

EEOC Enforcement Guidance on Retaliation

Podcast Transcript

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HEATHER: Hello and welcome to Prevention and Protection, the United Educators' (UE) Risk Management Podcast. I'm Heather Salko, senior risk management counsel, and I'm joined today by my colleague, Hillary Pettegrew, also a senior risk management counsel. Today, we will be discussing the U.S. Equal Employment Opportunity Commission's (EEOC) enforcement guidance on retaliation, which was released in 2016 and can be found on the **EEOC website**. Hillary, thank you for joining me.

HILLARY: I'm glad to be here, Heather.

HEATHER: Before we begin, I want to let listeners know that they can find other podcasts and risk management resources on our website, **www.EduRiskSolutions.org**. This 2016 enforcement guidance from the EEOC has been a long time coming. The last EEOC guidance on retaliation was released in 1998. The new guidance incorporates legal developments over the past 20 years, so many of you may already be familiar with what we're discussing. Our discussion today applies to retaliation claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), Section 501 of the Rehabilitation Act, the Equal Pay Act, and the Genetic Information Nondiscrimination Act (GINA). We will not be discussing retaliation under the Americans with Disabilities Act (ADA) which involves a slightly different analysis.

First, let's review the EEOC's definition of retaliation. Retaliation occurs when an employer takes a materially adverse action against an employee because they have engaged in or may engage in activity in furtherance of the equal employment opportunity (EEO) laws that the EEOC enforces and we listed above. Generally, that means participating in an EEO process or opposing unlawful conduct. While this sounds quite broad, the EEOC stresses that employees may not file discrimination claims solely to immunize themselves from the consequences of poor performance or improper behavior. Employers remain free to discipline or terminate for nondiscriminatory, nonretaliatory reasons. Hillary, would you tell our listeners the elements of a retaliation claim?

HILLARY: There are three required elements to proving any retaliation claim, and we'll discuss each of them in a bit more detail. First, an employee must have engaged in protected activity, which as you mentioned means either participation in an equal employment opportunity process, or opposition to discrimination. Second, the employer must take materially adverse action against the employee. And third, there must be a causal connection between the protected activity and the materially adverse action. In other words, it's not enough that an employee engaged in protected activity and the employer took adverse action. The employee has to show the protected activity actually caused the employer to take the adverse action.

So let's look first at the two different ways to engage in protected activity. The first is participation, which includes but is not limited to bringing a complaint of discrimination on one's own behalf. It also covers participation as a witness. Specifically, the 2016 EEOC guidance reaffirms that if someone makes a charge, testifies, assists, or participates in any way in an EEO matter, that person is protected from retaliation. It's important to understand that retaliation against an employee based on participation in an EEO process is prohibited regardless of the merit of the underlying discrimination complaint. So it doesn't matter if the original complaint was completely baseless. The employer still may not retaliate against the employee who brought the complaint, or any employees who supported that individual.

The second way to engage in protected activity is by opposing any practice made unlawful under the EEO laws that Heather listed. This applies to a much broader range of conduct than the participation clause. An employee can oppose a practice informally and doesn't need to use any special or magic words, such as harassment or discrimination. But there are two significant limitations on this form of protected activity. First, the manner of opposition must be reasonable. Not surprisingly, opposition is not reasonable if it involves illegal activities such as damaging property or making threats. It's also not reasonable to file an excessive number of clearly frivolous internal complaints.

However, I recommend that employers consult counsel before relying on that, since what might qualify as too many complaints and whether they are frivolous really depend on the specific facts of each case. In addition, the opposition must be based on a reasonable good faith belief that the conduct the employee opposes is or could become unlawful. Now this is an important distinction from the participation prong, under which, as you recall, an employee is protected from retaliation regardless of what they know or think about the merits of a complaint. To qualify for protection of the opposition prong, an employee must genuinely believe that he or she is opposing illegal discrimination.

HEATHER: Let me move on to talk about the second element of a retaliation claim, which is a materially adverse action. That is, any action taken by an employer that might deter a reasonable person from engaging in protected activity. This encompasses a range of actions, and courts have said that if the employer's retaliatory action considered as a whole would deter protected activity, there may be retaliation. In fact, the EEOC says, the individual alleging retaliation does not actually need to be deterred. But instead, the standard is whether a reasonable person would be deterred.

The EEOC guidance describes types of materially adverse actions, including both work-related and non-work-related adverse actions. Work-related adverse actions are fairly easy to understand and include what listeners might think: promotion denials, refusing to hire someone, terminations, or changing job benefits in a significant way. It can also include job reprimands and lowered performance appraisals, depending on the circumstances. Whether an employment action is materially adverse depends on the specific facts of each case. An employer may also retaliate by taking actions not related to work. This may not seem to make sense in the context of an employment matter, but if the actions still deter someone from engaging in protected activity, it is relevant and may rise to the level of retaliation.

On this point, I urge listeners to review the EEOC's guidance for examples, but here are just a few:

- Disparaging someone in the media
- Filing a civil action against them
- Taking action against a third party

That third party must be someone closely related to the claimant for there to be retaliation. For example, an employer may have a contract with a claimant's husband for outside services. If the employer cancels that contract after the employee files an EEO complaint, that may in fact be retaliation.

