

Updated EEOC Retaliation Guidance Suggests Scrutiny for Internal Investigation Practices

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Thursday, September 8, 2016

The Equal Employment Opportunity Commission takes an expansive position on protection given to persons who make internal complaints about discrimination in bad faith in updated guidance on retaliation law.

Under a retaliation theory, individuals have legal redress if an employer takes a material adverse action against an individual for opposing discrimination or for filing a charge of discrimination with the EEOC, or helping other with such efforts. Many of the points made by the EEOC in its updated guidance are accepted widely by the courts. To the extent employers are concerned with complying with the EEOC's guidance, they should reexamine their handbooks and keep the EEOC's guidance in mind when presented with bad faith or untruthful internal allegations of discrimination.

Background

The guidance, [EEOC Enforcement Guidance on Retaliation and Related Issues](#), updates the EEOC's 1998 guidance. The updated guidance states that much of retaliation law is straightforward and the guidance often follows legal precedent (e.g., it does not reject U.S. Supreme Court rulings). However, in some instances, the EEOC's interpretations differ from general trends in retaliation law developed in the

appellate courts. The Commission notes the updated guidance does not address issues relating to waivers and releases.

EEOC and Employer Concerns with Retaliation

Retaliation is the most frequently alleged basis of discrimination before the EEOC. Charging parties assert retaliation in almost 45 percent of charges filed with the Commission.

The updated guidance stresses the importance of the anti-retaliation provisions in Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act. Enforcement of the non-discrimination provisions of those laws depends on the willingness of employees and job applicants to challenge discrimination without fear of punishment.

Employers understand that it is crucial to allow employees to bring complaints of discrimination. To that end, many employers have maintained anonymous hotlines so employees can bring discrimination to the attention of management without identifying themselves. Additionally, human resource professionals often remind an employee's direct managers of non-retaliation obligations when that employee complains or files a charge of discrimination with the EEOC. However, there are concerns about excessive deference to those complaining about discrimination. For example, Justice Anthony Kennedy has written about poorly performing employees having incentive to file charges of discrimination to forestall expected adverse employment actions. *Nasser v. Univ. of Tex. Sw. Med. Ctr.*, 133 S.Ct. 2517 (2013).

Protected Activity: Type is Important

The EEOC's updated guidance reiterates that an employee must engage in protected activity to establish a retaliation claim. Historically, protected activity has been divided into two categories: "opposition" and "participation." The EEOC views "opposition" as an explicit or implicit communication that a matter complained of is or could become discrimination. The EEOC's prior guidance limited "participation" to: (1) individuals challenging alleged discrimination in EEOC proceedings, state administrative proceedings, and state and federal court proceedings (e.g., a charging party/plaintiff); and (2) individuals who testify or otherwise participate in such proceedings (e.g., individuals who assist the charging party/plaintiff in an investigation or lawsuit).

The opposition/participation distinction matters to the EEOC because the Commission and some courts have seen a need to give greater protection to employees who engage in participation. For the EEOC, allegations made in the form of "participation" is protected absolutely, while allegations made in the form of opposition are subject to a "reasonable belief" standard. Even if an employee files a charge and shortly thereafter admits the charge is false, the EEOC's long-standing position, although not accepted by some courts of appeal, is that the employer may not take adverse employment action based on the false charge. On the other hand, an employee may succeed on an "opposition" retaliation claim by showing that he or she had a reasonable belief that what he or she complained of was a violation of

federal anti-discrimination law.

Guidance Expands What is Participation

According to the EEOC's updated guidance, a company's own equal employment opportunity complaint process constitutes "participation" protected activity. The Commission's primary case law justification for this new position is that the Supreme Court declined to rule on the issue in *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271 (2009). Thus, employers who wish to avoid EEOC scrutiny will not take any action against an employee who provides demonstrably false or maliciously defamatory information in an internal investigation. The EEOC's position also raises the possibility the Commission will find defective any anti-harassment policy that requires complaints to be made in "good faith."

As a practical matter, the EEOC's new position may have limited impact. Many employers, when faced with dubious reports of discrimination, simply evaluate the claim as lacking merit but take no employment action against the employee making the meritless report. The EEOC's updated guidance permits an employer to evaluate truthfulness as part of its determination of the merits of the underlying complaint, so long as the employer takes no material adverse action as the result of concluding the employee's story is maliciously false.

