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Employment Law

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Employment Retaliation in the Eyes of the EEOC

In light of the numerous significant court rulings regarding employment-related retaliation and the fact that retaliation is now the most frequently alleged basis of discrimination, on January 21, 2016 the U.S. Equal Employment Opportunity Commission (EEOC) issued a Proposed Enforcement Guidance on Retaliation and Related Issues, updating the last guidance published in 1998. By the time of this publication, the public comment period will have ended and the final guidance could be released. In advance of the final publication, this column will highlight and summarize this new guidance. As with all EEOC Enforcement Guidance, courts are not required to follow it but will consider the EEOC's position as a source to which courts and litigants may properly resort for guidance. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

What is Retaliation?

Each of the federal employment laws contains prohibitions against retaliation. Retaliation is generally defined as an employer unlawfully taking action against an individual in punishment for exercising rights protected by any of the EEO laws. *See* 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a) and (b); 29 U.S.C. § 215(a)(3); and 42 U.S.C. § 2000ff-6(f). There are two types of activity that are protected by the non-retaliation laws: participation and opposition. The EEOC interprets participation very broadly as including "providing witness information; assisting or otherwise participating in any manner in an investigation, proceeding, or hearing under the EEO laws, including making an internal complaint to an employer or union; participating in an employer's own internal investigation; or filing an administrative charge or lawsuit alleging discrimination in violation of the EEO laws." http://www.regulations.gov/#!docketDetail;D=EEOC-2016-0001 (EEOC Proposed Guidance), at 4 (last visited Feb. 22, 2016).

Opposition is defined as "opposing a practice made unlawful by one of the employment discrimination statutes (*e.g.*, communicating a reasonable belief that the employer's activity violates the EEO laws), or engaging in non-verbal acts of opposition (*e.g.*, resisting an unwanted sexual advance by a supervisor or refusing to carry out an order reasonably believed to be discriminatory.)" *Id.* at 5. Retaliation claims have three elements: (1) protected activity which is participation in EEO activity or opposition by the individual to discrimination; (2) adverse action taken by the employer; and (3) causal connection between the protected activity and the adverse action. *Id.* The proposed guidance also contains a new section describing the ADA interference provision which is broader than the anti-retaliation provision and makes it illegal for an employer to interfere with any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights. *Id.* at 59-64.

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Participation Clause

Under the EEOC's proposed guidance, the participation clause includes not only charges filed with the EEOC, but also internal EEO complaints to company management, human resources, or made within an employer's internal complaint process. *Id.* at 8. Thus, anyone who management interviews as part of an investigation into an internal discrimination complaint would be protected under the participation clause. This includes employees who provide neutral testimony and those who provide employer-favorable information. *Id.* at 23. An individual may be protected by the anti-retaliation provisions regardless of whether the underlying discrimination claim fails for such reasons as being filed too late or because the charge had no merit—even if the discrimination claim was completely unreasonable. *Id.* at 6.

Under the EEOC's proposed guidance, an employee who knowingly fabricates a discrimination claim would still be protected under the participation clause. However, the employee would still need to demonstrate a causal connection between any adverse activity and her participation. *Id.* at 9. Employers may still discipline or terminate employees for legitimate, non-discriminatory, and non-retaliatory reasons. The EEOC suggests that when a manager recommends an adverse action following an employee's complaint, employers may reduce the chance of potential retaliation by independently evaluating whether the adverse action is appropriate by scrutinizing the legitimacy of the adverse action and ensuring that it is consistent with pre-existing employer policies and equivalent to actions taken against similarly-situated employees. *Id.* at 11.

Opposition Clause

Unlike the participation clause, the EEOC limits opposition claims to those who object to practices that they *reasonably* believe are unlawful. *Id.* at 6, n.16. The opposition clause applies to both explicit and implicit communications by an individual of a belief that the employer may be engaging in employment discrimination. *Id.* at 11. These complaints are most commonly made by the employee to the employer but also include complaints about the employer to others that the employer learns about. Such complaints may have been made to union officials, co-workers, an attorney or even persons outside the company. *Id.* at 16-17. The EEOC's proposed guidance states that the communication may be informal and need not include the words "harassment," "discrimination," or any other legal terminology, as long as circumstances show that the individual intended to convey opposition or resistance to a perceived EEO violation. *Id.* at 12. Nonetheless, the individual must explicitly or implicitly communicate the belief that the practice could constitute unlawful employment discrimination so that broad or ambiguous complaints of unfair treatment are protected in the eyes of the EEOC only if the complaint would reasonably have been interpreted as opposition to employment discrimination. *Id.* at 23-24.

