Warning! What You Say May Result in an Unlawful Retaliation Claim
EEOC Enforcement Guidance On Retaliation

https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

Replaces 1998 Compliance Manual section on retaliation

Addresses retaliation under Title VII, ADA, ADEA, EPA, GINA, Rehabilitation Act

Addresses separate “interference” provisions of ADA, which prohibit coercion, threats, or other acts interfering with exercise of ADA rights
EEOC Retaliation Enforcement Guidance

Q & A publication (https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm)

Small Business Fact Sheet (https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm)
EEOC – Retaliation Guidance

Retaliation – alleged in 45.9% of all charges in 2016, most frequently alleged basis for discrimination

EEOC – finding of unlawful retaliation between 42-53% of all EEO violations from 2009-2015
EEOC - Retaliation Guidance

Elements of a retaliation claim:

1. Protected activity – either participation in an EEO process or opposition to discrimination;

2. Materially adverse action by the employer; and

3. A causal connection between the protected activity and the materially adverse action.
EEOC – Retaliation Guidance

Protected activity:
- the employee engaged in (or may engage in) protected EEO activities (participation), or
- the employee has raised complaints of potential EEO violations (opposition)
EEOC – Retaliation Guidance

- Participation in an EEO process: raising a claim, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under the EEO laws

- Opposition to unlawful discrimination: individuals who act with a reasonable good faith belief that a potential EEO violation exists and who act in a reasonable manner to oppose it
EEOC – Participation

- Includes filing a claim or serving as a witness in an administrative proceeding or lawsuit
- Protected even if the underlying allegation is not meritorious or timely filed
- Protected regardless of whether the employee has a reasonable, good faith belief that the underlying allegations are or could be unlawful
- False or bad faith statements are protected - considered only for credibility purposes and in deciding whether underlying complaint has merit
- Protects participation in an employer’s internal complaint or investigation process (also considered protected “opposition”)

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EEOC – Protected Opposition

- Opposing any practice made unlawful under the EEO laws
- Manner of opposition must be reasonable
- Must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful
- Protects a broader range of conduct than participation clause
- Communicating a belief that the employer has engaged in a form of discrimination “virtually always” constitutes protected employee opposition
EEOC- Protected Opposition

- Includes filing an internal EEO complaint, or complaining to management about discrimination
- Applies if employee “explicitly or implicitly” communicates belief that matter complained about constitutes harassment or discrimination
- Need not include words “harassment” or “discrimination” or other legal terminology
- Qualifies if statement could reasonably be interpreted as opposition to employment discrimination
- Protects all employees – managers, HR, etc.
EEOC – Protected Opposition

Limits to Protected Opposition – manner of opposition must be reasonable

◦ Complaints can be made to third parties – union officials, co-workers, an attorney, police

◦ Complaints raised publically may be protected – picketing, writing critical letters to customers, etc., provided it is not unreasonably disruptive or excessive

◦ Going outside chain of command or prescribed internal complaint procedure may be reasonable

◦ Advising employer of intent to file an EEOC charge is a reasonable manner of opposition

◦ Advising an employer about alleged or potential discrimination/harassment even if not yet “severe or pervasive” is protected
EEOC – Unreasonable Opposition

- Making an “overwhelming number of patently specious complaints”
- Badgering a subordinate employee to give a witness statement
- Coercion to change a statement
- Not protected if it involves an unlawful act – committing or threatening violence to life or property
- Opposition is not a license to neglect job duties – protests that render the employee ineffective in the job do not immunize an employee from appropriate discipline or discharge
- Involves a context and fact specific inquiry
EEOC – Protected Opposition

Opposition must be based on a reasonable, good faith belief that conduct opposed violates EEO laws, or could do so in repeated

- Protects complainants, witnesses or bystanders who intervene or report observations
- Even reporting an isolated, single incident of harassment is protected opposition if employee reasonably believes that a hostile work environment is in process
- Example of unprotected complaint – complaint of a failure to promote due to sex when complainant knew she did not meet the minimum qualifications for the job, i.e., CPA license
EEOC – Protected Opposition

Examples of protected opposition:

◦ Complaining or threatening to complain about alleged discrimination against oneself or others – i.e., complaining about graffiti in workplace that is derogatory towards women

◦ Providing info in an employer’s internal EEO investigation – i.e., providing testimony corroborating a co-worker’s harassment allegation

◦ Refusing to obey an order or implement a policy reasonably believed to be discriminatory
EEOC – Protected Opposition