HILLARY: The third and final element is proving a causal connection between the protected activity and the materially adverse action. In the case of an educational employer, the evidence must show it's more likely than not, that "but for" the unlawful retaliatory motive, the employer would not have taken the adverse action against the employee. Evidence that helps an employee prove retaliation can include:

- Suspicious timing, such as the adverse action occurred shortly after the protected activity
- Oral or written statements that would include emails by individuals making or recommending the adverse action
- Comparative evidence, such as evidence showing that other employees committed similar misconduct as the employee claiming retaliation but were not disciplined at all or as severely

In some cases, employers claim that they weren't aware of the employee's protected activity and therefore could not possibly have been motivated by retaliation. Sometimes employers didn't know of the protected activity, but offer a legitimate nonretaliatory reason for the adverse action, such as an employee's poor job performance or misconduct. The employee can then try to show that the employer's alternative explanation is false or pretextual.

For example, say there's a female employee who claims she was denied a promotion to manager because she was considered a troublemaker after she vocally opposed the under-representation of women in management positions. The employer asserts that the candidate he chose was better qualified because that candidate had a master's degree, whereas the complaining employee had only a bachelor's degree. But if the employee can show that she has significantly greater experience with the employer, and such experience has traditionally been the employer's most important criterion for selecting managers, the employer's explanation for its decision may be pretextual.





HEATHER: Now that we know what the EEOC says comprises a retaliation claim, I will briefly talk about the remedies available to victims of retaliation. Under Title VII and GINA, the EEOC can seek injunctive relief before a charge is resolved if that's necessary to prevent a wrong. The EEOC can also seek injunctive relief as part of a lawsuit under the ADEA or the Equal Pay Act. This can allow a court to halt retaliation or even prevent it from occurring.

Let's look at an example. In one case, an employee filed a national origin discrimination claim and was soon after told he was going to be transferred to another facility halfway across the country. A court stepped in and deemed the transfer to be retaliatory, and stopped it from taking place. With regard to other damages under Title VII and GINA, the ADEA, and the Equal Pay Act, the claimant can recover compensatory and punitive damages for retaliation, which includes back pay in the instance of a termination or demotion.

HILLARY: Also, as part of the 2016 guidance, the EEOC urges the adoption of promising practices to prevent retaliation, and the first one is actually something that UE has always recommended. Employers should have a policy that's written in plain, easy-to-understand language that forbids retaliation and gives practical guidance with user-friendly examples of what to do and what not to do. The policy should also include proactive steps to avoid actual or perceived retaliation, such as how-to guidance for managers on interacting with employees who accuse them of discrimination, a clear mechanism to report retaliation, including an informal resolution procedure, and a clear statement that retaliation is subject to discipline, up to and including terminations.

HEATHER: In addition to having a policy, employers need to engage in training. Not only on the written policy, but also on how to be responsive to employees who do raise discrimination concerns. Of course, training shouldn't be limited only to those employees in offices or professional environments, but also should include others on your campus, such as food services or maintenance workers. And training should include practical examples that people can relate to.

HILLARY: Next, the EEOC recommends routinely providing anti-retaliation advice and individualized support to everyone involved when a discrimination complaint is filed. This should include describing the anti-retaliation policy and explaining how to avoid engaging in retaliation, and also how to report it if it occurs. For example, employers should provide managers with tips to avoid actual or perceived retaliation, as well as access to a resource person who can give advice on handling their reactions and managing the situation overall.

HEATHER: One additional good practice is to have employers act proactively. The EEOC recommends that the employer reach out and periodically check in with employees, witnesses, and managers to talk about potential problems with retaliation and to provide additional guidance. Don't just warn against retaliation at the beginning of an investigation and then forget about the issue, or wait for someone to come forward with a problem. Being proactive goes a long way to reinforcing that the employer does take retaliation seriously.

HILLARY: And finally, the EEOC recommends that all important employment actions be reviewed to help ensure they're based on legitimate nondiscriminatory and nonretaliatory reasons. This review might be conducted by an HR professional, an EEO specialist, a designated management official, or an attorney. But whoever provides it should, first, require decision makers to specify their reasons for taking actions, and ensure that documentation supports those actions.

Second, carefully scrutinize performance assessments for a consistent treatment of employees and to ensure the assessments are factual. If retaliation is found, be sure to identify and implement any process changes. And fourth, review data or other resources to determine if any particular areas of the organization seem to have compliance problems. If they do, you want to identify the causes of those problems and think about implementing oversight or training that's designed to address them.

Well, that's all we have time for today, Heather and I enjoyed this opportunity to talk about the latest EEOC guidance on combating workplace retaliation. We at UE hope you found the topic interesting and helpful to your work, managing risks on your campus. And I'll just remind everyone once more that you can find additional resources on our website, www.EduRiskSolutions.org, and also let you know that we'll have additional podcasts coming soon. Thanks so much for joining us.



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