officer, fulfilling child support obligations, and other civic responsibilities have also been protected against retaliation by both statutes and judicial decisions.
- Active whistleblowing: Sarbanes-Oxley's whistleblowing prohibitions have received considerable attention since they were enacted by Congress following multiple corporate scandals. The Act created new civil protection for employees who report concerns about fraud on shareholders and new criminal penalties for retaliation that relates to an even broader range of reporting activities. Congress also required Audit Committees to create mechanisms for anonymous reporting of employee concerns about financial improprieties. In addition, numerous other laws, including the False Claims Act of 1863, have long protected some subsets of employees from retaliation for "blowing the whistle" on employer misconduct. A new bill providing additional whistleblower protections for federal employees is also currently moving through Congress.
- Passive whistleblowing: Retaliation against an employee who refuses to commit a crime, violate safety or environmental regulations, or otherwise act unlawfully or unethically has also often been prohibited by regulators and courts.

Taking retaliation seriously is important for the additional reason that retaliation has become one of the fastest growing employment-related legal and regulatory agency claims. In the discrimination area alone, for example, retaliation claims comprised 22.6% of all EEOC claims in 1997; in 2006, they comprised 29.8% of all claims. Other claims such as sex, race, age, and disability, decreased or increased only slightly in the same period. Retaliation claims are also quite often added to other types of discrimination or harassment claims, particularly when the alleged retaliation resulted in the complainant's discharge, transfer, denial of promotion or other adverse employment action.

Finally, yet another reason for employer concern about retaliation is that, just as with harassment and other forms of discrimination, courts and government agencies are increasingly making it clear that employers have an obligation to take reasonable actions to prevent and correct retaliation in their workplaces. This paper describes legal developments regarding employer responsibilities to prevent and correct retaliation, and most important, reasonable management practices for meeting such obligations.

Employer Legal Responsibilities to Take Action to Prevent and Correct Discrimination and Harassment

For a number of years now, most employers have understood that the law requires employers to take preventative and corrective action regarding harassment and discrimination in the workplace. On the federal level, the seminal legal drivers include Title VII of the 1964 Civil Rights Act and related anti-discrimination statutes such as the ADEA and the ADA. Although the statutes do not themselves specifically mandate preventative and corrective efforts, key interpretative decisions of the U.S. Supreme Court in its landmark 1998 sexual harassment decisions (*Faragher v. City of Boca Raton* 524 U.S. 742 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 775 (1998))

explicitly indicate that employers must demonstrate that they exercised “reasonable care to prevent and correct promptly any sexually harassing behavior.” A year later, in its *Kolstad v. American Dental Association* 527 U.S. 526 (1999) decision, the Supreme Court also made it clear that “reasonable care to prevent and correct” harassment must be evaluated at trial in determining whether or not to award punitive damages. Thus, even if found liable for engaging in harassment or discrimination, those employers who have undertaken prompt and effective preventative and corrective action will escape the most punishing aspects of liability in a harassment or discrimination case under federal law.

Anti-discrimination statutes in a number of states including California are more explicit about the legal requirement to establish an effective prevention and correction program. California’s Fair Employment and Housing Act (FEHA), for example, explicitly states as a declaration of policy that: “In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons. (California Government Code Section 12920.5)

California Government Code Section 12940(k) explicitly states that it is an unlawful practice under the Act for an employee to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

In Government Code Section 12940 (j), FEHA also explicitly states that it is an unlawful practice under the Act for an employer and certain others to harass an employee, applicant, or contract service provider on any protected basis and that such harassment shall be unlawful if the employer “knows or should have known of this conduct and fails to take immediate and appropriate corrective action.” The section continues: “An entity *shall take all reasonable steps to prevent harassment from occurring.*”

California Government Code Section 12950 sets forth certain specific steps that employers must take to meet their legal obligation to prevent, deter and correct harassment and discrimination. Among these are that the employer must “communicate in a manner that ensures distribution to each employee” such information as the fact that sexual harassment is illegal; its definition including examples; the internal complaint process of the employer available to the employee; the fact that retaliation for opposing harassment or for complaining about it is also prohibited, and the processes for and directions as to how to contact the DFEH and the EEOC. Section 12950.1 specifies that employers of 50 or more employees must also provide a minimum of two hours of interactive training to supervisors every two years. This training must provide:

information and practical guidance regarding the federal and state prohibition against and the *prevention and correction* of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the *prevention of harassment, discrimination, and retaliation*, and shall be presented by trainers or educators with knowledge and expertise in the prevention of *harassment, discrimination, and retaliation*. (Section 12950.1 (a))

