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Public Input, Executive Officer
Equal Employment Opportunity Commission
131 M. Street N.E.
Washington, D.C. 20507

Re: Comments on EEOC Retaliation Guidance

We commend the EEOC for the obvious effort which was dedicated to developing this useful and detailed guidance. This guidance is helpful both from its discussion of the legal principles involved but also because it provides practical guidance illustrated with true work examples. As the EEOC docket of retaliation charges continues to increase, this guidance is extremely timely.

Hopefully the guidance will provide assistance not only to those who believe they have been subject to unlawful retaliation but also to employers attempting to provide a workplace free from unlawful discrimination and ultimately to the judges who will handle these cases in the courts. There are, however, several aspects of the guidance that warrant additional consideration by EEOC. Three of these involve substantive discussion of the law that we believe should be rewritten or edited. The remaining comments highlight some discussion that leaves room for confusion and should probably be refined. These are noted below, in list format, with explanations where necessary.

1. Causation Discussion on Pages 50 to 51.

    a. Generally speaking, the section defining "but-for" causation should be expanded. One paragraph attempting to explain and define what "but-for" causation means is insufficient where the Supreme Court has struggled to clearly define these terms in a line of recent cases.

    b. The use of the phrase "the real reason" is both confusing and concerning in light of the Supreme Court's clarifying statement on "but-for" causation in *Burrage v. United States*, 134 S.Ct. 881, 888-89 (2014) ("the desire to retaliate was [a] but-for cause of the challenged employment action"). As the EEOC correctly points out in footnote 151, in *Burrage* the Supreme Court "recognized that 'but-for' causation can include multiple causes," updating its interpretation in *Univ. of. Tex. SW Med. Ct. v. Nassar*, 133 S.Ct. 2517, 2528 (2013) and *Gross v. F.B.L. Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

We believe this discussion could be amplified to make the point even more clear that "but-for" cause does not mean "sole" cause. Before the Court's decision in *Burrage*, Justices over the years have made this point. *See, e.g., CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2645 (2011) (Roberts, C.J., dissenting, arguing that "but-for" causation was present when "negligence played any part, even the slightest" in the outcome), *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (Brennan, J., discussing "but-for" causation as a 'substantial' or 'motivating' factor), *Price Waterhouse* at 259 (White, J., concurring, applying *Mt. Healthy City Bd. Of Ed. v. Doyle*, 419 U.S. 274 (1977) for the proposition that "but-for" cause required only a 'substantial' or 'motivating' factor analysis), *Price Waterhouse* at 268-69 (O'Connor, J., concurring, and applying the standards of *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). While the Court has since clarified that the "problems associated with [*Price Waterhouse*'s] application have eliminated any perceivable benefit to extending its framework to ADEA claims," *Gross* at 179, it has never found that "but-for" causation means "sole cause." Indeed even Justice Kennedy who dissented in *Price Waterhouse* but was in the majority in both *Gross* and *Nassar* made the point in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 284 (Kennedy, J., dissenting). The EEOC recognizes this in the footnotes provided, but the use of "the real reason" undermines its reliance on this authority and suggests that "but-for" cause here is held to a higher standard more akin to that of "sole cause." The EEOC should revise this area of its guidance and ensure that this is made clear.

2. Example of Lawful Employment Action

   a. On page 10, Example 2 is problematic because of the timeline it sets forth and its suggestion that no reasonable factfinder could find unlawful retaliation under the facts presented. The example states that "less than a week after the post, plaintiff was discharged," but then goes on to say "even though management was aware of the plaintiff's protected activity...where the evidence shows the firing was in fact motivated by the audit results, plaintiff cannot prove retaliatory discharge." It is not clear how the facts show this as they are presented in the example. There should be some additional facts showing that the reason for the adverse action was a lawful one. Additionally, under the timeline in the example the employee's action was protected, but less than a week later they were terminated, raising the possibility that the reasons proffered by the employer are pretextual.

   Indeed the proposed example is actually close to the facts presented in *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 274 (2009), when shortly after finishing an investigation into sexual harassment, Crawford's employer fired her, purportedly for embezzlement. Following the Supreme Court's determination that the anti-retaliation provision extended to this situation, a jury found in favor of Crawford and awarded her $ 1.55

million in damages, front pay, and back pay. *Crawford v. Metropolital Gov., et al*, Docket No. 3:03-cv-00996, Document No. 257. To avoid this problem, the EEOC should add additional facts to make clear that the employer's reasons here are not pretextual and are in fact lawful, or delete this example.

3. Participation Analysis

    a. On page 6, the EEOC should consider including a brief discussion of the fact that internal procedures are included under "participation" and then refer the readers to the discussion later at pages 8-9. The Guidance picks this up on pages 8-9 but it bears referencing at the end of the paragraph on page 6.

    b. Further, during the discussion at pages 8-9, the EEOC should consider bolstering its conclusions with reference back to the *Faragher-Ellerth* affirmative defense. These cases provided employers with an affirmative defense not anywhere contained in the statutes enforced by EEOC. Accordingly if the adoption of these policies or the fact that the employee unreasonably fails to utilize these procedures provides a legal defense, it should logically follow that these circumstances constitute a "proceeding...under this subchapter." 42 U.S.C. § 2000e-3(a).

4. There is an inconsistency at page 18, when the EEOC refers to reasonable opposition and notes that "engaging in a production slow-down" may be included. On the next page, the EEOC notes that "if an employee's protests render the employee ineffective in the job, the retaliation provisions do not immunize the employee from appropriate discipline or discharge." These two statements appear to be in direct conflict. If an employee engages in a production slow-down, they will arguably be ineffective at their job, meaning that this conduct will not be protected by the retaliation provisions.

5. On page 2, at line 1, the explanation of retaliation includes the term "unlawfully" but does not provide an explanation as what "unlawfully" refers to. The EEOC should consider including a footnote explaining this when it is first mentioned, as opposed to where the footnote is currently located. Alternatively, the EEOC could include a brief explanation as to what "unlawful" means in the definition itself. We understand the point EEOC is making but a lay reader could interpret this as requiring some "unlawful" action on the employer's behalf in addition to any action which would be "reasonably likely to deter the charging party or others from engaging in protected activity." *Burlington Northern and Sante Fe. Ry. Co. v. White*, 548 U.S. 53, 61, 66 (2006).

6. On page 49, the reference to "the third party who was directly harmed" should be revised, and the word "directly" should be struck. In cases involving third-party zones of interest, it is unclear exactly what kind of harm is required and the EEOC should avoid including the term "directly" to prevent confusion over this term.

If you have any questions concerning these comments please don't hesitate to contact me.

Respectfully submitted,

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