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Whistleblower and Retaliation Claims

Presented by:

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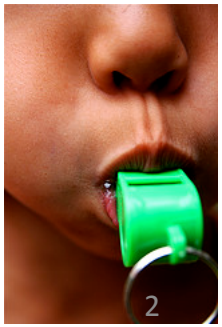
I. Florida Public Sector Whistleblower Act (the "ACT")

- The ACT prohibits "agencies" and "independent contractors" from retaliating against "employees" or "persons" who make certain protected disclosures.

F.S. 112.3187(2)



Protected Disclosures

- Does the disclosure go to a matter of public concern?
  - Does the disclosure show that the plaintiff disclosed a violation or suspected violation of a law, rule or regulations…which presents a substantial danger to the public health, safety or welfare? F.S. 112.3187(5)(a)
  - Does the disclosure show that the plaintiff disclosed an act or suspected act of gross mismanagement, malfeasance, misfeasance, waste of funds, or gross neglect of duty? F.S. 112.3187(5)(b)

Protected Disclosures

- A faculty member's complaint that a colleague was engaged in dual employment in violation of Florida law did not state a claim under the ACT.
- The violation did not present a substantial and specific danger to public health, safety or welfare.
- Laskey v. Florida Board of Regents, 22 FPER 27107 (1996).

Protected Disclosures

- Allegations that a police department was disorganized, had outdated policies and procedures, imposed discipline in an inconsistent manner, and the chief was a poor administrator, stated a claim under the ACT because a reasonable jury could draw an inference that the assertions were evidence of managerial abuses that amounted to gross mismanagement.
- Burden v. City of Opa Locka, 2012 U.S. Dist. LEXIS 144903 (S.D. Fla. Oct. 7, 2012).

To Whom Information Disclosed

- For disclosures concerning a local government entity, the information must be disclosed to a chief executive officer under F.S. 447.203(9) or "other appropriate local official." F.S. 112.3187(6).
  - CEO = County Manager
  - "Appropriate local official" = one empowered to investigate complaints and make reports or recommend corrective action
  - (Burden; Op. Atty. Gen. Fla. 99-07).

Circumstances of Disclosure

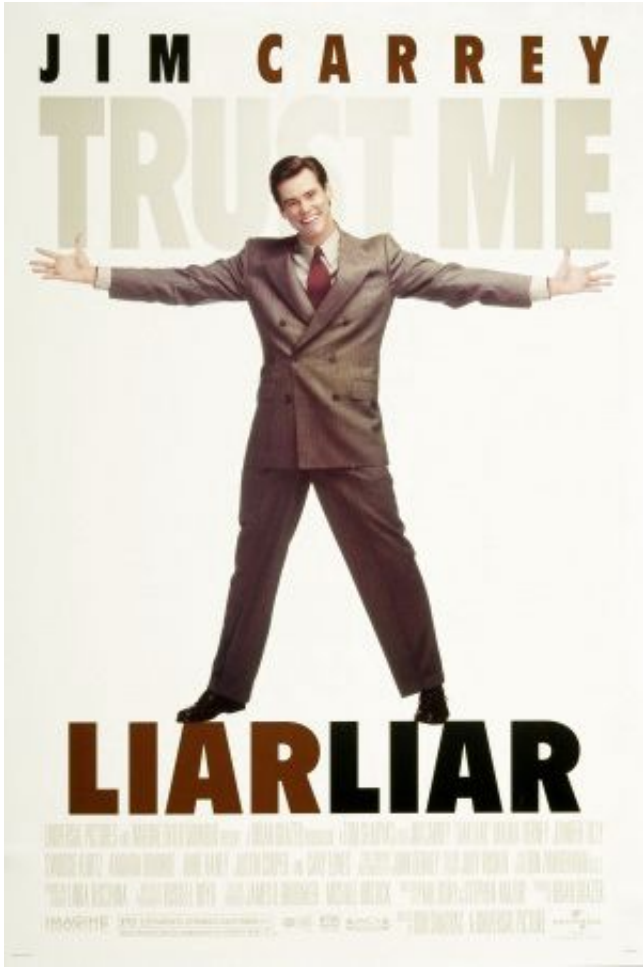
- Engaging in protected activity, assuming other requirements met, where:
  - Information is disclosed in a written and signed complaint
- An email can suffice (Scheirich v. Town of Hillsboro Beach, 2008 U.S. Dist. LEXIS 4090 (S.D. Fla.)
  - Disclosed upon being requested to participate in an investigation, hearing or other inquiry conducted by an agency
    - Writing not required (Burden)

Circumstances of Disclosure

- Refuse to participate in an adverse action that is prohibited by F.S. 112.3187
- File a written complaint to FCHR
- Make certain other complaints defined in F.S. 112.3187(7)

Exclusions

- The ACT does not protect:
  - A person who committed or intentionally participated in committing the violation (F.S. 112.3187(7))
  - A person who discloses information he or she knows to be false (112.3187(4)(c))



Prohibited Actions

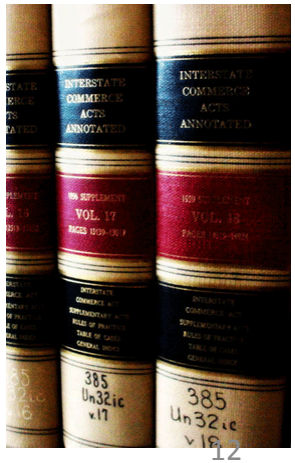
- Taking “adverse personnel action” against an “employee” based on the employee engaging in activity protected by F.S. 112.3187(4)(a) (i.e., the protected disclosures).
- Taking any adverse that affects the rights or interest of a “person” in retaliation for the person’s disclosure of information pursuant to F.S. 112.3187(4)(b).

Procedural Steps re: Employees of a Local Government Entity

1. If the local government entity has an ordinance that establishes procedures, or has contracted with DOAH to conduct hearings under the ACT...
    a) The employee's administrative complaint must be filed within 60 days after the prohibited action;
    b) The employee may file a civil action within 180 days after the entry of a final decision by the local government authority. (F.S. 112.3187(8)(b))

Procedural Steps re: Employees of a Local Government Entity

2. If the local government does not have an administrative procedure by ordinance or with DOAH, employees and all other individuals protected by the ACT may bring a civil action within 180 days of the prohibited action. (F.S. 112.3187(8)(b) and (c))



Prima Facie Case

i. Engaged in protected activity
ii. Suffered an adverse employment action
iii. A causal connection between the two events

Fla. Dept. of Children and Families v. Shapiro, 68 So.3d 298 (4th DCA 2011)

But also consider…

Prima Facie Case

- Must the plaintiff demonstrate, as an initial burden, that the disclosure was not made in bad faith, and did not occur after an agency's personnel action against the employee?
- State of Fla., Dept. of Transp. V. FCHR, 842 So.2d 253 (1st DCA 2003).

Pretext

- Under the ACT, the employer has the burden of "establishing that the adverse employment action actually was neutral and non-pretextual."
- Martin County v. Edenfield, 609 So.2d 27 (Fla. 1992)
- Thus, the employer's proffer of a legitimate reason does not shift the burden to the plaintiff to prove pretext.

Relief

- Back pay/benefits
- Reinstatement (or front pay)
- Attorney fees; costs
- Possibility of temporary reinstatement pending trial

NOTE: No provision for compensatory or punitive damages

II. Retaliation

- Now over one-third (1/3) of all EEOC charges
- Additional cause of action in majority of discrimination suits

Anti-Retaliation Provisions in Federal Discrimination Statutes

- Title VII
- ADEA
- Title I and V of the ADA
- FMLA
- FLSA

Why the Rise in Retaliation Claims?

1. Poor economy and slow recovery → "set up" scenario
2. Increased focus by EEOC on retaliation claims
3. Case law that's favored retaliation claims
4. Jury appeal
5. It (retaliation) actually happens

Retaliation – Prima Facie Case

- Elements: "**PAC**"
  - **P**rotected Activity
  - **A**dverse Employment Action
  - **C**ausal Connection

Charge Waivers as Retaliation

- EEOC takes the position that an –EE's waiver of the right to file a charge is null and void…
- And characterizes an –ER's attempt to secure a charge waiver as actionable retaliation
- Notwithstanding, an –EE can waive the right to "recover" in any lawsuit brought either by the –EE or by the EEOC

EEOC
U.S. Equal Employment Opportunity Commission

Recommended Release Language

- “Not the intent to interfere with the protected right of an employee to file a charge or participate in any manner (excluding receiving a personal financial benefit) in any investigation or proceeding under Title VII, ADEA, ADA, … etc.”
- (more expansive language can be provided upon request)

Getting to the Jury

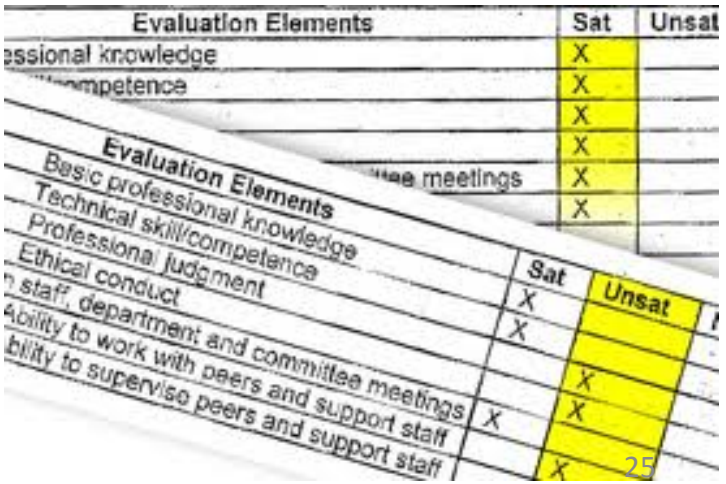
- Prima Facie case (-EE)
  - Protected activity
  - Adverse employment action
  - Causal Connection
- Articulation of non-retaliatory reason (-ER)
- Plaintiff's (-EE) burden:
  - Prove "pretext"

Adverse Action

- Must be “materially adverse”
  - Not a general civility code
  - Not petty slights or minor annoyances
  - Not personality conflicts
  - Not failing to invite for lunch
  - Not snubbing or shunning
- Clearly “materially adverse” if affects wages, benefits, terms, promotions

Adverse Action

- Lots of “grey” though
  - Putting –EE on warning or PIP?
  - Giving lower evaluation(s)?



Adverse Action

- Burlington Northern v. White (U.S. Sup. Ct. 2006)
  - Establishes an expansive standard of what constitutes an "adverse action"
  - **Holds**: the challenged action must be one that would "dissuade a reasonable worker from making or supporting a charge of discrimination."

"He that can heroically endure adversity will bear prosperity…"
- Henry Fielding

Is There a Causal Connection?

