Frontline

Practical Information for Managers & Supervisors
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EEOC Final Guidance on Retaliation

On August 29, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued its final Enforcement Guidance on Retaliation and Related Issues, to replace its 1998 Compliance Manual section on retaliation. The guidance also addresses the separate "interference" provision under the Americans with Disabilities Act (ADA), which prohibits coercion, threats, or other acts that interfere with the exercise of ADA rights.

Since EEOC's 1998 Compliance Manual section on retaliation, the U.S. Supreme Court has issued seven decisions addressing retaliation under EEOC-enforced laws. The filing of EEO claims, that include a retaliation allegation, have continued to grow. Charges of retaliation surpassed race discrimination in 2009, as the most frequently alleged basis of discrimination, accounting for 44.5 percent of all charges received by EEOC in FY 2015. In the federal sector, retaliation has been the most frequently alleged basis since 2008, and retaliation findings comprised between 42 percent and 53 percent of all findings of EEO violations from 2009 to 2015.

Small Business Fact Sheet: Retaliation and Related Issues

1. What is retaliation?

Federal equal employment opportunity (EEO) laws prohibit employers, employment agencies, or unions from punishing job applicants or employees for asserting their rights to be free from employment discrimination, including harassment.

- Asserting EEO rights is called "protected activity."
- Sometimes there is retaliation before any "protected activity" occurs. For example, an employment policy that discourages the exercise of EEO rights could itself be unlawful.

2. What actions by applicants and employees are protected from retaliation?

Protected actions can take many forms, ranging from participating in an EEO complaint process to reasonably opposing discrimination. For example, it is unlawful to retaliate against applicants or employees for:

- taking part in an internal or external investigation of employment discrimination, including harassment;
- filing or being a witness in a charge, complaint, or lawsuit alleging discrimination;
- communicating with a supervisor or manager about employment discrimination, including harassment;
- answering questions during an employer investigation of alleged harassment;
- refusing to follow orders that would result in discrimination;
- resisting sexual advances, or intervening to protect others;
- reporting an instance of harassment to a supervisor;
- requesting accommodation of a disability or for a religious practice; or
- asking managers or co-workers about salary information to uncover potentially discriminatory wages.

Participating in a complaint process is protected from retaliation under all circumstances. Other acts to oppose discrimination are protected as long as the employee was acting on a reasonable belief that something in the workplace may violate EEO laws, even if he or she did not use legal terminology to describe the issue.

The protections against retaliation apply not only to current employees (full-time, part-time, probationary, seasonal, and temporary), but also to applicants and to former employees.

- For example, a supervisor cannot refuse to hire an applicant because of his EEO complaint against a prior employer, or give a false negative job reference to punish a former employee for making an EEO complaint.

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These protections also apply regardless of an applicant or employee's citizenship or work authorization status.

- For example, assume an employer suspects a worker is undocumented but does not attempt to verify her authorization to work as required by the immigration laws. If the worker raises an EEO complaint, such as sexual harassment or national origin discrimination, and the employer then threatens to expose the worker's immigration status as punishment for complaining about EEO violations, the employer would violate the ban on retaliation.

3. Does this mean that an employer can't ever punish someone who has engaged in EEO activity?

No. Engaging in EEO activity does not shield an employee from discipline or discharge. Employers are free to discipline or terminate workers if motivated by non-retaliatory and non-discriminatory reasons that would otherwise result in such consequences.

- Examples include poor job performance or low productivity, or where the employee's actions in opposing discrimination interfered with job performance or involved something illegal or disruptive to the workplace.
- If a manager recommends an adverse action in the wake of an employee's discrimination complaint or other protected activity, some employers have found it useful to evaluate whether the adverse action is appropriate and ensure it is not motivated by retaliation.

4. What if the employer never takes an official employment action against the employee? Could there still be retaliation?

Yes. An employer is not allowed to do anything in response to EEO activity that would discourage someone from resisting or complaining about future discrimination.

For example, depending on the facts of the particular case, it could be retaliation because of the employee's EEO activity for an employer to:

- reprimand an employee or give a performance evaluation that is lower than it should be;
- transfer the employee to a less desirable position;
- engage in verbal or physical abuse;
- threaten to make, or actually make reports to authorities (such as reporting immigration status or contacting the police);
- increase scrutiny;
- spread false rumors, treat a family member negatively (for example, cancel a contract with the person's spouse); or
- take action that makes the person's work more difficult (for example, punishing an employee for an EEO complaint by purposefully changing his work schedule to conflict with family responsibilities).

5. What does the law say about interference with ADA rights?

The ADA prohibits disability discrimination, limits an employer's ability to ask for medical information, requires confidentiality of medical information, and gives employees who have disabilities the right to reasonable accommodations at work absent undue hardship.

An employer cannot retaliate against an employee for raising ADA rights, and also cannot interfere with ADA rights by doing anything that makes it more difficult for an applicant or employee to assert any of these rights.

- For example, it is unlawful for an employer to use threats to discourage someone from asking for, or keeping, a reasonable accommodation; intimidate an employee into undergoing an unlawful medical examination; or pressure an employee not to file a disability discrimination complaint. This is unlawful even if the person goes on to exercise his ADA rights.

6. Can employers do anything to reduce their chances of violating the law?

Yes. The following practices are not all legally required, but may reduce the chances of retaliation:

- Education: Supervisors and managers may not know that certain acts are considered illegal retaliation or interference. An employer can educate its workforce by having a written, plain-language policy, and by training all of its employees to identify and stop retaliation and interference. Employees may benefit from instruction on how to handle tough situations where retaliation or interference is likely to occur.
- Documentation and review of employment actions: Managers and supervisors may be more aware of actions that can be viewed as retaliatory if they are required to justify negative employment actions in writing. Other supervisors could be asked to review these negative actions to ensure that they are justified and consistent with existing practice.
- Support: Employees who are accused of employment discrimination, harassment, or interference may benefit from ongoing, individual support. The employer can discuss its policies and provide tips for avoiding actual or perceived retaliation and interference.