A final word of caution on the participation clause: the EEOC does not view participation protection limited to employees who *make bad faith statements alleging discrimination*. The EEOC also will find unlawful retaliation when an employer takes materially adverse action against *employees who in bad faith cover up discrimination*. The guidance states, "In the Commission's view, playing any role in an internal investigation should be deemed to constitute protected participation. Otherwise those providing information that supports the employer rather than the complainant could be left unprotected from retaliation."

Opposition Viewed Broadly

As mentioned, the EEOC defines "opposition" as a communication that a matter is discriminatory. An example would be an employee stating at a team meeting that women do all the difficult work. Perhaps concerned that courts will not agree with the EEOC's position that a complaint made pursuant to a company's internal complaint process is "participation," the EEOC considers those complaints to be both "participation" and "opposition" protected activity.

The EEOC stresses that "opposition" activity is not limited to employees who use the terms "discrimination" or "harassment." For the EEOC, the employee's complaint about discrimination may be implicit and the Commission's focus will be on whether the complaint would reasonably have been interpreted as opposition to employment discrimination. The EEOC's updated guidance makes numerous points about opposition activity, including the following:

- Opposition is not limited to complaints to managers, but also may include statements to coworkers, an attorney, the police or customers (provided complaints to customers are not so disruptive or excessive to be unreasonable).

- Opposition includes refusing to obey a command reasonably believed to be discriminatory, resisting sexual advances, and requesting an ADA or religious accommodation.
- The employee's opposition must be based on a reasonable good faith belief that there has been discrimination under federal law, but there is no requirement that a matter complained of actually violates the law. The EEOC considers its own positions, even if not adopted by courts, to be a safe harbor for demonstrating reasonable good faith belief, *e.g.*, the EEOC's position that discrimination on the basis of sexual orientation violates Title VII.
- The form of the employee's opposition also must be reasonable. Unlawful acts, threatening violence, badgering subordinates to provide witness statements in support of an EEOC charge, or an overwhelming number of patently specious complaints are not reasonable. In addition, opposition to alleged discrimination does not excuse an employee from performing job duties.
- All employees who engage in opposition are protected from retaliation. The EEOC rejects the "manager rule" adopted by some courts that requires managers "step outside" a management role and assume a position adverse to the employer to engage in protected activity.

Materially Adverse Action

The updated EEOC guidance emphasizes that under a 10-year-old Supreme Court law, an employer's retaliatory acts encompass a wider range of actions than "adverse actions" required to establish a viable claim under non-discrimination provisions of federal law. Thus, the EEOC considers work-related ultimatums, reprimands, warnings, transfers, and lowered performance evaluations sufficient to meet the standard of a materially adverse action. The EEOC sees the following acts — some of them not work-related — as potential materially adverse actions:

- Disparaging the person in the media;
- Making false reports to government authorities;
- Filing a civil action;
- Threatening reassignment;
- Workplace surveillance;
- Requiring re-verification of work status, initiating action with immigration authorities; and
- Taking a materially adverse action against a close family member.

The updated guidance states that "petty slights," "minor annoyances," or "trivial punishments" do not rise to the level of materially adverse actions. However, the EEOC's view is that context is very important and the key is whether an action is reasonably likely to deter protected activity.

Causation

In addition to showing protected activity and a materially adverse action, a charging party or plaintiff must show the materially adverse action was caused by the protected activity. With respect to causation, the updated guidance acknowledges that retaliation claims are subject to a “but-for” standard, not the more plaintiff-generous motivating-factor standard.

The Commission identifies inconsistent explanations for a decision, verbal and written admissions, and treatment of comparable employees who have not engaged in protected activity as potential evidence to support causation. In addition, the EEOC will find a causal link if the adverse action shortly follows the protected activity. The EEOC cautions, however, that causation still may exist if the time between the protected activity and the materially adverse action is lengthy, *e.g.*, if continued processing of a complaint stokes an employer’s animus.

The EEOC views the following, if credited by the factfinder, as defeating a claim for retaliation even if the employee has established the protected activity and materially adverse employment decision:

- The employer was unaware of the protected activity (this defense may not succeed if a person with knowledge of the protected activity influenced a decisionmaker who was unaware of the protected activity).
- The employer has a legitimate, non-retaliatory reason for its materially adverse action, *e.g.*, poor performance, inadequate qualifications for the position sought, misconduct, a reduction in force, or other downsizing.

The employer does not have the burden to disprove retaliation, the EEOC states. Moreover, causation is not proven if evidence shows the challenged adverse action would have happened anyway, even without a retaliatory motive.

