

APRIL 27, 2016 | DISCRIMINATION, HARASSMENT & RETALIATION

As Retaliation Claims Rise, Employers Face New Challenges Under Employment, OSHA and Health Care Laws

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✖ As we discussed in [a recent webinar](#), employers are facing an increased risk of defending a retaliation complaint as administrative policy changes and expansive federal laws make asserting these claims easier for employees.

Whistleblower and related-retaliation charges are on the rise throughout the country, and the Occupational Safety and Health Administration (OSHA), tasked with fielding complaints under 22 laws, is also becoming more aggressive. The Equal Employment Opportunity Commission (EEOC) enforces the anti-retaliation provisions of several laws, including Title VII and the ADA. In addition, sweeping laws like the Affordable Care Act (ACA) are creating increased fodder for discrimination complaints. Armed with increased financial resources, federal investigators now aim to be more receptive to complaints as part of what the EEOC and OSHA view as needed reforms of their whistleblower enforcement arm.

Claims on the Rise

Retaliation claims under Title VII have grown substantially over the years. More than a decade ago, these claims made up less than a quarter of all EEOC charges, but since then they have increased exponentially. Now not only do they make up the most significant portion of claims, they are almost [50 percent of all claims](#) brought. OSH Act 11(c) claims have also been increasing, and are now about double the number from 10 years ago. Despite the large number of 11(c) claims, however, about 72 percent of them are withdrawn or dismissed, and frequently are settled. Less than 1 percent actually receive a merit determination from OSHA.

Procedurally, there are important timing differences between an EEOC charge and an 11(c) claim. An EEOC charge must generally be filed within 180 days of the alleged retaliatory act (or 300 days if there is an equivalent state anti-retaliation statute), but there are no specific time constraints on a determination by the EEOC. If the investigation lasts more than 180 days, the employee can file suit in federal court. By contrast, OSHA whistleblower complaints are investigated on a much shorter time frame: charges must be filed within 30 days of the occurrence, and investigators are directed to provide a determination within 90 days. Importantly, unlike EEOC charges, under 11(c) there is no private cause of action for the employee; only OSHA can pursue an action

in federal court.

New Burden of Proof under OSH Act 11(c)

In January 2016, OSHA released [changes to its policies](#) for field staff to investigate retaliation charges. Under the new standard, to proceed on a claim, OSHA need only find “reasonable cause” that a judge may eventually find that a violation occurred. The old standard required investigators to find several elements of a *prima facie* case showing that a violation actually occurred. Thus, the new guidance is a much lower evidentiary burden of proof – and that means it is easier on the complainant in the early stages.

As OSHA puts it:

“Under the reasonable cause standard, OSHA must believe, after evaluating all of the evidence gathered in the investigation from the respondent, the complainant, and other witnesses or sources, that a reasonable judge *could* rule in favor of the complainant. The threshold OSHA must meet to find reasonable cause that a complaint has merit requires evidence in support of each element of a violation and consideration of the evidence provided by both sides or otherwise gathered during the investigation, but does not generally require as much evidence as would be required at trial.”

Because OSHA makes its reasonable cause determination prior to a hearing, the reasonable cause standard is “somewhat lower” than the preponderance of the evidence standard that applies following a hearing, according to the Agency.

“Accordingly, OSHA’s investigation must reach an objective conclusion – after consideration of the relevant law and facts – that a reasonable judge could believe a violation occurred. The evidence does not need to establish conclusively that a violation *did* occur.”

OSHA Assistant Secretary David Michaels has stated that the shift in the burden of proof is intended to reduce merit dismissals of complaints. He told members of the Whistleblower Protection Advisory Committee – an advisory panel OSHA formed to tackle rampant problems in the division – in September 2014:

“We are working on a new policy memo clarifying the agency’s position regarding the burden of proof required in whistleblower investigations. This memo will change the burden of proof to be based on reasonable cause that the violation occurred, which is a lesser burden to prove than a preponderance of evidence. OSHA and the Office of Solicitor of Labor have looked at this issue. I think we’ve come to a very valid conclusion.”

Despite this lower burden of proof, to prevail on a whistleblower charge, the employee will have to show three elements – that a protected activity occurred, that an adverse action was taken, and that there was a causal connection between the two.

Retaliation Claims Under the ACA

As the ACA's Employer Mandate becomes effective and underway for many large employers, we are seeing a growing trend of ACA-associated whistleblower claims that all employers should watch. Under the ACA, employers may not discriminate against an employee for receiving benefits under the ACA or for voicing a complaint about alleged non-compliance with the ACA, or otherwise challenging an employer's policy or actions with respect to health insurance mandates under the federal law. Similar complaints can also be brought under Section 510 of the Employment Retirement Income Security Act (ERISA) if an employer interferes with rights related to an employee benefit plan.

The question that arises from ACA-related claims under ERISA is whether the employer took action with the specific intent to interfere with an employee's attainment of a right to which an employee is or may be entitled. Recent case law indicates that a reduction in work hours in light of the ACA's 30 hour full time mandate could very well be a violation of ERISA 510.

The restaurant chain Dave & Busters is defending a class action after allegedly trying to reduce employees' hours and lay off workers expressly to sidestep the ACA's new requirements. The company sought to have the case dismissed on the grounds that the employees had no entitlement "to benefits not yet accrued" under the law, but the federal court in New York [rejected that argument](#), finding "unlawful motivation" by the employer to deny benefits to which the plaintiffs "may become entitled." The court stated that the critical element is the "intent of the employer."

In light of this decision, employers must be very cautious in communicating with employees so that the intent of an employment action cannot be construed as interference with benefits to which they are or may be entitled under the ACA. How business decisions about workplace restructuring or scheduling are made should be closely crafted with legal counsel and communicated appropriately to staff to avoid any inference of a specific intent to interfere with health benefits.

How To Respond to a Retaliation Charge

If you find yourself facing a retaliation charge, there are several steps to place the company's defense in the best possible position. If the complaining worker is still employed, it is imperative to ensure there is no further retaliation that the worker could claim. Filing a charge is itself protected activity under the law, and a company should have a zero-tolerance policy for retaliation.

Upon receipt of a charge, an employer should conduct its own investigation of the claim, including determining whether the charge is timely; collecting documents; interviewing employees; documenting the investigation and findings; and preparing a position statement responding to the allegations. The goal of the position statement is to give context to the charging party's allegations from the employer's point of view, to explain the actions in a legal context, and to tell a story that is easy for the investigator to follow, with backup documentation. Employers should be mindful that, in a [new policy shift](#), the EEOC and OSHA will disclose the position statement and any non-confidential documents attached to the position statement to the charging party; therefore, thoughtful consideration should be given to the information and documents disclosed.

Finally, it cannot be overstated that employers should vigorously train supervisors and everyone in management about compliance with whistleblower and anti-retaliation statutes, and to keep copious documentation related to

any adverse action taken against employees to show that it was not retaliatory. Keeping aware of the latest trends in whistleblower cases impacting employers of all sizes in all industries, and changes in policy by the enforcement agencies will help keep employers on their toes in this area that is fraught with potential legal landmines.