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THE EEOC GUIDES EMPLOYERS AND EMPLOYEES ON RETALIATION: The Key Take-Aways

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Nearly 45 percent of all charges filed with the United States Equal Employment Opportunity Commission (EEOC) – the federal agency that enforces laws against employment discrimination, harassment, and retaliation – include an allegation of retaliation, making retaliation the most frequently alleged basis of discrimination.

Retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the laws that the EEOC enforces.

On August 29, 2016, the EEOC published its *Enforcement Guidance on Retaliation and Related Issues*, as well as question-and-answer and small business fact sheets. These documents represent the EEOC's first comprehensive update of its retaliation enforcement guidance in 18 years, replacing the EEOC's 1998 compliance manual section on retaliation. The updated guidance stems from recent case law, including seven United States Supreme Court cases[1] issued since the 1998 manual, but is not binding on the courts.

Key Take-Away Regarding Protected Activity: **Reports Made Unreasonably, or in Bad Faith, Are Protected**

Protected activity includes participation and opposition. Under the "participation clause," an individual is protected from retaliation for having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under an EEO law. The opposition clause protects an employee who has opposed an unlawful practice under an EEO law by, for instance, making an internal complaint of discrimination to the employer.

The United States Supreme Court has held that an employee opposing a practice must have a reasonable, good faith belief that the conduct violates an EEO law.[2] However, the Court has not addressed that issue as it relates to participation. The EEOC's Guidance reinforces its long-standing position that participation is protected regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct.

The EEOC further seeks to protect, under the "participation clause" (as well as under the "opposition clause"), an employee's internal complaint to the employer, not just his/her complaints to the EEOC or similar state agency. Thus, it appears that the EEOC would deem an internal complaint – even if made unreasonably or in bad faith – to be protected.

***Another Key Take-Away Regarding Protected Activity:* Sexual Orientation Discrimination – If the EEOC Believes Conduct Violates EEO Laws, It Is Reasonable for You to Believe It Does, Too**

It is reasonable for an employee to believe conduct violates the EEO laws if the EEOC, as the primary agency charged with enforcement, has adopted that interpretation, the EEOC states in its Guidance. By way of example, the EEOC discusses an employee who believes he is being harassed by coworkers based on his sexual orientation, and complains to his manager and human resources. The EEOC would deem the employee's complaint to be protected activity under Title VII because, in light of the EEOC's stated legal position and enforcement efforts (See, e.g., our March 4, 2016 article *Got Title VII Straight?*), it is reasonable for an individual to believe that sexual orientation discrimination is actionable as sex discrimination under Title VII.

***Key Take-Away Regarding Materially Adverse Acton:* The Context Matters**

In Burlington Northern & Santa Fe Railway Co. v. White, the United States Supreme Court held that a materially adverse action subject to challenge under anti-retaliation provisions encompasses a broader range of actions than an "adverse action" subject to challenge under non-discrimination provisions.[3] It covers any employer action that "might well deter a reasonable employee from complaining about discrimination."[4] The standard can be satisfied even if the individual was not, in fact, deterred.[5] Whether an action is reasonably likely to deter protected activity depends on the surrounding facts.[6]

In its Guidance, the EEOC rejected the decisions of some courts that have found that certain actions can never be material enough to deter protected activity. The EEOC views those decisions as "contrary to the context-specific analysis, broad reasoning, and specific examples endorsed by the Supreme Court."

***Key Take-Away Regarding Who Is Protected:* The EEOC Rejects the "Manager Rule"**

Some courts have adopted a "manager rule," requiring managers to "step outside" a management role and assume a position adverse to the employer to engage in protected activity.[7] In its Guidance, the EEOC rejects this rule, stating that "all employees who engage in opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors."

