

NAVIGATING THE RISING TIDE OF RETALIATION CLAIMS

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Job Bias Charges Approach Record High in Fiscal Year 2010, EEOC Reports



- **EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010**
- ***EEOC had 36,258 retaliation charges filed representing the highest number of charges filed in 2010***
- ***Retaliation Surpasses Race as Most Frequent Allegation***

Elements of Retaliation

- **Opposition to discrimination or participation in covered proceedings**
- **Adverse action**
- **Causal connection between the protected activity and the adverse action**



Examples of Opposition

- Threatening to file a charge or other formal complaint alleging discrimination
- Complaining to anyone about alleged discrimination against oneself or others
- Refusing to obey an order because of a reasonable belief that it is discriminatory
- Requesting reasonable accommodation or religious accommodation

Standards Governing Application of Opposition Clause

- Manner of opposition must be reasonable
- Opposition need only be based on reasonable and good faith belief
- Person claiming retaliation need not be the person who engaged in opposition
- Practices opposed need not have been engaged in by the named respondent

Protected Activity: Participation

- Participation-person made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under Title VII, ADA, ADEA, EPA or GINA
- Protected activity regardless whether the allegations in the original charge were valid or reasonable

Participation

- Person claiming retaliation need not be the person who engaged in participation
- The practices challenged in prior or pending statutory proceedings need not have been engaged in by the named respondent

Adverse Action Does Not Have to be “ultimate employment action”

- Burlington Northern and Santa Fe Railway Company v. White, 548 U.S._____, 126 S.Ct. 2405 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process).

Remedies

- Temporary or Preliminary Relief-allows a court to stop retaliation before it occurs or continues.
- Such relief is appropriate if there is a substantial likelihood that the challenged action will be found to constitute unlawful retaliation, and if the charging party and/or EEOC will likely suffer irreparable harm because of the retaliation.

Compensatory and Punitive Damages

- Availability of damages for retaliation under ADEA and EPA
- Punitive damages-was action undertaken “with malice or with reckless indifference to the federally protected rights of an aggrieved individual”?

Retaliation Charges filed in Philadelphia District Office

- FY 2011 1336 of 3568 charges (37.44%)
- FY 2010 1318 of 3648 charges (36.13%)
- FY 2009 1027 of 2755 charges (37.28%)
- FY 2008 688 of 2108 charges (32.64%)
- FY 2007 697 of 2240 charges (31.12%)
- FY 2006 551 of 1817 charges (30.32%)

Retaliation Charges filed in Pittsburgh Area Office

- FY 2011 530 of 1540 charges (34.42%)
- FY 2010 656 of 1875 charges (34.99%)
- FY 2009 483 of 1288 charges (37.5%)
- FY 2008 524 of 1381 charges (37.94%)
- FY 2007 421 of 1344 charges (31.32%)
- FY 2006 322 of 1005 charges (32.04%)

Percent lawsuits alleging retaliation filed by Philadelphia District

- FY 2009: 37 lawsuits filed, 11 included retaliation allegation (29.7%)
- FY 2010: 21 lawsuits filed, 8 included retaliation allegation (38%)
- FY 2011: 19 lawsuits filed, 6 included retaliation allegation (31.5%)

Lawsuits resolved by Philadelphia District Office

- FY 2009: 49 cases resolved, 24 included retaliation allegation (48.9%). Total monetary value of all resolutions: \$29,902,137.08.
- FY 2010: 28 cases resolved, 13 included retaliation allegation (46%). Total monetary value of all resolutions: \$6,104,500.
- FY 2011: 28 cases resolved, 9 included retaliation allegation (32%). Total monetary value of all resolutions: \$31,386,235.

Questions?

- Please call:

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