- Consider
  1. Temporal proximity
  2. Pattern of antagonism
  3. Totality of the evidence

Temporal Proximity

- "When the 'temporal proximity' between the protected activity and adverse action is 'unduly suggestive,' this is sufficient standing alone to create an inference and defeat summary judgment."

  Lichtenstein v. University of Pittsburg Medical Center, 2012 WL 3140350 (3d. Cir. 2012).

"Revenge is a dish best served cold."
- Tony Soprano

Temporal Proximity

- There is no bright line rule on the amount of time
- Two days is "unduly suggestive"
  - Litchenstein (citing Jalil v. Avdel Corp., 872 F.2d 701, 708 (3d. Cir. 1989)
- In Farrell v. Planters Lifesavers Co., (206 F.3d 271 (3d. Cir. 2000), the court found "ample evidence from which to infer a causal connection between the [plaintiff's] rejection of [her supervisor's] advance and her subsequent termination" a few weeks later.

Temporal Proximity

- However, the plaintiff could not satisfy the causation prong in her retaliation case with temporal proximity of eight weeks between her employer's completion of the sexual harassment investigation and her termination, and despite a claimed pattern of antagonism after the complaint.
  - Bailey v. Commerce Nat'l Ins. Services, Inc., 267 F.App'x 167 (3d. Cir. 2008); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997); Hughes v. Derwinski, 967 F.2d 168, 174 (7th Cir. 1992); (three month and four month periods of proximity found insufficient to raise an inference of causation).

Pattern of Antagonism

- In Urey v. Grove City College, the court held that the plaintiff did not satisfy causation through antagonism. She had alleged "that following her protected activities, her supervisors increasingly began to nitpick her work, subject her to unreasonable deadlines, and criticize her appearance."

Pattern of Antagonism

- The Urey court found the conduct of which the plaintiff complained "was taken in response to her own insubordination, including her failure to adhere to the College's dress code and demonstrate respect for her supervisor, . . . the conduct did not portend any future retaliation, but instead amounted to discrete responses to particular occurrences."

Top 10 Best Practices

1. EEO Statements
2. Specific anti-retaliation rule
3. Supervisory training

"If practice makes perfect, and no one's perfect, then why practice?"
- Billy Corgan

Top 10 Best Practices

4. Indentify potential plaintiffs (cont'd)
   - Grievants/complainers
   - Charge filers
   - Litigants
   - Witnesses
   - Protestors
   - Those who refuse to act claiming illegality
   - Benefit claimants
   - Recent FMLA returnees

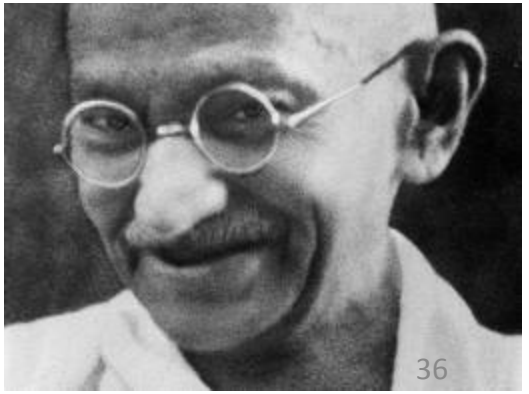
Top 10 Best Practices

5. Review paper trail (like in any discipline/discharge), but don't "over-do" it
6. Consider whether a decision-maker appears to have an axe-to-grind
7. Change reporting if necessary to protect/insulate protestor while investigating or dealing with –EE's claims
8. Keep knowledge of –EE's complaint within need-to-know circle

Top 10 Best Practices

9. Adverse action "in the works," and documented, at time of protected activity is helpful
10. Intervening "nice things" performed by employer may dispel any inference of retaliation

"Whenever you are confronted with an opponent, conquer him with love." - Gandhi



Thank you!

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RETALIATION CLAIMS

I. INTRODUCTION

Many federal statutes include provisions protecting employees from employer retaliation when they oppose unlawful employment practices or take part in employment discrimination proceedings. Such statutes include but are not limited to Title VII of the Civil Rights Act of 1964 (Title VI the Age Discrimination in Employment Act (ADEA). the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (ELSA). the Family and Medical Leave Act (FMLA), and the Occupational Safety and Health Act (OSHA). In addition, state statutes include similar protections. In Florida, retaliation claims are frequently made under the Florida Civil Rights Act (F.S. 761.10(7)), and Florida's Workers' Compensation Law (F.S. 440.205). These and similar statutes create independent causes of action for retaliation claims, meaning an employer can successfully defeat a discrimination claim but still face liability for retaliation.

The Equal Employment Opportunity Commission (EEOC) reports tremendous growth in the number of retaliation charge filings over the past two decades. In 1992 the EEOC reported 11,096 retaliation charges, representing 15.3 percent of that years total charge filings. In 2010, the most recent year for which statistics are available, the EEOC reported 36,250 retaliation charges. These retaliation charges represented 36.3 percent of the total charge filings made in 2010.

The United States Supreme Court has also expanded the scope of retaliation claims through rulings during the past several years. For example, in *CBOS West v. Humphries*, 553 U.S. 442 (2008), the court ruled that 42 U.S.C. § 1981 creates a claim for retaliation, even though such a claim falls outside of the plain text of the statute. Similarly, in *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), the Court recognized a cause of action for retaliation under the Age Discrimination in Employment Act. More recently, the Court has issued rulings that expand the scope of protected activity (*Crawford v. Metro. Govt. of Nashville & Davidson Cnty.*, 129 S.Ct. 846 (2009)) and expand the class of persons entitled to protection under retaliation statutes. *Thompson v. North Am. Stainless*, LP, 131 S.Ct. 863 (2011)).

Whistleblower claims are a subset of retaliation claims. A whistleblower is generally defined as an employee taking part in any of the following legally protected activities: (1) initiating a proceeding or causing a proceeding to be initiated, (2) testifying in a proceeding, (3) assisting or participating in a proceeding, or (4) complaining about a violation.

II. THE RETALIATION FRAMEWORK

To establish a prima facie retaliation case under the equal employment opportunity laws, a plaintiff employee must show (I) the employee took part in a protected activity; (2) the employer took an adverse action against the employee; and (3) there is a causal connection between the employees protected activity and the employer's adverse employment action.

The most basic retaliation cases are those involving direct evidence of employer retaliation. These cases are rare, as courts generally limit the scope of direct evidence to evidence requiring no inference to establish discriminatory intent. Direct evidence is often limited to employer statements conceding that an adverse employment action was taken in response to an employee's participation in a protected activity. If direct evidence of retaliation is not contradicted, a plaintiff will be entitled to summary judgment. If an employer contradicts

direct evidence, the case must be tried unless the employer can also show unrebutted evidence that it would have taken the adverse action even in the absence of a retaliatory motive.

The more complicated retaliation cases rest on circumstantial, not direct, evidence. Most retaliation claims proceed under the indirect framework. Under these indirect cases, plaintiff employees must satisfy the burden-shifting framework set forth in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973) by first establishing a prima facie case of retaliation. If the employee meets this initial burden, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action. Finally, if the employer meets this burden, the burden shifts back to the employee to show the reason offered by the employer was pretext for retaliation.

A. Establishing a Prima Facie Case

Although precise formulations vary, the prima facie case requires a showing of: (1) protected activity; (2) actionable adverse action against the person engaging in protected activity; and (3) causal connection or some reason to infer causation between the protected activity and the adverse employment action.

I. Protected Activity

An employee participates in a protected activity under the equal employment opportunity laws (Title VII, the ADEA. the Equal Pay Act, and the ADA) when he or she (1) opposes a practice made illegal by an employment discrimination statute (the "opposition clause"), or (2) files a charge, testifies, assists, or participates in any manner in an investigation proceeding pursuant to an employment discrimination statute (the 'participation clause").

a. Opposition to an Unlawful Employment Practice

The EEOC Compliance Manual lists four examples of protected opposition: (1) threatening to file a discrimination charge or complaint, (2) complaining about alleged discrimination against oneself or others, (3) refusing to follow an order due to a reasonable belief the order is discriminatory, and (4) requesting reasonable accommodation or religious accommodation.

In its recent decision in *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 129 S.Ct. 846 (2009), the Supreme Court held Title VII's opposition clause extends to an employee who spoke out about discrimination not on her own initiative, but while responding to questions asked in the course of her employer's internal investigation. Reversing the Sixth Circuits holding that "opposition" under Title VII demands active and continua! opposition of ones own initiative, the Court resolved a conflict among the circuits. It reasoned that the ordinary meaning of the word "oppose,"' left undefined by the statute, encompasses any communication from an employee to his or her employer expressing a belief that the employer engaged in discrimination The Court further reasoned that nothing in Title VII required "a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." To hold otherwise, the Court concluded, would create an unworkable catch-22: an employer could fire an employee who speaks out about discrimination during an internal company investigation, and if that same employee kept quiet and Later filed a Title VII claim the company could argue the employee had "unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer."

Crawford illustrates the liberal construction courts typically give retaliation provisions, in what the Court describes as an effort to avoid undermining Title VII's primary objective of

protecting employees. In light of this trend, employers must carefully consider when their employees may be "opposing" an employment practice.

Cases both before and after Crawford demonstrate the courts' struggle to determine what types of employee conduct constitute protected "opposition" under the equal employment opportunity laws.

(1) Examples of Protected and Unprotected Opposition

The following contains recent cases where courts have held employee conduct constituted **protected opposition**.

- *Helton v. Southland Racing Corp.*, 600 F.3d 954(8th Cir. 2010). Dianna Helton alleged that she was constructively discharged by Southland after a conversation with a co-worker in which she stated a Southland supervisor hated white people and gave preferential treatment to black employees. The supervisor Helton complained about was standing outside a nearby door and overheard the conversation. The Eighth Circuit held that the overheard conversation amounted to protected "opposition" activity under Title VII.

- *Pickett v. Sheridan Health Care Clr.*, 610 F.3d 434 (7th Cir. 2010). Plaintiff Danielle Pickets complained to her employer, Sheridan, that residents of the nursing home where she worked as a housekeeper were sexually harassing her. Pickett subsequently notified Sheridan's administrator that she was not satisfied with the steps the company had taken to prevent residents from harassing her. The Seventh Circuit held that Pickett's complaints were protected "opposition" even though the harassers were third-party non-employees.

- *Collazo v. Bristol-Myers Sqibb Mfg.*, 617 F.3d 39(Cir. 2010). Plaintiff Collazo helped co-worker Hiraldo initiate her sexual harassment complaint and urged Human Resources to act upon that complaint; court concluded this could be considered by a jury to be protected activity.

- *Vaughn v. Epworth Villa*, 537 F.3d 1147 (10th Cir. 2008). Employee engaged in protected activity when she submitted unredacted medical records to the EEOC.