Section 12950.1 concludes with:

The training and education required by this section is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations *to take all reasonable steps necessary to prevent and correct harassment and discrimination.* (Section 12950.1 (f))

Although both *Faragher* and *Ellerth* were sexual harassment cases, and the California statute's prevention and correction language appears in some sections to refer only to harassment or even sexual harassment specifically, the Equal Employment Opportunity Commission, as well as most state and federal courts that have considered the issue have extended the requirements for effective preventative and corrective efforts to all forms of harassment and discrimination cases.* In addition, California's Government Code Sections 12940-12951 explicitly indicates at certain other points (see, for example the italicized portions above) that the prevention and correction obligation extends, at a minimum, to all forms of harassment on a protected basis and to discrimination as well.

No court or statutes have as yet established a comprehensive, detailed or definitive set of requisite steps or specific actions needed to meet the legal standard of "reasonable efforts to prevent and correct" harassment and discrimination. However, most federal and state courts since the Supreme Court decisions in *Faragher*, *Ellerth* and *Kolstad* have weighed in on various aspects of what they consider to constitute legally compliant efforts to prevent and correct discrimination. For example a number of courts have disapproved such actions as: "mere policies on paper" lacking genuinely effective enforcement efforts; insufficiently prompt or thorough complaint investigations; inadequate training efforts and countless other specific practices. On the other hand, they have approved certain clear, comprehensive and fully communicated anti-harassment policies; prompt, thorough and impartial investigations; high-quality interactive management education for supervisors; and other specific management actions. Thus, while there is still no definitive legal ruling as to specifically what constitutes, or at any given time constituted, a complete, *legally* compliant discrimination and harassment prevention and correction program, a significant body of legal precedent now exists to assist employers in developing and maintaining effective anti-harassment and anti-discrimination efforts.

Employers' "Usual and Reasonable Management Practices" to Prevent and Correct Harassment and Discrimination

In addition to complying with the requirements of the law, responsible employers also make substantial efforts to conform to "usual and reasonable management practice" in their prevention and correction efforts. "Usual and reasonable management practice" in

*See EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors which was published in 1999. The EEOC's Vicarious Liability Guidance can be found at www.eeoc.gov/policy/docs/harassment.html. See also Attachment 1 to this paper for particularly relevant excerpts.

this context is essentially the known, feasible, and common or regular policies, procedures, processes and practices utilized by similarly situated employers in the prevention and correction of harassment and discrimination.* Usual and reasonable practice is obviously informed by the law, as management practice that fails to comply with legal obligations would be anything but reasonable. In addition, both judges and juries should, and do, tend to view an employer's prevention and correction efforts that deviate substantially from the employer's asserted policies and procedures or that significantly fail to conform to the standard practice of similarly situated employers to be suspect in considering whether the employer made the legally required "reasonable" efforts to prevent and correct harassment and discrimination.

As to what is usual and reasonable management practice in the prevention and correction of harassment and discrimination, expertise comes from a number of government agencies; law and consulting firms; management and human resources experts; and scholars and commentators. The EEOC in particular has provided detailed direction to employers in developing appropriate practices in this area through its 1999 Vicarious Liability for Supervisors Guidance, which was developed to respond to the Supreme Court's *Faragher* and *Ellerth* decisions. In 2006, the EEOC also issued a new compliance manual on race and color discrimination. Building upon its advice in its Vicarious Liability for Supervisors Guidelines, the EEOC's new guide offers examples and discussion of workplace practices that appropriately and effectively address race discrimination, harassment, or related retaliation as of 2006. The EEOC's "Best Practices of Private Sector Employers Task Force Report of 1997" also offers numerous examples of then-prevailing best practice.

The Sarbanes-Oxley Act and the various corporate scandals that led to its passage have also focused significant new attention on the establishment and implementation of other types of effective compliance practices and programs. Although these were originally seen as principally affecting corporate fraud, accounting, and securities violations, the analysis of what is "usual and reasonable" from both a legal and business practices compliance standpoint has more recently included such matters as harassment and retaliation against discrimination complainants and whistleblowers, as well as a number of other ethics and corporate conduct matters. Thus, analysis of what is "usual and reasonable" in corporate compliance efforts now also provides an excellent reference for such matters as effective employment discrimination prevention and correction, or compliance, programs.

