The State Of Play For Retaliation Claims

Insights
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It has been two years since the U.S. Equal Employment Opportunity Commission (EEOC) published its enforcement guidance on retaliation and related issues in late August 2016. Since that time, the country elected a new president who has installed an administration that is focused on starkly different priorities than those of the prior administration. Not only that, but the past 18 months have also seen intense interest and awareness of sexual harassment with the rise of the #MeToo movement and nightly news accounts of sexual misconduct in the workplace. Against this backdrop, what has become of the EEOC policies on retaliation under Title VII? And, where will it go from here?

The Basics

Perhaps it is worthwhile to examine what the EEOC—and federal courts—consider to be unlawful retaliation before going much further. The EEOC defines "retaliation" as "when an employer takes a materially adverse action because an applicant or employee asserts rights protected by the EEO laws." This may be in the form of "participation" in protected activity, or "opposition" to unlawful activity.

In many instances, the legal question in a claim for retaliation is whether the adverse action (such as a demotion or termination) was taken because the employee asserted participation or opposition rights under Title VII or other EEO laws. In years past, federal courts have reached a general consensus about the proper standard for making this determination. Generally, to earn the right to take a retaliation claim to trial, an employee must offer evidence of: (1) statutorily protected activity; (2) a materially adverse job action; and (3) a causal connection between the two. If the employee can show that they would not have experienced the adverse action "but for" the protected activity, they have stated a prima facie claim for retaliation.

What Do The Numbers Say?

The number of retaliation charges received by the EEOC in recent years has steadily increased. In 2007, the agency received 18,198 retaliation charges, constituting approximately 22 percent of its overall charge volume. But by 2017, the number of retaliation charges has risen to 41,097, which makes up nearly half of all charges received.

And this uptick in the volume of charges does not even reflect the number of additional retaliation charges received annually by state and local equal employment opportunity agencies. Clearly, the

issue of workplace retaliation is a problem that is bubbling closer to the surface—one that, at times, may be even more challenging for employers than the underlying discrimination from which it usually springs.

Expanded View Of Protected Activity

Many court decisions discuss what actions constitute an adverse job action, and then describe what is necessary to establish the necessary "but for" nexus with the protected activity. A question that often remains debatable, and continues to be examined by the courts, is what constitutes "protected activity."

As noted above, an employee engages in protected activity when they participate in an EEO-related activity or oppose discrimination. An employee cannot just oppose any workplace conduct and claim that they are engaging in protected activity; rather, the employee must have a reasonable belief that the conduct they oppose violates Title VII or other EEO laws. As outlined in its 2016 enforcement guidance, the EEOC has taken—and continues to take—a broad, inclusive approach to the umbrella of protected activity.

One area in which this expansive view has become most noticeable is found within the emerging area of discrimination based on sexual orientation. In *Hively v. Ivy Tech Community College*, the 7th Circuit Court of Appeals ruled that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII. Since then, other federal courts have reached the same conclusion, including the recent 2nd Circuit decision in *Zarda v. Altitude Express*. Numerous district courts throughout the country have also adopted similar positions, though there continues to be disagreement about the extent to which Title VII protects sexual orientation.

While the courts have not yet reached a consensus on this issue, the EEOC continues to take the enforcement stance that workplace discrimination based on sexual orientation constitutes sex discrimination under Title VII. Consequently, the EEOC holds the view that an employee opposing discrimination based on sexual orientation is similarly engaged in protected activity under the law.

This is because, given the legal developments in this area of the law, an employee may have a reasonable belief that sexual orientation discrimination is unlawful under Title VII and, as a result, believe that opposing such discrimination is a protected activity. In fact, even though certain federal appeals courts have only recently held that sexual orientation is a form of sex discrimination under Title VII, several district courts have held that, even if Title VII does not protect against sexual orientation discrimination, an employee's opposition to such discrimination can still give rise to a claim of unlawful retaliation.

Thus, so long as an employee holds the reasonable belief that they were opposing unlawful discrimination, those courts have reasoned, such opposition constitutes protected activity under the law. For example, in *Swift v. Countrywide Home Loans*, a 2011 federal court in New York concluded that "the fact that Title VII does not protect against sexual orientation discrimination does not

necessarily negate plaintiff's good faith belief that he engaged in protected activity when making a complaint of discrimination."

As a result of its expanding view of sex discrimination, the EEOC has correspondingly stretched its definition of protected activity under the law. The agency recently filed an amicus brief in which it argued that an employee's belief that Title VII prohibits sexual orientation discrimination was reasonable because of the rapidly changing legal landscape and the growing public opinion that it is impermissible to discriminate based on sexual orientation.

EEOC Continues To Champion Retaliation Cases

Additionally, the EEOC continues to aggressively pursue retaliation claims on behalf of workers. These retaliation claims are often coupled with underlying allegations of sexual harassment.

In June, for example, the EEOC sued Sierra Creative Systems, a company located in Paramount, California, for alleged sex-based harassment, failure to prevent and correct ongoing sexual harassment, and retaliation against female employees. Similarly, the EEOC is currently pursuing claims against Georgina's Taqueria, a restaurant in Traverse City, Michigan, for violating federal law by subjecting female employees to repeated sexual harassment and retaliating against employees for opposing that harassment. In another recent case filed by the EEOC in Arizona, a federal district court ordered a Scottsdale, Arizona wine bar to pay $100,000 for sexual harassment against two servers because of their actual or perceived sexual orientation and for retaliation against one for complaining about it. These lawsuits, among others, typify the interconnectedness between claims of sexual harassment and those of retaliation.

Conclusion

In the evolving landscape of workplace discrimination, the country's awareness of sexual harassment continues to increase and the courts continue to grapple with questions relating to the definition of sex discrimination. There seems little question that issues concerning retaliation are virtually inseparable from the underlying claims of discrimination that frame these discussions.

Not only that, but the EEOC continues to take a broad view of what constitutes discrimination and, as a result, what it deems "protected activity" giving rise to potential claims for retaliation. As the statistics and recent decisions show, retaliation will continue to be at the forefront of employment discrimination litigation for many years to come.

A version of this article originally appeared in EmploymentLaw360. For more information, contact the author at AStrauss@fisherphillips.com or 214.220.8303.

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