RETALIATION UPDATE

EEOC'S NEW GUIDANCE AND KEY EMPLOYER TAKEAWAYS

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Almost half of the complaints filed with the Equal Employment Opportunity Commission ("EEOC") contain retaliation allegations and that number has continued to increase over the past several years. In many instances, it is not the underlying claim of discrimination that results in an employer's liability, but the retaliation claim. These retaliation claims are preventable with appropriate policies, guidelines, and training of managers and supervisors.

In August 29, 2016, the EEOC published guidance to help employers avoid retaliation.[1] The guidance reflects the EEOC's expansive definition of what constitutes retaliation, creating risk for employers who do not properly and routinely train managers and supervisors to prevent any conduct that may reasonably form the basis of a retaliation complaint. This seminar will address the EEOC's new guidance, the expansive definition of retaliation, how it arises, and what employers can do to prevent and defend against claims of retaliation.

What is retaliation?

The EEOC's guidance provides that retaliation occurs:

> [W]hen an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the EEO laws the Commission enforces.[2] The EEO anti-retaliation provisions ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without employers taking materially adverse actions in response.

In order to establish a claim for retaliation, a Plaintiff must allege that he/she engaged in **protected activity,** that the employer took a **materially adverse action;** and that there was a **causal link** between the two. Of course, each of these phrases is a term or terms of art that requires a fact-specific inquiry and an application of the specific anti-retaliation statute at issue.

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[1] The EEOC's guidance replaces the EEOC's compliance Manual Section 8: Retaliation, issued in 1998.

[2] Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), Title V of the Americans with Disabilities Act (ADA), Section 501 of the Rehabilitation Act (Section 501), the Equal Pay Act (EPA), and Title II of the Genetic Information Nondiscrimination Act (GINA).

What is protected activity?

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. Under the EEOC's guidance, a trap for the unwary employer is noted. 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, the EEOC's guidance states that an individual's broad and ambiguous statement about unfair treatment can constitute protected opposition activity. [3]

This seemingly boundless definition of opposition activity is tempered only by the following limit: the communication, no matter how ambiguous, is a protected activity so long as the communication would reasonably have been interpreted as opposition to employment discrimination in context. Importantly, an employee can engage in "protected activity" giving rise to a retaliation claim even if the activity occurred at a prior employer and even if the communication constituting the "protected activity" was not directly made to the employer or its employees (e.g. a claim that current employer took materially adverse action against an employee [or prospective employee] following receipt of information that he/she participated in an investigation under EEO laws involving his/her prior employer).

Significantly and in line with the EEOC's expansive interpretation, the conduct complained of need not amount to actual violation of EEO laws. This is especially significant in areas of the law where there is ongoing debate about an employer's rights and responsibilities – consider, for example, accommodating medicinal marijuana under state anti-discrimination statutes or whether claims for discrimination on the basis of sexual orientation constitute actionable claims under Title VII. In the context of harassment, employers must be aware that allegations of conduct that would never rise to the level of a "hostile work environment" action may give rise to a retaliation claim. The EEOC reasons that precluding this type of protected activity would have a chilling effect on reporting what could quickly evolve into a hostile work environment. Thus, supervisors and managers should be mindful that complaints of inappropriate conduct, even if an isolated event, and even if the employee is mistaken, [4] may constitute protected activity.

Though outside the scope of this paper, employers should also be mindful that the EEOC guidance states that requests for either disability or religious accommodation constitutes protected activity under the ADA and Title VII, respectively. Moreover, employers should be mindful about whistleblower statutes and other federal laws, like the Equal Pay Act, that preclude employers from restricting or penalizing employees for certain communications or complaints.

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[3] E.g. *Lewis v. Oklahoma ex rel. Bd. Of Regents for Tulsa Community College*, 42 Fed. Appx 160 (June 18, 2002), citing *Love v.* RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984) (holding that an employee's statement that it was "time she get an attorney…" was sufficient to establish an "unofficial assertion of rights.")