- *Demers v. Adams Homes of Northwest Florida, Inc.*, 321 Fed.App'x 847 (11th Cir. 2009). Employee who requested to speak with a manager after her supervisor made a discriminatory statement was engaging in protected activity, because by asking to speak with a manager she "expressed her resistance to or antagonism toward the substance of his statement."

- *Scott v. Napolitano*, 717 F. Supp. 2d 1071 (S.D. Cal. 2010). The Federal Protective Service suspended and eventually terminated plaintiff James Scott after he refused to answer all of the questions on a medical questionnaire. Scott contended that several of the questions violated the ADA. The court found his refusal to answer the questions constituted protected "opposition."

- *Riscili v. Gibson Guitar Corp.*, 605 F. Supp. 2d 558 (S.D.N.Y. 2009). Gibson fired Patrick Riscili after he notified management about a co-worker who mocked his sexuality at a company-sponsored function. Riscili did not report the mocking himself. Rather, a co-worker reported the behavior to management in spite of Riscili's indication that he preferred to confront his mocker informally. In a subsequent phone call with a supervisor, Riscili reiterated that he would address the situation privately with his mocker. The court denied Gibson's summary judgment request in the

subsequent retaliation suit, concluding that Riscili's phone call with his supervisor constituted protected "opposition" under the logic of Crawford, 129 S. Ct. 846.

- Yanowitz v L'Oreal USA. Inc., 116 P.3d 1123 (Cal. 2005). The California Supreme Court took an expansive view of "opposition" as protected under the state's Fair Employment and Housing Act (FEHA). The general manager of L'Oreal fragrance division ordered plaintiff Elysa Yanowitz to fire a dark-skinned female sales associate because he did not find the woman physically attractive. The general manager instructed Yanowitz to get him "somebody hot." During several follow-up discussions with the general manager, Yanowitz reiterated that he needed to provide adequate justification before she would terminate the sales associate. After defying the general manager's order, her superiors at L'Oreal began soliciting negative feedback about Yanowitz, and she eventually took disability leave due to stress. Yanowitz never complained to her supervisor that she was being pressured to fire the sales associate, and she never explicitly told the general manager that she found his order to be discriminatory. But the court held when circumstances suggest an employee refused to comply with an employer's order based on a reasonable belief the order was discriminatory, that refusal is protected "opposition" under the FEHA whether or not the employee explicitly told the employer that she believed the order to be discriminatory. While the employer must have some knowledge that the employee believed the order to be discriminatory, the court concluded the employee need not use legal terms or buzzwords. The court ultimately held a reasonable trier of fact could find Yanowitz repeated objections adequately conveyed to her employer that she believed the general manager's order was discriminatory.

- *Pacheco v. Whiting Farms*, 365 F.3d 1199(Cir. 2004). Plaintiff Veronica Pacheco alleged her employer, Whiting Farms, terminated her in retaliation after she requested her overtime wages pursuant to the FLSA. The Tenth Circuit held such a request for overtime wages constituted "opposition" protected under the FLSA.

The following contains recent cases where courts have held employee conduct **did not constitute protected opposition**.

- *Thompson v. Somervell County*, 431 Fed.Appx. 338, 2011 WL 2623571 (5th Cir. 2011). Request for documentation of a sexual harassment report from four years earlier did not constitute protected activity. Although plaintiff told the personnel director that she 'was going to do whatever it took to make this right,' court held that a statement was insufficient to qualify as opposition given that the plaintiff admitted that her reason for requesting documentation was because she wanted to find a job. The Court also noted that the request was made nearly four years after the incident at issue. In light of these factors, no reasonable jury could find that the request was made with an intent "to contend against [,] confront [,] resist [or] withstand" any long ago discriminatory practices.

- *Hine v. Extremity Imaging Partners,* ,No. 1:09—cv-416--SEB—TAB. 2011 WL 765853 (S.D. Ind. Feb. 25, 2011). The District Court for the Southern District of Indiana granted summary judgment in favor of Extremity Imaging Partners, finding that plaintiff employee Tamara Hine did not engage in activity protected under Title VII. Although Hine asked her supervisor to stop making inappropriate jokes about "who wore the pants" in her family during a telephone conversation, her complaint lacked the specificity required to alert the supervisor that she was asserting her rights. The court determined that her complaint amounted to little more than an

attempt to change the direction of the conversation and was "far from the type of complaint that would put [her supervisor] on notice."

- *Bonds v. Leavitt*, 629 F. 3d 369 (4th Cir. 2011). Scientists opposition to retention of cell lines used in research did not constitute opposition to an individual employment practice. (Scientist did, however, state a claim under the Whistleblower Protection Act.).

- *Monk v. Potter*, 723 F. Supp. 2d 860 .D. Va. 2010). Plaintiff Ronnie Monk alleged the United States Postal Service terminated him in retaliation for filing Equal Employment Opportunity (EEO) complaints. The court noted that filing EEO complaints generally constituted protected "opposition" under Title VII. But Monk's complaints alleged harassment and retaliation in a general sense, with no reference to sex discrimination or discrimination based on any other characteristic protected by Title VII. The court held Monk failed to meet his burden of alleging he took part in protected "opposition" activity, as Title VII does not prohibit retaliation against employees who do not allege unlawful discrimination.

- *Duchesne v. Banco Popular D Puerto Rico, Inc.*, Civ. No. 04-2161, 2010 WL 3719184 (D.P.R. Sept. 13, 2010) Plaintiff Kevin Duchesne alleged he received negative performance reviews and was ultimately terminated by Banco Popular De Puerto Rico in retaliation for repeatedly requesting job training the company afforded its female employees. In granting Banco Popular's summary judgment motion, the court held Duchesne failed to show that requesting job training amounted to "opposition" to sex discrimination in the workplace protected under Title VII.

- *McKee v Tennessee*, Civ. Action No. 3:09-0321, 2010 WL 3447790 (M.D. Tenn. Aug. 30, 2010). The court held a female employee did not engage in protected activity by submitting a report complaining of her supervisor's abrasive behavior and poor interpersonal skills. While the plaintiff alleged that several of her supervisor statements giving rise to her report included comments that women did not belong in the workplace and that he hated white women, she did not include any of those statements in the report she submitted to her employer. Because the report did not make clear that she was "opposing" racial or sexual discrimination, it was not protected activity under Title VII.

- *Pitrolo v Cnty. of Buncombe*, 105 FEP Cases 1675 (4th Cir. 2009). The Fourth Circuit affirmed summary judgment in favor of the County of Buncombe on Melanie Pitrolo's retaliation claim. Pitrolo alleged the County retaliated against her after she complained to her father that the County passed her up for a promotion due to gender discrimination. Though her father relayed the complaint to the County, there was no evidence Pitrolo intended for him to do so. The Fourth Circuit held Pitrolo did not communicate to her employer her belief that it engaged in unlawful discrimination as required by Crawford, 129 S.Ct. 846, and thus she did not engage in protected "opposition" under Title VII.

- *Zokari v, Gates*, 561 F.3d 1076 (10th Cir. 2009). A Nigerian-born employee's refusal to take English lessons was not protected "opposition" activity under Title VII. The Tenth Circuit affirmed summary judgment in favor of the employer, concluding Zokari's refusal would not have communicated to his employer that he was opposing an unlawful employment practice, but that he felt his accent could be understood and did not require any classes.

(2) Good Faith, Reasonable Belief Requirement

To constitute protected activity, the employee's complaint need not be ultimately proven to be correct. Employees are also protected if they oppose employer conduct that does not violate one of the equal employment opportunity laws as long as the employee has a good faith, reasonable belief that the employer's conduct was unlawful. Thus, an employer can be liable for retaliation whether or not the court finds its underlying conduct to be unlawful.

The Supreme Court addressed the issue of what constitutes a good faith, reasonable belief in *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2010). Plaintiff Shirley Breeden attended a meeting with her male supervisor and another male employee to review job applications. Breeden's supervisor read aloud that one of the applicants had told a co-worker at a previous job "I hear making love to you is like making love to the Grand Canyon." The supervisor then looked at Breeden and stated he did not know what that comment meant. The other male employee said, "Well, I'll tell you later," and both men laughed. Breeden complained about this incident to several employees, and she alleged the school district retaliated against her for these complaints. The Court held no reasonable person could have believed this single incident violated Title VII. At worst, the Court concluded, the two male co-workers' comments and laughter represented an isolated incident not rising to the "extremely serious" level *Faragher V. Boca Raton*, 524 U.S 775, 788 (1998) requires.

As this good faith, reasonable belief standard suggests, there is no bright-tine test for determining when an employee's belief will constitute protected opposition activity. Employers should be cautious when assessing the reasonability of an employee's belief. Courts are generally reluctant to discourage employees from reporting what they believe to be violations out of the fear they could face retaliation if the perceived violation fails to meet some statutory standard.

The following contains recent cases where courts have held an employees belief satisfied the good faith, reasonable belief standard.

- *Nelson v. Realty Consulting Services, Incorporated*, 431 Fed.App'x 502, 2011 WL 2989565 (7th Cir. Jul. 25, 2011). Employee did not have requisite good faith belief that her African-American co-worker was discriminated against on the basis of her race. Plaintiff supported EEOC charge of co-worker that admitted that she knew of no facts to support the co-worker's claim of religious discrimination. Additionally, plaintiffs stated reason for concern about co-worker's pay was the fact that his replacement (also African-American) was paid the same salary that he was, which did not support a claim for race discrimination.

- *O'Leary v. Accretive Health, Inc.*, — F.3d___ ,2011 WL 4375684(7th Cir. Sept. 21, 2011). Employees report that, at a single social event, a co-worker boasted about her sexual exploits with other co-workers was not protected activity. Employee did not have reasonable basis for believing that the conduct was illegal, partly since none of the individuals present stated that they felt harassed. However, employee's complaint that co-worker had been treated more harshly because of her race did constitute protected activity.

- Sharpe v. Utica Mut. Ins. Co., No. 6:08-CV-627, 2010 WL 527984 (N.D..N.Y. Dec. 27, 2010). Though ultimately granting the employer's motion for summary judgment, the court held Joanne Sharpe's March 2007 internal complaint was based on a reasonable, good faith belief that Utica was engaging in an unlawful employment practice. Sharpe's initial email complaint did not explicitly allege sex discrimination,

though she did complain that a co-worker was not reprimanded for kicking her in the buttocks when she bent over to pick up a paper from the floor. But Sharpe stated in a later meeting that she felt she was being retaliated against because of a 1999 sexual harassment complaint against a since-retired (and deceased) former supervisor. Viewing the facts in the light most favorable to the employee, the court concluded the March 2007 complaint arose from her good faith, reasonable belief that she was opposing unlawful employer conduct. The complaint thus constituted "protected" opposition under Title VII.

