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Equal Employment Opportunity Commission Issues Enforcement Guidance on Retaliation

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The ***United States Equal Employment Opportunity Commission ("EEOC")*** is the federal agency charged with enforcing federal employment discrimination laws. In recent weeks, the EEOC issued the final version of its long anticipated *Enforcement Guidance on Retaliation and Related Issues*, (the "Guidance") which provides loads of helpful information about the elements of proof for retaliation suits filed under EEO laws such as ***Title VII of the Civil Rights Act of 1964 ("Title VII")***, the ***Age Discrimination in Employment Act ("ADEA")***, and ***Title II of the Americans With Disabilities Act***. Employers take note.

The new Guidance replaces the EEOC's *Compliance Manual Section 8: Retaliation*, which was issued all the way back in 1998. Since that time, the Guidance notes, the United States Supreme Court and lower federal courts have issued a number of significant rulings about employment-related retaliation, while the percentage of EEOC charges alleging retaliation has nearly doubled. Hence the new Guidance, which aims (1) to explain the law of retaliation as courts have agreed, and (2) to clarify the agency's interpretation where lower courts disagree.

I. An Elemental Approach

The Guidance reiterates that there are three elements of a retaliation claim under federal EEO law: (1) protected activity; (2) materially adverse action by the employer; and (3) requisite level of causal connection – which in the case of private sector or state government employers is "but-for" causation, and which in the case of federal government employers under Title VII and the ADEA is "motivating factor" causation. It makes clear that the EEOC, not surprisingly, takes a very broad view of these elements, as expressed below.

A. Protected Activity

Employees have two avenues to prove that they engaged in "protected activity." They may show that they "participated" in an EEOC process by raising a claim, testifying, assisting, or (shocker) participating in an investigation, proceeding, or hearing under EEO law. In the alternative, they may show that they opposed a practice made unlawful by an EEO law in a reasonable manner and with a reasonable, good-faith belief that there was indeed an EEO violation.

1. **Participation**

The Guidance states that employees may "participate" in an investigation, proceeding, or hearing within the meaning of EEO laws, even if they do not have a good faith belief that the underlying allegations are, or could become, unlawful conduct. According to the Guidance, this interpretation follows from the text of the participation clause in EEO laws, which does not include any good faith belief limitations, as well as the general purpose of EEO laws. If employees were protected from retaliation only when their statements or testimony meet a reasonable, good faith belief standard, the Guidance contends they would surely be less than forthcoming – exactly the opposite of what anti-retaliation provisions were meant to foster. The Guidance expressly disagreed with lower court holdings to the contrary. *See Mattson v. Caterpillar, Inc.*, 259 F.3d 885, 891 (7th Cir. 2004) (holding that employee's letter to the EEOC containing false, malicious statements was not protected participation).

The Guidance also expressly disagreed with lower courts that limit the participation clause to formal administrative charges and lawsuits under EEO laws. The Guidance noted that the Supreme Court's decision in *Crawford v. Metropolitan Government of Nashville & Davidson County* left this an open issue. It contended that there is overlap between protected "participation" and protected "opposition" to conduct that violates EEO laws. The EEOC averred that employees cooperating with an internal company, EEO investigation "participate" within the meaning of the participation clause, whether an EEO charge or lawsuit is or has been filed, even though their conduct may also constitute "opposition."

1. **Opposition**

The Guidance interprets the opposition clause even more broadly than the participation clause. As the Guidance states, the EEOC believes that the opposition clause has an "expansive definition." It is implicated when employees explicitly or implicitly communicate a belief that a matter complained of is, or could become, harassment or unlawful discrimination. Employees need not use any magic language in making their complaints. According to the Guidance, broad and even ambiguous complaints implicate the clause – *i.e.,* constitute protected opposition – if they can reasonably be interpreted as opposing unlawful employment discrimination.

The Guidance concedes, however, that opposing unlawful employment discrimination does not give employees permission to neglect their duties. Employers may discipline or discharge employees whose opposition has rendered them ineffective in their job.

The Guidance explains that opposition need only be based on a reasonable, good-faith belief that the employer's conduct violates EEO law. For example, assume that an employee opposes what he perceives to be unlawful discrimination under EEO law, complaining that two isolated sexual comments have made his work environment hostile. As a legal matter, the employee would be wrong. Such isolated comments do not, by themselves, create a severe and pervasive hostile work environment. Still, if the employee had a good-faith belief that he suffered a hostile work environment in violation of EEO law because of two sexual comments, he has engaged in "opposition." Of note, however, the Guidance states that employees' beliefs about violations of EEO law are categorically reasonable if they are consistent with an interpretation adopted by the EEOC. This is significant. That means, for example, if an employee opposed an employer's decision to not hire an individual because of the individual's sexual orientation or transgender status, the employee's belief would be

reasonable – even though EEO law does not expressly include protections for such individuals – because the EEOC has adopted that interpretation.

B. Materially Adverse Action

The Guidance likewise takes an expansive view of the term "materially adverse action" in its Guidance. According to the Guidance, the term includes any action that "might well deter a reasonable employee from complaining about discrimination" as being materially adverse. The action need not be materially adverse standing alone, the Guidance states, so long as "the employer's conduct, considered as a whole, would deter protected activity," even if the employer's conduct did not in the case at hand. The Guidance lists several examples of materially adverse actions. These examples include adverse employment actions in the traditional sense, such as the denial of promotion, the refusal to hire, demotion, and suspension. They also include actions that have not traditionally been defined as materially adverse, such as disparaging the person to others or the media, filing a civil action, threatening reassignment, or non-work-related conduct, which persuade employees not to engage in protected activity. The Guidance notes on this front that it disagrees with lower courts that have applied *Northern & Santa Fe Railway Co. v. White* and found some of these actions as being less than materially adverse.

C. Causal Connection

Further, the Guidance expands its view of what constitutes a causal connection between protected activity and a materially adverse action. Citing the Supreme Court's decision in *University of Texas Southwest Medical Center v. Nassar*, the Guidance notes that there can be multiple "but-for" causes for a materially adverse action, and that the causal standard is met in a retaliation case against private or state employers so long as retaliation was one of the "but-for" causes for the action. Similarly, the Guidance takes a forgiving view of the burden of proving causation in retaliation suits against the federal government under Title VII or the ADEA. The Guidance reminds employers too that, consistent with several lower court opinions, employees can prove causation by cobbling together pieces of circumstantial evidence to create a "convincing mosaic" of retaliatory intent. *See, e.g.*, *Ortiz v. Werner Enters., Inc.*, No. 15-2574, 2016 WL 4411434, at *3–4 (7th Cir. Aug. 19, 2016).

II. Promising Practices

The Guidance is not all bad news for employers. It provides a list of promising practices you are, hopefully, already following:

1. **Have a Written Anti-Retaliation Policy.** The policy should be complete with examples of retaliation, guidance for interactions between managers and complainants, instructions on how to report concerns, and disciplinary language making clear that retaliation will result in discipline up to and including termination.

2. **Train** employees and managers concerning your anti-retaliation policy and make sure they understand both the policy and the legal prohibition against retaliation for protected EEO activity.

3. **Proactive Follow-Up.** Check in with employees, managers, and witnesses during the investigation of a complaint to inquire about concerns or needed guidance. Don't wait for problems or misconceptions to fester. Being proactive will help support your managers and show the employee that your company takes its commitment to anti-retaliation seriously.

4. **HR Compliance Review.** Human resource personnel should review consequential employment actions to ensure that they do not run afoul of the anti-retaliation policy and are consistent with legitimate, non-discriminatory reasoning.

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