
EEOC Issues Enforcement Guidance on Retaliation

By Ethan M. Dennis / Sep 22, 2016

The Equal Employment Opportunity Commission ("EEOC") issued its *Enforcement Guidance on Retaliation and Related Issues*, along with two publications, a Question and Answer and a Small Business Fact Sheet. Together, these publications reflect the EEOC's current position on retaliation claims under a variety of federal employment statutes, including Title VII, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), and Title II of the Genetic Information Nondiscrimination Act ("GINA").

Retaliation is the most frequently alleged basis of discrimination under these statutes. The EEOC is empowered to bring lawsuits for violation of these federal statutes, and the Guidance sets forth the type of conduct the EEOC considers unlawful. The EEOC takes an expansive position on the type of conduct that constitutes retaliation. To avoid retaliation claims, employers should understand the legal principles and best practices set forth in the Guidance.

In the Guidance, the EEOC set forth its position on each of the requisite elements for proving a retaliation claim and its recommendations to employers for best practices to comply with the anti-retaliation provisions of the EEO statutes. Retaliation occurs when an employer takes a materially adverse action against an individual because the individual has engaged in, or may engage in, "protected activity" in furtherance of the laws enforced by the EEOC.

According to the Guidance, a "materially adverse" action occurs if the action might deter a reasonable person from engaging in protected activity. This element has always included work-related actions, such as firings, demotions, permanent transfers, and formal reprimands. In the Guidance, the EEOC stressed that materially adverse actions also include non-work related actions, such as filing a civil lawsuit against the complaining employee or disparaging the person to others or in the media. Indeed, the EEOC views actions taken against third parties as satisfying this element, such as firing the complaining employee's fiancé or cancelling a vendor contract of the employee's spouse.

"Protected activity" includes both "participation" in the EEO process and "opposing" discrimination. In the Guidance, the EEOC sets forth its broad view on the type of activity that constitutes participation and opposition. Classically, participation was regarded only as participation in formal EEOC administrative charges and lawsuits. According to the Guidance, the EEOC considers participation to include internal complaints and investigations. Under the Guidance, an employee need not have a reasonable good faith belief that the alleged conduct potentially violates the law. The EEOC may allege retaliation where an employer "takes it upon itself to impose consequences for actions taken in the course of participation," regardless of the employee's bad faith. Protection for opposition applies both to explicit and implicit communications of a belief that the employer has engaged in discrimination. According to the EEOC, an employee may be protected when the employee makes "broad or ambiguous complaints of unfair treatment." Although some courts disagree with the EEOC on these points, the Guidance suggests that the EEOC will continue to push its broad view until the Supreme Court holds otherwise.

In the Guidance, the EEOC also takes an expansive position on how an employee may prove a causal connection between the adverse action and the protected activity. The U.S. Supreme Court requires employees to prove "but-for" causation - that the employer would not have taken the adverse action but for the protected activity - instead of allowing the lesser standard known as "motivating factor" - that retaliation was merely one of the motivating factors among others. Although the EEOC recognized this holding, the Guidance suggests that there can be multiple but-for causes and that retaliation need only be one of the but-for causes of the materially adverse action in order for the employee to prevail.

The EEOC also gave examples of facts that may support and defeat a finding of retaliation. The EEOC will likely find retaliation when there is suspicious timing between the protected activity and the adverse action, the decision-maker's statements suggest a retaliatory intent, other similarly situated employees were treated more favorably, or the employer offers inconsistent explanations for the adverse action. In contrast, the EEOC will likely not find retaliation when the employer is unaware of the protected activity or had a legitimate non-retaliatory reason for the adverse action, such as poor performance, misconduct or a reduction in force.

The ADA prohibits both "retaliation" and "interference" with the exercise or enjoyment of ADA rights. The Guidance stresses that an interference claim is broader than a retaliation claim in that an employee need only prove that he or she was subject to coercion, threats, intimidation, or interference with respect to ADA rights. Unlike a retaliation claim, a plaintiff need not prove a "materially adverse" employment action to make an interference claim. The Guidance provides little clarity on an overarching definition of "interference," "coercion," "threats," or "intimidation." Instead, the Guidance provides some examples of prohibited interference, such as coercing an individual to relinquish a disability accommodation to which he or she is otherwise entitled or issuing a leave policy that provides that "no exceptions will be made for any reason."

Despite the EEOC's broad views regarding retaliation claims, the Guidance can help employers by providing best practices for avoiding such litigation. Specifically, the Guidance suggests that employers adopt written retaliation policies that prohibit retaliation, inform supervisors of examples of conduct that might not appear to be retaliation at first glance, and allow for reporting of employee concerns about retaliation. The Guidance also suggests training supervisors and employees on the written policy and instructing them how to ensure that discipline and performance evaluations of employees are motivated by legitimate, non-retaliatory reasons. Employers are also advised to include information about retaliation when responding to an employee's allegations of underlying EEO violations. Finally, the EEOC recommends that employers assign a designated individual, such as an HR representative or in-house counsel, to review proposed employment decisions to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons.

If you have any questions about the EEOC'S Guidance on Retaliation, please contact Ethan Dennis at (215) 640-8427 | edennis@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.