- *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951(9th Cit 2009). A jury awarded Youseff Bouamama a $200,000 judgment for his termination allegedly in retaliation for complaints he made about discriminatory conduct. Because Bouamama complained about discrimination two or three times to human resources, the court concluded that Ronamama had a reasonable belief that he was "opposing" discrimination based on his national origin and religion. More important, though, was the Ninth Circuit's conclusion that a comment Bouamama never reported to his employer—"The bastard Muslims need to die"— was relevant to the inquiry concerning the reasonableness of his belief.

- *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3d Cir. 2002). The Third Circuit allowed a retaliation claim to go forward where an employer believed an employee had engaged in protected "opposition" activity, regardless of whether or not the employee himself reasonably believed his activity was protected. The court held that so long as the employer's specific intent was discriminatory, the retaliation is actionable.

- *Smith v, Board of Educ. of School Dist. Fremont RE-1*, 83 P.3d 1157 (Colo.App. 2003).. Court held that employee could have reasonably believed supervisor's pinching of her was sexual harassment based on. among other things, fact that pinching was listed as an example of harassment in the employee handbook.

The following selection contains recent cases where courts have held an employee's belief **did not satisfy the good faith, reasonable belief standard**.

- *Bonn v. City of Omaha*, 623 F.3d 587 (8th Cir. 2010). The City of Omaha terminated Tristan Bonn after she published a report criticizing the Omaha Police Departments (OPD) handling of traffic stops. The report noted that OPD was estranged from many communities and could improve its relationship with communities of color in particular. The Eighth Circuit held Bonn could not reasonably have believed she was "opposing" an unlawful employment practice under Title VII. While her report suggested OPD's conducting of traffic stops was possibly discriminatory and estranged the department from communities of color, it neither examined nor challenged any OPD employment practices as discriminatory under Title VII.

- *Butler v. Ala. Dep't. of Transp.*, 536 F.3d 1209(11th Cir. 2008). Plaintiff Alverene Butler alleged her employer constructively discharged her in retaliation after she reported a white co-worker's use of racial epithets during a drive to lunch on a break from work. The Eleventh Circuit disagreed, holding that it is "objectively unreasonable" to believe that the use of racially discriminatory language on one occasion by one co-worker away from the workplace is enough to permeate the workplace with "discriminatory intimidation, ridicule, and insult" and to "alter the conditions of the victims employment and create an abusive working environment" In

fact, the court concluded Butler's belief was "not even close" to being objectively reasonable.

- *Jackson v. Geo Group, Inc.*, 312 Fed.Appx. 229 (11th Cir. 2009). Court held that plaintiff's belief that transfer was based on racial discrimination was not reasonable where his entire unit was transferred, he received no change in pay, seniority or benefits, and his internal claim had already been investigated and he was given legitimate non-discriminatory reasons for the transfer.

- *Tate v. Exec. Mgmt. Scrvs. Inc.*, 546 F.3d 528(7th Cir. 2008), cert. denied, l29 S. Ct. 1379 (2009). In a particularly employer-friendly application of the good faith, reasonable belief requirement, the Seventh Circuit held Alshafi Tate could not reasonably have believed his rejection of a supervisors sexual advances for purely personal reasons was protected activity under Title VII. Tate rejected the supervisor's advances because he wanted to remain faithful to his wife, not because he had a good faith, reasonable belief that the advances were unlawful. Hence, the court reversed the district courts denial of the employer's summary judgment motion.

(3) Reasonable Opposition Requirement

An employee's opposition against perceived employment discrimination must be reasonable in order for the anti-retaliation provisions in the equal employment opportunity laws to apply. Applying this reasonableness standard, both the courts and the EEOC balance the individual's right to oppose employment discrimination and the public's interest in having the equal employment opportunity jaws enforced against the employer's need for a stable and productive workplace.

The EEOC Compliance Manual identifies activities like informing an employer's customers of alleged discrimination or peaceful picketing as reasonable opposition. It points to several activities that courts have found to be unreasonable opposition: (1) locating and copying confidential documents and showing them to co-workers, (2) bypassing the chain of command to make an overwhelming number of unsubstantiated complaints, and (3) badgering a subordinate into giving a witness statement and later trying the coerce that subordinate into changing the statement.

The EEOC Compliance-Manual also notes that unlawful activities such as acts or threats of violence against people or property are not protected from retaliation. But the case law is not necessarily that simple. in cases of serious or extreme discrimination, courts have been less willing to hold an employees opposition to be unreasonable.

The following contains recent cases where courts have held an employee's opposition was reasonable.

- *Hertz v Luzenac Am. Inc.*, 370 F.3d 1014(10th Cir. 2004). Luzenac challenged the reasonableness of plaintiff Sanford Hertz's opposition to perceived anti-Semitism. Hertz lost his temper at work and shouted at his supervisor through his office door in the presence of other employees. Tenth Circuit affirmed the district courts refusal to give a reasonable opposition jury instruction. Hertz's outburst constituted a single isolated event, and it was not sufficiently unreasonable to deprive him of retaliation protection under Title VII. The court noted, "An emotional response to a racial or religious epithet is a most natural human reaction. ft would be ironic, if not absurd, to hold that one loses the protection of an antidiscrimination statute if one gets visibly (or audibly) upset about discriminatory conduct."

- *Anderson v. G.D.C., Inc.*, 281 F.3d 452(4th Cir. 2002). Tortica Anderson's co-workers directed a barrage of sexual comments at her throughout her employment at G.D.C. Her supervisor's comments were particularly egregious, as he regularly talked about her breasts and buttocks. At one point, he told Anderson that he "heard black women had the best p***y." On another occasion he told Anderson if he ever caught her driving on a particular road, he would "f*** [her] in the a**." When Anderson gave candy-coated objections and eventually complained to a co-worker, her supervisor told her she "might as well get used to it" because it was "the way of G.D.C." One day, Anderson's supervisor came up behind her and pressed his penis into her buttocks. Anderson turned and told him she would "cut his f**ing throat if he ever did it again." The Fourth Circuit held Anderson had presented sufficient evidence for her retaliation claim to reach a jury, reversing the district courts grant of summary judgment.

The following contains recent cases where courts have held an employee's **opposition was unreasonable**.

- *Argyropoulos v. City of Alton*, 539 F.3d 724 (7th Cir. 2008). Plaintiff Christina Argyropoulos complained about an instance of sexual harassment by a co-worker at the Alton city jail. Later, Argyropoulos secretly recorded a meeting where she discussed her harassment claim with her superiors. When her employer discovered that Argyropoulos had taped the meeting, she was eventually charged with felony eavesdropping and fired. The district court granted summary judgment in favor of the City of Alton. The Seventh Circuit affirmed, holding that Title VII's anti-retaliation protections do not grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination.

- *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000). Yvette Cruz got into an argument with a co-worker after the co-worker made a comment about her nipples. When the co-worker stepped near and hurled an insult at her, she slapped him. The Second Circuit held that the sort of "opposition" activity protected from retaliation under Title VII included complaints to management, letters to customers, filing formal complaints, and similar activities, but Title VII is not a license to respond to discrimination with physical violence. Careful to state it was not ruling categorically that physical violence could never be protected "opposition" activity, the court noted that Cruz had several other options for responding to her co-worker's discriminatory behavior. Thus, the Second Circuit affirmed the district courts decision to dismiss Cruz's retaliation claim.

- *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cit. 2008). Employee's disclosure of confidential and proprietary documents to her attorneys during - discovery phase of Equal Pay Act and Title VII sex discrimination class action against employer, in violation of employer's privacy policy, did not constitute protected "participation" under Title VII retaliation provision, even though disclosure was in response to attorneys request; employee admittedly had no documents to support equal-pay claim, and instead furnished documents that could be used in future retaliation action, including some that contained confidential information about employer's clients.

- *Johnson v. Mechanics & Farmers Bank*, 309 Fed. App'x. 675 (4th Cir. 2009). Employer's activities in opposing discharge of subordinate were not reasonable

Employee's emails regarding situations were inappropriate and insubordinate and employee had previously been warned regarding these issues.

b. Participation in Protected Activity

It is unlawful for employers to retaliate against an employee who has made a charge or testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under the equal employment opportunity laws. The EEOC notes that the participation clauses in the equal employment opportunity laws apply to EEOC proceedings, state administrative or court proceedings, and federal court or administrative proceedings.

The EEOC Compliance Manual suggests "participation" in a statutory complaint process is always protected, even if the underlying charge is unreasonable or brought in bad faith. As discussed below, courts have not consistently embraced this view.

The following contains recent cases where courts have held an employee's conduct constituted **protected participation activity**.

- *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011). The Supreme Court recently held the FLSA's anti-retaliation provision encompasses oral complaints that are sufficiently clear to put a reasonable employer on notice of an employee's assertion of rights. The FLSA prohibits employers from retaliating against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act]". Undertaking a textual analysis, the Court concluded that dictionary definitions, state statutory language, federal regulations, and common judicial usage could not conclusively answer whether this language covers oral complaints. The Court next turned to the FLSAs broad objectives and the respect due to the interpretations of the Department of Labor (DOL) and the EEOC under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Both the DOL and the EEOC interpret the "filed any complaint" language to encompass oral complaints. The Supreme Court agreed. Because the employer did not properly raise the issue, the Court explicitly declined to decide whether the FLSA applies to a complaint made to a private employer rather than the government.

- *EEOC v, Creative Networks, LLC*, No. CV 05-3032-PHX-SMM, 2010 WL 276742 (D. Ariz Jan. 15, 2010). Kathryn Allen alleged that her employer, Creative Networks, retaliated against her after she was identified as a witness in a co-workers EEOC charge. Creative Networks requested summary judgment, arguing that Title VII's participation clause requires affirmative participation—such as actual participation in a proceeding as a witness. The EEOC argued that Allen's passive act—being named as a witness in her co-workers charge—constituted protected "participation." Noting that the Ninth and other federal circuits give the participation clause an exceptionally broad reading, the court denied summary judgment even though Allen did not know she was listed as a witness until after the fact, being listed as a witness and discussing that listing with co-workers constituted "participation" in protected activity under Title VII.

- *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166 (2d Cir. 2005). The Second Circuit came to the same conclusion as the District of Arizona in a case involving an employee who offered to testify in a co-worker's discrimination lawsuit. As in Creative Networks, the witness was never actually called to testify. Nevertheless, the Second Circuit held it would be destructive to Title VII's remedial purpose to leave an employee who is poised to testify in a co-worker's discrimination suit "wholly unprotected" from retaliation.

- *Schramm v. LaHood*, Nos. 08-3420, 08-3421, 2009 WL 723164 (6th Cir. Mar. 19, 2009). The Sixth Circuit held that assisting a process server in identifying the target of a subpoena, a co-worker, amounted to protected activity under Title VII's anti-retaliation provision. While the court did not explicitly identify whether the "opposition" clause or the "participation" clause protected the employee's conduct, it seems to fall under the 'participation" clause's protection of employees who "assist" a Title VII proceeding.

