

PUBLICATION

EEOC Issues Its First Guidance on Retaliation in Almost Two Decades: Next Steps for Employers

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On August 29, 2016, the Equal Employment Opportunity Commission (EEOC) published its Final Enforcement Guidance on Retaliation and Related Issue. This was the first guidance from the EEOC on these issues since 1998. The EEOC also provided a [question-and-answer publication](#) and a [Small Business Fact Sheet](#), to supplement the 76-page Final Guidance. On January 21, 2016, the EEOC issued its [proposed guidance](#) for public input, and received approximately 65 comments.

Retaliation has become the [most common charge](#) filed with the EEOC, exceeding even race-based claims of discrimination. As recently as 2015, the EEOC reported that 44.5 percent of all charges filed with the agency involved claims of retaliation.

The Final Guidance, though it doesn't technically change the basic burden of proving retaliation, provides an expansive explanation of each element that the plaintiff must establish to prove unlawful retaliation. In general, an employee claiming retaliation has to show that:

- The employee engaged in a protected activity, like reporting harassment or objecting to perceived discrimination;
- The employee suffered an adverse action by the employer, like being terminated or demoted; and,
- There is a "causal connection" between the protected activity and the adverse employment action.

If the employee succeeds in meeting this burden, the employer can successfully defend the claim by demonstrating that there was a legitimate, non-retaliatory reason for the adverse employment action. Then, the burden shifts back to the employee to prove that the employer's non-retaliatory reason is pretextual or false.

Protected Activity:

There are two methods for demonstrating protected activity, either the employee can prove that he participated in an investigation or proceeding regarding alleged unlawful actions by the employer or that he opposed an activity that is, or could become, unlawful. Although the Supreme Court has not spoken on the issue, the EEOC concludes that an employee can establish that he participated in a protected activity, regardless of the reasonableness or good faith belief in the underlying action in which he "participated."

The EEOC further expands protected activity through participation to include not only participation in the EEOC's mechanisms for "investigation, proceeding or hearing," but notes that an employee can prove that he "participated" for the purposes of retaliation by raising a claim of discrimination internally with the employer.

While the EEOC requires that an employee prove that his opposition of employer conduct is reasonable and based on a good faith belief, it still explicitly states that there is an expansive definition of "opposition." The EEOC provides that opposition can include simply answering questions from an employer regarding potential discrimination or even making complaints to someone other than the employer that the employer learns about.

Finally, the EEOC extends the protections for opposition even to those employees such as HR representatives and managers whose job function would include opposing employment decisions that might be unlawful, effectively providing never ending protections for those employees.

Materially Adverse Activity:

The EEOC explains that to prove retaliation, the employee need only demonstrate that the action taken by the employer against him was sufficient to dissuade a reasonable employee under similar circumstances from engaging in the protected activity. The action need not have a tangible effect on employment. Some of the EEOC's expansive examples of adverse actions include threatening reassignment, and abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment. The EEOC acknowledges that the Supreme Court has explained that this is a fact intensive analysis and what might deter an employee in one circumstance could have no impact under other circumstances.

Causation:

In 2013, in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that Title VII retaliation claims must be proved according to traditional principles of "but-for" causation, rather than the lesser standards of "motivating factor." The "but for" standard typically requires that the employee show that "but for" his protected activity, the adverse action would not have occurred.

However, the Final Guidance states that an employee can establish "but for" causation by presenting a "convincing mosaic" of evidence or including "different pieces of evidence, [which] considered together, may allow an inference" of retaliatory intent. Such bits and pieces of evidence include suspicious timing, inconsistent explanations by the employer and evidence of selective enforcement.

Significance for Employers

It is not uncommon that an employee could succeed in proving his Retaliation claim despite the fact that his underlying discrimination claim fails, and this guidance could very well make it even more common. Further with the ever increasing number of retaliation charges being filed, employers must be well versed and prepared to handle such matters.

The EEOC provides a list of "promising practices" for employers including: (1) having written policies regarding retaliation; (2) providing training to all employees regarding retaliation and emphasizing through messages from top management that retaliation will not be tolerated; (3) advising employees on how to handle personal feelings following any EEO allegations; (4) follow up with employees and managers during pending EEO matters; and (5) review proposed employment actions and potential consequences to ensure they are based on legitimate, non-retaliatory reasons.

Employers should remember patience, diligence and documentation. When dealing with an employee who has or may engage in protected activity, be patient with all involved, including the employee and any manager or witnesses involved. Think and evaluate any decisions made with regard to the employee. Before any issues arise, be diligent in any investigations of employee performance issue and use progressive discipline. Further, be diligent when investigating any EEO matters or complaints from employees. Finally, always document. Document any performance issues or progressive discipline and be objective and accurate in the documentation. A well-documented history of rules violations or discipline history is strong evidence of a legitimate, non-retaliatory reason for an employer's challenged actions.