- Advising an employer on EEO compliance – i.e., HR manager advising employer of ADA violations
- Resisting sexual advances or intervening to protect others
- Passive resistance (allowing others to express opposition)
- Requesting reasonable accommodation for a disability or religion
- Complaining about or discussing compensation (Oregon law, federal contractors/subcontractors, NLRA)
EEOC – Retaliation Guidance

Protects:

- Protected activity involving a different employer – i.e., not hiring because applicant filed an ADA charge against a prior employer
- Post-employment retaliation – i.e., giving an unjustified, untruthful negative job reference, informing a prospective employer about a prior EEO complaint
- Discrimination allegations raised by those not covered by law – i.e., alleging age discrimination even if under 40 years of age
- Any ADA violation, not just employment discrimination provisions – i.e., public accommodations
- Those who an employer mistakenly believes have engaged in protected activity
EEOC – Materially Adverse Action

Materially adverse action – “any action that might well deter a reasonable person from engaging in protected activity”

Standard satisfied even if individual was not in fact deterred

Third parties who are subject to materially adverse action also have a claim, even if not employed by the employer
EEOC – Materially Adverse Action

Examples – warnings, reprimands, transfers, negative or lowered evaluations, transfer to less prestigious or desirable work or work location, disparaging the person, threatening reassignment, scrutinizing work/attendance w/o justification, abusive verbal or physical behavior, threatening to take action against a family member, threats to report immigration status, harassing conduct
EEOC – Materially Adverse Action

Examples of non-actionable retaliation:
- “Petty slight”, “minor annoyance” or “trivial” punishment
- Temporary transfer from an office to cubicle consistent with office policy
- Occasional brief delays in issuing refund checks involving small amounts of $
EEOC – Causation

Must be a causal connection between the protected activity and the adverse action

“But for” the retaliatory motive, the employer would not have taken the adverse action

Retaliatory motive need not be the sole cause for the action – need only be a “but for” cause
EEOC- Causation

Retaliatory motive need not be held by employee who took adverse action if another employee with a retaliatory motive intentionally and proximately caused the employee to take the action (Cat’s paw)

Causation cannot be proved if the evidence shows that adverse action would have occurred anyway, even without a retaliatory motive (i.e., prior written or final warnings)
EEOC – Evidence of Retaliation

Employee must show “it is more likely than not” that retaliation has occurred

Potential evidence of retaliatory motive:
- Suspicious timing – adverse action occurred shortly after protected activity (but temporal proximity is not necessary to establish a causal link)
- Oral or written statements – retaliatory animus, inconsistencies, predetermined decisions
EEOC- Evidence of Retaliation

- Comparative evidence – more favorable treatment of others
- Inconsistent or shifting explanations of reason for adverse action (unless they are innocuous or can be credibility explained, i.e., additional info is discovered)
- Other evidence the employer’s explanation is pretextual or not believable
EEOC – Retaliation Guidance

Employer Defenses:

◦ Employer is unaware of protected activity

◦ Legitimate, nondiscriminatory reason for taking action – poor performance, inadequate qualifications, negative job references, misconduct, RIF

◦ Evidence similarly situated employees treated the same
EEOC – ADA Interference

ADA prohibits both retaliation and interference with the exercise or enjoyment of ADA rights

Interference is broader than anti-retaliation provision - prohibits coercion, threats, intimidation or interference with respect to ADA rights

Prohibits conduct that is reasonably likely to interfere with ADA rights

Actions need not rise to the level of unlawful retaliation

Conduct need not meet the “materially adverse” standard

Individual need not establish that s/he is disabled or qualified
EEOC - ADA Interference

Examples:
- Threatening adverse action for not voluntarily submitting to an unlawful medical exam
- Policies that purport to limit ADA protections (i.e., “no exceptions for any reason” to fixed leave policy)
- Threatening a negative job reference if the employee files an ADA claim
EEOC – Promising Practices

◦ Plain language written anti-retaliation policies, that include examples, a reporting mechanism, and clear statement that retaliation can be subject to discipline and termination
◦ Remove policies that may deter employees from engaging in protected activity, i.e., no disclosure of wages
◦ Training for all employees on anti-retaliation policy
◦ Unbiased investigation of retaliation complaints
EEOC – Promising Practices

- Provide information on your anti-retaliation policy as part of an EEO investigation
- Pro-active follow up – check in with employees during or after an EEO investigation re concerns about retaliation
- Review of employment decisions to ensure EEO compliance – review proposed action to ensure it is based on legitimate non-discriminatory or retaliatory factors