

## Gavel to Gavel: EEOC sees increased retaliation allegations

By: Meagen Burrows Guest Columnist December 13, 2017



Almost half of the complaints filed with the Equal Employment Opportunity Commission contain retaliation allegations and that number is increasing. In many instances, it is not the underlying claim of discrimination that results in an employer's liability, but the retaliation claim. These claims are preventable with appropriate policies, guidelines, and training.

Retaliation occurs when an employer takes materially adverse action against an individual who has engaged in protected activity when there is a causal link between the protected activity and the adverse action. In short, protected activity includes both conduct amounting to participation in an investigation, proceeding or hearing under any of the EEO laws (e.g. filing a charge and/or testifying [or offering to testify] as a witness) and opposition to conduct that an employee reasonably and in good faith believes is a potential violation of any of the EEO laws. An employee need not use any magic words to oppose conduct that he or she perceives to be in violation of EEO laws. In fact, an individual's broad and ambiguous statement about unfair treatment can constitute protected opposition activity.

The EEOC's guidance makes clear that a materially adverse action can be virtually anything that might deter a reasonable person from engaging in protected activity. Notably, conduct that fails to amount to an adverse action under anti-discrimination statutes may still amount to retaliation if it is materially adverse. While most of the adverse actions will occur in the context of employment, even conduct outside of work can give rise to a retaliation claim. Moreover, the materially adverse action need not be taken against the employee directly, or even while he/she is an employee to be actionable.

The causal connection between protected activity and any materially adverse action depends on the language of the anti-retaliation provision at issue, whether it is a federal employer, and in what federal court your dispute arises. To defend against such claims, employers can demonstrate a pattern of poor performance or that comparators were treated the same to establish a legitimate reason for termination.

To prevent retaliation claims, employers should have written policies and provide routine training to all staff. Should there be allegations, a reminder of the anti-retaliation policy and guidance for how to successfully move through the process without violating any laws is critical.

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