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## Can You Discipline for False EEOC Charges?

By Matthew J. Feery

Handling charges of discrimination filed by current employees is always a balancing act for employers. This is especially the case when the employer suspects (or knows) that the charges are not just meritless but knowingly false, for just as there are occasions when valid complaints of discrimination or harassment are made, there are times when false complaints are filed. In these situations, employers often wonder if they have any recourse against the employee who made the false charge. But, as employers are aware, employment discrimination statutes have stringent prohibitions on taking adverse employment actions against employees for engaging in "protected activities," such as filing a charge with the EEOC. If an employer does attempt to discipline an employee for making a knowingly false and malicious charge, is it only setting itself up for further liability through a retaliation claim?

Two weeks ago in [Cox v. Onondaga County Sheriff's Department](#), the United States Court of Appeals for the Second Circuit (covering Connecticut, New York, and Vermont) looked at this very issue, and as its decision shows, there is no "one size fits all" answer.

The facts in *Cox* are involved, but for our purposes they can be distilled as follows. A group of officers in the defendant sheriff's department shaved their heads as a show of solidarity with a coworker who had lost his hair due to cancer treatments. These officers later filed an internal complaint, known as a "blue form," alleging that due to their bald heads they had been victims of rumors that they were "skinheads." They further alleged that the rumors

were started by a specific "African American Deputy," O'Dell Willis, who purportedly approached one of the officers and asked about the shaven heads. This, in turn, allegedly caused other African American Deputies to approach the officers and ask about their shaved heads. These actions, the officers claimed, resulted in a "racially hostile and unsafe" work environment and "put [the officers'] families, wives, and children in danger."

An internal investigation revealed that none of the officers filing the internal complaint actually heard other department employees accuse them of being skinheads. Moreover, one of the officers, after being interviewed during the internal investigation, withdrew his complaint because he admitted he was not approached by anyone about his shaved head, did not really feel harassed, and was "misled" by another officer into believing that the alleged harassing conduct actually occurred. The internal investigation concluded the claims were unsubstantiated, and no action was taken by the department.

The story does not end there, however. The officers subsequently filed EEOC charges, made under oath, that were materially different than their internal complaints. Where they earlier claimed no hostile confrontations about their shaved heads, they now alleged, among other things, direct, face-to-face confrontations with Mr. Willis in which he called them skinheads. The sheriff's department responded to the EEOC charges, which the EEOC subsequently dismissed. The officers did not pursue their charges in federal court.

In addition to the conflicting internal complaint and EEOC charges, the department was now confronted with a number of other thorny issues (many of which are not pertinent here). In particular, Mr. Willis had previously succeeded in a workplace discrimination suit against the department, and there was context of existing racial tension within the department at the time the officers made their accusations. Thus the false accusations made against Mr. Willis took on a more menacing and harassing context. In response, the department's internal investigation arm, the "Professional Standards Unit" ("PSU"), launched an investigation.

The PSU investigation included interviews with all the officers who filed EEOC charges, and in those interviews none of the officers claimed (contrary to their sworn EEOC charges) to have been personally called a skinhead by anyone. During each of the interviews, the officers were informed that disciplinary action was being considered against each of them for filing false EEOC charges. Ultimately, the internal investigation resulted in no action against any of the officers.

The officers then filed *another* EEOC charge, this time alleging that the PSU investigation and the threats of disciplinary action

constituted Title VII retaliation for their earlier harassment complaints. This time the EEOC agreed, finding that the department's decision to investigate the matter and to consider discipline for the false charges to be retaliation because the actions might have a "chilling effect" on the willingness of individuals to "speak out against employment discrimination or to participate in the EEOC's administrative process." The officers then filed a federal lawsuit in which the defendants ultimately prevailed on summary judgment. The officers appealed.

The analysis of the Second Circuit came down to two issues: Can the threat of discipline for filing false charges of discrimination constitute an adverse employment action to sustain a retaliation claim, and was the department's investigation and threat of discipline pretext for retaliating against the officers?

To the first question, the Second Circuit answered in the affirmative: The threat of discipline for false charges will "usually" constitute an adverse action to sustain a retaliation claim under Title VII. While "[a]n employer's investigation of an EEOC complaint alleging racial harassment without more . . . cannot sustain a valid retaliation complaint," an investigation *can* constitute retaliation if "carried out so as to result in a hostile work environment, constructive discharge, or other employment consequences of a negative nature," or if it is meant to dissuade employees from making charges of discrimination. And while Title VII's language "falls well short" of "immuniz[ing]" an individual who files a knowingly false charge from any repercussion and while "false charges before the EEOC are not permitted," that "does not necessarily lead to the conclusion" that employers targeted by such false accusations can respond with disciplinary actions. Within the statutory and legal framework for retaliation under Title VII, threats of discipline will thus "usually" suffice to support a retaliation claim.

As to the second question: The department's investigation did not constitute retaliation, and the Second Circuit affirmed summary judgment for the employer. The determination will come down to the circumstances of each case. Here, the officers gave inconsistent statements about Mr. Willis' behavior and, moreover, given the racial tension in the department, it was apparent that the false charges were *themselves* harassment against Mr. Willis. In that context, the Second Circuit found it would be "anomalous" to conclude that an employer "is not allowed to investigate, with a view to discipline, false complaints of harassment that themselves might be viewed . . . as harassment." The officers failed to show that any of this was retaliation for their earlier charges.

As the *Cox* case shows, these situations are complex and fact-driven. Employers can investigate, yes, but must be careful that the investigation does not morph into one with a retaliatory nature.

Employees have no "right" to file false charges, but employers do not have *carte blanche* to police false charges against them.

When confronted with false charges of discrimination, it is understandable, and perhaps natural, to react with indignation or a desire to impose discipline. There are no "light" accusations of discrimination and harassment. And apart from the time and money employers must expend to defend against these charges, the charges abuse a system that is designed and meant to do a greater good: prevent discrimination in the workplace. But in responding to these situations, employers must exercise restraint in their approach and be mindful of not only the legal requirements for and restrictions on their investigations, but also consistent application of any internal policies that could be applicable. Given that the governing law can differ depending on circuit, employers would also be wise to consult legal counsel when necessary to determine the best course of action.

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