The EEOC contends that the following types of activities could be protected by the opposition clause: accompanying a co-worker to the human resources office in order to file an internal EEO complaint; complaining about discrimination against co-workers; refusing to follow a supervisor's order that the employee reasonably believes to be discriminatory; and an employee answering an employer's questions about potential discrimination where the employee did not initiate the complaint. *Id.* at 12-13. Other types of opposition in the eyes of the EEOC are a human resources employee advising his employer on EEO compliance; resisting a supervisor's sexual advances; a co-worker intervening on behalf of an employee who is being sexually harassed by a supervisor; requesting reasonable accommodation for a disability or religion; and an employee requesting an exception to a uniform policy as a religious accommodation. *Id.* at 28-30. The

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EEOC's draft guidance also suggests that opposition may include "passive resistance" defined as the act of allowing others to express opposition. *Id.* at 29. An example of such conduct is where a supervisor does not carry out management's instruction to discourage subordinates from filing discrimination complaints. Any adverse action by management against the supervisor in reprisal for his refusal to prevent complaints would be actionable retaliation in the eyes in the EEOC. *Id.*

The EEOC's proposed guidance provides that where an employee tells the employer that she intends to file a charge, whether internally or externally, that statement alone would be protected reasonable opposition. *Id.* at 17. The EEOC also contends that reasonable opposition includes an employee informing the employer about alleged or potential discrimination or harassment, even if the alleged harassment has not yet risen to the level of a severe or pervasive hostile work environment. *Id.* at 17-18. Effective opposition need not be made through the prescribed internal complaint procedures, and employees who go outside the chain of command may still be entitled to protection under the opposition clause. *Id.* at 18. Opposition may also include an employee's public complaints about alleged discrimination through letter writing, picketing, engaging in a production slow-down, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal changes. *Id.* However, such opposition may not be done in a disruptive or excessive manner that would be unreasonable. *Id.*

The EEOC's proposed guidance contains examples of the unreasonable manner of opposition. This includes an employee who makes an overwhelming number of patently specious complaints, or badgers a subordinate employee to give a witness statement in support of an EEOC charge and attempts to coerce him to change that statement. *Id.* at 18-19. It is also unreasonable for an individual to engage in an unlawful act such as committing or threatening violence to life or property. *Id.* at 19. Employees who oppose perceived discrimination are not free to neglect job duties and may be disciplined or discharged where the employee's protest renders the employee ineffective in the job. *Id.*

Like the participation clause, individuals who oppose what they reasonably believe to be unlawful discrimination are protected even where the underlying challenged practice is actually lawful. *Id.* This includes employees complaining about harassment based on classes that are not protected by federal non-discrimination laws, such as discrimination based on sexual orientation, as long as the EEOC's stated legal position and enforcement efforts advocate for protection based on that classification.

Inquiries and Other Discussions Related to Compensation

The proposed guidance contains a new section on protections against retaliation for inquiring about or otherwise discussing compensation information. *Id.* at 31. The EEOC believes that actions taken by an employer to prohibit employees from discussing their compensation with one another may deter activity protected by EEO laws. One type of protected opposition could be an employee communicating with management or co-workers to complain or ask about compensation or otherwise discuss rates of pay. *Id.* Other federal laws may protect employees from retaliation based on discussions related to compensation. Those laws include Executive Order 11246, as amended by Executive Order 13665 (April 8, 2014), which prohibits federal contractors from taking adverse action against employees who discuss, disclose, or inquire about their compensation or that of other employees or applicants. *Id.* at 33. The National Labor Relations Act protects non-supervisory employees who are covered by the Act from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved in the effort. *Id.* at 34.

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Who is Protected?

The anti-retaliation protections extend beyond just those individuals who make formal or informal allegations of EEO violations on their own behalf – or just threaten to do so. *Id.* Protection under the EEO laws also extends to those who serve as witnesses or participate in investigations, and those who exercise rights such as requesting religious or disability accommodation. There are other groups who are protected from retaliation that employers may not realize:

i. individuals who are retaliated against after their employment relationship ends through an unfavorable and untruthful job reference, refusing to provide a reference, or by informing the prospective employer of the individual's prior protected activity;
ii. individuals who a prospective employer refuses to hire because they engaged in a protected activity with a different employer; and
iii. those whom an employer mistakenly believes have engaged in protected activity, even when they have not.

Id. at 34-36.

What is a Materially Adverse Action?

Each of the anti-retaliation provisions contain prohibitions against employers taking any action that is "materially adverse," meaning any action that might well deter a reasonable person from engaging in protected activity. *Id.* at 37. This definition is broader than the definition of "adverse action" under the non-discrimination provisions. The standard can be satisfied even if the individual was not in fact deterred. While the most obvious types of adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge, the EEOC's draft guidance includes examples of many other types of activity by employers that can be materially adverse.

