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ATZP-JA

30 November 2018

MEMORANDUM FOR ALL

SUBJECT: EEO Reprisal Guide for Supervisors

1. PURPOSE: To inform supervisors of the EEO process and how to avoid potential claims of reprisal or retaliation by employees

2. References

a. Equal Employment Opportunity Compliance Manual Section 8: Retaliation, 25 Aug 2016

b. AR 690-12, Equal Employment Opportunity and Diversity, 22 Dec 2016

c. 29 CFR 1614, Federal Sector Equal Employment Opportunity

3. Discussion

a. It is the policy of the Department of the Army to provide Equal Employment Opportunities (EEO) in Federal employment and to prohibit discrimination in employment, including that based on reprisal. AR 690-12, para. 1.5. 29 CFR 1614.101(b) states that "No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Equal Pay Act or the Rehabilitation Act or for participating in any stage of administrative or judicial proceedings under those statutes." Case law demonstrates that allegations of reprisal, particularly claims of *per se* reprisal, are often easier to establish than the initial charge of harassment or discrimination. In part, this is due to the "chilling" effect that retaliation can have on an employee or co-workers from filing an EEO claim in the future.

b. Reprisal: An act of reprisal occurs when an employer takes a materially adverse action against an employee because the employee has engaged, or may engage, in activity in furtherance of a protected EEO activity. Communicating with a supervisor or others in your chain of command about employment discrimination (including harassment of other employees), advising an employer on EEO compliance, or serving as a witness in an EEO complaint all constitute protected activities. An employee subsequently

subjected to discrimination for engaging in such activity may be able to establish their own EEO claim for reprisal.

c. **Establishing Reprisal:** The initial burden of proof in a retaliation or reprisal claim rests on the employee bringing the claim. In order to successfully raise a traditional claim of retaliation for a protected EEO activity (or opposing any practice made unlawful by Title VII, the ADEA, the Equal Pay Act, or the Rehabilitation Act), an employee must establish that:

(1) They engaged in protected activity.

(2) The employee was subsequently disadvantaged by a materially adverse personnel action.

(3) There is a sufficient level of causal connection between the protected activity and the adverse personnel action.

d. **Per Se Reprisal:** Alternatively, an employee can allege that an employer's act constitutes *per se* reprisal. An act of *per se* reprisal is an act that, on its face, discourages the employee or others from participating in an EEO action. Accordingly, a *per se* claim of reprisal does not require an employee to establish that they were disadvantaged by a materially adverse personnel action.

e. In the event an EEO complaint is filed, supervisors should:

(1) Maintain their usual course of conduct with the employee; remember that a complaint is not necessarily an attack on themselves, and; avoid discussing the specifics or merits of the complaint with the complainant or anyone else.

(2) Document all conversations with employees.

(3) Remain neutral. A supervisor must not behave in a manner that evinces his or her support or opposition of a complainant's claim of discrimination.

f. When an EEO complaint is filed, supervisors should not:

(1) Terminate, suspend, threaten, or discipline an employee for filing the complaint.

(2) Assign the employee unfavorable tasks or duties beyond their normal scope of employment.

(3) Deny benefits or a promotion for which the employee was in line.

(4) Make jokes or comments related to race, sex, or other protected EEO activity.

g. **Avoiding *per se* reprisal:** Supervisors should not:

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(1) express disappointment with the employee for filing a complaint; tell employees that they should have addressed the issue with you “first;” tell employees that filing an EEO complaint will adversely impact their career; tell an employee’s co-workers that the employee filed a complaint, or; demean the EEO process or otherwise criticize the employee for filing an EEO complaint.

h. If a supervisor suspects that an employee is attempting to provoke the supervisor to commit reprisal, the supervisor should take preventative measures to document the employee’s problem behavior. In particular, supervisors should be aware of and understand how to respond to the following behavior: long periods of absence; sloppy or poor work; contrived complaints; spending much of the day talking or otherwise engaging in unproductive behavior; trying to gain support for their case from others in the office; complaints that co-workers are treating them “coldly.”

4. Point of contact is the undersigned at (831) 242-6414.

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