[4] E.g., Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984) (An employee was fired after a request for a pay raise was submitted with a copy of the Equal Pay Act. The court concluded that the employer had retaliated against the employee, even though the lower court concluded that no violation of the Equal Pay Act actually occurred, because the employee had a *good faith* belief that the Act was violated.)

What constitutes a materially adverse action?

In keeping with its broad definition of retaliation, 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 as long as it is "materially adverse." While most of the adverse actions will occur in the context of employment (e.g. issuing a written warning, changing an employee's schedule [or denying a schedule change], negative performance evaluations, or denial of leave), the EEOC's guidance states that even conduct outside of work can give rise to a retaliation claim. For instance, and by way of example only, disparaging the employee to others may constitute a materially adverse action. Moreover, the materially adverse action need not be taken against the employee directly, or even while he/she is an employee (i.e. the action can be prior to hire [e.g. denial of employment] or after separation [e.g. giving a bad reference to a prospective employer] to be actionable.

When is there a Causal Link?

The causal connection between protected activity and any materially adverse action depends on the language of the anti-retaliation provision at issue, whether the employer is a federal employer, and importantly, in what federal court your dispute arises.

For non-federal employers, the Supreme Court's decision in *University of Texas Southwest Medical Center v. Nassar*, defined the "but for" causation standards for retaliatory conduct. The EEOC's guidance provides that the "but for" cause need not be the "sole" or only cause. There can be a variety of causes, but the employee will still prevail if he or she can demonstrate that the "protected activity" was the proverbial straw that broke the camel's back. Unlike the "but for" standard, federal sector employers defending against Title VII and ADEA retaliation claims, must demonstrate that the protected activity was not a "motivating factor" in the materially adverse action.

Just as in discrimination cases generally, evidence of causation is proved using the *McDonnel Douglas*[5] burden shifting framework. Circumstantial evidence (e.g. treatment of similarly situated comparators), evidence of close timing between the protected activity and the action (e.g. in *Connor*, the court held that "protected conduct closely followed by adverse action" may "justify an inference of retaliatory motive,"[6] but that "…unless the termination is closely connected in time…the plaintiff will need to rely on more than mere temporal proximity to establish causation."[7]), as well as any direct evidence (e.g. actual statements of animosity) are all

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[5] *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973) (wherein the plaintiff must first establish a prima facie case, then, if successful, the burden shifts to the employer to offer a legitimate reason for termination, and finally, if the employer is successful, the plaintiff must demonstrate that the proffered legitimate reason is either contradicted by direct evidence or pretextual)

[6] *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 13961395 (10th Cir. 1997), citing *Burrus v. United Tel. Co. of Kan., Inc.,* 683 F.2D 339, 343 (10th Cir. 1982)

[7] Id. at 1395 (noting that 4 months, standing alone, is too long to merit an unsupported causal link).

examples of the type of evidence that may be used to establish causation in the plaintiffs prima facie case.

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; however, if the plaintiff can establish that the stated legitimate reason for the action (e.g. poor performance) is mere "pretext,[8] then the plaintiff may still prevail. Of course, the most straightforward defense is to demonstrate that the employer was unaware of the protected activity.

What can employers do to prevent retaliation?

First, employers should have written policies that provide easily understood instructions that retaliation is prohibited, how to report conduct believed to be retaliatory, and examples of the type of conduct that constitutes retaliation. Second, employers should provide routine training to all managers, supervisors and employee on the employer's written policy. This training should include guidance on the appropriate mechanism for handing internal complaints or responding to EEO investigations so that supervisors and managers know what is and is not appropriate. Third, employers should debrief those impacted and involved in EEO allegations to provide a reminder of the anti-retaliation policy and guidance for how to successfully move through the process without violating any laws. Fourth, employers should regularly check in with managers and supervisors with ongoing relationships so as to provide regular guidance on how to manage the ongoing employment situation. Finally, employers should consider reviewing proposed employment actions that pertain to individuals who have engaged in protected activity to confirm there is adequate evidence of a legitimate, non-retaliatory reason for the recommendation.

[8] See, e.g., *Morgan v. Hilti, Inc.,* 108 F.3d 1319 (10th Cir. 1997), holding that pretext could be determined through evaluation of the "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons…"