Bond

INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

SEPTEMBER 2016

EEOC Issues Final Enforcement Guidance on Retaliation and Related Issues

On August 25, 2016, the U.S. Equal Employment Opportunity Commission issued its final "Enforcement Guidance on Retaliation and Related Issues." Along with the final guidance, the EEOC issued a Q&A publication and a Small Business Fact Sheet.

Since 1998, the Supreme Court and lower courts have issued a number of significant rulings regarding employment related retaliation. The guidance illustrates where the EEOC is in agreement with lower court rulings and, significantly, where the EEOC's interpretation of the law differs from that of the courts. It should come as no surprise that the EEOC takes a broad view of the protections afforded by the anti-retaliation provisions of the EEO laws it enforces. The final guidance offers employers insight into how the EEOC will handle retaliation charges and suggests "promising practices" for employers to follow to avoid such charges. Some issues of note include:

The EEOC takes an expansive view of protected participation activity.

The basic premise of "retaliation" has not changed. Retaliation occurs when an employer takes a materially adverse action against an individual because the individual engaged in protected activity. Protected activity includes participating in an EEO process (participation activity) or opposing discrimination (opposition activity).

Both the courts and the EEOC recognize that participating in administrative proceedings or lawsuits to enforce rights under the EEO laws is protected participation activity. However, the EEOC goes a step further, taking the position that participation in an employer's internal complaint process is also protected participation activity. This is significant because participation activity is so broadly protected. Indeed, an employee need not have a reasonable good faith belief that discrimination actually occurred for participation activity (i.e., filing an internal complaint) to be protected. According to the EEOC, even complaints made in bad faith or which contain false or malicious allegations are protected participation activity. Further, it is the EEOC's position that employers can be liable for retaliation if they discipline an employee for such bad faith actions taken in the course of participation.

A wide range of actions are considered "materially adverse."

Relying on Supreme Court precedent, the EEOC makes clear that in the context of a retaliation claim, a much broader range of employer actions will be considered "materially adverse" than in the context of a discrimination claim. For purposes of a retaliation claim, a materially adverse action is "any action that might well deter a reasonable person from engaging in protected activity." Work-related threats, warnings, reprimands, negative or lowered performance appraisals, and transfers to less prestigious or desirable work or work locations all likely meet this standard. Note, however, that an employer's actions need not be work-related to be considered "materially adverse actions." According to the EEOC, prohibiting only employment-related actions would not be effective in preventing retaliation because the employer could retaliate by taking action not directly related to the employee's employment or by causing the employee harm outside of the workplace.

The EEOC lists the following examples of materially adverse actions: disparaging an employee to the media, making false reports to government authorities, filing a civil action, threatening reassignment, scrutinizing work or attendance more closely, removing supervisory responsibilities, requiring re-verification of work status or initiating action with immigration authorities, terminating a union grievance process, and taking or threatening to take adverse action against a close family member.

There is a lower standard for actionable "retaliatory harassment."

The EEOC recognizes that sometimes retaliatory conduct is characterized as "retaliatory harassment." The standard for establishing "retaliatory harassment" differs significantly from the standard for establishing a discriminatory harassment claim. To constitute unlawful retaliation, harassing conduct does not have to be severe or pervasive enough to create a hostile work environment. If the alleged harassing conduct is reasonably likely to deter protected activity, it would be actionable retaliation, even if not sufficiently severe or pervasive enough to create a hostile work environment.

The ADA's interference clause is interpreted more broadly than the anti-retaliation clause.

In addition to retaliation, the Americans with Disabilities Act prohibits interference with the exercise of ADA rights. According to the EEOC, the interference clause is much broader than the anti-retaliation clause, "reaching even those instances when conduct does not meet the 'materially adverse' standard required for retaliation." However, the EEOC notes that in its view, the interference provision does not apply to any and all conduct an individual finds intimidating. Rather it only prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights. Examples of such conduct include:

- Coercing an individual to forego an accommodation to which they are entitled;
- Intimidating an applicant from requesting an accommodation for the application process by indicating they would not be hired as a result of the request;
- Threatening an employee with termination if they do not "voluntarily" submit to a medical examination or inquiry otherwise prohibited by the ADA;
- Issuing a policy purporting to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- Interfering with a former employee's right to file an ADA lawsuit by stating that a negative reference will be given if a suit is filed; and
- Subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because the employee assisted a co-worker in requesting a reasonable accommodation.

The guidance includes some suggested "promising practices" for employers.

The final guidance includes "promising practices" which the EEOC posits may help reduce the risk of violations. However, the EEOC is careful to advise that adopting these practices will not insulate an employer from liability or damages for unlawful actions. The "promising practices" include:

- Maintaining written policies which include examples of retaliation, steps for avoiding actual or perceived retaliation, a complaint procedure, and a clear explanation that engaging in retaliation will result in discipline, up to and including termination;
- Training all managers, supervisors, and employees on the anti-retaliation policy;
- Establishing a process for reminding the parties and witnesses involved in an EEO matter of the anti-retaliation policy, and providing advice to managers and supervisors alleged to have engaged in discrimination on how to avoid engaging in retaliatory conduct or conduct which may be perceived as retaliatory;
- Following up with employees, managers and witnesses while an EEO matter is pending to ask if there are any concerns regarding potential or perceived retaliation; and
- Reviewing proposed employment actions, preferably by a designated human resource or management official, to ensure that employees and witnesses are not subject to retaliation.

If you have any questions about this Information Memo, please contact Sharon A. Swift, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS
Commitment · Service · Value · Our Bond