ADA Interference

Under Section 503(b) of the ADA, it is unlawful to “coerce, intimidate, threaten, or interfere” with any individual in the exercise or enjoyment of his or her ADA rights or for having assisted or encouraging others in exercising ADA rights.

The EEOC notes that in many cases, actions that would constitute interference would be separately actionable as a denial of accommodation, discrimination or retaliation. However, taking an approach similar to that under the Family and Medical Leave Act, the EEOC says the interference provision protects individuals from many acts that do not rise to the level of materially adverse employment actions, and that the interference protections of the law therefore are much broader than the anti-retaliation provisions. Additionally, the interference and anti-retaliation provisions are not limited to qualified individuals with a disability. Following are some examples of potential ADA interference claims provided by the EEOC:

- Manager pressuring a non-disabled employee not to advise a disabled coworker of rights to reasonable accommodation;

- Manager refusing to consider accommodation unless employee takes medication prescribed by doctor that might eliminate the need for accommodation;
- Issuing a policy that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason.");
- Requiring an applicant to submit to an unlawful pre-employment medical examination, regardless of whether the applicant is disabled and is ultimately offered the job;
- Employee requests telecommuting from human resources, manager agrees to informally allow employee to work from home one day a week, but tells employee if she does not withdraw her formal request for accommodation, manager will tell human resources job cannot be performed at home;
- Discouraging an applicant who needs an accommodation from pursuing the position or requesting the accommodation; and
- Disabled employee is granted a modified work schedule by her prior manager as a reasonable accommodation, but new manager threatens employee with an adverse action if employee does not forgo the modified schedule and begin working a normal schedule.

Based on the examples provided in the guidance, it appears the EEOC intends to find interference violations when it determines employers have communicated an intent to enforce policies inflexibly or in a manner that might undermine or discourage the interactive process.

Preventive Practices

The EEOC suggests several "promising practices" to help reduce the risk of retaliation in the workplace.

Written Employer Policies

The updated guidance states that employer should maintain a written, plain language anti-retaliation policy that includes examples of retaliation that managers might not otherwise realize are actionable, a reporting mechanism that includes a mechanism for informal resolution, and a clear statement that retaliation can be subject to discipline.

Reminders of Policy of Anti-Retaliation Upon Receipt of Discrimination Complaint

According to the updated guidance, in response to any complaint of discrimination, an employer should provide all parties and witnesses information about the company's anti-retaliation policies, how to report retaliation, and how to avoid engaging in retaliation, e.g., putting aside personal feelings and carrying out

management duties to avoid the perception of retaliation.

Training

The EEOC encourages periodic training of all managers, supervisors, and employees about the company's written anti-retaliation policy messaging top-management's lack of tolerance for retaliation. The EEOC also opines that more general efforts in encouraging a respectful workplace will assist in minimizing retaliation. For management training, the Commission provides numerous other suggestions, emphasizing the need to provide real-life scenarios.

Review Employment Actions

The EEOC recommends that human resources, a designated management official, in-house counsel, or another resource review proposed employment actions of consequence (including performance assessments) to ensure those actions are based on non-discriminatory and non-retaliatory reasons. As part of this effort, decisionmakers should identify the reasons for taking the employment action and supply supporting documentation. Where retaliation is found, an employer should implement appropriate process improvements based on perceived causes. Such improvements might involve training and increased oversight, as well as other changes.

Next Steps

By reviewing the EEOC's updated guidance, HR professionals and in-house attorneys will be able to refresh themselves on retaliation law and learn how the EEOC's interpretation of the law differs in some respect from district and appellate case law. The EEOC provides 29 fact pattern "examples." Employers should review their reasonable accommodation policies and practices to limit exposure to ADA interference claims, including a review of any practices that resemble those referenced by the EEOC.

Case law and the EEOC guidance permit taking action against an individual who has engaged in protected activity so long as the action is unrelated to the protected activity. However, even though a company may believe its actions against some individuals are not related to the protected activity, a court might conclude a jury should decide the issue. Thus, it is in a company's interest to review carefully contemplated adverse actions against a person who has opposed discrimination, filed a charge, or assisted others in doing so.

In the end, it is important to keep in mind the guidance is the EEOC's interpretation of the law, which may or may not be accepted by any particular court. However, employers must tread lightly in this area, recognizing the cost to prove a point and the risks associated with doing so. In any event, regardless of whether the Commission's interpretation of the law is right or wrong, there is no question the guidance will be followed by the EEOC investigators evaluating charges filed with the agency.

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