Pre-Conference Special Briefings

STAYING POWER

RETALIATION CLAIMS STILL TOP THE CHARTS AFTER A DECADE

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Staying Power: Retaliation Claims Still Top the Charts After a Decade

Presenters
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Why Do We Care?

- Dramatic increase in retaliation charges filed – and keeps climbing
- 46% of all charges in FY 2016; 48.8% of all charges in FY 2017
- 51.6% of all charges in FY 2018
- Highest category 10th year in a row (leads race charges by 19.4 percentage points)
- EEOC Enforcement Guidance on Retaliation and Related Issues (2016)
- More likely to succeed, greater damage potential, favored by plaintiffs’ counsel in litigation
- Depending on geographic location, juries reluctant to conclude racism/sexism, but not reluctant to conclude retaliation
What is Retaliation?

- Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because he or she engaged in protected activity.

What is Actionable Retaliation?

- Title VII defines protected activity as:
  - Opposition to a practice believed to be unlawful discrimination
    » Must be based on reasonable, good-faith belief that the complained practice violates anti-discrimination law
  - Participation in a covered proceeding
Materially Adverse Actions

- Courts all over the map
- Anything that dissuades a reasonable worker from making or supporting a discrimination claim
- PIP, scrutiny, actions away from workplace, exclusion from lunches
- Fact-specific analysis

Not Just Title VII

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EEOC Enforcement Guidance on Retaliation and Related Issues

- [https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm](https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm)
- Issued August 29, 2016; replaced 1998 Guidance
- Applies to Title VII, ADEA, ADA, EPA, and GINA
- Describes EEOC’s position on law, remedies, and examples

EEOC Enforcement Guidance “Promising Practices”

- Written policies
- Training
- Anti-retaliation advice and individualized support for employees, managers, and supervisors
- Proactive follow-up
- Review of employment actions to ensure EEO compliance
Get Your House in Order

- Follow best discipline and discharge practices (consistency, documentation, timing)
- Encourage a positive compliance culture
- Establish and enforce strong written policies
- Train and communicate regarding culture and policies

Encourage a Positive Compliance Culture

- Critical to create a culture encouraging reports, promptly investigating them, and taking prompt remedial action
- Potential issue if adverse action taken against reporting employee is close in time to report
Polling Question

- Do you have an internal bounty program?

Encourage a Positive Compliance Culture

- Consider an Internal “Bounty” Program
  - Pros:
    » Encourages internal report of issues
    » Enforces company’s compliance commitment
  - Cons:
    » Potential for false/exaggerated reports
    » Increased human and economic resources in investigations
    » Monetary cost in the “bounty”—other rewards could include praise in newsletter or broadcast email, personal telephone call from the CEO
Establish Written Policies

- Expressly require compliance with the law
- Explain in detail how, to whom, and when to report a violation or suspected violation
- Include a strong anti-retaliation policy with consequences
- Distribute policies multiple ways
- Review and update policies

Train and Communicate

- Communicate your commitment, and employee obligations, to all levels
- Policies and procedures work only if they are known and followed
- Include as part of employee and supervisor training
- Periodic reminders
- Make compliance everyone’s responsibility
Methods of Training, Communication, and Enforcement of Code of Conduct

- New Hire Orientation
- Posters, Brochures, Wallet Cards
- Company Intranet
- Compliance Hotline/Ethics Help Line
- Training Modules
- Corrective/Remedial Action (publicize if no confidentiality concerns)

Monitor

- Training and communication not always enough
- Must set up monitoring
- Don’t let rogue managers take action without HR or other oversight
- Administratively painful, fiscally responsible
Top 10 Takeaways

1. Use best practices for performance, discipline, and discharges
2. Update and scrupulously follow policies
3. Create and reinforce a consistent compliance culture
4. Train and evaluate supervisors on protected conduct and responding properly
5. Fairly investigate all concerns, assign a handler, close the loop, and follow-up

Top 10 Takeaways

6. Create a direct line of communication to voice future concerns (consider anonymous hotline)
7. Identify impending episodes at risk of being retaliatory and monitor closely
8. Consider limiting/changing decision-makers
9. Take control after a retaliation claim and be consistent
10. Employ “Promising Practices” per EEOC Guidance
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