

Retaliation – Legal Update and Avoiding Claims

Delaware Valley Labor and Employment Law Conference

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TOPICS TODAY

- Legal and Political Background
- EEOC Enforcement Guidance
- Legal Framework – Proving a Retaliation Claim in Court
- EEOC's Best Practices for Avoiding a Retaliation Claim
- Practical Advice
 - The Half-Hearted Complaint
 - The Frequent Complainer
 - Last Minute Complaint
 - Dueling Complaints
 - Investigating the Complaint
 - Terminating the Complainant

WHY IS THIS PRESENTATION IMPORTANT?

- Retaliation is now the most frequently alleged basis of discrimination under the federal EEO statutes
- The EEOC takes an expansive position on the type of conduct that constitutes retaliation
- Retaliation cases are difficult to defend
- Despite the EEOC's broad views regarding retaliation claims, the Guidance can help employers by providing best practices for avoiding such litigation

WHAT IS RETALIATION?

- A retaliation claim has three elements
 1. **Protected activity**: "Participation" in an EEO process or "opposition" to discrimination
 2. **Materially adverse action** taken by the employer
 3. Requisite level of **causal connection** between the protected activity and the materially adverse action

TRUMP AND EEOC

- EEOC is an independent agency created by Congress. EEOC is empowered to bring lawsuits for violation of EEO federal statutes
- The President nominates the commissioners and general counsel to staggered multiyear terms and their appointments must be confirmed by the Senate
- The commissioners cannot be fired by the President. The President can only nominate new commissioners when a sitting commissioner's term expires.
- President Trump's opportunity to create a Republican majority on the commission is this July
- The President currently has the opportunity to appoint new General Counsel

EEOC ENFORCEMENT GUIDANCE

- An Enforcement Guidance sets forth the type of conduct the EEOC considers unlawful
- It is not "the law," but it represents the conduct which the EEOC believes discrimination statutes impose on employers
- In August 2016, EEOC issued *Enforcement Guidance on Retaliation and Related Issues*
- 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

EEOC ENFORCEMENT GUIDANCE – "PROTECTED ACTIVITY" ELEMENT

- "Protected activity" includes both "participation" in the EEO process and "opposing" discrimination
- Participation
 - Formal EEOC administrative charges and lawsuits. Less formal 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
- Opposition
 - 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"

EEOC ENFORCEMENT GUIDANCE – "MATERIALLY ADVERSE" ELEMENT

- 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
- Under this Guidance, materially adverse actions also include non-workplace 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

EEOC ENFORCEMENT GUIDANCE – "CAUSAL CONNECTION" ELEMENT

- The U.S. Supreme Court requires employees to prove "but-for" causation instead of allowing the lesser standard known as "motivating factor"
 - "But For" – that the employer would not have taken the adverse action but for the protected activity
 - "Motivating Factor" – that retaliation was merely one of several 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

EEOC ENFORCEMENT GUIDANCE – PROVING RETALIATION

- Guidance provides examples of facts that may support and defeat a finding of retaliation
- Support – 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
- Defeat – 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

EEOC ENFORCEMENT GUIDANCE – BEST PRACTICES

- 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
- Train 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
- Include information about retaliation when responding to an employee's allegations of underlying EEO violations
- 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

HYPOTHETICALS – BACKGROUND

- Jane is a 10 year sales employee at Widget Co. She is beloved by her colleagues and close friends with John, her boss and Vice President of Sales
- Jane is also close friends with John's sister, Elizabeth, who is the HR Director of NewCo, a customer of Widget Co.
- You are the HR Director of Widget Co.

THE HALF-HEARTED COMPLAINT

- At an HR conference, Elizabeth tells you, the HR Director of Widget Co., the following story
 - John, her brother and your employee, is getting divorced and he has recently begun organizing groups to go out for drinks after work. Jane told Elizabeth that the drinking group consists entirely of men and that the drinking group members are now getting all the best sales leads.
 - Elizabeth mentions this situation to you, but says that Jane doesn't want to make a big deal of it and that Jane isn't offended by the boys' club
- Are Jane's comments to Elizabeth protected activity?
- What do you do when Elizabeth tells you this story?

THE FREQUENT COMPLAINER

- Jane is unhappy with the results of the investigation. You know this because she has been in your office once a week for the past three months. Among other things, she has told you
 - Her friend, Emily, was not hired as an accountant. The job required a CPA license, which Emily does not possess.
 - John promoted Jason to Sales Team Leader over Jane, even though Jason has only been with the company for five years. Jason had the best sales figures in each of those five years.
- Moreover, Jane is so unhappy with your response to her complaints that she has begun speaking with company executives not listed in the complaint procedure, posting on Facebook, and complaining to customers
- Are Jane's complaints to you about Emily and Jason protected activity? What about her complaints to others?

THE LAST MINUTE COMPLAINT

- After a stellar five year run, Jane's performance has slipped each of the past five years. Now, Jane ranks last in the sales force. Widget Co. puts her on a performance improvement plan, but her numbers don't improve.
- On the day before a meeting to discuss her Final Performance Improvement Plan, Jane files an EEOC charge with explosive allegations of sexual harassment and retaliation for her numerous complaints
- She adamantly maintains that she wants to keep working for Widget Co. and has not hired a lawyer
- How to deal with Jane's performance?

DUELING COMPLAINTS

- John is questioned during the investigation into Jane's allegations. During that interview, he submits his own complaints about Jane. According to John, Jane is "handsy" with the men in the office, uses "locker room" talk, and thinks she can get away with anything because she was college roommates with Suzy, one of the company's investors and board members.
- Now Suzy is dropping by the sales department to "check in" with her friend, Jane. How do you deal with the dueling complaints?
- Moreover, Suzy also owns NewCo. where John's sister, Elizabeth, works. Elizabeth is being transferred to North Dakota after John told Jane he needed to discuss her conduct with HR.
- Can Elizabeth sue Widget Co., as well as her own employer?

INVESTIGATING THE COMPLAINT

- Review the handbook and other pertinent policy documents
- Review personnel files for the accused and accusers
- First, interview the complainant
- Then, interview any witnesses identified by the complainant
- Finally, interview the accused
- Get signed written statements from all witnesses
- Take corrective action

QUESTIONS?



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THANK YOU

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