

EEOC REPORT ON CHARGE STATISTICS SHOWS CONTINUED RISE IN RETALIATION CLAIMS

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JANUARY 15, 2010

Introduction

Earlier this month, the EEOC posted its [charge statistic report](#) for fiscal year 2009. Once again, the statistics show a near record number of charges filed, with only a slight decrease from a record setting 2008. While filings for race, sex, religion, and national origin discrimination have all remained fairly constant, the report shows an upward trend in retaliation and disability charges. In 2009, there were 10,000 more, retaliation charges filed than in 2006, with disability charges increasing by 5,000 over the same period. Recent amendments to the Americans with Disabilities Act and favorable court rulings, together with the overall aging of the population, are the most likely cause for the increase in disability claims. But what are the reasons for the increase in retaliation claims? This alert focuses on some likely reasons for this trend, the components of a retaliation claim, the risks presented by such a claim, and offers employers suggestions on how to avoid claims for retaliation.

What is a Claim for Retaliation?

Title VII retaliation claims generally require proof that (1) the plaintiff engaged in a protected activity (e.g., filing a complaint of discrimination or harassment, or assisting others in doing so); (2) an adverse employment action occurred (e.g., discipline, adverse change in work conditions); and (3) a causal link exists between the protected activity and the adverse employment action. Usually, an employer's best defense is that one of these elements is missing from the plaintiff's case. In many cases, the employer claims that there was no "causal connection" between the events. For example, a common fact pattern is as follows: employee makes a report of sexual harassment with the employer in January; this same employee is then terminated in June of the same year as part of a reduction of forces; the employee

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argues she was selected for terminated in retaliation for filing her claim of sexual harassment; the employer responds that the employee was lawfully terminated for reasons completely unrelated to the sexual harassment filing. Thus, the employer claims that there was no “causal connection.” If unresolved, the case proceeds to court and, ultimately, trial.

Why Are Retaliation Claims Increasing?

In 2006, the United States Supreme Court decision in *Burlington N. & Sante Fe Ry. Co. v. White* significantly lowered the standard claimants must prove to win a retaliation claim. Prior to *White*, employees in most courts could only recover when they established an adverse and “ultimate employment decision,” such as being fired or demoted. In *White*, the Court expanded this definition of “adverse employment action” to include not only “ultimate employment decisions” but also any action which would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” As a result, the scope of actionable conduct now allows employees to recover with evidence of minor changes in the terms and conditions of their employment.

In addition, last year, the United States Supreme Court again expanded the scope of retaliation claims that may be brought under Title VII. In *Crawford v. Metro. Gov’t of Nashville and Davidson County*, the Court held that Title VII protects an employee from retaliation when the employee speaks out about his or her own discrimination and when the employee speaks out about discrimination during an employer’s investigation into another employee’s complaint of discrimination. Accordingly, if the employee who participated in a sexual harassment or other discrimination investigation is later subjected to an adverse employment action, he or she can claim the employer retaliated against him or her for disclosing the information in response to questioning during the investigation.

As a result of these high-profile decisions, it is not surprising to discover claimants and their attorneys are filing an increased number of retaliation claims. It is now common for an employer to receive a charge alleging both discrimination and retaliation. With the lower standards of proof, retaliation claims are much easier for claimants to sustain and make them a much more attractive option for purposes of litigation.

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Why Do So Many Retaliation Claims Succeed When the Underlying Claim of Discrimination Fails?

It is important to keep in mind that a claim for “retaliation” under Title VII focuses on an employer’s alleged response to an employee’s report of discrimination or participation in an investigation of discrimination and not to the validity of the underlying assertion of discrimination. For example, in one case, an employee filed multiple claims of race and sex discrimination claims against her employer over of a multi-year period. The employee continued in her position with the employer while these claims were investigated, and then filed a lawsuit against the employer. While the discrimination claims were still pending in federal court, the employer terminated the employee for what it claimed was falsification of company records and other policy violations. The employee amended her complaint to add a count for “retaliation,” and the employer filed a motion for summary judgment on all claims. The District Court awarded summary judgment to the employer on all claims, and the employee appealed.