Inside the workplace, those actions include work-related threats, warnings, reprimands, transfers, negative or lower evaluations, verbal or physical abuse (whether or not it rises to the level of creating a hostile work environment), transfers to less prestigious or desirable work or work locations, denial of overtime or any other type of adverse treatment that might well dissuade a reasonable person from engaging in protected activity. *Id.* at 39-41. Citing the Courts of Appeals for the Second and Sixth Circuits, the EEOC contends that formal reprimands and lowered performance appraisals may also rise to the level of materially adverse actions. *Id.* at 40-41 (citing *Millea v. Metro-North Railroad Co.*, 658 F.3d 154, 165 (2d Cir. 2011); *Halfacre v. Home Depot, U.S.A., Inc.*, 221 Fed. App'x. 424, 433 (6th Cir. 2007)).

Adverse actions may also be an action that has no tangible effect on employment, or actions that take place exclusively outside of work. The EEOC's proposed guidance includes a list of examples, some of which have been found by lower courts to not rise to the level of materially adverse actions. The examples set forth in the proposed guidance are:

i. disparaging an individual to the others or in the media;
ii. making false reports to government authorities;
iii. threatening reassignment;
iv. scrutinizing work or attendance more closely than that of other employees, without justification;

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v. giving an inaccurately lowered performance appraisal or job reference, even if not unfavorable;
vi. removal of supervisory responsibilities;
vii. abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if not sufficiently "severe or pervasive" to create a hostile work environment;
viii. requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities; and
ix. terminating the union grievance process or other actions relating to blocking access to otherwise available remedial mechanisms.

Id. at 41-43.

Materially adverse actions do not include trivial harms and petty slights as they are not likely to dissuade an individual from engaging in protected activity. *Id.* at 44. Examples include failing to grant a retired professor "emeritus" status; occasional brief delays by an employer in issuing refund checks to an employee that involved small amounts of money; and a supervisor excluding a complaining employee from lunch, unless all employees are regularly invited to the lunch and the complaining employee is now excluded or the lunches are devoted to training or some activity to advance the employee's career. *Id.* at 44-45, 47.

The EEOC proposed guidance includes third party retaliation as a potentially materially adverse action by citing language in *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011), that it is "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." *EEOC Proposed Guideline*, at 48. Another example occurs when an employer punishes an employee for engaging in protected activity by cancelling a vendor contract with the employee's husband, even though the husband is employed by a different company. *Id.* The EEOC has further noted in that in such circumstances, not only would the employee have a retaliation claim against the employer, but so too may the third party who was directly harmed by the employer's retaliation. *Thompson*, 562 U.S. at 178.

A Causal Connection Between the Protected Activity and Adverse Action is Required

In order for the employer to have unlawfully retaliated against an individual, it must have done so *because* the person engaged in protected activity. *EEOC Proposed Guidance*, at 50. Thus, in those cases where the employer acknowledges or betrays a retaliatory motive for the adverse action verbally or in writing, the causal connection will be obvious. More often, the employer identifies a lawful reason for its action, which then places the burden on the complaining individual to produce enough evidence to show that the employer's explanation is untrue and the real reason was retaliation. The individual must show that "but for" a retaliatory motive, the employer would not have taken the adverse action. *Id.* However, retaliation need not be the "sole cause" of the action. *See Miller v. Am. Airlines, Inc.*, 525 F.3d 520, 523 (7th Cir. 2008).

An individual may discredit the employer's explanation by citing to different pieces of evidence which, in combination, are sufficient to allow an inference of retaliatory intent. *EEOC Proposed Guidance*, at 52-53. Such evidence is often referred to as a "convincing mosaic" of circumstantial evidence and may include suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the

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employer's proffered reason for the adverse action, or any other "bits and pieces" from which an inference of retaliatory intent might be drawn. *Id.* at 53.

Who Retaliates Against an Individual?

In most cases, the alleged retaliatory conduct was taken by a supervisor or other agent in the exercise of her official responsibilities. *Id.* at 57. If retaliatory conduct does not involve the explicit or implicit abuse of delegated authority, the applicable standard turns on whether the employer granted the alleged retaliator "power that materially assisted her in carrying out the retaliation." *Id.* In such cases, the employer is strictly liable for retaliation by supervisors and other agents whose retaliation was enhanced by delegated authority and there are no defenses. *Id.* at 58. However, if the retaliator's delegated authority was insufficient to justify automatic employer liability, the employer is only liable if it unreasonably failed to prevent the retaliation or if it failed to take appropriate corrective action once it knew, or reasonably should have known, about the retaliation. *Id.* at 58-59.

