UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE , NW, WASHINGTON, DC 20425 www.usccr.gov

Dear Ms. Yang:

I write as an individual member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole to comment on the EEOC's draft guidance on retaliation dated January 21, 2016 ("Draft Guidance"). Given my limited time and resources, I focus on certain aspects of the draft. It is not my intent to indicate agreement or disagreement with the aspects that I am not able to cover.

The part of Title VII dealing with employer retaliation can be found in Section 704(a). It states:

> *(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings:* It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment … because [such an employee or applicant for employment] has opposed any practice made an unlawful employment practice by this subchapter, or because [such an employee or applicant for employment] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3 (a). Such a provision was deemed necessary to ensure that Title VII's core prohibitions on discrimination were properly enforced. It gives employees and applicants for employment the confidence they need to file complaints and to otherwise participate as complainants or witnesses or in other roles in investigations, proceedings and hearings. Without that confidence, they might fear to speak up. At the same time, this anti-retaliation provision was never meant to insulate employees from any consequences for their own wrongdoing, and it is unfair to require employers to put up with the repeated, frivolous, bad faith complaints that are all too common today on the ground that doing so might possibly discourage some meritorious claim at some point in the future. A balance must be struck. I believe the Draft Guidance does a poor job at striking that balance.

One troubling aspect of the Draft Guidance is its dramatically different interpretations of the Opposition Clause (highlighted in blue above) and the Participation Clause (highlighted in green above). In the former case, the provision is interpreted to require an employee's actions to be reasonable and undertaken in good faith before they are considered protected; in the later case, no requirement of reasonableness or good faith is imposed.

The Draft Guidance clearly states that an individual needs a "reasonable belief that the matter complained of violates the EEO laws in order for his statements or actions to constitute protected 'opposition.'" Draft Guidance at 19. Two things are worth noting here. First, a "reasonable belief" must be both reasonable and an actual belief and hence the requirement has both a reasonableness and a good faith component to it. Second, the EEOC can hardly have required anything less, since the abundant case law has already decided this issue. See, e.g., Trent v. Valley Electric Association, 41 F.3d 524, 526 (9th Cir. 1994).

How could the Draft Guidance fail to require reasonableness and good faith? Sometimes the evidence that an employee is malicious, incompetent or mentally unstable stems solely from the fact that he has engaged in repeated unreasonable, frivolous, malicious or bad faith Title VII claims. In the case of malicious or bad faith claims, there obviously has to be some point at which it is permissible to terminate an employee. The same is true of unreasonable or frivolous claims. In either case, an employer cannot be expected to wait until such an employee has done further damage to the employer's business. The Opposition Clause should not and has not been interpreted to prevent a termination.

The problem comes from squaring the requirement of a "reasonable belief" for the purposes of the Opposition Clause with the Draft Guidance's position that the employee's belief need not be reasonable (and implicitly need not be good faith) for the purposes of the Participation Clause. As the Draft Guidance put it, "the participation clause applies regardless of the reasonableness of the underlying allegations of discrimination." Draft Guidance at 6. While it does not specifically state that good faith is also irrelevant, it leaves that impression by citing approvingly *Ayala v. Summit Constructors, Inc*., 788 F.

Supp. 2d 703, 719 (M.D. Tenn. 2011). In *Ayala*, the court stated that protection against retaliation is "'not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong.'" Draft Guidance at 7, n. 17 (quoting *Ayala*).

It is surely not obvious why the Participation Clause and the Opposition Clause should be interpreted differently on this issue, such that an employee (or job applicant) who does not have a reasonable and good faith basis for his claim under the Opposition Clause can nonetheless make himself immune from dismissal by the simple expedient of invoking the Participation Clause rather than the Opposition Clause. My fear is that creating such an anomaly in the law is a deliberate effort to undermine the case law requiring reasonable belief in the context of the Opposition Clause.[1]

This is especially so given the Draft Guidance's expansion of the Participation Clause to include informal internal investigations. Just about any claim that could come under the Opposition Clause will thus also come under the Participation Clause. Is all this jiggery-pokery? Or is there a good reason for this distinction? In the absence of an explanation, it is difficult to avoid going with the former explanation.

The Draft Guidance's rejection of the so-called "manager rule" is also a bit baffling. Draft Guidance at 13-16. Surely, some special provision must be made for employees whose job it is to "participate" in discrimination claim investigations, proceedings and hearings. See, e.g., *McKenzie v. Renberg's, Inc*., 94 F.3d 1478, 1486-86 (10th Cir. 1996). It cannot be that employers cannot judge the performance of and (if appropriate) terminate an employee whose whole job consists of such "participation." How else is an employer to judge his performance? A human resources officer should be dismissed if he proves himself to be unskilled in executing his duties. Yet unless his special position is recognized in the law, the Participation Clause would seem to prevent this.

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Finally, I am troubled by the notion that actions that are not work-related, as well as trivial actions, can nevertheless be materially adverse actions within the meaning of the law. Attempting to control the private lives of employees by insisting that they socialize with persons with whom they do not want to socialize is a little too totalitarian for my taste. I suspect many other Americans will agree.

Thank you for your kind attention. I would also like to commend to your attention the letter of Peter Kirsanow, my colleague on the Commission on Civil Rights, which was also filed today. Commissioner Kirsanow was able to discuss in his letter several issues that I was not able to get to.

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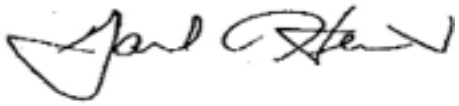

Gail Heriot

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