



3C's of EEO

Civility, Compliance, & Culture



Ethics and EEO Law


Taylor Hilton | Trial Attorney
U.S. Equal Employment Opportunity Commission
Philadelphia District | Cleveland Field Office

 EEOC Training Institute

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What laws does the EEOC enforce?

- ▶ The EEOC is charged with enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of the person's race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information.

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Why was the EEOC created?

- ▶ 1941: President FDR signs Executive Order 8802 prohibiting government contractors from engaging in employment discrimination based on race, color, or national origin.
- ▶ 1948: President Truman ordered desegregation of the Armed Forces by Executive Order 9981 to prevent race, color, religion, or national origin discrimination.
- ▶ 1961: President JFK signs Executive Order 10925 prohibiting federal contractors from discriminating on account of race and establishing the President's Committee on EEO.

Continued

- ▶ 1963: Congress passes the Equal Pay Act protecting men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.
- ▶ 1964: The Senate passes the Civil Rights Act of 1964- Title VII prohibits discrimination based on race, sex, color, religion, and national origin.
- ▶ 1972: The EEO Act of 1972 gives the agency litigation authority.
- ▶ 1990: GHWB signs into law the Americans with Disabilities Act of 1990.
- ▶ 1991: Civil Rights Act of 1991 expands Title VII- amendments include allowing parties request jury trials and allowing plaintiffs to recover compensatory and punitive damages.

Why do we enforce these statutes?

- ▶ 1) It's the law. A number of statutes give the EEOC the statutory authority to investigate and litigate employment discrimination cases.
- ▶ 2) As JFK said in his address to Congress "...above all, because it is right."

How do EEO laws and ethics interact?

- ▶ EEO laws provide the legal framework that prohibits discrimination based on protected characteristics (e.g. Title VII, ADA, ADEA, EPA, GINA)
- ▶ Ethics focuses on the moral principles and standards that guide an employer's behavior (fairness, respect, dignity).

The Intersection of Ethics and Law

- ▶ Common issues:
 - Retaliation
 - Leave policies
 - Failure to address harassment/investigate
 - Hiring decisions
 - AI

EEOC Cases Breakdown

January 1, 2022- November 21, 2024, the EEOC has filed 366 cases in Court.

- ▶ 127 involved a claim of retaliation.
- ▶ 124 involved a claim under the ADA.
- ▶ 142 involved a sex-based claim (this can include sex, sexual orientation, pregnancy, gender identity)

Ethics in EEO law

- ▶ Compliance with the law vs. ethical considerations
- ▶ Beyond mere compliance with Title VII, employers should create policies and practices that prevent discrimination and harassment.
- ▶ For example: Ensuring that all workers have access to/are aware of the company's policies, decision-making processes, and expectations.

Title VII- Retaliation

- ▶ Retaliation may occur when an applicant or employee reports unethical and/or unlawful employment actions.
- ▶ Retaliation may occur when an applicant or an employee complains on behalf of someone else or opposes a discriminatory practice.
- ▶ Retaliation may not be termination but may include lesser adverse employment actions.

What is Retaliation?

- ▶ Retaliation is the most frequently alleged basis of discrimination in the federal sector and the most common discrimination finding in federal sector cases.
- ▶ An employer may not fire, demote, harass, or otherwise retaliate against an individual for filing a complaint of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.

Elements of a Retaliation Claim

- ▶ 1) Protected Activity
 - Participation in an EEO process or “opposition” to discrimination
- ▶ 2) Materially Adverse Action
- ▶ 3) Causal Connection between protected activity and the materially adverse action

Title VII- Retaliation

- ▶ 42 U.S.C. § 2000e-3(a)
 - “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ...because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.”

Title VII- Retaliation

- ▶ Does a complaint to someone other than the employer constitute protected activity under the opposition clause?

Title VII- Retaliation

- ▶ *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) (stating that "there is no qualification on . . . the party to whom the complaint is made known," and it may include management, unions, other employees, newspaper reporters, or "anyone else.")
- ▶ *Pearson v. Mass. Bay Transp. Auth.*, 723 F.3d 36, 42 (1st Cir. 2013) (observing that "there is no dispute that writing one's legislator is protected conduct")
- ▶ *Conetta v. Nat'l Hair Care Ctrs., Inc.*, 236 F.3d 67, 76 (1st Cir. 2001) (ruling that employee's complaints of sexual harassment to coworker who was a son of general manager was protected opposition)

Other Examples of Opposition

- ▶ E.g. Plaintiff, who works for an employment agency referring individuals to fill temporary and permanent positions with corporate clients, is instructed by his manager not to refer any African Americans to a particular client per the client's request. Plaintiff tells the manager this would be discriminatory and proceeds instead to refer employees to this client on an equal opportunity basis. Plaintiff's refusal to obey the order constitutes "opposition" to an unlawful employment practice.
- ▶ *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581 (6th Cir. 2000) (concluding that action taken by a university vice president, in his capacity as an affirmative action official, to respond to hiring decisions that he believed discriminated against women and minorities, constituted protected opposition under Title VII).