On appeal, the federal Circuit Court disagreed with the District Court, and held that the lower court’s dismissal of the underlying discrimination claims could stand, but reversed the District Court’s decision with respect to the retaliation claim. In ruling on the issue of retaliation, the Court held that there was evidence to suggest that the employer’s proffered reasons for plaintiff’s termination were pre-textual. According to the court, it is improper for an employer to wait for a “legal, legitimate reason to fortuitously materialize” and then use it to “cover up his true longstanding motivation for firing the employee.”

Likewise, in a recent jury trial in the case *Gerszten v. Univ. of Pittsburgh Cancer Inst. Cancer Ctrs. (W.D. Pa. 2009)*, a doctor alleged that she had been passed over for promotions that ultimately went to less-qualified male doctors. She also questioned how the employer was evaluating her female colleagues for promotion. Because of these actions, the doctor alleged that her employer refused to renew her employment contract and filed Title VII claims for discrimination and retaliation. After trial, a jury found for the doctor in the amount of \$3.7 million on the retaliation claim, but found against the doctor on her underlying claims of discrimination. This case is almost identical to a recent Colorado verdict awarding a plaintiff \$3 million against United Airlines after finding that she had been retaliated against due to complaints of sex discrimination. As in the *Gerszten* case, the Colorado jury also found that the plaintiff failed to establish her underlying discrimination claim.



As these court cases demonstrate, employers must use caution following an employee's report of discrimination so as not to permit a finding of retaliation. Courts and juries alike know that it is hard for an employee to remain neutral in response to claim that he/she has acted in a discriminatory manner. It is only human nature for this employee to show some sort of emotional reaction. In fact, it is also normal for co-workers to occasionally respond by protecting a co-worker whom they believe may be unfairly accused. Many court decisions have noted the normal "taking of sides" that happens in a workplace following an accusation of discrimination or harassment. Consequently, it is easier for a claimant to piggy-back on this general understanding of "human nature" and establish a claim for retaliation but fail in establishing a claim for discrimination. The goal for the employer is to prevent this somewhat normal flow of events.

How Can Employers Prevent Retaliation Claims?

There are many steps employers can and should take to reduce the risk of retaliation claims. In particular, employers can:

- Review policies against discrimination and harassment to ensure they contain an express statement against retaliation and provide for a reporting process for retaliation claims; alternatively, create a separate anti-retaliation and reporting policy; make sure all of these policies describe the consequences for violation the prohibition against retaliation;
- Train all employees on what constitutes retaliation, and train managers and supervisors on how to respond when a complaint is brought to their attention;
- When a report of discrimination or harassment is filed, provide the claimant with a copy of the policy against retaliation and explain the reporting policy; communicate that the employer takes retaliation complaints seriously and encourage the claimant to report any trouble immediately; follow-up with the claimant on a regular basis and ask whether any incidents of retaliation have been perceived (document all of these interactions in a separate memo);
- In addition, when a report of discrimination or harassment is filed, provide specific training to pertinent managers, supervisors and co-employees concerning the law of retaliation and their obligations with respect to acting in a non-retaliatory manner;



- Investigate any and all claims of retaliation as independent claims; consider having a different investigator review the allegations separate from the original investigator;
- Carefully consider any changes to the terms and conditions of an employee's responsibilities following a claim for discrimination and whether this change might be viewed by a court or jury as "detering a reasonable employee from engaging in protected activity;" and finally,
- Act consistently in enforcing anti-retaliation policies.
- Provide a mechanism for employees to immediately report perceived retaliatory conduct.
- Be proactive. Schedule regular meetings with employees who may be candidates for retaliation to make sure that they have not experienced adverse changes to their work environment.

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