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By First-Class and Electronic Mail

February 23, 2016

Jenny R. Yang, Chair
Equal Employment Opportunity Commission
131 M Street N.E.
Washington, D.C. 20507

Re: Comments on Proposed Enforcement Guidance on Retaliation and Related Issues

Dear Chair Yang:

Thank you for providing an opportunity for members of the public to comment on the EEOC's Proposed Enforcement Guidance on Retaliation and Related Issues, which we realize is not a required step when the Commission issues sub-regulatory guidance. We believe this guidance will be enormously helpful to employers, employees, litigants, and courts because it provides comprehensive and up-to-date explanations of the current state of the law and of the Commission's perspective on these crucial issues. The guidance advances a number of helpful new positions consistent with the overarching goal of ensuring that victims of discrimination and harassment will not be deterred from bringing their complaints to the EEOC and other enforcement agencies.

We are particularly pleased with the position the Commission has taken on a number of issues, including:

- making clear that the Commission considers an individual's actions in resisting sexual advances to be protected activity for purposes of an opposition clause claim of retaliation;
- embracing a rule that an internal complaint to an employer about harassing conduct that is not sufficiently severe or pervasive to be actionable is nonetheless protected conduct under the opposition clause;
- rejecting the so-called "step-outside" rule that would serve to deny statutory protections to those who oppose discrimination in the course of performing duties connected with the handling of internal complaints or compliance review;
- endorsing the view that participation in an employer's internal investigation of a discrimination or harassment allegation may be protected conduct under both the participation and opposition clauses;

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- endorsing the view that all retaliation claims are evaluated under the *Burlington Northern* standard, even when the form of the retaliation is workplace harassment, so that victims of this form of retaliation are not held to the higher standard of proving that the retaliatory conduct was “severe or pervasive”; and
- clarifying that the causation requirement of a retaliation claim can be satisfied where an individual with retaliatory animus influences a decision-maker to take an adverse action (the so-called “cat’s paw” theory of liability).

We also have a few suggestions for changes that we believe would strengthen the new guidance:

1. One recurring factual situation that leads to retaliatory discipline and frequent discharge, is the employer’s judgment after investigating an employee’s complaint of harassment that he or she lied about what happened. The guidance addresses this in footnote 27 by asserting that an employer’s proffered non-retaliatory reason for discipline of an allegedly lying witness or complainant will be viewed as a pretext “unless the employer has independent corroborating evidence to support its finding of misconduct.” This is an extremely important point that we think should be made in the text rather than in a footnote. Also, it would be strengthened by citing judicial authority supporting this standard. One such case is *Gilooly v. Missouri Dep’t of Health & Senior Services*, 421 F.3d 734, 741 (8th Cir. 2005), which made the point that an employer would need independent corroborating evidence to support a conclusion that an employee had lied during an internal investigation.
2. On a related note, the guidance takes the strong position that protection for employees who participate in proceedings under Title VII (beyond the internal investigations mentioned in the preceding paragraph) is absolute so that employers may not discipline or discharge them even if their allegations were not truthful. This point about the scope of the protection for conduct under the participation clause is discussed on page 7 and in footnote 19. We think it would be helpful to include a citation to the leading case that takes a contrary view, and affirmatively state that the Commission disagrees with the court’s holding in *Mattson v. Caterpillar*, 359 F.3d 885 (7th Cir. 2004).
3. As mentioned above, we are very pleased that in this guidance the Commission has endorsed the view that internal investigations of harassment complaints are proceedings under the statute so that individuals who complain or serve as witnesses in such investigations are engaging in protected conduct under the participation clause. This discussion on page 8 would be stronger if the Commission explained more of its rationale for adopting this position, since it has not been embraced by the courts. In appellate

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briefs, the Commission has argued that the Supreme Court's articulation of an affirmative defense for cases of supervisory harassment in *Faragher* and *Ellerth* mandates that the now pervasive employer practice of engaging in internal investigations should be viewed as an aspect of proceedings under the statute. Expanding on this reasoning would help to persuade courts that the EEOC's interpretation is reasonable and entitled to deference.

4. Toward the end of the discussion of the breadth of the opposition clause, the guidance says "the employee will have to produce enough evidence to discredit the employer's explanation and prove the real reason was retaliation." (Page 16). This language could be read to endorse the now discredited "pretext plus" standard. Because *Reeves v. Sanderson Plumbing Prods. Co.*, 530 U.S. 133, 148 (2000), clarified that proof a defendant's explanation for its action is false or unworthy of credence can be sufficient to support a finding of discrimination without any additional independent evidence of discrimination, we suggest rewording the sentence in the guidance to say: "produce enough evidence to discredit the employer's explanation and thereby permit a fact finder's conclusion that the real reason was retaliation."
5. We believe the discussion of "compensation discussions" as protected conduct under the opposition clause is extremely helpful. And we think it is particularly helpful that the Commission has included reference to other federal authorities such as the OFCCP regulations and the NLRA so that users of the guidance will know that there are other sources of protection for those who seek information about potential wage discrimination. However, we think this section could be strengthened by adding another illustrative example after example 15 to clarify that a woman engages in statutorily protected conduct if she says to her employer:

"I don't think I am being paid fairly. Would you please tell me what men in this job are being paid?"

With such an example, the Commission would provide clearer guidance that the context merely has to suggest the individual's belief that the unfair compensation is being challenged based on a protected basis, in contrast to the situation described in example 15.

6. We think the boxes that highlight critical information throughout this document are very helpful. In the box on page 34, which lists individuals who could have retaliation claims, we think it would be helpful, in terms of being complete, to add "applicants" and "relatives of people who have engaged in protected conduct." Admittedly, that last descriptor is a bit wordy, but since the guidance explicitly addresses the claims of these

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so-called third party victims of retaliation, it would make things clearer to include them in this box as well.

7. In our view, since the Supreme Court has clarified standards for protected conduct and adverse action that are generally helpful to plaintiffs and that promote broad and effective protections against retaliation, the more difficult and more highly contested question in litigation now is causation. Because the Court rejected the “motivating factor” standard for retaliation cases, we think the guidance should do more to explain what “but for” cause means, beyond the fact that it does not mean “sole” cause. Thus, in footnote 151, where the guidance cites to the Supreme Court decision in *Burrage v. United States*, 134 S. Ct. 881, 888-89 (2014), the quoted language does not actually help to illuminate what the Court means by “but for” causation. We believe the more helpful language is the Court’s statement in *Burrage* that an act is a “but for” cause “[even if it] combines with other factors to produce the result, so long as the other factors alone would not have done so—if so to speak, it was the straw that broke the camel’s back.” *Id.* at 888.

Again, we thank you for this opportunity to comment, and would be pleased to respond to any questions you or your staff may have about these suggestions.

Sincerely,



Lisa J. Banks



Carolyn L. Wheeler