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## LABOR & EMPLOYMENT LAW ALERT

### What Can an Employer Do When Confronted With A False EEOC Discrimination Charge?

It is not unusual for an employer to conclude that a discrimination charge filed by an employee with the federal Equal Employment Opportunity Commission (EEOC) is false. Does the employer have a right to terminate or otherwise discipline the employee for filing a false claim? Are there potential pitfalls if the employer decides to conduct its own investigation into the charge but stops short of taking disciplinary action? The July 23, 2014 decision of the U.S. Court of Appeals for the Second Circuit in *Cox v. Onondaga County Sheriff's Department*, Docket No. 12-1526-CV, supplies some valuable insights into how New York State employers may be able to reduce the risk of a subsequent retaliation claim when they react to a false EEOC charge.

The facts in *Cox* are extensive but can be boiled down to the following. The plaintiffs were several white transport and custody officers employed by the Onondaga County Sheriff's Office (OCSO). They shaved their heads to show support for another white officer who was receiving cancer treatments. After rumors surfaced that the officers were "skinheads", that is, racist white supremacists, they filed internal complaints alleging that a certain black co-worker had started the rumor. The plaintiffs did not allege either in their internal complaint or during subsequent internal investigatory interviews that the co-worker or other black officers who asked them why they had shaved their heads were in any way confrontational or accusatory. When they later filed a sworn charge of racial harassment with the EEOC, however, they claimed that the black officer who was the alleged source of the rumor had indeed been confrontational toward them. Therein arose the apparent falsity.

After the OCSO filed a response to the charge with the EEOC, it continued its investigation into the issues raised by the charge. As part of the investigation, the plaintiffs were interviewed. None of them maintained that they had been called a skinhead during any face-to-face confrontation. They were told by a management official that they might be subject to disciplinary action based on the apparently false statements in their charge, but the County Sheriff ultimately decided not to pursue any disciplinary action against them for providing false information to the EEOC. The plaintiffs then filed a second set of EEOC charges, claiming they had been retaliated against because of their internal complaint of racial harassment via: (1) the OCSO's investigation process; and (2) the threat of disciplinary action for filing their initial false EEOC charge.

The good news for employers is that the Second Circuit held that the employer's pursuit of an internal investigation of alleged discrimination is not an adverse employment action of itself, explaining that an employer must be free to investigate employee complaints of harassment or other forms of discrimination in order to ensure a fair work environment, to inform itself of all the facts relevant to the EEOC charge so as to meaningfully participate in the EEOC's investigatory and conciliation process and to avoid being seen as indifferent to claims of illegal discrimination.

The Court also found, however, that a threat of disciplinary action for filing an apparently false EEOC charge will usually provide a plaintiff employee with enough to demonstrate a prima facie case of unlawful retaliation, shifting the burden to the employer to establish that it had a non-retaliatory and non-pretexual reason for the threat of discipline. The OCSO was able to do so in the Cox case since, among other things, the false statements about the black officer could be viewed as racial harassment of him, triggering the OCSO's duty to investigate and curb racial harassment by any employee against another. The Second Circuit affirmed the lower court's grant of summary judgment to the OCSO and the other named individual County defendants.

The takeaway for employers from this case is as follows:

- Employers have a right to conduct their own internal investigations of discrimination complaints, either before or even during the course of the EEOC's investigation.
- To avoid the risks of a later retaliation claim while investigating an apparently false EEOC charge, the employer should adhere to its usual policies and procedures for conducting investigations.
- The employer should make sure that there is overwhelming evidence of the falsity of the EEOC charge before taking or even threatening disciplinary action.
- An employer should not tell an employee that the employer will forego discipline or terminate the internal investigation if the employee withdraws his/her false EEOC charge.
- Labor and employment counsel should be consulted at the onset since each situation is fact-specific and courts have varying ways of analyzing each.

**If you have any questions or would like more information on the issues discussed in this communication, please contact any of the following Hancock Estabrook attorneys:**

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