One of the most important sources of guidance on effective compliance practices in this new area is the U.S. Federal Sentencing Commission Guidelines, as amended in 2004. Despite the title, the Federal Sentencing Guidelines are actually used by government agencies such as the Department of Justice and the OFCCP, as well as organizations such

* Many business people are more familiar with the phrase "best practices." In fact, to be completely accurate "best practices" is actually an aspirational standard intended to denote unusual excellence. Accordingly, unless a practice is explicitly described as an unusually excellent "best practice," this paper will utilize the phrase "usual and reasonable" practice to more accurately describe the standard that employers are expected to achieve and for which most responsible employers actually aim.

as the Securities Exchange Commission, for charging and prosecution evaluation rather than for sentencing. Among other matters, this guidance indicates how the agencies should assess the effectiveness of an organization's compliance program as an important consideration in determining whether or not to pursue an investigation, charge, or prosecution. The Guidelines parallel developments in EEOC compliance rather closely. For example, Chapter Eight of the Guidelines lists a number of factors to consider in evaluating the effectiveness of any given compliance program. It includes, for example, significant emphasis on the factor that it identifies as the "tone at the top", that is, the active and knowledgeable commitment of the organization's top leadership to appropriate compliance. It also includes the establishment and maintenance of an organizational "culture of compliance" as well as effective management education and training programs; provisions for effective fact finding and investigations; and other matters that also have a resonance in employment discrimination compliance.

In addition, the past decade's anti-discrimination efforts of thousands of employers and their advisors in every industry and sector of the economy, as well as the wide range of management responses to the business incentives and challenges of providing a discrimination-free workplace, developed and utilized over time, have ultimately resulted in a body of practice that constitutes "known, usual and reasonable management practice." "What to do" and "what not to do" or "what works" and "what doesn't" as regards the reasonable management practices relevant to effective prevention and correction of discrimination, for example, has been, and continues to be, regularly chronicled in academic books, treatises and journals, the news media, trade journals, and professional meeting proceedings.

Although a complete discussion of Management Practices Group's evaluation and explication of the requisites of a reasonable discrimination and harassment prevention and correction program is beyond the scope of this paper, the following summarizes the major elements of an effective program.* These include, at a minimum:

- 1. Clear and unambiguous organizational commitment to an enterprise and workplace free of such discriminatory and/or harassing conduct.**
- 2. The establishment and maintenance of a culture and environment that supports such anti-discrimination efforts.**
- 3. Clear and effective communication of comprehensive, understandable, written anti-discrimination, anti-harassment and anti-retaliation policies and procedures, including effective complaint and remedial procedures.**
- 4. Effective education of all employees, particularly managers, about their responsibilities to refrain from discrimination, harassment, and retaliation against co-workers as well as their rights and responsibilities under the organization's non-discrimination and diversity/respect programs.**
- 5. Effective accountability systems for managers and, where appropriate, employees.**

* For a more extensive discussion of these principles, please refer to Management Practices Group's Best Practices Series "Focus on Prevention and Correction of Harassment and Discrimination."

6. **Effective actions to investigate and reasonably evaluate complaints of, as well as circumstances or occurrences suggesting, possible discrimination, harassment or retaliation.**
7. **Appropriate remedial and deterrence efforts, including disciplinary action and/or make-whole remedies, where needed.**
8. **Adequate documentation and record-keeping to permit both effective deterrence and remedial efforts.**

Employer Legal Responsibilities to Take Action to Prevent and Correct Retaliation

Many of the court decisions and statutes prohibiting harassment and discrimination and requiring reasonable efforts to prevent and correct them either explicitly or implicitly apply to retaliation. Title VII prohibits retaliation for opposing practices made unlawful by the Act as well as because of filing a complaint or participating in an investigation. In its Vicarious Liability for Supervisors Guidance, the EEOC states that: “An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.” It also includes retaliation in its guidance concerning specific proactive preventative and corrective practices. The EEOC’s Compliance Manual prohibits retaliation in several contexts and encourages proactive efforts to prevent and correct retaliation. It provides, for example, that employers’ anti-harassment policies should contain “clear assurance that employees who make complaints or provide information related to complaints will be protected against retaliation.”

State statutes, such as California’s, explicitly provide that it is an unlawful employment practice for “any employer...or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.” (Section 12940 (h)) The state’s mandatory anti-sexual harassment policy information and anti-sexual harassment training require that the employer provide information about its prohibition of, and assurance against, retaliation as well as the complaint procedures available to employees who wish to complain.

