Retaliation Claims on the Rise: What is an Adverse Employment Action?
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It is common knowledge that retaliation is against the law: that is, employers may not take any adverse action against an employee for complaining about discriminatory employment practices, or for participating in an investigation of discrimination claims. Despite employers' awareness of the prohibition against retaliation, the number of retaliation charges and lawsuits has sharply escalated in recent years. No fewer than 22,257 retaliation charges were filed with the Equal Employment Opportunity Commission (the "EEOC") in 2001, compared to only 7,900 such charges filed in 1991, a decade earlier. What's more, retaliation charges accounted for 27.5% of all charges filed with the EEOC last year. Making matters worse for employers, many plaintiffs whose underlying discrimination claims were dismissed have still won their retaliation claims by demonstrating that they suffered an adverse employment action as a result of lodging the discrimination complaint.

To state a claim of retaliation under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act, an employee must demonstrate that he engaged in statutorily protected activity (such as complaining of discrimination, filing a charge, or participating in an investigation); he suffered an adverse employment action; and there is a causal link between the statutorily protected activity and the adverse employment action. This definition of retaliation has proven to be less than a model of clarity, particularly with regard to the phrase "adverse employment action." Federal courts around the country have expressed widely divergent views on what constitutes an adverse employment action for purposes of a retaliation claim.

What Constitutes Adverse Action?

It is clear that employment decisions such as firing or demoting an employee, reducing his compensation, or denying him a promotion constitute adverse actions; it is unlawful to take these actions because an employee engaged in protected activity. What is unclear is whether less dramatic actions (such as threats, reprimands, and negative performance reviews) rise to the level of "adverse employment actions." Not surprisingly, the EEOC defines "adverse employment action" very broadly, so as to include any "adverse treatment that is reasonably likely to deter protected activity." See EEOC Guidance 8-15. Federal courts have not consistently embraced this definition, however.

Under the narrowest interpretation, an adverse employment action only encompasses "ultimate employment decisions," such as hiring, firing, demotion, denial of promotion or leave, or adverse pay decisions. This interpretation has been adopted by the U.S. Courts of Appeal for the Fourth, Fifth, Sixth and Eighth Circuits. See, e.g., Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997).
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For example, the Sixth Circuit recently concluded that the transfer of a female employee from the position of forklift operator to the more physically demanding position of track maintenance laborer did not constitute an adverse employment action, and therefore could not form the basis for a Title VII retaliation claim. *White v. Burlington Northern & Santa Fe Railway Co.*, 310 F.3d 443 (6th Cir. 2002). The Court reasoned that the plaintiff did not suffer from a salary decrease, a material loss of benefits or a less distinguished job title, or significantly diminished material responsibilities. Nor was the court persuaded that plaintiff’s transfer to a position requiring heavy lifting and more physically demanding tasks constituted a “demotion.”

The most expansive definition of “adverse employment action” has been adopted by the Ninth Circuit Court of Appeals, and has been followed by the First, Seventh, Tenth, Eleventh, and D.C. Circuits. Under this definition, which mirrors the EEOC’s definition, an action constitutes an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity. Thus, in these jurisdictions, a far broader array of personnel actions may constitute adverse employment actions, including lateral transfers, denial of flex time, negative job references and evaluations, and co-worker harassment. See e.g., *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994); *Knox v. Indiana*, 93 F.3d 1327 (7th Cir. 1996); *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000); *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996); *Passer v. Am. Chem. Soc’y*, 935 F.2d 322 (D.C. Cir. 1991).

In *Boswell v. Potter*, No. 01-16289, 2002 WL 31558091 (9th Cir. 2002), the Ninth Circuit ruled that an employee suffered an adverse employment action when warning letters were placed in his personnel file six months after he filed complaints against his supervisor with the EEOC. The court reasoned that the warning letters constituted an adverse employment action because they might have affected later discipline, and thus were “more than mere unimportant ‘feedback’ or ‘snubs’ having no effect on an employee’s record.” *Id.* at *1.

The D.C. Circuit recently opined that an adverse employment action occurs when there are “material adverse consequences affecting the terms, conditions, or privileges” of employment that a reasonable finder of fact could conclude caused him “objectively tangible harm…. To state the obvious, the employee must be worse off after the personnel action than before it; otherwise, he has suffered no objectively tangible harm.” *See Currier v. Postmaster General*, 304 F.3d 87 (D.C. Cir. 2002).

In a recent First Circuit case, the Court noted that “work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.” *Bishop v. Bell Atlantic Corp.*, 299 F.3d 53 (1st Cir. 2002). In this case, the
employee, a former telephone service technician, claimed that his employer retaliated against him for filing a complaint against his supervisor by (among other things) denying him credit for a job he performed and for placing him on a performance "action plan." The Court of Appeals concluded that neither of these actions rose to the level of an adverse employment action: the failure to credit him for completing a job had only a de minimis effect on his overall work performance numbers, and no effect on his pay; and placing him on an action plan resulted from the "routine application of pre-existing Company policy," and did not impose overly onerous burdens on the employee. Id. at 59.

The Second Circuit has adopted a more restrained interpretation, defining an adverse employment action as a "materially adverse change in the terms and conditions of employment." See Weeks v. New York State (Div. of Parole), 273 F.3d 76, 85 (2d Cir. 2001). Thus, according to the Second Circuit in Weeks, an adverse employment action can mean a termination in employment, a demotion (evidenced by a salary decrease), a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities. The allegedly retaliatory "notice of discipline" issued to the plaintiff in Weeks did not constitute an "adverse employment action" because "a criticism of an employee (which is part of training and necessary to allow employees to develop, improve and avoid discipline) is not an adverse employment action." Id. at 86.

How to Protect Your Organization From A Retaliation Claim

As this survey of cases shows, whether a particular personnel action constitutes an adverse employment action, which can form the basis for a retaliation claim, may depend on geography: the particular federal judicial Circuit in which the employer is based. Nevertheless, there are a number of measures all employers, regardless of location, can and should adopt to minimize the likelihood of retaliation claims, without having to keep abreast of the rapidly changing legal standards in this area.

Adopt, communicate and enforce a policy prohibiting retaliation: Encourage employees who lodge discrimination complaints to come forward immediately if they believe they are being retaliated against. Promptly investigate and resolve complaints of retaliation. Tell the complaining employee that retaliation will not be tolerated, and urge him to inform the company immediately if he believes he is being retaliated against.

Keep discrimination complaints confidential to the greatest extent possible: The smaller the universe of people who know about a complaint, the smaller the group who might be accused of impermissibly retaliating against the complaining employee. Thus, while it is usually not possible to keep a discrimination complaint completely
confidential (because to do so would make it impossible to investigate that complaint), it is important to disclose the complaint only on a "need to know basis," and with an accompanying admonition that (a) the complaint is confidential, and (b) retaliation is prohibited.

Take adverse employment action against a complaining employee only for legitimate purposes: In situations in which an adverse employment action follows an employee's protected activity, it is imperative that the employer be able to clearly demonstrate a legitimate, non-retaliatory reason for taking the adverse action. For example, consider the case of an employee who receives a written warning for poor performance and then complains that the written warning constitutes unlawful harassment. The employee's performance then continues to deteriorate, and the employer demotes the employee and reduces his compensation. In order to demonstrate that these disciplinary actions were not taken in retaliation for the employee's harassment complaint, it is imperative that the employer have objective and well-documented examples of the employee's unsatisfactory performance.