Good Intentions; Unintended Consequences

A Warning to Employers About Communications with Employees

By Danielle C. Lester

It is not unusual during litigation or in the investigatory phase of an agency charge for an employer to disclose employee names and contact information of actual or potential witnesses who are not managers, supervisors, or otherwise "the client." However, many employers know that some employees panic when they get a surprise call from the United States government or an attorney, and they seek assistance from human resources or the legal department to address their questions, concerns, and anxiety. Consequently, an employer may want to be proactive and practical and give these employees a heads-up that it has given out their contact information. Considering a recent federal district court case, employers must be very careful with these communications to avoid potentially violating federal law.

Summary of the case

The brief facts above describe what a Connecticut employer, Day & Zimmerman NPS, Inc., did. The case is *EEOC v Day & Zimmerman NPS, Inc.*[1] Day & Zimmerman provides unionized workers to its clients in the power industry.[2] Gregory Marsh accepted an assignment from Day & Zimmerman as a temporary electrician during a local power outage.[3] After accepting the assignment, Marsh provided a doctor's note to a company representative, indicating that he could not work around radiation because he had lung disease, and requested accommodations. After receiving the doctor's note and the request for reasonable accommodation, Day & Zimmerman terminated Marsh's employment.[4]

After his termination, Marsh filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against Day & Zimmerman alleging discrimination on the basis of his disability in violation of the Americans with Disabilities Act (ADA).[5] Months later, as part of its investigation, the EEOC sought information from Day & Zimmerman, including the names and contact information of other company employees. Before providing the EEOC with the requested information, Day & Zimmerman sent a letter through its in-house counsel to approximately 146 employees.[6] The letter identified Marsh by name and noted his disability discrimination charge with the EEOC.[7] The letter also informed employees that "[i]t is [their] decision whether [they] wish to speak with the investigator and [their] decision will not have an adverse impact on [their] current or future employment with [Day & Zimmerman]."[8] The letter went on to provide contact information for the company's outside counsel in the event employees would like to have counsel present while they speak to the EEOC investigator.[9]

Day & Zimmerman's attorney explained that she thought the letter was a "standard courtesy notice."[10] She believed the

notice simply let employees know that the employer had given out their contact information and that employees may receive a telephone call. In essence, the letter was intended to address questions the company would likely get (and, in fact, did get) from employees.[11]

Subsequent events

Following distribution of the letter, Marsh claimed reputational and professional harm. He claimed he was approached by some of the letter's recipients "who discussed the letter's contents, including the fact that Mr. Marsh had alleged disability discrimination against [Day & Zimmerman]."[12] Marsh also claimed that after being placed by Day & Zimmerman into a new temporary assignment, he would be the first to get laid off.[13]

The EEOC reasoned that Day & Zimmerman's alleged conduct in sending the letter violated the ADA's prohibitions against retaliation and interference with the rights guaranteed under the statute, and ultimately decided to take Marsh's case to litigation. The EEOC issued a press release about the litigation describing the general nature of the case and published an update on social media. The press release disclosed Marsh as the complainant and the nature of his charge, including that the charge arose from a disability or medical condition, but did not identify the specific condition.[14]

The court's decision

During litigation, the EEOC and Day & Zimmerman filed motions for summary judgment; both were denied.[15] In relevant part, the court examined whether the ADA was violated. The court first examined whether the letter constituted *retaliation* under the ADA. To make out a prima facie case of retaliation under the ADA, a plaintiff must demonstrate:

> (1) the employee was engaged in activity protected by the ADA, (2) the employer was aware of that activity, (3) an employment action adverse to the plaintiff occurred, and (4) there existed a causal connection between the protected activity and the adverse employment action.[16]

The first two factors were not in dispute.[17] For the third factor, the court left it up to a jury to determine if the letter was an adverse employment action.[18] On the fourth factor, the court found that the jury could find causation based on the timing of when the letter was sent—three months after the EEOC's request for employee names. Moreover, the letter mentioned Marsh's charge and the EEOC investigation, further linking the protected activity and the potential adverse action—the letter. Accordingly, the court found that a reasonable jury could decide there was sufficient causation.[19]

The court also found that a jury had to decide whether Day & Zimmerman's proffered legitimate business reason for sending the letter—"to prevent business disruption and efficiently inform the [l]etter recipients that [Day & Zimmerman] would be producing their contact information to the EEOC"—was pretext for retaliation.[20] The court noted:

> If the [l]etter had been solely intended to minimize business disruption and inform recipients about the disclosure of their contact information to the EEOC, the letter need not include an entire paragraph identifying Mr. Marsh, discuss the nature and subject matter of the charge, nor disclose the specific accommodations he sought, that "his doctor told him he could not work in an area that had radiation… chemicals or exposure."[21]

The court also found that a jury could find that Day & Zimmerman's explanation was pretextual because the letter did not have to explain that recipients weren't required to speak to the EEOC investigator and that the company's counsel could be present if the recipient chose to speak to the EEOC.[22]