Additionally, although anti-retaliation provisions exist, and have long existed, in more than 2,000 state and federal statutes, retaliation prevention and correction requirements have received particular attention since the corporate and governmental whistleblower cases of the early 2000’s and the rise of retaliation claims in agency and court proceedings. Media attention, from the press and television to movies, has also refocused national public attention on the retaliation problems faced by whistleblowers.

Given the new interest in whistleblowing, it is not surprising that one of the most important Supreme Court cases of the last several years was an employment retaliation case. In *Burlington Northern & Santa Fe Ry. Co. v. White v.*, 126 S. Ct. 2405 (2006), a case involving a female employee who found herself transferred to the dirtiest and least

skilled jobs, and ultimately suspended for “insubordination” after she complained about sexual harassment, the Supreme Court addressed an interpretive conflict that had arisen in the lower courts. Although courts were clear that retaliation was prohibited under Title VII, the divergence concerned the meaning of actionable retaliation. Some courts held that it occurred only when allegedly retaliatory actions were “materially adverse” in the sense that they resulted in loss of substantial economic benefits, demotion, or discharge. Other courts had held that more subtle forms of disadvantage such as loss of promotional opportunities or unfavorable transfer or working conditions could constitute retaliation. The Supreme Court resolved the dispute squarely, and somewhat surprisingly for such a conservative Court, in favor of the latter interpretation. The Court held that employer actions were actionable as retaliation when they resulted in a material action that would deter a reasonable person in the complainant’s circumstances from making a complaint. This has been described as the “deterrence” theory. The Court went even further to say that what constitutes deterrence to making a complaint would depend upon the context. It offered as an example of potential deterrence or actionable retaliation an employer, as a result of the employee making a complaint, altering a single parent’s work schedule in such a way as to interfere substantially with child care responsibilities. In fact, the Court indicated that Ms. White’s suspension just before Christmas was the type of action that reasonably could have deterred a person in her circumstances from complaining. Such a broad view of what constitutes retaliation in the workplace makes it clear that employers’ legal responsibility to prevent and correct retaliation is substantial and certainly just as important as that to prevent and correct harassment and discrimination.

California employers now have a significant additional concern about legal liability from failing to prevent and correct retaliation. Basing its decision on *Burlington Northern v. White*, in 2006, the Second District California Appellate Court held in *Taylor v. City of Los Angeles Dept. of Water and Power*, 144 Cal. App. 4th 1216 (2006) that courts should apply the *Burlington* deterrence test in determining whether a challenged employer action could constitute retaliation. Even more important, the court held that failure to prevent retaliation is unlawful under California’s Fair Employment and Housing Act, Government Code Section 12940 (k). Reasoning that retaliation is a form of discrimination, the court concluded that just as FEHA makes unlawful an employer’s failure to “take all reasonable steps” to prevent harassment and discrimination, it is unlawful for an employer to fail to prevent retaliation for opposing or complaining about it. Although the court did not specifically address the other sections of FEHA which prohibit failure to correct harassment and discrimination, California employers should certainly expect that future decisions will address the issue in the same way as courts have addressed failure to correct harassment and discrimination.

Employers’ “Usual and Reasonable Management Practices” to Prevent and Correct Retaliation

In view of the rise in retaliation claims since Enron and the passage of the Sarbanes Oxley Act, most employers have already made substantial additions and changes to their existing harassment, discrimination, and retaliation policies, procedures, and practices.

The developments in *Burlington Northern v. White* and *Taylor v. Los Angeles Water and Power* should convince any procrastinators to take similar measures as soon as possible.

Because retaliation for opposing discrimination or harassment, complaining about it, or participating in investigation or resolution of such issues is a form of discrimination, as a matter of usual and reasonable practice, employers must clearly engage in all of the same actions to prevent retaliation as to prevent harassment and discrimination. However, because retaliation differs from discrimination in certain respects, effective prevention and correction of retaliation requires a number of additional measures as well. At a minimum, employers should engage in the following additional proactive measures:

