Insight

IN-DEPTH DISCUSSION

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EEOC Guidelines Provide a Confusing Roadmap to Investigating Retaliation Claims

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Employers have been warned time and time again – retaliation claims are on the rise. With the number of these claims climbing, the U.S. Equal Employment Opportunity Commission ("EEOC") issued its *Final Enforcement Guidance on Retaliation and Related Issues*, which are guidelines for EEOC investigators to use in investigating retaliation claims. This is the first time in nearly two decades that the Commission has updated these guidelines.[1]

In the beginning of 2016, the EEOC published proposed guidance for public input. The proposed guidelines reflected an overall presumption of retaliation (i.e., a presumption of guilt), shifting a claimant's burden to prove his retaliation claim to the employer to disprove the claim. Although the final guidelines advance activist views of the anti-retaliation laws for which the EEOC is charged with enforcing – including Title VII, the Age Discrimination in Employment Act ("ADEA), and the Americans with Disabilities Act (ADA) (collectively, "EEO laws") – the revised final guidelines reflect significant revisions and are more objective than what was originally proposed.

Quick Primer on Retaliation in the Workplace

EEO laws prohibit employers from taking an adverse action – e.g., termination or demotion, etc. – against an employee because that employee engaged in protected activity. There are three primary issues in every retaliation case: protected activity, adverse action, and causation. Claimants must also show that the employer's stated reason for the adverse employment action – e.g., misconduct, poor performance, etc. – was a pretext for an unlawful retaliatory motive.

1 The *Final Enforcement Guidance on Retaliation and Related Issues* can be accessed here: https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

The EEOC Adopts an Expansive View of "Protected Activity"

EEO laws delineate protected activity into two categories: (1) participation in proceedings and investigations occurring under the EEO laws (the "participation clause," and (2) opposition to conduct made unlawful by the EEO laws (the "opposition clause"). The proposed guidelines, however, take on a much broader view of these two clauses than what is found in the language of the statutes.

- The guidelines state that protected activity includes an employee's participation in internal discrimination complaints to company management, human resources, or other internal complaint processes, even though the plain language of federal EEO laws explicitly limits the participation clause to investigations, proceedings, or hearings occurring under the law, such as EEOC investigations or proceedings.
- Although EEO laws, as interpreted by the federal courts, limit protected opposition conduct to circumstances in which the employee opposes unlawful discrimination *specifically* based on a protected class, the guidelines' interpretation broadens the opposition clause to include employee complaints that "explicitly or implicitly" communicate an employee's belief that the employer may be engaging in employment discrimination.
- The guidelines further expand the opposition clause to include an employee's opposition to conduct that the employee reasonably believes is unlawful under EEO laws, but which may not actually be prohibited by these laws. To the contrary, the EEO laws' opposition clauses are specifically limited to an employee's opposition to conduct that is made unlawful by the respective statute.

Arguably these are fine lines to draw, but these overreaching views reflect the EEOC's recommendation to its investigators to take a more lenient stance on what is and is not protected activity, and focus more on the causation piece of their investigations.

The EEOC Confuses the "But For" Causation Standard

EEO laws have all adopted a "but-for" causation standard for retaliation claims. This is not a difficult concept – it simply means that but for an employee's protected activity, the adverse action would not have occurred. In employment law, the competing causation standard is the "motivating factor" standard, meaning that a claimant need show only that a prohibited factor (e.g., race, sex, disability, etc.) contributed to the employment decision—not that it was the but-for or sole cause. Discrimination claims asserted under Title VII and the ADA are subject to the motivating factor standard, and age discrimination claims and retaliation claims under all EEO laws require a showing of but-for causation.

Although the proposed guidelines recite the but-for standard, the EEOC muddles the explanation of this otherwise straightforward burden of proof. In 2013, the U.S. Supreme Court in University of Texas *Southwestern Medical Center v. Nassar* held that retaliation claims under Title VII must satisfy the "but for" causation standard. The Court explained: "[i]n the usual course, this standard requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct."[2] Stated another way, "but for" means "the real reason," as in the employee's alleged misconduct was the real reason for the termination. Rather than relying on this clear-cut explanation, the guidelines instead advise that "[t]here can be multiple 'but-for' causes, and retaliation need only be 'a but-for' cause of the materially

2 *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013).

adverse action in order for the employee to prevail." If you are confused by this explanation, you are not alone. This explanation unnecessarily complicates the "but for" causation standard.[3]

Sage Advice from the EEOC

The Commission's final guidelines offer these recommendations to employers:

- Maintain a written, plain-language anti-retaliation policy, and provide practical guidance on the employer's expectations with user-friendly examples of what to do and not to do;
- Train managers, supervisors, and employees on the employer's written anti-retaliation policy, and send a message from the company's leadership that retaliation will not be tolerated;
- When an employee makes a complaint of discrimination – internal or external – remind all parties involved, especially the subject of the complaint and the managers and supervisors, that the company has a zero-tolerance policy for retaliation, and any retaliatory acts will be met with severe consequences;
- Check 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; and
- Designate a human resources manager, in-house counsel, or other member of management to review proposed employment actions of consequence to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons.

Employers should consider implementing all of these recommendations, if they have not done so already. Not only will these practices help reduce the number of actual or perceived retaliatory acts, but will help support a company's defense to retaliation claims filed with the EEOC or in court.

How the Guidelines Affect Employers

Although retaliation claims may be on the rise, that does not mean retaliatory acts are. Employers face increasing challenges to legitimate employment-related decisions with allegations of discriminatory or retaliatory motives. And many employees who attempt to avoid being lawfully held accountable for poor performance or misconduct know that an allegation of discrimination or retaliation can slow, if not halt, the disciplinary process. It is, of course, important that employees participate in EEOC proceedings and oppose conduct made unlawful by EEO laws without fear of reprisal, and it is equally vital to business operations that employers lawfully hold employees accountable for performance, conduct, and reliability deficiencies, including imposing disciplinary measures when warranted.

Whether or not the final guidelines result in an increase in EEOC reasonable cause determinations, it is likely the guidelines will result in more vigorous investigations, especially where disciplinary actions are not well documented. In addition to the recommendations advanced by the Commission, it is worth a reminder to document all employment-related decisions, including meetings and investigations; be honest with employees about the reasons for the employment action; and enforce employment policies and practices promptly and consistently.

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3 There is a body of case law explaining that age discrimination and retaliation cases often present more than one reason for an employer to take an adverse action, and that the employee need not refute each and every mark on her record. Rather, the employee need only prove that setting the unlawful considerations aside, the other nondiscriminatory grounds did not cause the employer to take the adverse employment action. *See Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009); *Arthur v. Pet Dairy,* 593 Fed. Appx. 211, 220 (4th Cir. 2015). This is a far cry from the EEOC's final guidelines explanation that there can be multiple "but for" reasons causing the adverse action.