

Increasing Rates of EEOC Retaliation Complaints Impacts Disability Rights

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Summary

This paper investigates retaliation complaints aggregate data as reported by the Equal Employment Opportunity Commission (EEOC) in recent years. This paper will explore what is causing the increasing rates of retaliation complaints and how it impacts individuals with disabilities. The paper will

review the EEOC complaint process, trends of retaliation and disability complaints, and outcomes of complaints to find insight into causes for retaliation rates increases. The paper will conclude by suggesting the best possible explanation for rate increases based on the available data.

EEOC

1. Introduction to the EEOC

The Equal Employment Opportunity Commission (EEOC) is a U.S. federal agency established by the Civil Rights Act of 1964. The EEOC was created to enforce civil rights laws in the workplace and provide guidance to other federal agencies regarding employment discrimination. The EEOC is tasked with investigating complaints of workplace rights violations against covered employers, which are generally public and private employers with 15 or more employees.¹ The EEOC specifically investigates and enforces Title I (Employment) of the Americans with Disabilities (ADA), among other laws.²

2. The EEOC Complaint Process

To bring a civil action under Title I of the Americans with Disabilities Act, employees are required to file a complaint with the EEOC.³ Employees may be represented by attorneys in the complaint process, and attorneys may be awarded attorney fees if their claims prevail.⁴ Employees generally have 180 days to file a complaint from the date the discrimination occurred.⁵ The deadline may be extended to 300 days if the state or local government where the discrimination took place has similar laws prohibiting employment discrimination.⁶ Once a complaint is filed, the EEOC is required to notify the

¹ EEOC, Coverage, <https://www.eeoc.gov/employers/coverage-0>

² EEOC, Laws Enforced by EEOC, <https://www.eeoc.gov/statutes/laws-enforced-eeoc>

³ 42 U.S.C. §2000e-5(e)(1)

⁴ 29 C.F.R. § 1614.501(e); EEOC, Chapter 11 REMEDIES, <https://www.eeoc.gov/federal-sector/management-directive/chapter-11-remedies>

⁵ EEOC, Time Limits For Filing A Charge, <https://www.eeoc.gov/time-limits-filing-charge>

⁶ *Id.*

employer of the employee's claims, including the employee's identity within ten days.⁷

If the EEOC finds that employment discrimination has occurred, the agency will encourage the employer to settle the case or in limited cases, sue the employer on behalf of the employee. The EEOC may also find "no reasonable cause" and issue a "notice of rights and dismissal" letter.⁸ The letter explains that the employee may pursue other remedies available to them through state or federal courts for their employment discrimination case, even though the EEOC has found "no reasonable cause."⁹ The EEOC is required to issue the "right to sue" letter within 180 days if the agency decides not to pursue the case.¹⁰

Retaliation Complaints

3. What are Retaliation Complaints?

Retaliation complaints are a specific category of complaints filed with the EEOC in which the employer decides to take negative actions (i.e., discharge, disciplinary action, passing up for promotion, etc.) against an employee because the employee engages in a protected activity. Protected activities are specifically defined by the EEOC to mean "participating in an EEOC process" and "opposing discrimination or other unlawful conduct governed by laws enforced by the EEOC."¹¹ Protected activities under the EEOC include requesting accommodations or complaining about discrimination or harassment, for example.

⁷ 42 U.S.C. §2000e-5(b)

⁸ EEOC, *What You Can Expect After a Charge is Filed*, <https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed>

⁹ See "No Reasonable Cause" under EEOC, *Definition of Terms*, <https://www.eeoc.gov/data/definitions-terms>

¹⁰ 29 C.F.R. §1601.28

¹¹ EEOC, *Enforcement Guidance on Retaliation and Related Issues*, https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#II._ELEMENTS

4. Proving Retaliation is Difficult

To prove an employer has engaged in retaliation against an employee's protected activity, there are several components to be considered: (1) whether the protected activity is "participation" in an EEOC process or "opposition" to the employers' violation of EEOC laws; (2) is the "opposition" reasonable; (3) was the employer's action materially adverse; and (4) was the action causally connected to the protected activity.¹²

