

Publications

Labor and Employment Alert: EEOC Issues Expansive Enforcement Guidance on Retaliation

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"Heat not a furnace for your foe so hot that it doth singe yourself." ~ William Shakespeare, *King Henry VIII*

According to the Equal Employment Opportunity Commission (EEOC), retaliation is now the most frequently alleged basis of discrimination. This explains the rationale behind the EEOC's August 2016 *Enforcement Guidance on Retaliation and Related Issues*, the EEOC's first comprehensive review of retaliation since 1998. The *Guidance* represents "the Commission's well-considered guidance on its interpretation of the laws it enforces" (and, as the EEOC admits, regardless of whether courts agree with the EEOC or not). While the *Guidance* does not have the force of law, it does show how the EEOC will approach retaliation claims when the individual must show he or she: (1) engaged in protected activity; (2) suffered a materially adverse employment action; and (3) the protected activity caused the adverse employment action. The *Guidance* takes an expansive view of each of these elements.

"Protected activity" encompasses both participating in an EEO process or reasonably opposing conduct made unlawful by an EEO law. So an employer cannot punish an applicant or employee for filing an EEO complaint, serving as a witness, or participating in any way in an EEO matter (including participating in an employer's internal complaint process). And participation is protected "whether or not the EEO allegation is based on a reasonable, good faith belief that a violation occurred."

Moreover, an employer may not retaliate against an individual for *communicating opposition to a perceived EEO violation*. This includes the obvious (complaining or threatening to complain about alleged discrimination) and the not-so-obvious ("passive resistance – allowing others to express opposition") communications. It also includes asking about or discussing wages when gathering information or evidence to support a potential EEO claim. The protection for opposition is limited to those who act with a reasonable good faith belief that the conduct opposed is unlawful. But the EEOC broadens this to include beliefs

“that conduct violates the EEO laws if the EEOC has adopted that interpretation, even if some courts disagree with the EEOC on the issue.” For example, the EEOC says it’s reasonable for an individual to oppose sexual orientation discrimination because the EEOC believes such discrimination is prohibited by Title VII.

The EEOC takes a similarly broad view of what constitutes a “materially adverse” action, which can be any action that *“might deter a reasonable person from engaging in protected activity.”* This includes an employer action that is work-related, one that has no tangible effect on employment, or one that takes place exclusively outside of work, *as long as it may well dissuade a reasonable person from engaging in protected activity* (even if it does not actually stop the employee from asserting EEO right an even if it does not harm the employee). The EEOC also considers retaliatory actions allegedly taken against close family members because of an employee or applicant.

Finally, as to causation, the EEOC notes that the standard for proving retaliation under Title VII is that the employer would not have taken the adverse action “but for” a retaliatory motive. The EEOC then notes there can be more than one “but for” case and “different types or pieces of evidence, either alone or in combination, may be relevant to determine” whether a materially adverse action was retaliatory.

Employers can expect to see the EEOC aggressively focus on retaliation. To that end, the EEOC provides examples of “promising practices” employers should adopt in order to reduce the possibility of retaliation. These include: (1) maintaining a written, plain-language anti-retaliation policy with user-friendly examples; (2) training all managers, supervisors, and employees on anti-retaliation and sending a message from top management that retaliation will not be tolerated; (3) training managers alleged to have engaged in discrimination on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace; (4) following-up 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 (5) requiring decision-makers to identify and document their reasons for taking consequential actions. The EEOC may be more likely to find evidence of retaliation in cases where employers have not adopted these practices.

Contact your Vorys lawyer if you have questions about the impact of the EEOC’s new Guidance or about managing the EEO process.