Title VII- Participation

- ▶ What is an example of participation?
 - It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge." *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1004-1007 (5th Cir. 1969)); see also *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000)

What is Materially Adverse Action?

- ▶ "materially adverse" -meaning any action that might well deter a reasonable person from engaging in protected activity.
- ▶ The most obvious types of adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.
- ▶ Other materially adverse actions include transfers, work related threats, write-ups, reprimands, lowered evaluations,

Examples of Materially Adverse Actions

- ▶ E.g. A federal agency employee filed a formal complaint with her agency EEO office alleging that she was denied a promotion by her supervisor because of her sex. One week later, her supervisor invited a few other employees out to lunch. She believed that her supervisor excluded her from lunch because of her complaint. Even if the supervisor chose not to invite the employee because of her complaint, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity. By contrast, if her supervisor invited all employees in her unit to regular weekly lunches, and she is excluded because she files the sex discrimination complaint, this might constitute unlawful retaliation since it could reasonably deter her or others from engaging in protected activity.
- ▶ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) ("A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.")

Causal Connections

- ▶ Unlawful retaliation is established when a causal connection is established between a materially adverse action and the individual's protected activity.
- ▶ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (holding that "but-for" causation is required to prove Title VII retaliation claims raised under 42 U.S.C. § 2000e-3(a), even though claims raised under other provisions of Title VII only require "motivating factor" causation)

Examples of Causal Connection

- ▶ Suspicious Timing
 - E.g. an adverse action was taken a month after an employee filed a complaint
- ▶ Oral or Written Statements
- ▶ Inconsistent or Shifting explanations
 - E.g. one manager says someone was fired for violating attendance policy another says the person was fired for some other conduct.

ADA- Retaliation

- ▶ 42 U.S.C. § 12203(a)
 - “No person shall discriminate against any individual because such individual has *opposed* any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this chapter.”

Retaliation- ADA

- ▶ What is protected activity under the ADA?
 - Requesting a reasonable accommodation.
 - *Solomon v. Vilsack*, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014) (citing rulings from every federal judicial circuit holding that requests for reasonable accommodation are protected activity)

Factors that can Lead to Retaliation

- ▶ A lack of administrative policies discouraging retaliation;
- ▶ An authoritarian management culture;
- ▶ Overly hierarchical organizations, where rank or organizational level is prized;
- ▶ High levels of task-related conflicts;
- ▶ Reward systems and structures that promote competition; and
- ▶ The ability of the accused to isolate the accuser.

Promising Practices

- ▶ Written Employer Policies
- ▶ Training
- ▶ Anti-Retaliation Advice and Individualized Support for Employees, Managers, and Supervisors
- ▶ Proactive Follow-Up
- ▶ Review of Employment Actions Ensure EEO Compliance

Written Employer Policies

- ▶ Employers should maintain a written, plain-language anti-retaliation policy and provide practical guidance on the employer's expectations
- ▶ Examples of retaliation that managers may not realize are actionable
- ▶ Proactive steps for avoiding actual or perceived retaliation
- ▶ A reporting mechanism for employee concerns about retaliation
- ▶ A clear explanation that retaliation can be subject to discipline, up to and including termination

Training

- ▶ Employers should consider the following:
- ▶ Train all managers, supervisors, and employees on the employer's written anti-retaliation policy
- ▶ Tailor training to address any specific deficits in EEO knowledge and behavioral standards that have arisen in that particular workplace
- ▶ Offer instruction on EEO compliant ways that these situations could have been handled
- ▶ Emphasize that those accused of EEO violations, in particular management and supervisors, should not act on feelings of revenge or retribution
- ▶ Include training for management and HR staff regarding how to be responsive and proactive when employees do raise concerns.

