

Avoiding Workplace Retaliation: Guidance for Employers

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Workplace retaliation is currently the most commonly reported complaint to the Equal Employment Opportunity Commission (EEOC) by employees in all US business sectors of employment. Although other federal agencies, such as the Occupational Safety and Health Administration (OSHA), and other federal laws, such as the Sarbanes-Oxley Act (SOX), regulate and protect employees against certain types of workplace retaliation, the broad reach of the EEOC offers the most protection for employees against retaliation in the workplace under a wide variety of circumstances. The EEOC protections against retaliation are extended through 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). Job applicants, current employees, and former employees can all allege retaliation.

RETALIATION CASES IN 2016

The EEOC investigated and then brought suit for a wide variety of workplace retaliation claims in 2016. For instance, the EEOC sued Aloha Auto Group, Ltd. after the company fired an employee because he had allegedly advised other employees of their right to complain about racial harassment.¹ The

EEOC also filed suit against Hobson Bearing International, Inc., accusing the employer of retaliation when it filed a lawsuit against a former employee for malicious prosecution after that employee had filed a complaint of pay discrimination with the EEOC.² The EEOC settled another lawsuit filed against popular restaurant chain, Texas Roadhouse, for retaliating against female employees as young as 17 years old who complained of sexual harassment.³ The EEOC settled a similar lawsuit against a large security firm, Guardsmark, in which the employer was accused of retaliating against a security guard who reported that his colleague was using security cameras to sexually harass women.⁴ This small sampling shows the wide variety of employer practices that can trigger workplace retaliation challenges.

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The retaliation case that attracted perhaps the most press coverage in 2016 involved Wells Fargo, the international banking and financial-services firm. Last year, Wells Fargo agreed to pay \$185 million in fines and \$5 million in consumer relief in settlement of a California lawsuit filed by Los Angeles City Attorney Mike Feuer, as well as

investigations by the Consumer Financial Protection Bureau and the Office of the Comptroller of the Currency, but the bank remains under investigation by numerous agencies due to allegations that employees opened credit card and bank accounts in customers' names without the customers' knowledge or permission in order to meet company-imposed sales goals. Subsequently, employees have filed at least two class-action lawsuits, and the US Department of Labor is investigating Wells Fargo, based on allegations of retaliation against whistleblowers who complained of the financial misconduct within the company. After the bank agreed to settle the initial California lawsuit, former Wells Fargo employees throughout the country started sharing stories with news outlets of losing their jobs after reporting or questioning the sales activities of the bank. Some employees have alleged that after calling the company's confidential ethics hotline or internally reporting questionable sales tactics, the company responded by closely monitoring the employees for any minor violation of a work rule, which then resulted in termination. In January 2017, Wells Fargo admitted that after reviewing calls to its confidential ethics hotline that there are signs that some employees' claims of retaliation were legitimate.⁵

EEOC GUIDANCE

Workplace retaliation claims can be extremely costly for employers, including compensatory and punitive damages for private-sector employers, as well as potential back pay, front pay (or reinstatement), required changes to employer policies, and mandatory training, along with other remedies provided by law. To assist employers in their attempt to

avoid such costs, the EEOC issued detailed enforcement guidance in August 2016 on workplace retaliation, its first update to such guidance since 1998.⁶

The EEOC has included workplace retaliation as one of its six substantive priorities in its new Strategic Enforcement Plan for 2017–2021, issued in the fall of 2016. The premise behind the commission's guidance and enforcement actions is that employees and job applicants must be able to challenge discriminatory practices without fear of punishment in order for federal discrimination laws to be effective. Of course, the guidance and the Strategic Enforcement Plan may be subject to change with the new administration of President Trump. Even so, the guidance is instructive for employers in assessing what to do to prevent workplace retaliation, and it also serves as a reference tool for the staff of the EEOC and other federal agencies that investigate retaliation issues.

Although the new EEOC guidance does not alter the three basic elements of a retaliation claim, the guidance interprets those elements more broadly. The elements are:

1. An employee engaged in a protected activity (participating in an equal employment opportunity [EEO] process or opposing discrimination);
2. The employee is subject to a materially adverse action by the employer; and
3. The employee can show a causal connection between the protected activity and the materially adverse action.

Engaging in Protected Activity

Participation in a protected activity can include raising a claim or testifying,

assisting, or participating in an investigation, proceeding, or hearing. The new guidance defines participating in an EEO process more broadly than filing an EEOC charge or serving as a witness in an EEOC investigation. The new guidance includes participation in an employer's *internal* EEO process even if a charge has not yet been filed with the EEOC. On the other hand, protection for opposition to practices that are unlawful under the laws enforced by the EEOC is limited to employees acting with a reasonable good-faith belief that a potential EEO violation exists.

