

STETSON UNIVERSITY COLLEGE OF LAW · CENTER FOR EXCELLENCE IN HIGHER EDUCATION LAW AND POLICY

Demystifying Retaliation in Higher Ed

A Field Guide for Civil Rights Investigators

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Where Are We Going?

1

Why Parties and Witnesses Are Confused About Retaliation

How a simple internet search for “what is retaliation” can lead parties and witnesses astray.

2

How Civil Rights Investigators Assess Retaliation

The math: protected activity + materially adverse action + causal connection = retaliation.

3

Case Study: The Dawn of It All (& Navigating a Party’s Fear)

Where we'll spend the bulk of our time. One real-world scenario, three vantage points: Complainant, Respondent, Witness.

4

Best Practices: Demystifying Retaliation for Parties and Witnesses

Seeing the questions behind their questions so we can answer them *and* get the evidence we need.

This Is Why Parties and Witnesses Are Confused About Retaliation

A party or witness gets your notice. They've heard the word “retaliation.” Their first instinct? They look it up. Here's what the search engine's AI answer tells them:

“ *Retaliation is the act of harming, punishing, or getting revenge on someone because they did something to you.* ”

AI-GENERATED SEARCH ANSWER, TOP OF THE RESULTS PAGE

Think about how many people will read this and conclude: **“I have a retaliation claim because *someone did something to me.*”**

Say They're a Slightly More Patient Searcher...

Further down the AI answer, under “Workplace and Legal Meaning”:

“ *In a job or legal setting, retaliation happens when an authority figure punishes you for a protected legal action.*

SAME SEARCH, ONE SCROLL DOWN

Is this an accurate definition?

“Authority figure” might close people off from reporting retaliation that actually fits your institution’s policy. Think of a co-worker or a classmate: those people might not be “authority figures,” but they could all subject you to retaliation under your institution’s policy.

Maybe They Find the Department of Education...

“ *In general, retaliation may take the form of intimidation, threats, coercion, or another adverse action that would deter a reasonable person from exercising civil rights protected under the laws enforced by OCR and occurs when a person is discriminated against for taking actions that are protected by civil rights laws.*

U.S. DEPARTMENT OF EDUCATION, <https://www.ed.gov/laws-and-policy/civil-rights-laws/retaliation/retaliation-discrimination>. (August 20, 2026)

So imagine: you’re new to civil rights investigations. What questions might you have after reading this definition?

<i>What kind of intimidation?</i>	<i>What kind of threats?</i>	<i>What kind of coercion?</i>
<i>What's an “adverse action”?</i>	<i>Deter?</i>	<i>Who is a “reasonable person”?</i>
<i>Exercising what civil rights?</i>	<i>OCR?</i>	<i>What actions are protected?</i>

Say They're a Student at Stetson...

Main campus. They pull up the Code of Community Standards, v. 5:



Any adverse action taken against a person participating in an activity because of their participation in that activity. Examples of activities include, but are not limited to, reporting behavior of any sort to the University which may violate the Code of Community Standards, including sexual harassment and assault, filing a discrimination or bias complaint, assisting someone in reporting discrimination or filing a report, participating in any manner in an investigation or conduct process (such as a witness). Retaliation may take the form of physical, verbal, written, or by electronic means.

STETSON UNIVERSITY CODE OF COMMUNITY STANDARDS, V. 5 (MAIN CAMPUS)

The party or witness still asks: ***“What’s an ‘adverse action’?”***

How Civil Rights Investigators Assess Retaliation

Explaining the math. For retaliation, we're asking three questions:

1

Protected activity?

Complaining about harassment or discrimination, or participating (or declining to participate) in a harassment or discrimination process. It could also be participating in an accommodation process.

+

2

Materially adverse action?

Would it dissuade a reasonable person from making or supporting a complaint, or from engaging in the protected activity period?

+

3

Causal connection?

Did the materially adverse action happen because of the protected activity? Timing matters.

= RETALIATION

The Dawn of It All

MEET DAWN

The Complainant. A Geography Professor at University A.

Dawn has filed a gender-based discrimination complaint with University A's Civil Rights Office.

MEET PATRICK

The Respondent. Chair of the Geography Department at University A.

Patrick is Dawn's department chair. He is named in Dawn's complaint.

THE ALLEGATION: Patrick subjected Dawn to gender-based discrimination when he failed to select her as a member for a Tenure-Track Search Committee, and instead selected a demonstrably less-qualified man.

