



EEOC Issues Final Retaliation Guidance

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EEOC Issues Final Retaliation Guidance

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On August 29, 2016, the *EEOC* issued its final [*Enforcement Guidance on Retaliation and Related Issues*](#) (Guidance) to replace its 1998 Compliance Manual section on retaliation, including tips on ADA interference. The Guidance reflects the Commission's consideration of feedback received on the proposal from about 60 organizations and individuals following a 30-day public input period that ended February 24, 2016. The changes in the Guidance are in line with the EEOC's efforts to broaden the conduct that would be deemed retaliatory as well as the concept of causation.

Along with the Guidance, the EEOC has issued two accompanying documents: a [question-and-answer publication](#) that summarizes the Guidance, and a short [Small Business Fact Sheet](#) that condenses the major points in the Guidance. The Guidance also provides "boxed" examples of actual and perceived retaliation that will be of great help to employers and employees.

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).

Since 1998, the last time the EEOC issued a formal resource document on retaliation, the Supreme Court and the lower courts have issued numerous significant rulings regarding employment-related retaliation. Further, the percentage of EEOC charges alleging retaliation has essentially doubled (now nearly 45% of all charges). Retaliation is now the most frequently alleged basis of discrimination in all sectors, including the federal government workforce.

The guidance also addresses the interference provision under the Americans with Disabilities Act (ADA), which prohibits coercion, threats, or other acts that interfere with the exercise of ADA rights. The EEOC considers the scope of this separate interference provision broader than the anti-retaliation provision under the ADA.

In preparing the Guidance, the Commission analyzed courts' interpretation and application of the law to specific facts, noting that, regarding many retaliation issues, the lower courts have been uniform in their interpretations of the relevant statutes. Where the Commission agreed with those interpretations, the Guidance explains the law on such issues with concrete examples. The Commission noted that there are cases where the lower courts have not consistently applied the law, or the EEOC's interpretation of the law differs. In those instances, the Guidance sets forth the EEOC's position and explains its analysis.

Elements of a Claim. The Guidance does not change the three well-established elements of a retaliation claim and leaves little doubt that the EEOC takes a broad view when defining each element:

1. An employee's participation in a protected activity, generally a complaint of discrimination or harassment.
2. A materially adverse action taken by the employer/manager against the employee.
3. A causal connection between the protected activity and adverse action.

The small business fact sheet provides a list of actions taken by applicants and employees that are protected from retaliation:

- taking part in an internal or external investigation of employment discrimination, including harassment;
- filing or being a witness in a charge, complaint, or lawsuit alleging discrimination;
- communicating with a supervisor or manager about employment discrimination, including harassment;
- answering questions during an employer investigation of alleged harassment;
- refusing to follow orders that would result in discrimination;
- resisting sexual advances, or intervening to protect others;
- reporting an instance of harassment to a supervisor;
- requesting accommodation of a disability or for a religious practice; or
- asking managers or coworkers about salary information to uncover potentially discriminatory wages.

Protected Activity. In the Commission's view, playing any role in an internal investigation (even in support of the employer) should be deemed to constitute protected participation. For example, an employee can issue a direct complaint ("participation") or engage in "protected opposition" by communicating explicitly or implicitly opposition to perceived employment discrimination. According to the EEOC, an employee may make a broad or ambiguous complaint of unfair treatment because they may not know the specific requirements of the anti-discrimination laws and such communication would be considered protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination.

While the Guidance states that the manner of opposition must be reasonable, the Guidance points out that the scope of the opposition clause is not limited to complaints made to the employer directly, and may include complaints made to coworkers, an attorney, others outside the company, or even publicly. According to the EEOC, employees' complaints or opposition activities will be protected as long as their actions are based on reasonable, good faith that their assertions are accurate. Nonetheless, opposition to perceive discrimination "does not serve as a license for the employee to neglect job duties."

Adverse Action. The Guidance seeks to expand the definition of "adverse action" to include activity that could be reasonably likely to deter protected activity even if it has no tangible effect on a person's employment. According to the EEOC, adverse actions can be activities that are not work-related, or take place outside of work, and may even be taken against a third party who is closely linked to a complaining employee.

Causal Connection. The Guidance also expands what constitutes a causal connection between a protected activity and adverse action. Under the Commission's interpretation of the "but-for" causation standard articulated in [*University of Texas Southwest Medical Center v. Nassar*](#), that there can be multiple "but-for" causes, and retaliation need only be *one* of those but-for causes in order for the employee to prevail. Moreover, citing a Seventh Circuit decision ([*Ortiz v. Werner Enters., Inc.*](#)), the Guidance notes that causal connection may be established by combining different pieces of circumstantial evidence into a "convincing mosaic" showing retaliatory intent. Citing a [decision](#) where a termination that occurred five years after an employee filed a discrimination lawsuit defeated summary judgment, the Commission noted that it may go years back into a person's employment history to find evidence of either a protected activity or an adverse action.

Guidance for Employers. The Commission includes a section in the Guidance on “promising practices” that it suggests may help reduce the risk of retaliation violations. While adhering to these practices is not a safe harbor, employers should take note of the list provided by the EEOC:

- Including clear anti-retaliation language in written employment policies that provide practical guidance on what retaliation is and how it is avoided, with examples of conduct that managers, supervisors, and decision makers may not realize are actionable;
- Taking proactive steps for avoiding actual or perceived retaliation, including practical guidance on interactions by managers and supervisors with employees who have lodged discrimination allegations against them;
- Instituting a reporting mechanism for employee concerns about retaliation, including access to a mechanism for informal resolution; and
- Providing a clear explanation to employees that retaliation can be subject to discipline, up to and including termination;
- Providing all parties and witnesses to an alleged act of discrimination with information about how to avoid engaging in retaliation, and how to report alleged retaliation; and
- Ensuring that someone with special knowledge of EEO guidance reviews proposed employment actions to ensure they are based on legitimate, non-discriminatory, non-retaliatory reasons.

