

# EEOC Offers Guidance on Protected Activity Preceding Retaliation Claims

## Labor & Employment Law Update

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Last month, the EEOC issued its *Enforcement Guidance on Retaliation and Related Issues*. Having last issued guidance on retaliation claims in 1998, the agency stated that an updated publication was necessary in light of the significant court rulings on these claims, as well as the increasing frequency of retaliation claims in administrative charges and lawsuits. Retaliation is now the most commonly alleged basis of discrimination.

Of particular interest, the EEOC discusses at length its position on various issues that arise in determining whether an employee has engaged in protected activity:

### "Participation" Protected Activity

"Participation" protected activity includes making a charge, testifying, assisting, or participating in any investigation or proceeding under anti-discrimination law. As compared with "opposition" protected activity, "participation" protected activity does not require a good faith, reasonable belief that the underlying alleged discrimination or harassment constitutes unlawful conduct.

### "Opposition" Protected Activity

"Opposition" protected activity includes any report, complaint, or other communication that an employee makes opposing what he or she reasonably and in good faith perceives to be discrimination or harassment.

The EEOC takes a broad view of this type of protected activity, stating that it may encompass complaints that employees make to people outside of human resources and management, including reports made to coworkers, union officials, or even people outside of the company, such as an attorney.

The EEOC also notes that employees may engage in protected activity by raising complaints publicly or informing management of the intent to make a complaint (rather than actually making one).

## Reasonableness of the Complaint

Despite the EEOC's expansive view of protected activity, it does recognize some limitations. For example, the EEOC clarifies that the manner in which the employee opposes the alleged unlawful conduct must be reasonable.

Determining whether the employee acted reasonably is a "context- and fact-specific inquiry." However, the EEOC provides some clarification, noting that complaints including threats of violence and complaints made in an overly disruptive and excessive manner are not reasonable and, therefore, not protected activity. Further, the EEOC notes that engaging in protected activity does not immunize employees from discipline if the protected activity causes them to neglect their job duties.

## Protected Activity Regarding Harassment

The EEOC also offers guidance on protected activity relating specifically to complaints of harassment. An employee can complain of harassment in good faith even if the complained-of conduct is not yet severe or pervasive.

While one isolated inappropriate comment in the workplace may not rise to an actionable harassment claim, the EEOC takes the position that complaining about that one comment can create the basis for an actionable retaliation claim. Also, an employee engages in protected activity by resisting sexual advances of a superior, even if he or she does not separately report the advance.

## Compensation

An employee's inquiry about others' compensation rates, even when made to coworkers, may constitute protected activity if the context of the inquiry shows that the employee was trying to gather information in support of a potential discrimination claim. Therefore, employers with a policy that prohibits employees from discussing their pay should reevaluate in light of the EEOC's position on compensation inquiries, especially if the company issues discipline for violations of any type of pay secrecy policy.

For further information on the EEOC's Guidance on Retaliation Claims, [click here](#).

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