The court then turned to the claim of *interference* under the ADA. On this claim, the EEOC argued that "[Day & Zimmerman] interfered with the rights under the ADA of Mr. Marsh and all the [l]etter recipients because a reasonable jury would need to conclude that the [l]etter had a tendency to chill recipients from exercising their rights under the ADA."[23] Relying in part on interference claims under the National Labor Relations Act, the court held that a reasonable jury could conclude that the letter "could have the effect of interfering with or intimidating the [l]etter's recipients with respect to communicating with the EEOC about possible disability discrimination by [Day & Zimmerman]."[24] In other words, the court found that the ADA protected employees who had not even engaged in any EEOC-related activity. According to this court, all that is required to establish an ADA interference claim is to point to evidence of an employer action that *may* be interpreted as coercing or intimidating employees into not exercising their rights under the ADA.

In lieu of trial, Day & Zimmerman settled this case with the EEOC in November 2017 for $45,000 and agreed to furnish "extensive injunctive relief."[25]

At a Glance

In-house counsel communicate with employees; it is a routine part of the work environment. However, as recently addressed by the U.S. District Court for the District of Connecticut, a communication from corporate counsel to staff and employees may result in potential liability under employment discrimination laws if it constitutes unlawful interference with an employee's civil rights.

Lessons to learn

Based on the *Day & Zimmerman* case, the EEOC likely prefers that employers not contact employees at all during the investigatory phase of a discrimination charge. However, that may not be practical for some employers who know from experience that an unannounced call to a group of employees creates a panic and a flood of questions to human resources. Accordingly, below are some dos and don'ts gleaned from this case to use when communicating with employees about agency charges or lawsuits:

DOs	DON'Ts
DO be proactive and advise employees that they may be contacted by the EEOC as part of an investigation. This simple communication alone could take away the element of surprise, which is often the reason many employees have questions and concerns.	DON'T provide employees with the name of the charging party or describe the case with such specificity that it would otherwise reasonably identify the charging party. Naming or identifying the charging party places attention on the party and may make his or her claim of retaliation more plausible.
DO inform employees that it is their choice to speak with the EEOC and that no retaliation or adverse employment action will result. Providing this type of accurate information is defensible, particularly as such is permitted in other areas of the law (e.g., in response to union activity).	DON'T include specifics about the employee's charge or that it involves disability discrimination under the ADA. Also, do not include or disclose the charging party's underlying medical condition(s) or request for reasonable accommodation. In all practicality, this means you should not attach a copy of the disability discrimination charge to your correspondence with non-client employees.
DO make sure to document your business rationale and reasoning for employee communications and ensure your correspondences align with them.[26]	DON'T offer to provide non-client employees with the company's counsel to sit with them during their interview with the EEOC. This is a key factor that may lead to a finding of interference under the ADA. Also, it is not advisable to provide counsel to such employees from a practical standpoint as it could create privilege or conflict issues later.

Admittedly, the above guidelines cannot assure employers that they will not find themselves in conflict with the EEOC. Nevertheless, the suggestions may allow employers to better balance the risks of business disruption with the risks of litigation. ■

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ENDNOTES

1. *Equal Employment Opportunity Comm v Day & Zimmerman NPS, Inc*, 265 F Supp 3d 179 (D Conn, 2017).
2. *Id.* at 185.
3. *Id.* at 186.
4. *Id.*
5. *Id.* at 187.
6. *Id.* at 187–188.
7. *Id.* at 188.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 188–189.
12. *Id.* at 189.
13. *Id.* at 190.
14. *Id.* at 191. See also US Equal Employment Opportunity Comm, *Press Release: EEOC Sues Day & Zimmerman NPS for Unlawful Retaliation over Discrimination Charge* (September 28, 2015) <https://www.eeoc.gov/eeoc/newsroom/release/9-28-15.cfm> (accessed April 13, 2019) [https://perma.cc/7224-GE2H].
15. *Id.* at 191–192.
16. *Id.* at 199.
17. *Id.*
18. *Id.* at 200–201.
19. *Id.*
20. *Id.* at 201–202, 203.
21. *Id.* at 203.
22. *Id.*
23. *Id.*
24. *Id.* at 206.
25. US Equal Employment Opportunity Comm, *Press Release: Day & Zimmerman Will Pay $45,000 to Settle EEOC Disability and Retaliation Suit* (November 30, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/11-30-17b.cfm> (accessed April 13, 2019) [https://perma.cc/5CDZ-L44F].
26. As reflected in *Equal Employment Opportunity Comm v Day & Zimmerman NPS, Inc*, 265 F Supp 3d at 188–190, 203, the company attorney testified during depositions that the letter would not have been sent if Mr. Marsh's union representative had objected. However, the court found that an email between the company and the union at the time of the drafting of the letter could be interpreted as intent to send the letter regardless of any objection by the union. This issue was submitted to the jury to determine pretext.