"Participation" in an EEOC process occurs when the "individual [employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing (involving an EEOC claim)"¹³ Internal investigations and internal complaints by employees to their employers may also be considered "participation" in the EEOC process.¹⁴ "Opposition" refers to "the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination."¹⁵

Where an employee expresses "opposition" to an employer's unlawful conduct, the "opposition" must be "reasonable."¹⁶ Reasonable opposition concerns how the employee opposed the employer's unlawful conduct rather than whether the employer's conduct was actually unlawful. Thus, if the employee acts unlawfully, in a harassing manner, or is coercive to the employer, the employee's "opposition" would not be considered "reasonable."¹⁷

Employers must also take "materially adverse action" against the employee for the action to be considered retaliation. "Materially adverse actions" are generally any negative action an employer takes that "might well deter a

¹² *Id.*

¹³ *Id.* at "Participation"

¹⁴ *Crawford v. Metro. Govt. of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009)

¹⁵ *Crawford*, 555 U.S. at 276; EEOC, *Opposition*, https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#2_Opposition

¹⁶ https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#2_Opposition

¹⁷ *Rollins v. Fla. Dep't of Law Enf't*, 868 F.2d 397, 399, 401 (11th Cir. 1989); *Jackson v. Saint Joseph State Hosp.*, 840 F.2d 1387, 1392 (8th Cir. 1988) (noting that district court characterized employee's attempts to persuade coworker to revise witness statement she had provided as "grossly persistent," "disruptive," "almost frantic," and "bizarre")

reasonable employee from complaining about discrimination.¹⁸ The “materially adverse action” must also be “causally connected” to the employee’s protected activity. A causal relationship is established when the materially adverse action would not have occurred “but for” the employee’s protected activity or when the protected activity was a contributory factor in the materially adverse action.¹⁹ Yet demonstrating that the protected activity “caused” the materially adverse action tends to be extremely challenging when most employment provisions are “at will.”²⁰ The “at will” provisions allow employers to take any negative action against an employee, including discharge, for no reason at all.²¹

The employee has the burden of showing that it is “more likely than not” that the protected activity led to the materially adverse action.²² The employer will often challenge the employee’s evidence by providing other evidence demonstrating their reason for the materially adverse action. Evidence such as poor job performance, negative references, lack of qualifications, administrative or financial issues may allow the employer to prevail in challenging the employee’s assertion of unlawful retaliation unless such evidence were disproven. Hence, the process of proving retaliation can be particularly challenging for employees because employers can claim a myriad of other reasons for the negative action even if the employer’s main reason was truly retaliatory.²³

¹⁸ Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006); Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72 (2d Cir. 2015); Sanford v. Main St. Baptist Church Manor, Inc., 327 F. App’x 587, 599 (6th Cir. 2009)

¹⁹ Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013); Staub v. Proctor Hosp., 562 U.S. 411, 418-22 (2011)

²⁰ National Conference of State Legislatures, *At Will Employment Overview*, <https://www.ncsl.org/labor-and-employment/at-will-employment-overview>

²¹ *Id.*

²² *Id.*

²³ Etienne v. Spanish Lake Truck & Casino Plaza, LLC, 547 F. App’x 484, 489-90 (5th Cir. 2013); Stephens v. Erickson, 569 F.3d 779, 788 (7th Cir. 2009)

5. The Ongoing Rise in Retaliation Complaints²⁴

Retaliation rates have been steadily increasing since 1997. The retaliation rate in 1997 was at 22.6%. Retaliation rates have consistently grown by 1-2% each year. Retaliation rates reached the 30% mark in 2007, the 40% mark in 2013, and the 50% mark in 2018. The fastest growing years for retaliation rates were between 2007 to 2017, during which there was a 20% total growth, averaging 2% yearly growth.

Interestingly, the years which marked the most growth in EEOC retaliation rates also had the most total EEOC complaints, averaging high totals of 90,000+ each year. This is a significant change from the 1997-2007 periods, which were consistently between 75,000 to 80,000, and the 2018 to 2022 periods, which had a significantly lower number of complaints ranging from 60,000 to 70,000.

