

11th Circuit Addresses Retaliation “Timing” Element

Employers are aware that retaliation has become a favorite “second” claim for employees who believe they have experienced discrimination in the workplace. When the employees later sue for discrimination, they are now typically adding a claim that they were penalized in some way after they originally complained about the discriminatory treatment. Ironically, employers often successfully defend against the discrimination claim, only to lose and be ordered to pay damages on the retaliation claim.

One of the elements that a worker alleging retaliation must prove is a causal connection between his/her complaint and the subsequent reprisal by the employer (*i.e.*, that the reprisal was triggered by the complaint). In the absence of more direct proof of causation, an employee may simply highlight the proximity in time of the two “events,” the inference being that they are “related.” The Eleventh Circuit Court of Appeals (the federal appellate court handling appeals from Alabama, Georgia, and Florida cases) recently ruled on the issue of what is or is not sufficiently close in time to establish causation. A faculty member at Georgia State University complained to her dean about gender discrimination in December 2004, and next Spring (in May 2005) she received a negative evaluation that led to the non-renewal of her contract. She sued for gender discrimination and retaliation under Title VII of the Civil Rights Act of 1964. The trial court granted summary judgment to Georgia State, dismissing her suit.

In her appeal of the summary judgment ruling, the Eleventh Circuit Court of Appeals held that she failed to show a causal connection between her complaint and the poor evaluation due to the intervening “five month gap” between the time each occurred. The court cited several of its previous cases holding that a time interval of as short as three or three and one-half months between the “protected activity” (usually, the original complaint about discrimination) and the adverse employer action was insufficient, by itself, to establish causation. In this particular case, the Court also noted that the university had renewed the faculty member’s contract with “serious reservations” in July 2004, indicating concern about her performance predating her oral complaint. *Schechter v. Georgia State University*, No. 08-16127 (11th Cir. Aug. 12, 2009)

University officials must be mindful of this timing issue in any instance in which an employee has lodged a complaint, formal or informal, about discrimination or has otherwise opposed discriminatory activity on campus. Fortunately, the Eleventh Circuit is requiring close temporal proximity between a complaint and any punitive action allegedly taken in response to support a finding of retaliation. Without more evidence of a retaliatory intent, a three months intervening period will generally be insufficient. However, it may be wise to seek the advice of the Office of Counsel and/or Human Resources any time adverse action is being considered with respect to an employee who has previously engaged in “protected action.”