

In The News

Karen Buesing Addresses Employer Concerns on Retaliation Claims at EEOC Meeting

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The U.S. Equal Employment Opportunity Commission should develop new guidance embracing the current standard for retaliation claims set by the U.S. Supreme Court in *Univ. of Texas SW Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), Florida management lawyer Karen Buesing testified last week. Buesing was testifying as a representative of the Employer community was a management witness at the EEOC's June meeting in Washington, D.C., on "Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention." As reported in a *Bloomberg BNA* article titled, "[EEOC Ponders Ways to Curb Retaliation Against Workers Who Pursue Bias Claims](#)," the federal commission sought testimony on issues surrounding workplace retaliation and best practices to prevent it. Retaliation charges now represent more than 42 percent of all charges, Buesing noted.

"The EEOC is rightly concerned with the explosive growth of retaliation claims. I can assure you, employers are even more concerned," said Buesing during her oral testimony.

Buesing noted one reason for the explosive growth of retaliation claims is that often an underperforming employee knows his or her job is on the line, and makes a claim of discrimination in the hopes of creating job security. She agreed with

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Commissioner Charlotte Burrows' comment that retaliation claims are "uniquely insidious," noting that "from the employer's perspective they are uniquely insidious for another reason: the simple truth is that by filing a complaint of discrimination, an employee can make him or herself a member of a protected class to which he/she did not previously — and could not otherwise — belong."

Buesing recommended that the EEOC update the retaliation guidance in its Compliance Manual to embrace the standard established by the United States Supreme Court in *Nassar*. That decision held that for an employee to establish a retaliation claim, the employee must prove that but for the employee's protected activity, the adverse employment action would not have occurred.

Given the agency's limited resources and the fact that less than 3 percent of retaliation charges result in cause findings, Buesing recommended the EEOC provide more detailed guidance to its field staff on *Nassar* and how to evaluate retaliation charges, being mindful, as Commissioner Feldblum said, that "employers need to be able to discipline and terminate employees who are not doing their jobs." Since employers routinely review the Compliance Manual for the EEOC's interpretation, such guidance would inform the employer community as well, Buesing said.

The EEOC is expected to amend its retaliation guidance in the coming months.

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