The average EEOC complaint processing time until closure or resolution is achieved has also increased steadily over the years. In 2015, the average complaint processing time was 403 days or 13 months. In 2020, the complaint processing time increased to 612 days or 20 months, nearly double the average rate in 2015.²⁵

6. Rise of Retaliation Complaints in Recent Years²⁶

Retaliation rates reached their all-time peak of over 50% in 2018. Since 2018, the rates have steadily remained over 50%, with some years exhibiting steady increases such as 2019 (53.8%) and 2020 (55.8%) and some years like 2022 returning to the rates set in 2018 (51.6%).

²⁴ Data described in this section are based on <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022> unless otherwise noted in footnotes.

²⁵ EEOC, *FY 2020 Annual Report on the Federal Workforce Part 1: EEO Complaint Processing Activity*, <https://www.eeoc.gov/fy-2020-annual-report-federal-workforce-part-1-eeo-complaint-processing-activity>

²⁶ Data described in this section are based on EEOC, *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2022*, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022>

The pandemic (2020 to 2022) did not necessarily change or affect retaliation rates as drastically as expected. Instead, 2020-2022 marked periods of slowing down and drops in retaliation rates. The pandemic increased rates of overall unemployment and workforce adjustments, and yet this economic change had been inversely reflected in EEOC data. The expectation was that there would be more employment complaints given the massive amounts of layoffs and adjustments in work during the pandemic. Yet, at the height of the pandemic, EEOC total complaints were only 67,448 (2020) and 61,331 (2021). These numbers are *significantly less* than other years in the same retaliation rates growth period such as in 2018 (76, 418) and 2019 (72,675). It was not until 2022 that the normal rates of complaints returned to baseline (73,485), similar to the pre-pandemic number of complaints experienced during 2018 and 2019.

Retaliation Trends Relationship to Disability Trends

7. Disability Discrimination Trends by the Numbers²⁷

Year	2018	2019	2020	2021	2022
All Complaints	76,418	72,675	67,448	61,331	73,485
Total Retaliation	39,469	39,110	37,632	34,332	37,898
Total Disability	24,605 (32%)	24,238 (33%)	24,324 (36%)	22,843 (37%)	25,004 (34%)
Discharge	14,860 (60%)	14,592 (60%)	15,193 (62%)	14,209 (62%)	14,990 (60%)
Reasonable Accommodation	10,877 (44%)	11,120 (46%)	11,469 (47%)	11,706 (51%)	13,508 (54%)
Contract Terms	5,058 (21%)	4,898 (20%)	4,960 (20%)	4,913 (22%)	5,124 (20%)
All Harassment	5,014 (20%)	5,073 (21%)	5,138 (21%)	4,569 (20%)	5,424 (22%)

²⁷ Table is largely based on EEOC, *Bases by Issue*, <https://www.eeoc.gov/data/bases-issue-charges-filed-eeoc-fy-2010-fy-2022>

In the table above, total disability data comprises all EEOC complaints filed under ADA Title I. The disability data is further broken down into categories comprising of percentage rates.

The table shows, like retaliation complaints, complaints filed under the ADA have also steadily increased. ADA charges have made up a third of all EEOC charges in 2019, and more than a third starting in 2020. Disability-related complaints in this sense, have also steadily increased over the years. Similarly, the categories listed for retaliation complaints have reappeared in disability complaints. These categories, however, differ in total percentage (making up more than 100%) due to multiple categories listed per disability complaint.

The most common category of disability-related complaints are discharge-related complaints as well. Discharge rates follow retaliation trends but are 2-3% higher for disability complaints, averaging 60% in 2018, 2019, and 2022 with minor rate increases (62%) in 2020 and 2021. Similarly, terms and conditions (contract terms) and harassment follow retaliation trends and are consistently between 20-22% for disability complaints.

Reasonable accommodations rejections, however, are more common for disability complaints than for retaliation complaints. In 2018-2020, reasonable accommodation rates were between 44%-47%, with only 1-2% rate increases per year. In 2021 and 2022, however, reasonable accommodation rates were 51% and 54% respectively. There was a 4% increase in rates between 2020 and 2021, and a 3% increase in rates between 2021 and 2022. These rate increases mimic retaliation trends, suggesting that the increase in employers rejecting reasonable accommodation not only affect retaliation rates but also impacts individuals with disabilities.

