Patterson Belknap Webb & Tyler LLP

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"Don't retaliate! (We really mean it)": EEOC and Second Circuit Crack Down on Workplace Retaliation

On August 25, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued final enforcement guidance on employer retaliation (the "Guidance"). The Guidance addresses retaliation under each of the statutes enforced by EEOC, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), Title V of the Americans with Disabilities Act (ADA), Section 501 of the Rehabilitation Act, the Equal Pay Act (EPA) and Title II of the Genetic Information Nondiscrimination Act (GINA). The EEOC explained that retaliation is now the most frequently alleged basis of discrimination, making up 45% of all complaints filed with the EEOC and surpassing racial discrimination in 2009.

A few days after the Guidance was issued, the Second Circuit came down with a decision in *Vasquez v. Empress Ambulance Service, Inc.*, No. 15-3239, 2016 U.S. App. LEXIS 15889 (2d Cir. Aug. 29, 2016). Here, the Second Circuit held that an employer may be liable for retaliation if its negligence gives effect to an employee's retaliatory animus and causes another employee to suffer an adverse employment action.

Background to the New EEOC Guidance

The Guidance replaces the section of the EEOC's 1998 compliance manual addressing retaliation and follows the agency's January 21, 2016, publication of its proposed guidance and a June 17, 2016, public meeting at which the EEOC received stakeholder testimony. In addition to retaliation under the federal anti-discrimination laws, the Guidance also addresses the ADA's separate "interference" provision, which prohibits employer threats, coercion or similar acts that interfere with a worker's exercise of ADA rights.

The EEOC also issued together with the final guidance a question-and-answer document summarizing the guidance's major points (https://www.eeoc.gov/laws/types/retaliation_considerations.cfm) as well as a fact sheet that condenses the guidance's highlights (https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm).

The Guidance

The Guidance provides that retaliation occurs when an employer unlawfully takes a materially adverse action against an individual because he or she engaged in activity protected by any of the federal employment discrimination laws. There are two types of protected activity: (1) participation, in which an individual participates in any manner in an investigation or proceeding under the federal anti-discrimination laws, and (2) opposition, in which a person opposes any practice made unlawful under the anti-discrimination laws.

The Guidance includes an expansive definition of these types of protected activity. For example, it states that protected activity includes complaints which are internal, oral, informal, ambiguous, and those concerning actions which are ultimately deemed lawful. In addition, the following are all considered protected activity: a human resources manager advising an employer on EEOC compliance; an employee's refusal to obey an order believed to be discriminatory; intervening to protect others; and an employee's request for a reasonable accommodation for disability or religion. In addition, communicating to management or co-workers to complain or ask about compensation, or otherwise discuss rates of pay, may constitute protected activity. Importantly, an individual does not have to be an employee to be protected against retaliation. Refusing to hire an applicant who made a previous EEOC complaint against another employer could constitute retaliation.

The Guidance also expands the types of employment actions considered to be materially adverse and provides the following examples of actions now considered materially adverse: disparaging the person to others or in the media; making false reports to government authorities; filing a civil action; threatening reassignment; scrutinizing work or attendance more closely than that of other employees, without justification; removal of supervisory responsibilities; abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment; requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities because of protected activity; taking or threatening to take a materially adverse action against a close family member; and any other action that might deter reasonable individuals from engaging in protected activity.

Some examples of actions that the Supreme Court has ruled could be viewed as adverse actions in retaliation claims include:

- Excluding an employee from a weekly training lunch that contributes to professional advancement;
- Asking an employee's co-workers to conduct surveillance on the employee and report back about his or her activities;
- Transferring a worker to a job requiring him or her to work alone at a more dangerous facility than the one where he or she usually worked; and
- Posting an EEOC complaint where co-workers could access it.

The Guidance also outlines examples of legitimate, non-retaliatory reasons for a challenged action that may defeat a claim of retaliation, including: poor performance; inadequate qualifications for position sought; qualifications, application, or interview performance inferior to the selectee; negative job references; misconduct (e.g., threats, insubordination, unexcused absences, employee dishonesty, abusive or threatening conduct, or theft); and reduction in force or other downsizing.

In addition to discussing traditional retaliation, the guidance also addresses the ADA prohibition of "interference" with the exercise or enjoyment of ADA rights. The guidance explains that the ADA interference provision is broader than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights. In addition, an applicant or employee need not establish that he or she is an "individual with a disability" or "qualified" in order to prove interference under the ADA. Examples of interference include pressuring an employee not to advise a co-worker of his or her right to reasonable accommodation, refusing to consider accommodation unless an employee tries medication first, and warning an employee not to request accommodation.

***Vasquez v. Empress Ambulance Service, Inc*.**

A few days after the Guidance was issued, the Second Circuit held in *Vasquez v. Empress Ambulance Service, Inc.*, No. 15-3239, 2016 U.S. App. LEXIS 15889 (2d Cir. Aug. 29, 2016) that an employee's retaliatory intent may be imputed to an employer where the employer's own negligence gives effect to the employee's retaliatory animus and causes the victim to suffer an adverse employment decision. In this case, the plaintiff had informed her supervisor that she received unsolicited sexual photographs from a co-worker, and her employer promised to investigate the complaint. Within a few hours, however, the plaintiff's co-worker had discovered her complaint and had provided the employer with false documents purporting to show the plaintiff's consent to and solicitation of a sexual relationship. In reliance on those documents, the employer immediately fired the plaintiff on the ground that she had engaged in sexual harassment.

The plaintiff sued the employer under a theory that has been termed "cat's paw" liability. The phrase derives from an Aesop fable, in which a monkey flatters a cat into pulling roasting chestnuts out of a roaring fire for their mutual satisfaction; the monkey, however, devours them fast, leaving the cat "with a burnt paw and no chestnuts" for its trouble. The "cat's paw" metaphor now refers to a situation in which an employee is subjected to an adverse employment action by a supervisor who does not have any discriminatory motive, but who has been manipulated by a subordinate who does have such a motive. The Second Circuit held that the "cat's paw" theory may be used to support recovery for claims of retaliation in violation of Title VII if the employer in effect adopts an employee's unlawful animus by acting negligently with respect to the information provided by the employee.

Take-Aways for Employers

The Guidance suggests practices that employers may wish to consider implementing to minimize the likelihood of retaliation violations. These practices include:

- Maintaining a written, plain-language anti-retaliation policy that includes:
    - examples of retaliation that managers may not otherwise realize are actionable,
    - proactive steps for avoiding retaliation,
    - a reporting mechanism for employee concerns about retaliation, and
    - a clear explanation that retaliation can be subject to discipline, up to and including termination.
- Training all managers, supervisors, and employees on the employer's written anti-retaliation policy.
- Automatically providing the anti-retaliation policy to all parties and witnesses as part of an employer's response and investigation following allegations concerning any of the federal anti-discrimination laws.
- Following up with employees, managers, and witnesses during the pendency of any investigation concerning any of the federal anti-discrimination laws.
- Reviewing proposed employment actions of consequence to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons.

In addition, following *Vasquez*, we recommend that employers carefully investigate all complaints, even if they are internal, oral, informal, or ambiguous, before taking any kind of adverse action. Finally, we recommend that employers maintain accurate and complete documentation when taking adverse actions against employees.

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