

EMPLOYMENT LAWSCENE ALERT: DOCUMENTATION MATTERS!

If you call your employment lawyer and tell her that you want to terminate an employee for performance issues, one of the first questions will be “What documentation do you have?” Recently, the Seventh Circuit confirmed just how crucial documentation can be when defending an employment lawsuit.

In *Rozumalski v. W.F. Baird and Associates*, decided August 22, 2019, the employee had been sexually harassed by her supervisor, who was investigated by the employer and terminated once the investigation confirmed the allegations. However, after her supervisor’s termination, the employee was eventually terminated from her job and filed a federal complaint alleging that she had been retaliated against for her original sexual harassment claim and for other complaints stating that her previous supervisor who had been terminated had negatively influenced her new boss in retaliation. The company testified that the employee was terminated for legitimate, non-discriminatory reasons, namely, performance issues. The company stated that the employee struggled with her business development responsibilities, submitted a report that was grossly below company standards and required significant reworking, and was consistently late to work. These performance issues were documented in her written performance evaluation and listed as “needs improvement.” The employee then continued to receive negative performance evaluations, which provided specific examples to support the company’s concerns about her work, and was eventually placed on an Employee Improvement Plan. When she violated a term of her Employee Improvement Plan, she was terminated.

The Seventh Circuit acknowledged that a prior complaint of harassment could impact a victim long after the incident. However, it found that the employee’s new supervisor was not aware of her original harassment complaints until at least five months after the first negative performance review and, therefore, could not have been motivated by a retaliatory animus. Additionally, the individual who made the ultimate decision to terminate the employee’s employment did not know about the original complaints and was motivated solely by the employee’s violation of the Employee Improvement Plan. Finally, the Seventh Circuit observed that the employee’s complaints that her new supervisor was negatively impacted by her previous supervisor could not have been a basis for retaliation because her documented performance issues predated her complaints.

This case stresses the importance of employers properly documenting employee performance issues and creating honest performance evaluations that accurately describe and document employee performance issues. Performance evaluations should be focused on critical performance issues measured against the employer’s legitimate business

expectations. When an employee fails to meet a legitimate business expectation, the performance evaluation should reflect that deficiency. Too often, employers want to terminate underperforming employees without supporting documentation. For example, when an employee's most recent performance evaluations are reviewed prior to termination and there is absolutely no indication or evidence of poor or underachieving performance, the company's business records do not match the reality of the employee's performance, and the termination decision becomes more problematic.

The Seventh Circuit's decision could have been much different for this employer if the employee's performance issues had not been documented or had not been documented accurately. As demonstrated, good and accurate documentation is vitally important—it may be the difference for your company in winning or losing a lawsuit.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES DRAFT PROPOSED ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES

Recently, the U.S. Equal Employment Opportunity Commission (“EEOC”) published Draft Proposed Enforcement Guidance on Retaliation and Related Issues in order to get public input. The EEOC handles employment discrimination laws, including retaliation claims by employees who engage in “protected activity,” such as employees who complain about discrimination, file a charge of discrimination, or participate in an employment discrimination proceeding. Despite the fact that retaliation is the most frequently alleged type of charge filed with the EEOC, it last published guidance on the matter in 1998. It has used this Draft Proposed Guidance as a way to clarify its stance on certain points of law and an attempt to expand the definition of retaliation.

Among the proposed changes is the EEOC's rejection of the “manager rule,” whereby an employee who has a job responsibility that involves policing discrimination in the workplace (e.g., human resource manager) is not engaged in “protected activity” if that person is simply performing his or her job. The EEOC proposes to focus on the “oppositional nature of the employee's complaints or criticisms” instead of the employee's job duties. Therefore, while someone such as a human resources manager would not always be protected under the retaliation provisions, that person would also not have to step outside of their role and assume a position adverse to the employer to receive protection.

The EEOC considers internal complaints to be included in the “participation” aspect of

retaliation, regardless of whether a formal charge is filed. Additionally, the EEOC proposes that an individual engaged in “participation” in an employment discrimination proceeding does not have to be “reasonable” in either the belief that discrimination occurred or in how the employee presents himself. In fact, the participation could be wrong, defamatory, or malicious. Oppositional activity must still be objectively reasonable to be protected.