***Another Key Take-Away Regarding Who Is Protected:* Third-Party Retaliation**

An employer may take a materially adverse action against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee. In Thompson v. North American Stainless, LP, the United States Supreme Court explained that it is "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[8]

In the case of third-party retaliation, the employee who engaged in the protected activity may state a claim. In addition, the third party who is subjected to the materially adverse

action may state a claim, even if he was never employed by the defendant employer.[9]

***Key Take-Away Regarding Standards of Proof*: Retaliatory Harassment Need Not Be Severe or Pervasive**

Sometimes, retaliatory conduct is characterized as "retaliatory harassment." However, applying Burlington Northern, the EEOC states in its Guidance that establishing retaliatory harassment does not require the severity or pervasiveness that is required to establish a discriminatory hostile work environment. If the conduct is sufficiently material to deter protected activity under the circumstances, a retaliation claim would exist, even if the conduct was not severe or pervasive enough to alter the terms and conditions of employment.

***Key Take-Away Regarding Liability*: The Cat's Paw Theory Applies**

The cat's paw theory of liability stems from an old fable in which a monkey convinces a cat to pull roasting chestnuts from a fire, promising him a share. The cat is duped, burns its paw, and the monkey eats all of the chestnuts, suffering no pain in the process. In the retaliation context, the cat's paw theory of liability means that an employer can be liable for retaliation even if the ultimate decision-maker (the duped cat) was not biased, but acted on the biased, untrue reports of another (the monkey).

***Key Take-Away Regarding the ADA:* It Is Not Just About Retaliation, It Is Also About Interference**

The Americans with Disabilities Act (ADA) prohibits not just retaliation, but also "interference" with the exercise or enjoyment of ADA rights. The interference provision is broader than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights. Because the "interference" provision is broader, it covers conduct that does not meet the "materially adverse" standard required for retaliation. The standard is objective, however, so it prohibits only conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights, not all conduct that an individual finds intimidating. Examples include coercing an individual to relinquish or forego an accommodation to which he or she is otherwise entitled or issuing a policy that purports to limit an employee's right to invoke ADA protections, like a fixed leave policy that states that no exceptions will be made.

***Key Take-Aways for the Employer:* "Promising Practices"**

The EEOC outlines several "promising practices" that employers may consider implementing in an effort to minimize the likelihood of retaliation:

- Written, plain-language anti-retaliation policies with practical guidance on the employer's expectations and user-friendly examples;
- Training;
- Anti-retaliation advice and individualized support for employees, managers, and supervisors following EEO allegations;
- Proactive follow-up with employees, managers, and witnesses during the pendency of an EEO matter; and
- Review of employment actions to ensure EEO compliance.

Key Take-Away for Employers and Employees

Remember, the breadth of the anti-retaliation provisions does not mean that employees may insulate themselves from the consequences of poor performance or misconduct by raising an

EEO allegation. Employers are free to discipline or terminate employees for legitimate, non-discriminatory, and non-retaliatory reasons, notwithstanding an employee's protected activity.

Please contact Patricia Tsipras at 610.408.2029 or ptsipras@rubinfortunato.com for more information on this article, the EEOC's Guidance, or to discuss how to implement "promising practices" for your company.

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[1] University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011); Thompson v. North American Stainless, LP, 562 U.S. 170 (2011); Crawford v. Metropolitan Government of Nashville & Davidson County, 555 U.S. 271 (2009); Gomez-Perez v. Potter, 553 U.S. 474 (2008); Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006); and Clark County School District v. Breeden, 532 U.S. 268 (2001).

[2] Clark County School District v. Breeden, 532 U.S. 268 (2001).

[3] 548 U.S. 53, 67 (2006).

[4] Id. at 69.

[5] Id. at 68.

[6] Id. at 69.

[7] See, e.g., Littlejohn v. City of New York, 795 F.3d 297, 318 (2d Cir. 2015).

[8] 562 U.S. 170, 174 (2011).

[9] See McGhee v. Healthcare Servs. Grp., Inc., No. 5:10cv279/RS-EMT (N.D. Fla. Mar. 2, 2011) ("if an employer punishes an employee for engaging in protected activity by cancelling a vendor contract with the employee's husband (even though he was employed by a contractor, not the employer), it would dissuade a reasonable worker from engaging in protected activity…").