- *EEOC v. Bojangles Rests., Inc.*, 284 F. Supp. 24 320 (M.D.N.C. 2003). Revonda Mickle "participated" in protected activity by providing financial support for her co-worker and fiancé after he announced his intention to file an EEOC charge against Bojangles Restaurant. The court noted that without Mickle's financial support, her fiancé could be forced to accept a quick (and perhaps small) settlement, or he might have difficulty securing adequate legal counsel, Further, because Mickle worked at the same restaurant as her fiancé, the court noted she could potentially become a witness on his behalf The court thus held Mickle "assisted" her fiancé under the plain language of 42 U.S.C. § 2000e-3(a), and it denied Bojangles Restaurants motion to dismiss.

- *Vaughn v. Epworth Villa*, 537 F.3d 1147(10th Cir. 2008). Employee engaged in protected activity under Title VII when she submitted unredacted medical records to the Equal Employment Opportunity Commission (EEOC) in support of her discrimination claim against employer; however, Employee's violation of employer's policies and procedures regarding confidentiality was legitimate, non-retaliatory reason for her termination.

The following contains recent cases where courts have held an employee's conduct **did not constitute protected participation activity**.

- *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 74 Cir. 2010). Janet Hatmaker's comments during an internal company investigation of a co-worker did not constitute protected participation. Hatmaker told an investigator that her boss was a Southern Baptist and a good old boy who therefore had inherently sexist views. The Seventh Circuit held that even if a purely internal investigation is covered under Title VII's anti-retaliation provision—a point it assumed but did not decide—Memorial fired Hatmaker for her poor judgment and preoccupation with her boss's superficial characteristics, not because she participated in the investigation. The court concluded that Title VII forbids retaliation against an employee for participating in an investigation into employment discrimination, but it does not forbid firing an employee for conduct that would have warranted termination if it occurred outside of the investigation context. The court acknowledged that there is a conflict among the circuits on this point.

- *Basinger v. Hancock, Daniel, Johnson & Nagle, P.C.*, No. 1:10-cv-666 (LMB 2010 WL 5395043 (E.D. Va. Dec. 23, 2010). The court granted Hancock, Daniel, Johnson, & Nagle, P.C.'s motion for attorney fees, holding Judith Basinger's retaliation suit frivolous. Basinger claimed she participated in protected activity when she was interviewed by superiors in relation to allegations that she had engaged in sexual harassment. The court noted she was interviewed as a possible instigator of inappropriate behavior, not as a witness. Thus, her participation in the interview was not protected under Title VII.

- *Ellis v. Compass Grp. USA, Inc.*, Civil Action No. 1:08-cv-366, 2010 WL 4792668 (E.D. Tex Oct 18, 2010). Plaintiff Ora Ellis alleged that she suffered retaliation after attempting to obtain statements from her co-workers one month prior to filing an

EEOC charge. The court held that collecting statements did not amount to "participation" under Title VII's anti-retaliation provision. The court concluded that any retaliation pre-dating Ellis's EEOC charge, including an informal phone call to the EEOC, did not amount to "participation" in a protected activity and could not serve as the basis of a prima facie retaliation claim.

- *Slagle v. Cnty. of Clarion*, 435 F.3d 262 (3d Cir. 2006). The Third Circuit held Timothy Slagle's facially invalid EEOC charge did not constitute "participation" under Title VII's anti-retaliation provision. The court concluded that any other holding would render meaningless the "under this subchapter" language in 42 U.S.C. § 2000e-3(a). The court maintained that anti-retaliation protection is not lost simply because a plaintiff is mistaken on the merits of his or her charge, for Title VII sets a low bar for anti-retaliation protection. But Slagle's vague complaint of "civil rights" violations could not meet even this low bar.

2. Adverse Employment Action

To satisfy the second element of a prima facie retaliation claim, an employee must show that he or she suffered a materially adverse employment action. The EEOC identifies several typical forms that retaliatory adverse employment actions take: threat, reprimand, negative evaluation, harassment, denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, termination, and "other adverse treatment."

While some courts have accepted the broad definition of what constitutes an adverse employment action, the circuits have historically been divided into three camps on this point. The Supreme Court resolved this divide in *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006).

a. The Burlington Northern Standard

Burlington Northern and Santa Fe Ry, Co., provides the definition of "adverse action" in the retaliation context. In Burlington Northern, Sheila White alleged that her employer retaliated against her after she complained about a supervisor's sexual harassment and ultimately filed an EEOC charge. After White complained that her supervisor made offensive comments and told her that women should not work in the maintenance department, Burlington suspended the supervisor and ordered him to attend sexual harassment training. But Burlington also removed White from her job as a forklift operator, assigning her to standard laborer tasks. Burlington told White that a more senior male employee should be able to fill the cleaner and less arduous forklift operator position. White filed an EEOC complaint alleging Burlington reassigned her in retaliation for reporting her supervisor's harassment. After her being reassigned and filing an EEOC charge, White got into a disagreement with her new supervisor, and Burlington suspended her 37 days for insubordination. Though Burlington later reinstated White and awarded her back pay, she filed an additional retaliation charge with the EEOC based on her suspension.

A jury found that *Burlington* retaliated against White both in reassigning her from her forklift operator position and in later suspending her. Both the Sixth Circuit en banc and the Supreme Court affirmed. The Supreme Court noted that one effective way of discouraging White from pursuing a discrimination charge would be insisting that she spend more time doing difficult work tasks and less time doing agreeable tasks. The Court thus held a reasonable jury could have concluded that Whites reassignment to the laborer position would have been materially adverse to a reasonable employee.

The Court also held a reasonable jury could have concluded that White's 37-day suspension would have been materially adverse to a reasonable employee. Even though White later received back pay for the duration of her suspension, the Court noted that a month without pay could have been a "serious hardship" for White and her family. White received medical treatment for her emotional distress and described having the worst Christmas of her life during her suspension. The Court concluded a reasonable employee in White's position might choose to avoid suspension and forego filing a discrimination charge, even if the suspension would end with the employee receiving back pay.

Burlington Northern establishes an expansive standard for determining what constitutes an "adverse employment action" under Title VII. The Court held that a plaintiff must show a reasonable employee would have found the challenged action to be "materially adverse". Under this objective standard, the challenged action must be one that would "dissuade a reasonable worker from making or supporting a charge of discrimination" The Court noted that it embraced a material adversity standard because the decision to report discriminatory "behavior cannot immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience." The Court further noted that it embraced this broadly worded standard because "the significance of any given act of retaliation will often depend upon the particular circumstances. . . [c]ontext matters."

Federal court decisions on the adverse action question have varied in the aftermath of Burlington Northern. The following contains recent cases where courts have **held an employer's conduct satisfied *Burlington Northern's* material adversity standard**.

- *Young v. Graphic Packaging Int'l,* 631 F.3d 909(8th Cir. 2011). The Eighth Circuit recently held that firing an employee for making a discrimination complaint satisfied the Burlington Northern material adversity standard even where the employer rescinded the firing after only two days. This holding is a stark reminder of the dangers employers face when their supervisors make rash, unthinking decisions to retaliate—as employers are often powerless to undo the effect of those decisions.

- *Blackburn v Shelby Cnty.*, No. 2:07-cv-02815-JPM-dkv, 2011 WL 692808 (W.D. Tenn. Feb. 18, 2011). Judy Blackburn alleged her employer took nine discrete adverse actions against her in retaliation after she filed EEOC charges. The court did not consider whether these nine actions, taken together, could have dissuaded a reasonable employee from supporting a discrimination charge. Rather, it examined each action in isolation, finding that none of them independently amounted to a materially adverse employment action.

- *Zelaya v. UNICCO Serv. Co.*, Civil Action No. 07-0231 1(RCL), 2010 WL 3292364 (D.D.C. Aug. 20, 2010). The District Court for the District of Columbia held that a lateral job transfer without loss of pay or benefits can amount to a materially adverse employment action under *Burlington Northern.* Although the transfer required the plaintiff to report to a building less than two miles from her previous place of employment, her move to a new building caused her to lose seniority. The Court concluded that loss of seniority could create significant risks for the plaintiff in the event of company layoffs or transfers, and thus it could dissuade a reasonable employee from making and supporting a discrimination charge.

- *Mogenhan v. Napolitano*, 613 F.3d 1162 (D.C. Cir. 2010). The D.C. Circuit held that posting an employees EEO complaint on the employer's intranet where fellow employees could see it constituted a materially adverse employment action under Burlington Northern. The court also held that increasing the plaintiffs workload to

five or six times that of her co-workers constituted a materially adverse employment action. The court determined that either action could dissuade a reasonable employee from engaging in further protected activity.

- *Hicks v. Baines*, 593 F.3d 159 (2d Cir. 2010). The Second Circuit held that intentionally adjusting shift times, break schedules, work locations, and work assignments could constitute a materially adverse employment action, particularly where those actions require a plaintiff to work alone in a residential youth facility. The plaintiffs alleged that working atone was not only tedious, but it could be dangerous when the youth act in a violent manner. The court thus reversed the district court's grant of summary judgment in favor of the employer.

- *Wharton v. Gorman-Rupp Co.*, 309 Fed. App'x 990 (6th Cir. 2009). The Sixth Circuit held that threatening behavior by a company vice-president in the company's parking lot constituted a materially adverse employment action where the plaintiff employee reasonably feared violence was possible. Though the district court held the encounter only amounted to a 'stray comment,' a disinterested witness described it as "very threatening." The Sixth Circuit held that the district court erred in finding the parking lot conduct could not satisfy the material adversity standard as a matter of law.

- *Pantoja v. American NTN Bearing Mfg. Corp.*, 495 F.3d 840 (7th Cir. 2007). Noting that whether disciplinary measures are adverse action for purposes of retaliation claim is a "context-driven inquiry," the Seventh Circuit ruled that there was enough in the record for a factfinder to conclude that warnings at issue were materially adverse.

- *Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008). African-American employee of state university suffered materially adverse action, within meaning of Title VII's retaliation provision, in form of unfavorable performance review that directly affected her eligibility for merit pay increase and that was received after she had complained of racial discrimination; negative review clearly might deter reasonable employee from pursuing pending charge of discrimination or making new one.

- *Donaldson v. CDB Inc.*, 335 Fed.Appx. 494 (5th Cir 2009). Genuine issue of material fact existed as to whether staff meeting during which supervisor discussed female employee's Equal Employment Opportunity Commission (EEOC) sexual harassment charge against him was retaliatory measure against employee for filing EEOC claim, precluding summary judgment for employer on former employees Title VII retaliation claim.