Available Remedies in Retaliation Cases

There are a wide range of available remedies in retaliation cases. The EEOC has the authority to sue for temporary or preliminary relief before completing its processing of a retaliation charge in cases brought under Title VII, the ADA, and GINA. *Id.* at 64. The ADEA and EPA do not authorize such interim relief. *Id.* In cases brought under Title VII and GINA, the Section 1981a caps on compensatory and punitive damages (excluding past monetary losses) apply. *Id.* at 66. Punitive damages are available when a practice is undertaken "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* Compensatory and punitive damages are available for retaliation claims brought under the ADEA and EPA and such damages are not subject to statutory caps. *Id.* at 67.

With respect to the ADA, while courts are split regarding whether compensatory and punitive damages are available for retaliation and interference claims, the EEOC's proposed guidance takes the position that such damages are available. *Id.* Keep in mind that the Seventh Circuit does not agree with the EEOC and has found that compensatory and punitive damages are not available for ADA retaliation. *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 964-66 (7th Cir. 2004). All statutes provide that relief may include back pay if the retaliation resulted in termination, constructive discharge, or non-selection, as well as front pay or reinstatement. *EEOC Proposed Guidance*, at 68. The EEOC can also seek equitable relief such as changes in employer policies and procedures, managerial training, reporting to the Commission, and other measures designed to prevent violations and promote future compliance with the law.

Best Practices

The EEOC's proposed guidance contains a number of suggested best practices that are not legal requirements, but that employers may wish to implement to reduce the incidence of retaliation. Certainly, all employers should maintain a written, plain-language anti-retaliation policy and provide practical guidance on the employer's expectations with examples of what to do and not to do. *Id.* at 68. Such policy should include examples of retaliation that managers may not otherwise realize are actionable; proactive steps for avoiding actual or perceived retaliation, including interactions by managers and supervisors with employees who have lodged discrimination claims against them; a reporting mechanism

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for employee concerns about retaliation, including access to a mechanism for informal resolution; and a clear explanation that retaliation can be subject to discipline, up to and including termination. *Id.* at 69. The EEOC suggests that such policies do not include terms that make an employee fear retaliation such as warnings that reports of discrimination found to be false will subject the employee to disciplinary action.

The EEOC also recommends that employers should consider training for all employees on the written anti-retaliation policy. *Id.* at 70-71. During this training, top management should send a message that retaliation will not be tolerated and hold periodic refresher training. *Id.* at 70. Such training should be tailored to address any specific deficits in EEO knowledge and behavioral standards that have arisen in that particular workplace, ensuring that employees are aware of what conduct is "protected activity" and providing examples of how to avoid problematic situations that have actually occurred or are likely to occur. *Id.* at 70-71. The training should include scenarios and advice for EEO-compliant ways to handle various situations to ensure that discipline and performance evaluations of employees are motivated by legitimate, non-retaliatory reasons. *Id.* at 71. Supervisors should recognize and understand that if they are accused of EEO violations, they cannot act on feelings of revenge or retribution, even though those emotions may occur. *Id.* Lastly, the EEOC recommends that employer use this training to encourage workplace civility which may help curb retaliatory behavior. *Id.*

When an individual does make EEO allegations, the employer's response should include providing information to all parties and witnesses regarding the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it. *Id.* at 72. Supervisors should be reminded to not discuss pending EEO matters with other employees and managers, but they are welcome to access designated employer resources for support. *Id.* The employer should also provide tips for avoiding actual or perceived retaliation, as well as access to a resource individual for advice and counsel on managing the situation. *Id.* Employers may also consider checking in with employees, managers and witnesses during the pendency of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation and to provide guidance. *Id.* The EEOC believes that such a proactive response provides an opportunity to identify issues before they fester, and to re-assure employees and witnesses of the employer's commitment to protect against retaliation. *Id.* at 72-73.

Lastly, the EEOC's proposed guidance recommends that employers consider ensuring that a designated individual review proposed employment actions of consequence to ensure that they are based on legitimate non-discriminatory, non-retaliatory reasons. These reviewers should require decision-makers to "'know, understand, and easily identify' their reasons for taking consequential actions, and ensure that necessary documentation supports the decision." *Id.* at 73. Additionally, the reviewers should scrutinize performance assessments to ensure they have a sound factual basis and are free from unlawful motivations. Employers who implement these suggested bests practices should be well-positioned to defend themselves from claims of retaliation.

About the Author

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