Anti-Retaliation Advice and Individualized Support

- ▶ Employers should provide info to all parties and witnesses regarding the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it.
- ▶ Provide tips for avoiding actual or perceived retaliation

Pro-Active Follow-up

- ▶ Employers may wish to check in with employees, managers, and witnesses during the investigation of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation.

Review of Employment Actions

- ▶ Employers may choose to have a HR or EEO specialist or some other qualified individual review proposed employment actions to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons.
- ▶ Require decisionmakers to identify their reasons for taking actions
- ▶ Scrutinize performance assessments to ensure they have a sound factual basis and are free from unlawful motivations
- ▶ Determine if there are any particular organizational components with compliance deficiencies

Addressing Harassment

- ▶ Employers should create a comprehensive anti-harassment policy. It could include, but is not limited to:
 - A statement that harassment based on a protected characteristic is prohibited;
 - An easy-to-understand description of prohibited conduct, including examples;
 - A description of the company's complaint system;
 - A statement that the employer will provide a thorough and impartial investigation;
 - A statement that retaliation is unlawful

[Promising Practices for Preventing Harassment | U.S. Equal Employment Opportunity Commission](#)

Examples of Ineffective Policies

- ▶ *Lamarr-Arruz v. CVS Pharm., Inc.*, 271 F. Supp. 3d 646, 661 (S.D.N.Y. 2017) (the employee's testimony that complaints to the ethics hotline were ignored raises questions regarding the reasonableness of the employer's purported available corrective measures)
- ▶ *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1300 (M.D. Ala. 2010) (criticizing the employer's complaint reporting procedure where employees were directed to file complaints with one person at an address located in a different city, the point of contact never visited the location where the harassed employee worked, and the harassed employee was not provided with any other contact information for the point of contact.)

Examples of Ineffective Policies

- ▶ *Escalante v. IBP, Inc.*, 199 F. Supp. 2d 1093, 1103 (D. Kan. 2002) (determining the employer failed to show it exercised reasonable care by promulgating and implementing an anti-harassment policy where it “has a confusing number of contradicting policies, each stating a different reporting mechanism, the specific policy dealing with discrimination claims only provides the employee one person to report such claims to[, and] [t]his person is located in another state, is only accessible by telephone, and the policy does not state the hours or days in which this person may be reached”)

Recruitment and Hiring

- ▶ EEO laws such as Title VII and the ADA require employers to provide equal opportunities in hiring. For example, under the ADA this includes providing applicants with disabilities a reasonable accommodation.
- ▶ An employer could meet its legal obligations by ensuring all qualified applicants are considered.
- ▶ Employers could take a step above and beyond by ensuring that recruitment efforts reach a broad and diverse pool of applicants.

Ethics in the Workplace

- ▶ What can employers do to ensure ethical decision-making processes are being followed?
- ▶ Create clear and transparent policies
- ▶ Be consistent in applying these policies
- ▶ Train HR/Supervisor, etc. on accommodations under Title VII and the ADA.
- ▶ Document the reasons that you are taking certain actions.

Ethical AI Practices?

- ▶ A complaint in the N.D. of California alleges that Workday's AI-powered applicant screening tools discriminate based on race, age, and disability.
- ▶ The Plaintiff alleges that the AI could infer his race from graduation from a historically Black college, determine his age from his graduation year, and identify mental disabilities through personality tests.
- ▶ The Court found that Workday falls under the definition of "an employer" under Title VII, the ADEA, and the ADA.
- ▶ *Mobley v. Workday Inc.*, 2024 WL 3409146 (N.D. Cal. Jul. 12, 2024)

AI- Continued

- ▶ The EEOC sued iTutorGroup Inc. and its affiliates over age discrimination in hiring.
- ▶ In the Complaint, the EEOC alleged that the recruiting software that was programmed to automatically reject both female candidates over the age of 55 and male candidates over 60 for tutoring roles.
- ▶ *EEOC v. iTutorGroup, Inc.* No. 1:22-cv-02565-PKC-PK (E.D. N.Y. Aug. 9, 2023)

EEOC Guidance on AI Software

- ▶ The EEOC guidance discusses whether an employer's selection procedures have disproportionality large negative effect on a basis that is prohibited by Title VII.
- ▶ Employer can assess whether a selection procedure has an adverse impact on a particular protected group.
- ▶ Employer and potentially software vendor could be held liable.
- ▶ Employers should take caution in reviewing its hiring software.

Summary

- ▶ Employers should take action to prevent unethical and/or unlawful behavior.
- ▶ Implement transparent policies.

Thank you!