The following contains recent cases where courts have held an employee's conduct **did not satisfy *Burlington Northern's* material adversity standard**.

- Barton v. Zimmer, Inc.,___ F.3d.___, 2011 WL 4921603 (7th Cir. 2011). Court notes that receiving a challenging work assignment typically is not sufficiently adverse to amount to a retaliatory adverse employment action. In this case, the court questioned whether the plaintiffs assignment to teach a different training class was materially adverse but also noted that there was no evidence of retaliatory motive. "No reasonable jury could conclude that [supervisor], in an act of retaliation, assigned [plaintiff] an important project she thought he was fully qualified to perform."

- *Steward v. New Chrysler*, 415 Fed. Appx. 632, 2011 WL 338457 (6th Cir. 2011). The Sixth Circuit rejected the plaintiffs claim that being placed on a "segregated assembly line" was an actionable adverse action. The court noted that this allegation was a "serious charge." However, the court found that there was no evidence that the assembly line was actually segregated. The plaintiff further did not present any evidence that she was given more difficult work than white employees, nor did she allege that her salary, title, or benefits were negatively affected during this time period. Accordingly, she could not establish an actionable adverse action.

- *Vance v. Ball State University*, F.3d 2O1l WL 2162900 (7th Cir. 2011) Promotion of employee, albeit with reduced responsibility, did not constitute adverse action. Additionally, no reasonable jury could find that delivery of a verbal warning based on a complaint from a co-worker constituted an adverse action.

- *Kurtz v. McHugh*, No. 10-5042. 2011 WL 1885983(6th Cir. 2011). Supervisor's actions in hiding plaintiff's purse because it was unsecured and in taking an abandoned recycle bin to "make a point about the need to return directly to work, while petty, juvenile, and annoying, were not materially adverse."

- *Morales-Vallellanes v. Potter*, 605 F.3d 27 (Cir. 2010). The First Circuit held that neither selective enforcement of a company's break policy, removal of the plaintiffs preferred duties as part of a temporary rotation, nor changing the scheduled days off allotted to a position for which the plaintiff had already bid could amount to a materially adverse employment action. The court acknowledged that disadvantageous work assignments or schedule changes could constitute materially adverse employment actions under certain circumstances. But it did not find those circumstances present where the plaintiff produced no evidence that his new duties were objectively more difficult than or inferior to his prior duties and where the plaintiff produced no evidence suggesting the altered days off created a greater hardship for him than all of the other bidders.

- *Fincher v, Depository Trust & Clearing Corp*, 604 F.3d 712 (2d Cir. 2010). The Second Circuit held that failure to investigate an employee's complaint cannot constitute a materially adverse employment action in retaliation for filing the same complaint. The plaintiff was in no worse a position as a result of her employer's failure to investigate than she would have been had she never filed the complaint, even if the failure to investigate did not provide any positive incentive to pursue future claims. The court distinguished the case from *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), where the D.C. Circuit held an employer's failure to investigate an employee claim in retaliation for some separate protected act amounted to an adverse employment action.

- *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673 (7th Cir. 2010). The Seventh Circuit held that making a threat to an employee that he needed to withdraw his EEOC charge in order to continue working on the floor of an auto dealership did not amount to constructive discharge or a materially adverse employment action. After the single threat, the plaintiff never returned to work. But the dealership followed this single threat with multiple reassurances that the plaintiff still had his job. The court thus held no reasonable employee would have been dissuaded from engaging in further protected activity.

- *Goodman v, Nat'l Sec. Agency, Inc.*, 621 F.3d 651 (7th Cir. 2010). The Seventh Circuit held changing an employee's hours did not constitute a materially adverse employment action without evidence of any resultant harm. The court further held a

demotion from site supervisor to shift supervisor did not constitute an adverse action where the demotion did not change the plaintiff's pay, benefits, or job responsibilities. Nor did the plaintiffs uncertainty about being reassigned to a shift she could not work amount to an adverse action where the reassignment never took place.

- *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106(7th Cir. 2009). The Seventh Circuit held, inter alia, that a suspension never served is not materially adverse. Distinguishing the case from *Burlington Northern*, the court noted the plaintiff did not suffer any economic hardship resulting from the suspension because he never actually served it. Any uncertainty about whether he would have to serve the suspension did not rise to the level of a materially adverse employment action.

b. Third-Party Retaliation

Federal courts have disagreed on the issue of whether a third party can sue for retaliation under the equal employment opportunity laws. Recently, a unanimous Supreme Court gave its answer.

(1) Retaliation against Closely Related or Associated Individuals

The EEOC maintains that the equal employment opportunity laws "prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights." The Supreme Court recently weighed in, embracing the EEOC's long-held position.

In *Thompson v. North Am. Stainless LP*, 567 F.3d 804 (6th Cir. 2009) (en banc), the Sixth Circuit held Tide VII does not create a claim for third-party retaliation where the plaintiff never personally engaged in protected activity. The plaintiff in Thompson worked for the same employer as his fiancé, and he alleged that the employer fired him in retaliation for his fiancé's protected conduct. Though the plaintiff argued for a broad reading to effectuate Title VII's remedial purpose, the court noted that Congress employed words of action like "opposed," "participated," and "assisted" in the anti-retaliation provision, not words of association. Affirming summary judgment for the employer, the court concluded that " [t]he plain text simply cannot be read to encompass 'piggyback' protection of employees like Thompson who, by his own admission, did not engage in protected activity, but who is merely associated with another employee who did oppose an alleged unlawful employment practice"

The Supreme Court issued its unanimous opinion in *Thompson v. North Am. Stainless*, LP, 131 S.Ct. 863 (2011) adopting the *Burlington Northern* standard, *supra*, for third-party retaliation cases. Under that standard, the court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." Hence, the Court held that the employer violated Title VII when it fired the plaintiff.

In so holding, the Court recognized the challenge of line-drawing when applying the Burlington Northern standard to third-party retaliation claims. This standard creates risk and uncertainty for any employer taking adverse action against an employee who is associated with a co-worker who has engaged in protected conduct. But in spite of this uncertainty, the Court noted that it adopted a broad standard in Burlington Northern "because Title VII's anti-retaliation provision is worded broadly," and it concluded that "a preference for clear rules cannot justify departing from statutory text."

While the Court declined to fix a class of relationships that would always meet the *Burlington Northern* standard in third-party retaliation cases, it "expect[s] that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so." In light of the uncertainty about where courts will ultimately draw the line for such claims—a process certain to take years—employers should be cautious when taking any adverse employment action against an employee who enjoys a close relationship with a co-worker who has engaged in protected conduct. Until the line is established, employers should probably exercise the same caution with the acquaintance that they would with the employee who actually engaged in the protected activity.

The Court went on to determine whether the plaintiff fiancé had standing to sue, or whether the actual employee who engaged in protected conduct had to bring the suit herself. The Court held that the plaintiff was a "person aggrieved" under Title VII because he fell within the "zone of interests" Title VII sought to protect, and he thus had standing to sue. Because the plaintiff raised a prima facie case of retaliation and had standing to sue, the Court reversed the Sixth Circuit and remanded.

A few courts have considered third-party retaliation claims following the Supreme Court's decision in *Thompson*.

- *Harrington v. Career Training Institute Orlando, Inc.*, No. 8:11-cv-1817-T-33MAP, 2011 WL 4389870 (M.D. Fla. Sept. 21,2011). Court denied motion to dismiss retaliation claim. Plaintiff alleged that he was dating the co-worker that had been subject to retaliation. Finding that such an allegation could fall within the scope of the ruling in Thompson, the court denied the motion to dismiss.

- *Ali v. District of Columbia Government*, No. CIV 08-01950 (MIIK), 2011 WL 4063234 (D.D.C Aug. 31, 2011). Credible threats of termination of the "best friend" of employee who complained of discrimination constituted "adverse action," for purposes of opposing summary judgment on retaliation claim.

(2) Retaliation by Different Entities

According to the EEOC, the equal employment opportunity laws protect an individual from retaliation even where the retaliating entity is not the entity involved in the protected activity. For instance, an employer would violate anti-retaliation provisions if it refused to hire an individual because he or she had opposed a prior employers unlawful employment action or filed an EEOC charge against a former employer.

The Sixth Circuit's opinion in *Christopher v. Stouder Mem'l Hosp*, 936 F.2d 870(6th Cir. 1991) illustrates this point. A plaintiff nurse applied for privileges at Stouder Memorial Hospital, and the hospital's executive committee denied her application on two occasions. Stouder's president and a member of the executive committee both allegedly told the plaintiff that her application would not have encountered any difficulties if not for a sex discrimination claim she filed against a previous employer, Miami Valley Hospital. The Sixth Circuit determined that these alleged conversations constituted direct evidence of Stouder's retaliatory intent.

c. Retaliatory Harassment

Courts have also addressed the issue of whether retaliatory harassment carried out by a supervisor or co-worker can be imputed to the employer to fulfill the adverse employment action element of a prima fade retaliation case.

Courts have generally been willing to impute a **co-worker's retaliatory harassment** to the employer only where the employer knew about or reasonably should have known about the harassment but failed to stop it.

- *Alford v. Martin & Gass, Inc.*, 391 Fed. App'x 296 (4th Cir. 2010). Charles Alford alleged his co-workers subjected him to retaliatory harassment after he complained about a crude effigy of a black man hanging from a noose near where parked at work. After he reported the incident, one co-worker told Alford, "I guess you're going to have Al Sharpton out here." Another co-worker drove a forklift near Alford in a threatening manner, white several others glared angrily at him as they walked by. Without deciding whether the co-workers actions were sufficiently severe to be actionable, the Fourth Circuit held they could not be imputed to the defendant employer. Alford conceded that he never reported the harassment to his employer, and he produced no evidence suggesting the employer otherwise knew of the co-workers' conduct. While Alford did report his discomfort about working in the yard, he did not report that the discomfort arose from anything other than the original incident involving the noose- Hence, the court affirmed summary judgment in favor of the employer.

- *Haney v. Preston*, No. 08-2658 JAR/GLR, 20 WL, 5392670 (D. Kan. Dec. 22, 2010). The court held that, in the wake of *Burlington Northern*, a plaintiff alleging retaliatory harassment need only show conduct that, in the aggregate, could dissuade a reasonable employee from making and supporting a discrimination charge. Anita Haney alleged that she faced ongoing harassment after filing a discrimination claim. Her supervisor criticized her work in front of co-workers, co-workers alienated her, co-workers with less seniority critiqued her work, and her supervisor misconstrued her claim, threatened her with disciplinary actions, and placed her on AWOL. The court acknowledged that none of these allegations taken alone constituted an adverse employment action, but it held that a reasonable jury could find all of the allegations in the aggregate rise to the level of material adversity.

