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RETALIATION: Winning the Battle, Losing the War

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I. EEOC FY 2020 STATISTICS

The EEOC released its charge statistics from fiscal year 2021, which ran from Oct 1, 2020, through Sept 30, 2021. ***Retaliation was the most common claim in FY 2022***, representing 56% of all charges filed. Further, note that the EEOC's online portal, launched in November 2017, makes it incredibly easy for individuals to sign in and file charges. For prior years, the retaliation for statistics indicate an increased rise: FY 2017 (48.8%); FY 2018 (51.6%); FY 2019 (53.8%); and FY 2020 (55.8%).

Key Takeaways

- Take this heightened awareness as an opportunity to review and, if necessary, revise antiharassment, anti-discrimination and/or anti-retaliation policies. It is crucial that these policies provide multiple avenues for employees to report incidents of perceived harassment, discrimination, and retaliation.
- As employers face more internal complaints of harassment – this retaliation number further highlights the critical importance of a robust and well-honed investigation process. Employers need to handle investigations very carefully and be mindful that the complainant (and the witnesses) may also be the source of your next retaliation complaint. Investigators and managers must be carefully trained to avoid situations which can lead to complaints or retaliation.

II. TIPS FOR AVOIDING RETALIATION CLAIMS UNDER THE EEOC'S RETALIATION GUIDANCE

Because of the alarming frequency of charges and the need for employees to report discrimination without fear of reprisal, in 2016, the EEOC issued an enforcement guidance on retaliation. https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm. Even though the EEOC's position is not necessarily the final word on these issues, as courts often disagree with the EEOC's interpretation of federal discrimination laws, employers should know how EEOC staff, including its investigators and litigators, will approach retaliation charges. Here is a look at the guidance with tips on how to avoid becoming another retaliation charge statistic.

A. Overview of Retaliation and Protected Activities

The federal discrimination laws enforced by the EEOC, such as Title VII, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA") and others, prohibit employers from taking adverse action against an employee or applicant because the individual engaged in "protected activity." Adverse actions that be retaliatory by the EEOC include not just discipline or discharge, but also transferring the employee to a less desirable position or shift, giving a negative or lower performance evaluation, increasing scrutiny, or making the person's work more difficult.

"Protected activity" falls into two categories: participation and opposition.

- *Participation activity* is when an individual "participates" in an EEO process, which can include filing a charge, being involved in an investigation, or testifying or serving as a witness in a proceeding or hearing.
- *Opposition activity* is when an individual complains, questions, or otherwise opposes any discriminatory practice. Employees have the right to engage in both types of protected activity without being subject to retaliation from their employer.

B. Harassment as Retaliation

According to the EEOC, harassing conduct be retaliation, even if it does not rise to the level of being severe or pervasive enough to alter the terms and conditions of employment. The agency states that harassment can constitute actionable retaliation so long as the conduct is sufficiently material to deter protected activity in the given context.

C. Evidence That May Support a Retaliation Finding

To determine whether there is a causal connection between a materially adverse action and the individual's protected activity, the EEOC will consider several types of relevant evidence, alone or in combination. Some of the facts that may lead to a retaliation finding include:

- Suspicious timing, especially when the adverse action occurs shortly after the individual engaged in protected activity;
- Inconsistent or shifting explanations, such as where the employer changes its stated reasons for taking the adverse action;
- Treating similarly situated employees more favorably than the individual who engaged in protected activity;
- Statements or other evidence that suggest the employer's justification for taking the adverse action is not believable, was pre-determined, or is hiding a retaliatory reason.

D. Defeating a Retaliation Claim

Even if protected activity and an adverse action occurred, an employer may escape a retaliation claim if it can show that it was unaware of the individual's protected activity when the adverse action decision was made, or if it can establish a legitimate non-retaliatory reason for the adverse action. Examples of legitimate, non-retaliatory reasons can include poor job performance, misconduct, reductions in force, or inadequate qualifications.

Title search: Retaliation: Winning the Battle, Losing the War

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