9. Pandemic Accommodation:

The most drastic fluctuation in EEOC data occurred in 2022. The pandemic impacted retaliation claims, which resulted in large increases in

accommodations request denials.²⁸ The pandemic also impacted disability claims as there were increases in accommodation request denials in 2022 likely due to vaccine mandates.²⁹ Despite EEOC guidance and recommendations on accepting disability accommodations, there was also an influx of disability accommodations denials in 2022.

10. How Retaliation Trends Impact Americans with Disabilities

The recent rise of retaliation complaints shows that there is an increase in complaints related to reasonable accommodations in 2022. This data is also evident in ADA-related complaints as shown in the previous table.³⁰ The increase in reasonable accommodations for employees living with disabilities are, however, expected because these employees will often need accommodations to be able to perform their work. Thus, for employees with disabilities, there is often a high reliance on employers to accommodate.

Employers, on the other hand, are more empowered by regulations to make decisions that benefit themselves over employees. Employers may choose to deny an employee's disability accommodation request on the basis of undue burden or inability to reduce the "direct threat."³¹ Employers may claim their negative action against the employees with disabilities were the result of financial or administrative hardship, lack of cultural fit, lack of social skills, or poor job performance. Adverse actions taken by employers due to employees' performances are often justified and argued as non-discriminatory reasons.

²⁸ See table in Section 7 "Recent Retaliation Trends by the Numbers"

²⁹ See table in Section 8 "Disability Discrimination Trends by the Numbers"

³⁰ See Section 8 "Disability Discrimination Trends by the Numbers"

³¹ 29 C.F.R. § 1630.2(r)

Findings

11. Results of Complaints³²

YEAR	2018	2019	2020	2021	2022
No Reasonable Cause	All: 70.6% Retaliation: 68.5% ADA: 67.4%	All: 69.5% Re: 66.9% ADA: 66.2%	All: 66.8% Re: 63.7% ADA: 63.9%	All: 63.6% Re: 61% ADA: 61.1%	All: 61.4% Re: 58.7% ADA: 58.5%
Reasonable Cause	All: 3.5% Re: 3.3% ADA: 4.2%	All: 3% Re: 2.7% ADA: 3.7%	All: 2.8% Re: 2.4% ADA: 3.4%	All: 2.7% Re: 2.1% ADA: 2.7%	All: 2.2% Re: 2.1% ADA: 2.5%
Negotiated Settlements	All: 6.1% Re: 6.1% ADA: 7.5%	All: 6.6% Re: 6.7% ADA: 8%	All: 7.7% Re: 8% ADA: 9%	All: 8.9% Re: 9% ADA: 9.7%	All: 8.7% Re: 9% ADA: 9.6%
Withdrawal with Benefits	All: 5.6% Re: 6.5% ADA: 6.8%	All: 6.1% Re: 7% ADA: 7.3%	All: 6.9% Re: 7.4% ADA: 7.7%	All: 7.6% Re: 8.4% ADA: 8.7%	All: 7.7% Re: 9% ADA: 9.3%
Merit Resolutions	All: 15.2% Re: 15.9% ADA: 18.4%	All: 15.6% Re: 16.4% ADA: 19%	All: 17.4% Re: 17.8% ADA: 20%	All: 19.2% Re: 19.6% ADA: 21.1%	All: 18.6% Re: 20.1% ADA: 21.4%

The outcomes of retaliation complaints, disability complaints and all EEOC complaints overall are not promising for employees. The majority (over 60%) of retaliation and disability complaints results in a showing of “No Reasonable Cause.” This has been historically true since 2010.³³ “No Reasonable Cause” means the EEOC was unable to find cause to pursue resolution to the complaint and settle with the employer. This also means the employee is free

