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New EEOC Retaliation Guidance Seeks to Further Stack the Deck Against Employers

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On January 21, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) released its proposed changes to its guidance on workplace retaliation. These changes mark the first time the EEOC has modified its guidance in nearly 20 years. The proposed changes track the EEOC's recent efforts to broaden conduct deemed retaliation and the concept of causation.

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Causation Standard

Perhaps most importantly, the new guidance attempts to expand what can constitute a causal connection between an adverse employment action and prior protected activity. In the EEOC's view, evidence of a causal connection can be proved by what one appellate court has called a "convincing mosaic" of circumstantial evidence that would support the inference of retaliatory intent.

The guidance provides a striking example of the "convincing mosaic" standard concerning a situation in which retaliatory animus was found where the protected activity occurred more than five years earlier. The EEOC explains that even though the protected activity occurred many years earlier, the opportunity for the adverse employment action did not present itself until the alleged retaliatory action occurred.

Protected Activity

The guidance also provides an expanded definition of protected activity. At the outset, the guidance states "[a] retaliation claim, whether based on participation or opposition, is not defeated merely because the underlying challenged practice ultimately is found to be lawful." Conduct could, therefore, be considered

protected activity when an employee subjectively believes the employer's conduct violates the equal employment opportunity laws. The employee's subjective belief must be based on reasonable good faith, but the guidance suggests protected activity will be found unless the complaint is "patently specious."

For hostile work environment claims, the guidance suggests a harassment complaint is protected activity even if a pervasive or severe hostile work environment does not exist. Protected activity is found "even if the harassment falls far short of 'severe or pervasive' harassment, since the entire hostile work environment liability standard is predicated on encouraging employees to report harassment and employers to act on early complaints, before the harassment becomes 'severe or pervasive.'" The guidance acknowledges this is contrary to many court rulings, but suggests that a finding of a hostile work environment could be tacked on to any claim of harassment, because "an employee might reasonably complain about even a single incident," as evidence of a hostile work environment.

Adverse Action

Concerning the definition of "adverse action," the guidance acknowledges what the EEOC has believed for years: the definition includes "any action that might well deter a reasonable person from engaging in protected activity." Even though courts generally refer to this element as an "adverse employment action," the guidance defines the element to include actions that are not work-related as a suitable basis for a protected complaint. The guidance states, "[a]n adverse action may also be an action that has no tangible effect on employment, or even an action that takes place exclusively outside work." Further, "[i]f the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation regardless of the level of harm."

Retaliatory animus can also be found where the materially adverse action is taken against a third party "who is closely related to or associated with the complaining employee." This action could include threatening to fire an employee's fiancé, for example, since it might dissuade the employee from engaging in protected activity. Adverse action could also be found where an employer punishes an employee by cancelling a vendor contract with the employee's husband, even though he was employed by a contractor, not the employer.

Conclusion

The guidance confirms the EEOC will find protected activity and retaliatory animus in nearly all situations in which an employee subjectively believes the employer has retaliated against him or her. Circumstantial evidence forming a "convincing mosaic" also renders the employee's entire employment history, no matter how many years it spans, fair game for finding evidence of protected activity or retaliatory animus. In short, the new guidance confirms what many employers have always believed—the EEOC strains to find protected activity and retaliatory animus in nearly every complaint.

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