Complainant's Fear of the Unknown

You're conducting an investigative interview with Dawn. Just as you get started, she tells you:

“ *I don't know what to do. I know the notice of my complaint went out to Patrick last week, and I have to see him tomorrow. It's our annual department retreat. I can't miss it. But I'm scared.*

DAWN

What do you tell Dawn?

“ *Dawn, now is a good time to make sure you know our retaliation policy. Under our policy, retaliation means intimidation, threats, coercion, or another adverse action that would deter a reasonable person from exercising civil rights... Do you have any questions about the policy?*

IS THIS A GOOD RESPONSE?

Response 1: Reciting the Policy?

NO

Dawn did not ask you for the definition of retaliation. She told you she was scared. An accurate recitation of your institution's retaliation policy does not respond to Dawn's concern.

Let's try another response:



Dawn, retaliation is prohibited by University policy and state and federal law. Patrick knows that, too. So you do not have to worry about anything happening tomorrow.

IS THIS A GOOD RESPONSE?

Response 2: Saying “Everything Will Be Fine?”

NO

Unlike the first response, this time, you heard Dawn's fear, but you tried to allay it with something you cannot promise or control. You do not know what Patrick will do, or will not do, tomorrow.

Let's try another:

“

Dawn, since your investigation has begun, it's better to be safe than sorry and avoid Patrick at all costs — it could damage the integrity of your complaint. If you'd like, our office can provide a supportive measure releasing you from any departmental obligations that would have you interface with Patrick.

IS THIS A GOOD RESPONSE?

Response 3: Avoiding Patrick?

NO

Even when a retaliation matter is ongoing in an academic department, both parties are allowed to conduct normal departmental business. This response is overly sweeping and could inadvertently damage the functioning of the department.

Caveat: If Dawn's complaint involved a fear for her physical safety, a supportive measure of a non-punitive, non-disciplinary mutual no-contact directive might be appropriate.

Let's try another response.

“

Dawn, thank you for telling me about your feelings about seeing Patrick at the departmental retreat tomorrow. You mentioned that you're scared. Can you tell me more about that?

IS THIS A GOOD RESPONSE?

Response 4: Asking For More Information?

YES

This is the best answer. It does not assume or conclude based on the limited information Dawn has provided. You need more information TO help you do your job better, and help you connect Dawn to resources she might need.

THE BIG PICTURE

Your interactions with Dawn about potential retaliation will not necessarily hit each element of a retaliation claim.

Some retaliation talk with parties and witnesses will involve identifying their fear and navigating their fear, rather than an analysis of specific elements. You need to locate the fear before you can respond to it.

Complainant's Fear of Retaliation

Dawn tells you more:

“ *I'm scared because Patrick is friendly with everyone in the department, and the retreat is a more relaxed environment than usual. Some of my colleagues have information that's really important to my discrimination allegation against Patrick, and I'm worried they might talk to Patrick, and he might convince them not to participate in the investigation.*

DAWN

ZOOM ROOM, YOU TELL ME: What should we tell Dawn?

You Are Not a “Precog”

In the film Minority Report, “precogs” see a crime before it happens, and people get punished for crimes they haven't committed yet.

WHAT PARTIES SOMETIMES WANT

They want you to “bust” the other party for something they are scared might happen... but has not happened yet, or might not ever happen.

WHAT YOU CANNOT DO

Prevent or pre-empt retaliation based solely on a fear or a premonition.

WHAT YOU CAN DO

Monitor. Connect to supportive measures. Inform them of what's required of a new allegation.

Behind the Fear of Retaliation

Sometimes a party has no interest in filing a new retaliation allegation. By mentioning their fears, they are looking for someone to hear them and support them. This is the time to make sure the party is aware of potential supportive measures:

Do they want an advisor?

A lawyer?

Counseling or mental health services?

An accommodation?

Listen not only to their questions, but try to hear the question behind the question. What help do they need beyond the scope of the policy?

Respondent's Retaliation Concerns

You're conducting an investigative interview with Patrick, a week after the departmental retreat. He tells you:

“ *So I run into Dawn yesterday in the hallway at work, and she says, ‘Patrick, there's just one thing I wanted to say about my complaint’ — and I immediately shut her down. I told her we can't talk, and we need to let the investigation happen. Did I do the right thing there?*

PATRICK

ZOOM ROOM: Did Patrick do the right thing there?