In a nod to the National Labor Relations Board, which has held that discussing compensation among employees constitutes protected, concerted activity, the EEOC’s Draft Proposed Guidance state that conversations about pay “may constitute protected opposition under the equal employment opportunity laws, making employer retaliation actionable based upon the facts of a given case.” The EEOC gives the example of an employee who discusses the fact that she is being discriminated against due to her gender, as evidence by her lower pay than similarly situated male employees.

The Draft Proposed Guidance also expand on the definition of “materially adverse employment action” to include: disparaging the employee to others or in the media; making false reports to government authorities; threatening reassignment; scrutinizing the employee’s work or attendance more closely than that of other employees, without justification; giving an inaccurately lowered performance appraisal or job reference, even if not unfavorable; removing supervisory responsibilities; engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently “severe or pervasive” to create a hostile work environment; requiring reverification of work status, threatening deportation, or initiating other action with immigration authorities; and taking any other action that might deter reasonable individuals from engaging in protected activity. Although the EEOC acknowledges that some courts would find these actions insufficient to constitute a materially adverse employment action, it believes that this interpretation is supported by Supreme Court reasoning.

The public has until February 24, 2016 to submit input, and after that, final guidance will be published. Although, even when finalized, the guidance is simply a reference tool for investigators and not law, employers should be aware of the EEOC’s new proposed guidance, particularly the above points. Not only will the EEOC be using these in order to issue initial determinations, but these are items the EEOC is likely to aggressively pursue in litigation as well.

SUPREME COURT ADOPTS HEIGHTENED

STANDARD FOR EMPLOYEE RETALIATION CLAIMS

Recently, the Supreme Court of the United States issued its decision in *University of Texas Southwestern Medical Center v. Nassar*, which raises the bar for employees who file Title VII retaliation claims against their employers.

Title VII protects employees from discrimination based on race, sex or gender, religion, or national origin. Title VII also protects employees against certain forms of retaliation. Specifically, Title VII prohibits an employer from retaliating against an individual who has opposed, complained of, or participated in any complaint of unlawful employment practices by the employer. Retaliation can take many forms, including actions relating to terms and conditions of employment (*i.e.* hiring, firing, promotions, *etc.*), disciplinary actions and even discriminatory acts that occur outside the workplace.

For an employee to prevail under Title VII for a claim of retaliation, the employee must show some causal link between an adverse employment action and the employee's protected activity. Although federal district courts have been divided on just what type of proof an employee must establish in order to succeed on a Title VII retaliation claim, the key inquiry has always been the employer's motivation. Some courts have allowed employees to prove retaliation claims by establishing that the employer's action or decision was motivated by the employee's complaint or other protected activity, even if the employer also had other lawful motives that caused the employer's action or decision. Other courts, however, have applied a more stringent standard that requires employees to prove that the employer would not have taken the challenged employment action "but for" the employee's complaint or engagement in other protected activity.

In *Nassar*, the Supreme Court clarified that in order to prove retaliation under Title VII, an employee must prove "but-for" causation - that the employee's complaint of unlawful employment practices was the "but-for" reason for the challenged employment action rather than just one of many reasons. Proving that a challenged employment action was motivated by discriminatory reasons, even if the employer's action was also motivated by other lawful reasons, is no longer sufficient to succeed with a retaliation claim.

What does the Court's decision mean for employers?

The Court's decision in *Nassar* is of particular significance because the number of retaliation claims filed by employees has significantly increased in recent years and has nearly doubled from 1997 to 2012, according to EEOC statistics. Requiring employees to prove "but-for" causation in a Title VII retaliation claim should make it easier for employers to succeed at the early stages of litigation and will hopefully curb the filing of frivolous claims that cost

employers time and money to defend. That is not to say that employers no longer need to apply or enforce anti-retaliation policies. Documenting performance problems and adhering to consistent disciplinary and termination practices continues to be of critical importance for employers as evidence of legitimate and non-discriminatory reasons for any challenged employment action.