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In a situation where an employee advises his or her employer of the employee's belief that the employer has engaged in a form of employment discrimination, that communication "virtually always" constitutes the employee's opposition to the activity.⁷ Opposition includes situations where an employee takes a stand against an employer's discriminatory practices not by "instigating action," but by holding firm in one's beliefs by, for example, refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons or refusing to sign a discriminatory negative evaluation of a subordinate.⁸ Whether opposition is reasonable will be determined on a case-by-case basis, but the EEOC has provided some examples of reasonable and unreasonable opposition activity. Examples of reasonable opposition could include an employee communicating about potential

discrimination to union officials, coworkers, or an attorney; picketing or an informal protest; and notifying an employer of the employee's intent to file a charge with the EEOC or a formal internal complaint. On the other hand, unreasonable opposition could include any form of unlawful conduct or attempting to harass or coerce subordinate employees to provide or alter a witness statement in support of an EEOC charge. Employers should be mindful that the protected status of opposition activity will not be defeated simply because the opposed conduct or practice is ultimately determined to be lawful.

One of the most common forms of opposition activity that employers may not think about deals with discussions surrounding employee compensation. Employers should be very cautious about implementing policies that discourage or completely prohibit discussions about employee compensation. Any adverse action taken against employees for discussing wages could implicate not only the antiretaliation protections of the EEOC, but also other federal laws. For example, if a female employee complains to her supervisor that she believes the employer may be discriminating against the women working in the company by paying them less than the men, or if she engages in conversations with her male coworkers regarding their rate of pay, those activities are protected opposition activities, and no adverse employment actions should be taken against the employee as a result. Further, Executive Order 11246 protects federal contractors and subcontractors from discrimination or adverse employment actions for discussing compensation, and the National Labor Relations Act protects nonsupervisory

employees from retaliation for discussing wages or working conditions with colleagues as part of a concerted activity.

Subject to Materially Adverse Action

According to the enforcement guidance, a materially adverse action can be any action that might deter a reasonable person from engaging in protected activity. Although most employers think of materially adverse actions as discrete acts that affect pay (denial of promotion, failure to hire, denial of benefits, demotion, suspension, or discharge), the US Supreme Court has also held that other actions designed to silence protected activity can be actionable, such as the filing of false criminal charges against a former employee, changing the work schedule of a parent who has caretaking responsibilities for school-age children, or excluding an employee from a weekly training lunch that contributes to professional advancement.⁹ The EEOC goes further in its guidance and notes that materially adverse actions can include disparaging an individual to the media, threatening reassignment, removal of supervisory responsibilities, taking a materially adverse action against a close family member, and terminating a union grievance process.

The EEOC also repeatedly warned in its 2016 guidance and resource documents that threatening to report immigration status will be viewed as a materially adverse action. For example, if an employer knowingly hires a group of undocumented workers and one of those workers complains about sexual harassment in the workplace, the employer cannot threaten to report (or actually report) the employee's immigration status to government authorities to keep the employee

from asserting rights under Title VII or in retaliation for the employee's having done so. The employer cannot use the workers' undocumented status as a defense.

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Minor annoyances and trivial punishments that are not enough to dissuade an employee from engaging in protected activity do not constitute a materially adverse action. Whether an action is likely to deter an employee from engaging in protected activity is determined based on the facts and circumstances of each case.

Showing a Causal Connection

A causal connection can be shown by suspiciously close timing between the individual's protected activity and the adverse action, or by proof that an employer has changed its stated reason for the adverse action. However, the employer's absence of knowledge that the individual has engaged in protected activity, or the employer's consistent assertion of a legitimate business reason for the adverse action, may defeat such causal connection and place the burden on the employee to prove that the asserted reason is pretext for a retaliatory motive.

Any discussion of causal connection must include recent developments in the "cat's paw" theory. That theory allows an employee to establish a causal connection not based on the retaliatory motive of the decision maker—after all, the decision maker may not have known of the protected activity. But if the employee can show that the information relied on by the

decision maker—the information considered in taking the adverse action—was “tainted” by some other person who did have a retaliatory motive, the employee can establish the necessary causal connection.

For example, in a recent Alabama case a probationary employee was terminated two days after allegedly refusing her supervisor’s offer to increase her production numbers in exchange for sexual favors.¹⁰ The court found that while the superintendent alone made the decision to fire the employee, there was evidence that the superintendent sought out the opinion of the supervisor, thus creating a question of fact for a jury to decide whether the company could be liable for retaliation. On the other hand, in another Alabama case, a former employee brought a claim for Family and Medical Leave Act (FMLA) retaliation the day after he was discharged by his general manager after he told his supervisor he needed back surgery.¹¹ The former employee alleged that his supervisor’s comment, “here we go again,” after he hurt his back should be attributed to the general manager; however, a federal court found there was no showing that the supervisor’s actions were the proximate cause of his termination, and he was terminated after an independent investigation confirmed a safety violation by the employee. This theory puts great pressure on decision makers to be sure the information they are considering in taking an adverse action is accurate and not “tainted” in this manner.