- *Prise v. Alderwoods Grp., Inc.*, 657 F. Supp. 2d 564 (W.D. Pa. 2009). The court held a plaintiff employee who tacked any knowledge about allegedly retaliatory conduct until pretrial discovery could not sustain a claim of constructive discharge. But the court held unawareness is not relevant to the question of material adversity in a retaliatory harassment claim under Burlington Northern objective standard. The court concluded a reasonable jury could find the employer's covert surveillance and attempt to create a paper trail justifying termination of the plaintiff to constitute material adversity.

- *Hawkins v Anheuser-Busch Inc.*, 517 F.3d 321 (6th Cir. 2008). Here, the Sixth Circuit recognized a co-worker retaliatory harassment claim under Title VII for the first time. The court noted nothing in Title VII precludes such a claim, and a contrary conclusion would allow employers to recruit employees to retaliate with impunity.

- *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005). While she worked as a parking enforcement officer, Christi Noviello's supervisor unhooked her bra, ripped it off, hung it on the window of the van they rode in, and shouted a sexual remark to another employee nearby. After Noviello reported the incident, her co-workers retaliated by making false claims about her, insulting her at work, ostracizing her, forcing her to eat alone, and carrying out a variety of other harassing behaviors. Noviello met with management and asked why they tolerated the harassment.

Management did nothing. The First Circuit explicitly held for the first time that co worker retaliatory harassment can amount to material adversity. The court further held Noviello alleged sufficient facts for a reasonable jury to find her employer subjected her to a materially adverse work environment in retaliation for her complaint against the popular supervisor.

- *But see, Hernandes v. Yellow Transportation Incorporated*, 641 F.3d 118 (5th Cir. 2011). The court declined to find that harassment by co-workers was actionable retaliation. The court ruled that none of the alleged incidents were perpetrated by anyone other than ordinary employees, nor was the alleged harassment committed in furtherance of the employers business. Accordingly, the court declined to apply case law from other circuits expanding Title VII's retaliation provisions to protect against co-worker retaliation.

Claims based on a supervisor's retaliatory harassment have had varying success in federal court.

- *Perez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19 (1st Cir. 2011). Reversing summary judgment for the employer, the Fourth Circuit ruled that there was evidence from which a reasonable jury can conclude that the supervisor's discriminatory harassment escalated in response to the employee's complaint; accordingly retaliation claim presented an issue of fact for trial.

- *Muse v. .Jazz: Casino Co.*, Civil Action No. 09-0066, 2010 WL 2545278 (E.D. La. June 16, 2010). Plaintiff Gay Muse alleged her supervisor retaliated against her after she complained about discrimination. She alleged the supervisor closely monitored her work and breaks, ridiculed her at weekly meetings, required her and only her to clock in and out and stay later than co-workers, altered her shift hours three times. pulled her out of lunch unnecessarily, screamed at her, denied her paid leave, and started rumors about her. The Court held the supervisor's actions did not rise to the level of material adversity, even when viewing the facts in the light most favorable to Muse.

- *Donaldson v. CDB, Inc.*, 335 Fed. App'x 494(5th Cir. 2009). The Fifth Circuit held that calling a meeting of all female employees and berating an employee who tiled a sexual harassment charge with the EEOC could constitute a materially adverse employment action. At the meeting, the general manager accused of harassment called the plaintiff the devil, accused her of recruiting female co-workers to file statements against him with the EEOC, and accused her of trying to "bring [him] down." The court concluded such alleged harassment raised a genuine issue of material fact as to whether a reasonable employee would have been dissuaded from pursuing further protected activity.

- *Moore v. City of Philadelphia*, 461 F.3d 331 (3d Cir. 2006). Three police officers alleged a supervisor retaliated against them by failing to respond to harassment visited upon the officers by their co-workers. The Third Circuit held an employer may be liable for retaliation if management knew or should have known about co-worker retaliatory harassment and failed to take adequate remedial action, even if the co-worker's harassment did not itself rise to the level of material adversity. But here, the court held the supervisor responded reasonably to the harassment, so the plaintiffs retaliation claim failed.

- *Morris v. Oldham Cnty. Fiscal Court*, 201 F.3d 784 (6th Cir. 2000) This case predates *Burlington Northern* and the material adversity test, instead limiting

actionable retaliatory harassment to instances of severe and pervasive harassment. But this case is interesting because the Sixth Circuit held an employer has an opportunity to prove an affirmative defense in a case of supervisor retaliatory harassment as long as the harassment never culminates in a tangible employment action. To establish this defense, employers must show both (that they took reasonable care to prevent the retaliatory harassment and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.

4. Retaliation through Use of the Judicial Process

Since the Supreme Court announced *Burlington Northern's* "dissuade a reasonable worker" standard for material adversity, several courts have held that an employers use of the judicial process may constitute actionable retaliation under the equal employment opportunity and other labor laws.

Courts have generally found an employer's resort to the judicial process to **meet the material adversity standard** where the employer claims are frivolous or without merit.

- *Ramos v. Hoyle*, No. 08-21809- 2010 WL 2151305 (S.D. Fla. Jul. 16, 2009). Plaintiff housekeepers Ramos and Santos filed an FLSA claim against their employers to recover unpaid wages and overtime. After the employers responded with counterclaims alleging Ramos abused their son, Ramos filed a supplementary complaint alleging retaliation under the FLSA anti-retaliation provision. The court granted Ramos summary judgment on her retaliation claim. First, the court found Ramos submitted uncontroverted evidence of the employers retaliatory motive. Second, the court found the employers' counterclaims were "baseless" and "lack a reasonable basis in fact." Finally, the court rejected the employers' insistence that absolute immunity under the Florida litigation privilege precluded retaliation liability, as a "state absolute privilege purporting to confer immunity from suit cannot defeat a federal cause of action."

- *Hughes v. Miller*, 909 N.E.2d 642 (Ohio Ct. App. 2009). In this state action, counterclaim plaintiff Annette Miller filed an internal sexual harassment claim against her co-worker, Ralph Hughes. Hughes responded to the internal harassment claim by suing Miller for defamation, and Miller counterclaimed alleging Hughes filed his lawsuit as a retaliation, violating Ohio Rev. Code § 4112.02(I). The Ohio anti-retaliation statute is broader than that found in Title VII as Ohio does not limit coverage to employer-employee retaliation. But Ohio has adopted the same standard for proving a retaliation claim under Ohio law as that employed by federal courts in Title VII claims. Because Hughes filed his suit as a direct result of Miller's internal harassment claim, the court held Miller sufficiently alleged a prima facie case of retaliation under the *Burlington Northern* standard.

- *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008). Plaintiff Larry Darveau sued his employer for overtime pay under FLSA. Shortly thereafter, Darveau's employer sued him in state court for fraud and breach of contract, and Darveau added a retaliation claim to his FLSA suit. The Fourth Circuit held that the district court properly granted summary judgment in favor of the employer on Darveau's FLSA overtime claim. But the court went on to reverse the district court's dismissal of Darveaus retaliation claim. The court held that Darveau sufficiently showed his employer filed the fraud suit with a retaliatory motive. Applying the *Burlington*

Northern standard to the FLSA, the court further held such conduct could have dissuaded a reasonable employee from supporting a claim under the FLSA.

- *Thompson v. City of New York*, No. 03 Civ. 4182 (JSR)(JCF), 2006 WL 2457694 (S.D.N.Y. Aug. 10, 2006). Plaintiff Thompson alleged her employer fought her workers compensation claim in retaliation for her discrimination claim under the ADA. The court dismissed Thompson ADA claims of failure to accommodate and harassment but the court denied summary judgment on Thompson claim that her employer retaliated against her by fighting her workers' compensation claim, even though her claim was ultimately unsuccessful. Applying the *Burlington Northern* standard to the ADA, the court held that illegitimately opposing a workers' compensation claim could create a fear of lost benefits and amount to a materially adverse employment action.

The Federal District Court for the District of Columbia rejected a claim based on retaliation through use of the judicial process in *Gross v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 599 F. Supp. 2d 23 (D.D.C. 2009). Plaintiff Donald Gross alleged Akin Gump filed breach of fiduciary duty and tortious interference counterclaims in retaliation for age discrimination claims Gross filed against the firm. Akin Gump alleged that it filed those counterclaims only after discovering Gross disparaged the firm to potential clients via email. Because Akin Gump did not even learn of those emails and file it counterclaims until the discovery phase of Gross's retaliation suit, which took place after the firm terminated his employment, the court granted summary judgment in favor of Akin Gump on Gross's retaliation claim.

e. Adverse Actions against Former Employees

The Gross case also introduces a different sort of retaliation claim: claims asserting an employer took a materially adverse action against a former employee. Courts have generally held employers may not take adverse retaliatory actions against former employees who engaged in protected activities during the term of their employment

The following contains recent cases where courts have addressed alleged retaliation against former employees.

- *Fuentes v. Shannon Produce Farm, Inc.*, 671 F. Supp. 2d 1365 (S.D. Ga. 2009). Fourteen seasonal Mexican farmers alleged that Shannon Produce refused to rehire them in retaliation for their participation in an FLSA lawsuit against the company. Shannon Produce moved to dismiss the retaliation claim, arguing in part that the farmers had no right to re-employment. The court held the issue of a right to re-employment was irrelevant, as the right at issue was the plaintiffs' right to be free from retaliation for participating in an FLSA suit. The court denied Shannon Produces motion to dismiss.

- *Abdullahi v. Prada USA Corp.*, 520 F.3d 710(7th Cir. 2008). Plaintiff Parisima Abdullahi filed a discrimination charge with the EEOC after her employer terminated her employment. After the employer allegedly spread "derogatory rumors" about her, Abdullahi filed a Title VII post-employment retaliation claim. The district court dismissed the retaliation claim because Abdullahi did not file the EEOC charge allegedly giving rise to the retaliatory conduct until after her employer terminated her employment. The Seventh Circuit reversed, holding that spreading rumors can amount to actionable post-employment retaliation.

- *Matthews v. Wis. Energy Corp., Inc.*, 534 F.3d 547 (7th Cir 2008). Here, the Seventh Circuit rejected a post-employment retaliation claim. Plaintiff Bernadine

Matthews alleged Wisconsin Energy, her former employer, gave negative employment references in retaliation for her prior EEOC charge and discrimination lawsuit. In the Seventh Circuit, negative job references must amount to "dissemination of false reference information" in order to constitute material adversity. Matthews failed to show that the reference information Wisconsin Energy supplied to potential future employers was false, with the exception of one mistake that Wisconsin Energy later corrected. Though Wisconsin Energy left one potential employer with the feeling that Matthews was gaming' the Social Security system, Wisconsin Energy never explicitly made that claim, and the court felt any questions or comments leading to that conclusion "followed naturally" from the context of the conversation. The court held any "interpersonal slight in that conversation failed to rise to the level of actionable material adversity under the Burlington Northern standard."

f. Charge Waivers as Retaliation

The EEOC takes the position that an employee's waiver of the right to file a charge is null and void. Some courts have gone beyond the EEOC's position and characterized an employer's attempt to secure a charge waiver as actionable retaliation, while others have held charge waivers null and void but not retaliatory.