1. Create organizational awareness of the potential for retaliation and specifically commit to address it effectively. Treat it not only as serious misconduct but as a fundamental violation of the organization's values, code of conduct, and good ethics. (Tip: Pay particular attention to business Codes of Conduct and values statements.)
2. Allocate adequate resources to prevention and correction of retaliation by such measures as: devoting managerial attention and prioritization to retaliation as to other leadership issues; educating and deploying adequate human resources or other competent personnel to assist managers with retaliation questions or concerns; and making certain that the organization's enforcement capabilities are directed to retaliation as well as to other important policies and procedures like business misconduct and serious rules infractions.
3. Clearly communicate to all employees that retaliation is viewed with the same seriousness as other forms of discrimination and serious misconduct and that the same disciplinary penalties and other measures will be used to enforce the employers' prohibitions relating to it.
4. Revise or update the organization's anti-harassment, discrimination, and conduct rules to affirm, clarify, or strengthen their anti-retaliation provisions. Policy statements are often a good place to communicate that the employer views retaliation with exactly the same seriousness as the underlying prohibition. Make sure that complaint, investigation, open-door or other relevant procedures incorporate retaliation as well as discrimination, harassment, or other serious misconduct.
5. Educate all employees as to their rights and responsibilities to refrain from and to be free from retaliation in the workplace. Include explicit information that retaliation is prohibited to the same degree and in the same way that other forms of serious misconduct are treated. Educate employees, and particularly managers and supervisors, as to what retaliation is, how it can manifest itself in the workplace, and what employees can and should do if they believe it is happening to themselves or others. Just as with other more complicated forms of discrimination, such as sexual harassment, it is important to educate employees about what retaliation is *not*, as well as what it *is* and to demonstrate consistency in application of the definitions provided.

6. Explicitly alert managers and supervisors that any accountability and incentive measures the organization has established for other serious rules violations applies to retaliation. Be consistent and proactive with enforcement of anti-retaliation measures just as with other important policies or asserted organizational expectations.
7. In the event of a specific complaint, both the complainant and the accused (as well as any managers and supervisors of either) need to be explicitly reminded of the organization's policies regarding retaliation. Special attention should be given to the responsibilities of supervisors and managers as well as the accused as to their responsibilities to refrain from retaliation and the appearance of retaliation. They may also need to be reminded as to the types of actions that could constitute retaliation or the appearance of retaliation in the context of the complaint.
8. Complainants should be encouraged to raise any retaliation-related concerns that arise both during and subsequent to the original complaint handling process. They should also be given clear assurances that the organization will not tolerate retaliation and will take active steps to address it. In fact, this should be provided in writing. They should be assigned specific and knowledgeable persons to provide appropriate "avenues of complaint." Such individuals must schedule repeated, specific follow-up sessions in which they must carefully probe the complainant's experience. A casual "how's it going?" contact is clearly insufficient.
9. The contact person or persons should place "tickler" reminders in his or her calendar and prepare for the contact meetings carefully. This should include preparing an outline of questions to be asked and matters to be raised. The contact person should document when, where, and how long the meeting lasted, and what was discussed. Care should be exercised to ensure that the contact meetings are as confidential and comfortable for the complainant as possible. A best practice would be to schedule similar meetings with the accused as well.
10. The complainant's work environment as well as decisions about the complainant should be monitored for some period following a complaint. Hostile or vengeful statements, acts, or conduct by any employee, including peers, subordinates, and others in or outside the parties' chain or command, must be addressed stopped, and, if necessary, remedied. Additional education or counseling for individuals or a work unit should be considered even if the potentially retaliatory action does not appear to be extremely serious. Ostracism, anger, and teasing may be the tip of the iceberg for more serious harassment or even threats or sabotage of a complainant.
11. Competent guidance for and oversight of decision-making concerning the complainant should be provided. It is also necessary to provide for effective review of important decisions for at least some time after the individual has complained. In some circumstances, it may even be necessary to substitute an uninvolved and impartial individual as decision-maker concerning the claimant.

12. Complaints of or circumstances possibly suggesting retaliation must be investigated as promptly, thoroughly, fairly, and confidentially as any other complaint of harassment or discrimination. Any such complaint investigations should be treated with considerable attention: they should be well-planned and resourced; results should be carefully acted upon; and actions consonant with the results of the investigation and sufficient to remedy any retaliatory misconduct should be undertaken.

13. Document prior counseling and/or remedial action concerning retaliation and consider it in any subsequent action involving the complainant, the accused, or other retaliator. Make sure that your files and records have the capacity to alert decision-makers as to the existence of an ongoing or recent prior complaint by the subject of the decision-making.

14. Never transfer or significantly change the complainant's working conditions as a result of, or proximate in time to, a complainant's serious or good faith complaint. If the complainant seeks and is granted a significant change, get the complainant's assent in writing.

15. Do not ever dismiss retaliation complaints out of hand. Although it is true that complaints are occasionally raised as a defense to an employee's concern that he or she is about to be subjected to negative action, like a poor performance evaluation or discharge, or even as a sword to accomplish some unrelated end of the complainant's, make any such conclusion very carefully and after thorough and careful consideration.