³² Data described in table based on EEOC, *All Statutes (Charges filed with EEOC) FY 1997 - FY 2022*, <https://www.eeoc.gov/data/all-statutes-charges-filed-eeoc-fy-1997-fy-2022>; EEOC, *Retaliation-Based Charges (Charges filed with EEOC) FY 1997 - FY 2022*, <https://www.eeoc.gov/data/retaliation-based-charges-charges-filed-eeoc-fy-1997-fy-2022>; EEOC, *Americans with Disabilities Act of 1990 (ADA) Charges*, <https://www.eeoc.gov/data/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent-charges>

³³ EEOC, *Retaliation-Based Charges*; EEOC, *Americans with Disabilities Act of 1990 (ADA) Charges*

to pursue other remedies that may be available through their state and federal courts (such as through a civil lawsuit). The showing of “No Reasonable Cause” has steadily decreased by 2% from 2018 to 2022 for both retaliation and disability complaints. It was only until 2022 that “No Reasonable Cause” fell to 58% for both retaliation and disability-related complaints.

When EEOC found “Reasonable Cause,” they determined that the employer engaged in employment discrimination and would make efforts to seek remedies on behalf of the employee. Yet only a small fraction (2-3%) of retaliation and disability complaints result in an actual showing of “Reasonable Cause.” The percentage of complaints found to have “Reasonable Cause” surprisingly, have also steadily decreased in recent years by 0.3-0.6%.

What has, however, increased over the 2018-2022 years are “Negotiated Settlements” and “Withdrawal with Benefits.” “Negotiated Settlements” are complaints that are settled prior to the conclusion of the EEOC investigation favorably to employees. “Withdrawal with Benefits” are complaints that are withdrawn by the employee because of a separate agreement with the employer which would benefit the employee. Negotiated settlements and withdrawal with benefits each account for similar percentages of settlement results, between 6-9%. Both resolutions similarly have increased by 0.5% to 1% each year. The only difference in these numbers was the slightly higher percentage of “negotiated settlements” for disability complaints than for retaliation complaints. “Negotiated settlements” and “withdrawal with benefits” are considered “merit resolution” because the findings and their totals create the majority of the total of merit resolutions, which averaged around 18% for retaliation complaints, and 20% for disability complaints during the 2018-2022 period.

12. Conclusion

Retaliation rates have increased steadily ever since the EEOC began publishing its data. The overall increase in retaliation rates percentage, however, is not congruent to the overall number of EEOC complaints. Recent years between 2018-2022 demonstrate that the number of EEOC complaints have significantly decreased by 15,000-20,000 from the averages during 2007-2017. At the height of the COVID-19 pandemic (2020-2021), overall complaints were less (by 10,000) than pre-pandemic numbers but showed increases in rates of accommodations denial.

The most significant changes in EEOC data occurred in 2022. The increase in “reasonable accommodation” retaliation complaints rose to 18% in 2022 in comparison to only 12% in 2020.

The increase of retaliation rates during the pandemic also directly impacted individuals with disabilities. Reasonable accommodation requests for disabilities complaints were significantly higher in 2022 by nearly 10% (2,300+ more complaints) than in 2019. Employers may easily challenge reasonable accommodation request for disabilities. Employers may find the employee’s disability does not require reasonable accommodation, consider the employees “direct threats,” find that no reasonable accommodation would reduce or eliminate the “direct threat,” or find that granting the reasonable accommodation would create “undue hardship.” Individuals with disabilities must often rely on their employers to grant their accommodation requests, while employers may be more fiscally incentivized to deny these requests.

Proving retaliation is also difficult as employees have the burden of proof and employers may affirmatively defend against such accusations by providing evidence of other reasons for the employer’s actions.

The data shows there is a low likelihood of success in participating in the EEOC process. There is a low percentage of merit resolution for EEOC retaliation complaints (averaging 18%) and disability complaints (averaging 20%). The overall finding across all types of complaints is 60+% of “no reasonable cause.” An actual finding of “reasonable cause” is only 2-3% at most.

The low chance of success, the low percentage of merit resolutions, and the high burden of proof means that employers may not feel threatened by employees’ complaints. Employers may choose to retaliate against employees participating in the EEOC process or opposing the employer’s discriminatory activities without much risk. Employees, however, must go through the EEOC process to receive any remedies resulting from the employers’ retaliation. Thus, it is not surprising retaliation complaints continue to rise.

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