PUBLICATION

EEOC Does Its Best to Make Complaining Employees Untouchable with New Enforcement Guidance on Retaliation

March 07, 2016

Almost 20 years have passed since the EEOC published its guidance on retaliation claims in 1998, and much has changed in the workplace since then. Not surprisingly though, the agency's position on retaliation – now the most likely claim to show up in an EEOC Charge – has become even more employee-friendly.

In late January, the EEOC released its 76-page proposed update to the 1998 guidance. The purpose of the update is two-fold. First, according to EEOC Chair Jenny R. Yang, retaliation is a growing problem. Yang claims that "[r]etaliation is a persistent and widespread problem in the nation's workplaces," and, according to the EEOC's records, retaliation charges have "roughly doubled since 1998." Second, the EEOC updated the guidance to incorporate what it describes as "numerous significant rulings" from "the Supreme Court and lower courts" regarding retaliation.

Not surprisingly, most of the newly incorporated cases are employee friendly. For instance, the guidance explains that since 1998 the Supreme Court has found that Title VII prohibits retaliatory acts beyond just "ultimate employment actions" like termination and promotion denials. Retaliatory acts identified as "adverse employment actions" – think pay reductions and transfers – are also now considered illegal. The high court has also found that an employer's acts against a third party, such as a family member of a protected employee, can form the basis for a retaliation claim. In addition, the EEOC included various opinions from courts of appeals that either broaden protections or lighten an employee's burden of proof.

Indeed, the proposed guidance does its best to lower the bar an employee must clear to show retaliation and broaden the path for doing so. Specifically, the guidance explains that "participation in any manner" in "an EEO process," including something as simple as providing witness information or participating in an internal investigation, is protected activity. The guidance goes on to make clear that "broad" protections apply even if the employee's underlying complaint has no merit. It can also be totally unreasonable. Relying on an opinion from the United States Court of Appeals for the Fourth Circuit, the guidance claims that an employee is protected from retaliation "regardless of the reasonableness of the underlying allegations of discrimination."

So, nonsense is protected; that's where we are.

To the EEOC's credit, its guidance to its investigators makes clear that employers "remain free to discipline or terminate employees for a legitimate, non-discriminatory, and non-retaliatory reason." The guidance also makes clear, though, that any employer who acts against a complaining employee should expect the decision to be highly scrutinized. Indeed, the guidance even implies that a manager about whom a complaint has been made should not be trusted. It advises employers that a decision by a manager who "may be angry or hurt" by the employee's complaint should be independently evaluated and the "legitimacy" of their decision must be "scrutinized."

The proposed guidance also characterizes the protections provided by Title VII's opposition clause as "expansive." The opposition clause prohibits retaliation against an employee because they have opposed any practice made unlawful under the employment discrimination statutes. According to the guidance, opposing an unlawful practice can be inferred from any circumstances that show "the individual intended to convey

opposition or resistance to a perceived EEO violation." Simply asking about compensation is identified as protected opposition activity. Even an employee's silence may form the basis of a retaliation claim, at least according to the EEOC: The guidance explains that "passive resistance" – defined as "allowing others to express opposition" – may be considered a form of protected opposition.

Think about that for a minute.

Finally, the guidance does its best to provide as many avenues as possible for an employee to prove that they were retaliated against because they engaged in protected activity. The guidance acknowledges that an employee must show that "but for" a retaliatory motive, the employer would not have acted against her. But it then goes to great lengths to explain how easy it is to make this showing. The guidance initially notes that a retaliatory motive need not be the sole cause of the adverse action as long as it is one of the causes. Yet even if an employer has a legitimate reason for its decision, the employee may "discredit" the reason and show a causal connection between the reason and the protected activity by presenting a "'convincing mosaic' of circumstantial evidence." Examples for the contents of the mosaic include suspicious timing, evidence that a coworker was treated differently, inconsistent explanations, and other "bits and pieces" that, when considered together, hint at retaliatory intent.

Importantly, the proposed guidance, even when published in the coming months as final guidance, is not the law. But it will be used as a guide by EEOC investigators when they are considering charges of retaliation. And based on its expansive definition of retaliation, it will guide them to find that retaliation occurred in more instances than they have found previously. It will also show up outside of EEOC proceedings as plaintiffs' lawyers invoke its reasoning in support of retaliation claims. Some courts may even be influenced by it.

So what should an employer do?

- Train managers. Employers must make their supervisors aware of the various activities that are protected and equip them with strategies to avoid retaliation claims. Then they should document this training and do it again the following year.
- Proactively document problems. Employers must train their managers to document performance problems and disciplinary issues when they happen. One of the best defenses to a retaliation claim is a well-documented disciplinary process that began before the protected activity did.
- Get others involved. As soon as an employee engages in activity that is clearly protected, include another manager not involved in the protected activity in any decisions that affect the employee. This will not be possible in all situations, but including a disinterested manager in decisions that follow protected activity lends more credibility to the decisions and may dispel an allegation of retaliation.
- Keep complaints confidential. Human resources employees must keep complaints confidential because a manager cannot retaliate against an employee for engaging in protected activity they do not know about.
- Enact a policy. If not already in place, enact an anti-retaliation policy that discusses protected activity, prohibits retaliation and provides for discipline if the policy is violated.