Interference with the ADA

The EEOC guidance also specifically addresses the ADA’s prohibition against “interference” with an individual who exercises his or her rights under the ADA.

The interference provision of the ADA is even broader than the antiretaliation provision, and can therefore extend to actions that may not meet the “materially adverse” requirement for retaliation. Under the ADA, it is unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual’s exercise of ADA rights or with an individual who is assisting another to exercise ADA rights. Keep in mind that a threat does not have to be carried out and an individual does not have to actually be deterred from exercising rights under the ADA for the employer to be liable for interference. Some examples of prohibited conduct include:

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- ❑ Coercing an individual to forego an accommodation to which he or she is entitled;
- ❑ Intimidating an applicant from requesting accommodation during the hiring process by indicating that such a request will result in the applicant not being hired;
- ❑ Issuing a policy or requirement that limits an employee’s rights to invoke ADA protections (i.e., a fixed-leave policy that states “no exceptions will be made for any reason”); and
- ❑ Subjecting an employee to unwarranted discipline for assisting a coworker in requesting reasonable accommodation.

BEST PRACTICES FOR EMPLOYERS

The issuance of the EEOC’s enforcement guidance on workplace retaliation and its

Strategic Enforcement Plan highlight the issue of retaliation as priority focus for the commission. However, it is not intended as a signal to employers that they cannot discipline an employee for poor performance or violations of work rules if the employee has engaged in a protected activity. Nor does it signal to employees that they can immunize themselves from consequences by filing a discrimination claim with the EEOC. However, disciplinary action should only be taken for legitimate, nondiscriminatory reasons. In fact, one could argue that an employer's failure to take disciplinary action against an employee who has engaged in protected activity—that is, failing to inform that employee that improvement is necessary and giving that employee the opportunity to improve with full knowledge of expectations—could be viewed as "materially adverse" as well. Savvy employers know that it is this balance that is critical.

The EEOC's enforcement guidance also advises employers to engage in proactive practices that will reduce the risk of retaliation violations. These include practices such as drafting a well-written antiretaliation policy, providing training to all employees on the policy, and maintaining good documentation regarding the reasons for adverse employment action. A well-written antiretaliation policy should provide examples of retaliation, include the proper reporting mechanism for reporting potential retaliation, and warn employees that any retaliatory actions will be subject to discipline, up to and including termination. It is critical for employers to communicate their antiretaliation policies to employees clearly and frequently.

Proper training also plays a large role in maintaining a workplace free of retaliation.

Not only should all employees be trained on the provisions of the policy, but managers and supervisors should be specifically trained on how to address retaliation complaints. The policy will be effective only if implemented consistently by taking each complaint seriously and disciplining any employee who engages in conduct that violates the policy.

The EEOC also recommends providing guidance to managers or supervisors who allegedly have been involved in discriminatory actions as to how to deal with their personal feelings regarding the allegations while carrying out managerial duties. Taking a proactive approach to check in with employees, managers, and witnesses during an EEO investigation can also help suppress any issues that may arise during the pendency of the investigation. In light of the recent developments in case law surrounding the cat's paw theory, it is also very important for the decision makers to rely on more than the word of a supervisor, but rather conduct independent investigations to ensure that there is a legitimate nondiscriminatory reason to take an adverse employment action against an employee.

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Finally, the importance of thorough documentation for any adverse employment action is crucial in an EEOC investigation. Well-documented disciplinary actions in accordance with company policy with explanations of the business reasons for such actions that are free from unlawful

motivations avoid the appearance of discriminatory action. Human resources departments should review this documentation regularly to ensure that supervisors and managers are addressing disciplinary issues consistently within a company.

NOTES

1. EEOC v. Aloha Auto Group Ltd., Case No: 1:16-cv-00521.
2. Equal Employment Opportunity Commission v. Hobson Bearing International, Inc., Civil Action No. 3:16-cv-05034-SWH.
3. EEOC v. East Columbus Host, LLC d/b/a Texas Roadhouse and Ultra Steak, Inc., Civil Action No. 2:14-cv-1696.
4. EEOC v. Guardsmark, Case No. 2:13-CV-15229.
5. <http://cnfn.cnn.com/2017/01/23/investing/wells-fargo-retaliation-ethics-line/index.html>
6. Enforcement Guidance on Retaliation and Related Issues; see <https://www.eeoc.gov/eeoc/newsroom/release/8-29-16.cfm>
7. Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn., 55U.S. 271, 276 (2009).
8. Crawford, 555 U.S. 277 (2009); EEOC v. Navy Federal Credit Union, 424 F.3d 397,406 (4th Cir. 2005).
9. Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 63-69 (2006).
10. Austin v. Mac-Lean Fogg Co., 999 F. Supp. 2d 1254 (N.D. Ala. 2014).
11. Rudy v. Walter Coke, Inc., 613 F. App'x 828 (11th Cir. 2015).

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