Yes, But

YES, BUT

Patrick is right that he and Dawn should not discuss the allegations outside the investigation. But if Dawn wanted to talk about regular departmental business, Patrick should not “shut her down.”

A week later, Patrick calls you:

“Two professors came up to me in private and told me Dawn asked them if they still had these handwritten notes she'd sent them about me, and if they did, could they hand them over to her? That feels weird. Is she interfering with your investigation? And if she's interfering with your investigation, does that mean she's retaliating against me?”

PATRICK

Zoom Room: What do you think?

What Could Flip the Script?

What would Dawn have to do for Patrick to have a retaliation claim against her?

1

Patrick's protected activity

Participating in the investigation: responding to the complaint is itself protected.

2

A materially adverse action by Dawn

Something that would dissuade a reasonable person in Patrick's shoes from participating.

3

Because of his participation

The causal connection: she did it because he's defending himself in the process.

Complainants can retaliate, too.

Why Should I Do This?

ENTER BRIAN

Another professor in the Geography Department. Patrick selected him for the tenure-track search committee. Dawn is working with him on a research paper. Brian has great working relationships and friendships with both Patrick and Dawn.

You sit down for an investigative interview with Brian. He says:

“*Can I be honest? Why should I participate in this investigation? I might say something that upsets Patrick... and Patrick is the department chair. He can affect my reputation, my standing in the department, my future here. Or I might say something that upsets Dawn. She's my collaborator. We're working on two serious papers, we're talking like big-money grants. What good will this do me? I tick both of them off and make a mess of my career?*”

BRIAN

Brian Is Circling Retaliation Without Naming It

He's circling, not naming.

As we've discussed today, this happens a lot in investigative interviews. You're catching witnesses and parties as they digest the situation. They won't always give voice to the retaliation they fear — but they're circling it. Hear it anyway.

Be straight about exposure.

Depending on your institution, he may or may not be anonymized in a report. Either way, what he provides might go out to state or federal agencies on request. The safest honest thing to say: there's a chance both Patrick and Dawn could learn what he says about them.

Don't undersell the fear.

You can remind him the retaliation policy would respond if Patrick or Dawn took action against him. But that likely undersells his real-world fear of more subtle isolation. This is hard. There is no perfect answer; every investigation leaves a mark.

Make the fairness case.

It's not uncommon for a witness to one day be a Complainant or Respondent. For the process to work fairly, we need participation. If he's ever in that chair as a party, he'd want witnesses showing up so the investigator can reach a fair finding.

Don't promise that work relationships will be untouched. Do promise honesty about who sees what, and when.

When the Elements Get Complicated

The three-part test looks clean on paper. Here's where it gets harder in practice.

CAUSAL CONNECTION

Timing is There, but Is That Enough?

Let's say Dawn files her discrimination complaint in October. In November, Patrick issues her annual performance review, and it's the worst she's ever received. Timing is suggestive, but it doesn't establish causal connection alone. What else do you need?

MATERIALLY ADVERSE ACTION

Is The Action "Adverse" Enough?

After filing her discrimination complaint, Dawn stops receiving department-wide emails about professional development opportunities. Is Patrick removing her from the distribution list a materially adverse action? Would a reasonable person be deterred from participating in the complaint process?

PROTECTED ACTIVITY

Is the Activity Protected?

Brian tells HR informally (in a hallway conversation, not a formal complaint) that he thinks Dawn is retaliating against him for participating in your discrimination investigation. Two weeks later, Dawn removes Patrick from one of the grants they're working on together. Was the hallway conversation protected activity?

Demystifying Retaliation for Parties and Witnesses

DAWN COMPLAINANT	WHAT SHE SAID <i>"I'm scared."</i>	YOUR MOVE Identify her fear. Determine what she is actually asking: Is it a policy question, or is it a request for supportive measures?
PATRICK RESPONDENT	WHAT HE SAID <i>"I told her we can't talk."</i>	YOUR MOVE Identify his fear. Make sure he knows retaliation is a two-way prohibition: both parties can retaliate, and both parties can report retaliation.
BRIAN WITNESS	WHAT THEY SAID <i>"What good will this do me?"</i>	YOUR MOVE Identify his fear. Make sure he is aware of the big picture.

CLOSING THE LOOP

Questions?