The following contains recent cases where courts have held charge waivers did not constitute retaliation.

- *Perez v, Faurecia Interior Sys., Inc.*, CA. No. 6:08-4046-HMH-WMC, 2009 WL 2227510 (D.S.C. July 22,2009). Plaintiff Mayra Perez alleged her employer violated the anti-retaliation provisions in both Title VII and the ADEA by forcing her to sign a severance agreement containing a charge waiver. The court dismissed her retaliation claim, holding the mere offer of a charge waiver cannot constitute retaliation where the employer takes no adverse action to prevent the employee from filing a charge. Here, in fact, Perez's employer conceded that the charge waiver provision was unenforceable.

- *Burden v. Isonics Corp.*, Civil Action No. 09-cv-01028-CMA-MJW, 2009 WL 3367071 (D. Colo. Oct. 15, 2009). The District Court for the District of Colorado held the withdrawal of a severance package did not amount to actionable retaliation. The court noted, "[O]ffers of severance benefits beyond the terms of the employment agreement and in exchange for the employer's release from all liability, without an-employees guarantee of such release, are offers of benefits not otherwise promised or owed." Hence, withdrawal of such enhanced benefits does not amount to an adverse employment action under 29 U.S.C. § 626, *et seq.*

- *Adams v. Entercom Kansas City, LLC*, No. 08-2643-JWL, 2009 WL 3561149 (D. Kan. Oct 30, 2009). An employee did not suffer retaliation under the ADEA where his severance agreement only entitled him to additional severance if he signed an agreement releasing his employer from all claims. The employee received all of the severance due to him under his collective bargaining agreement, but he did not receive enhanced severance because he refused to sign the waiver. The court held that such severance terms could not dissuade a reasonable employee from making or supporting a charge of discrimination.

The following contains recent cases where courts have held charge waivers constituted retaliation.

- *Allen v. Suntrust Banks., Inc.*, No. 1:06-CV-3075-RWS, 2008 WL 2608880 (ND. Ga. April 30, 2008). A class of plaintiffs alleged Suntrust Banks retaliated against them by refusing to grant ERISA-administered severance plans unless they dismissed their FLSA suit and waived their rights to refile. The court enjoined the employer from conditioning severance on dismissal of the class suit, finding, *inter alia*, that the class FLSA retaliation claim had a substantial likelihood of succeeding on the merits.

- *EEOC v. Lockheed Martin*, 444 F.Supp. 2d. 414 (D. Md. 2006). The District Court for the District of Maryland held a claims release facially retaliatory under Title VII The release prohibited employees from pursuing any "[c]laims or charges against the Released Parties seeking monetary relief or other remedies for [them]sel[ves] and/or as a representative on behalf of others." The court determined this prohibitory language could encompass little other than EEOC charges. Citing EEOC V. *SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006), the court held the charge waiver facially retaliatory and granted summary judgment in favor of the EEOC.

Notwithstanding the charge waiver retaliation analysis, however, it appears that an employee may waive the right to recover in any lawsuit brought either by the employee or by the EEOC on behalf of the employee.

3. Causal Connection

The final element of a prima fade retaliation claim requires the plaintiff to show a causal connection between opposing an unlawful employment practice or participating in protected activity and the employer's materially adverse employment action. Borrowing the framework employed in other discrimination claims, plaintiffs can establish the causal connection in a retaliation case through either direct or circumstantial evidence.

a. Direct Evidence of Retaliation and Mixed Motive Analysis

In a direct evidence case, the plaintiff must produce credible, direct evidence that retaliation motivated the employers materially adverse action. The EEOC lists two examples of direct evidence, noting that such evidence is rare: (1) a written or oral statement from the employer conceding that retaliation for engagement in protected activity motivated the materially adverse employment action, and (2) a written or oral statement from the employer demonstrating a bias against the plaintiff caused by the plaintiffs engagement in protected activity coupled with evidence linking the bias to the adverse action.

In a direct-evidence case, if the employer does not rebut the direct evidence, the causation element is established. But employers almost always claim that they took any materially adverse employment action for a legitimate business reason. In these cases, courts have traditionally undertaken a mixed motive analysis using the standard set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under that framework, a plaintiff employee must initially show that actionable retaliation was one motivating or substantial factor leading to the adverse action. If the plaintiff meets this initial burden, the burden shifts to the employer to show by a preponderance of the evidence that it would have reached the same decision even if it had not taken the impermissible motive into account.

The Supreme Court's recent decision in *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009) held that a mixed motive analysis is never appropriate under the ADEA. Rather, to make out a prima facie case in an ADEA claim, a plaintiff must show by a preponderance of the evidence that age was the "but-for" cause of an adverse employment action. The Court distinguished Price Waterhouse, noting that Title VII imposes liability if any improper motive is a "motivating factor," whereas the ADEA lacks a parallel provision suggesting any standard of causation other than "but-for" causation.

b. Circumstantial Evidence of Retaliation

In a circumstantial evidence case, the plaintiff bears the initial burden to show that he or she engaged in protected activity, that he or she was subsequently subjected to an adverse employment action, and that a causal connection links the adverse action to the protected activity.

Plaintiffs can meet this initial burden of production in many ways, but two types of evidence tend to be critical in circumstantial cases: (1) temporal proximity between the protected activity and the adverse employment action and (2) the existence or absence of prior performance criticism pre-dating the protected conduct.

(1) Temporal Proximity

The Supreme Court addressed the causal value of temporal proximity in *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). The Court held temporal proximity alone could give rise to an inference of causation only where the employer's first knowledge of the protected activity and the adverse employment action are temporally "very close." The Court cited *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) and *Hughes v. Derwinkski*, 967 F.2d 1168, 1174-175 (7th Cir. 1992) respectively as cases where three-month and four-month periods of proximity were insufficient to raise an inference of causation. Thus, the Court concluded the twenty month period at issue in Clark could not establish such an inference.

The following selection contains recent cases where courts have **held temporal proximity gave rise to an inference of causation**.

- *Pye v. Nu Aire Inc.*, 641 F.3d 1011(8th Cir. 2011). Employee established causal link between his protected conduct of filing internal discrimination complaint and his termination, given employer's stated reason for termination, i.e.. that employee attempted to obtain promotion and/or money and company car through coercion or intimidation. Court further found that temporal proximity between protected conduct and termination established a causal connection.

- *Villanti v. Cold Spring Harbor Cent. Sch. Dist.*, No. 08-CV-434 ADS MLO, 2010 WL 3303375 (E.D.N.Y. Aug. 20, 2010). A plaintiff teacher filed an EEOC charge stemming from her employer's denial of ADA accommodations. The plaintiff alleged that her employer responded to the complaint by increasing her workload, giving her negative performance reviews, increasing her supervision, and limiting her professional development The court noted evidence suggesting the plaintiff requested accommodations and then received her increased workload the very next month. The court held such proximity created a genuine issue of material fact on the issue of causation.

- *Mascioli v. Arby's Rest. Grp., Inc.*, 610 F. Supp. 2d 419 (W.D. Pa. 2009). Here, the plaintiff was terminated within three weeks of informing her employer she would

need FMLA leave in the near future. The plaintiff did not offer any evidence of causation aside from this temporal proximity. While the court called it "a somewhat close question," it held the plaintiff produced sufficient evidence to establish a prima facie case of retaliation.

- *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516 (6th Cir. 2008). The Sixth Circuit also held the causation element can be satisfied on the sole basis of temporal proximity. Here, the plaintiffs employer followed him into his office and laid him off on the very morning the employer learned he had filed an EEOC charge. But the Sixth Circuit noted that causation can be inferred from temporal proximity alone only where the employer takes an adverse employment action "immediately after learning of a protected activity."

- *Fye v. Oklahoma Corp. Cornm'n*, 516 F.3d 1217 (10th Cir. 2008). The Tenth Circuit held the temporal proximity of two weeks between when the plaintiff informed her employer of her sexual harassment complaint and when the employer terminated her satisfied the causation element.

The following selection contains recent cases where courts have held **temporal proximity did not give rise to an inference of causation**.

- *Kyle-Eiland v. Neff*, 408 Fed. App'x. 933, 2011 WL 239864 (6th Cir. 2011). Although plaintiff had filed ten complaints with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission during her employment, there was no evidence that her supervisors were aware of the complaints at the time they took the adverse employment action against her. The complaints were not in her personnel file, her supervisors denied knowledge of them, and plaintiff presented no evidence to the contrary.

- Leitgen v. *Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668 (7th Cir. 2011). The Seventh Circuit held plaintiff Christine Leitgen could not overcome "the general rule that suspicious timing alone is insufficient to support a claim of retaliation." Leitgen argued that her complaints were ongoing, and thus there was little time between her protected conduct and her discharge. But the court rejected this argument, noting that she had been engaged in protected conduct for years. Leitgen could not show why one discreet instance of protected conduct at the end of this period should be the trigger for temporal proximity analysis instead of her initial engagement in protected conduct years before. The evidence thus showed relevant decision-makers knew of Leitgen's protected conduct long before they terminated her employment, and the court declined to infer causation.

- *Hennagir v Utah Dep't of Corr.*, 587 F3d 1255 (10th Cir. 2009). Although the Tenth Circuit held temporal proximity alone established the causation element in *Fye*, it came to the opposite conclusion in *Hennagir*. In *Hennagir*, approximately sixth months passed between the plaintiffs first internal grievance and the alleged adverse employment action, and the court held such temporal proximity too attenuated to establish an inference of causation.

- *Van Horn v. Best Buy Stores*, L.P., 526 F.3d 1144(8th Cir. 2008). The Eighth Circuit held a two-month interval between protected activity and an adverse employment action cannot establish the causation element by itself. The court wrote, "Though in rare circumstances an adverse action may follow so closely upon

protected conduct as to justify an inference of a causal connection between the two, we have held that an interval of two months is too big to support such an inference."

(2) Prior Performance Criticism

By showing that a plaintiff has a history of prior performance criticism or an otherwise poor work history pre-dating the allegedly protected conduct, an employer can defeat an inference that the plaintiffs protected conduct motivated an adverse employment action. Put differently, poorly performing employees cannot gain immunity from adverse employment actions simply by engaging in some statutorily protected conduct. Of course, the opposite is also true: a history of positive performance evaluations pre-dating the allegedly protected conduct will serve to bolster the inference of causation.

The following two cases illustrate how prior performance history operates in causation analysis.

- *Erenberg v. Methodist Hosp.*, 357 F.3d 787 (8th Cir. 2004). Plaintiff Sandra Erenberg alleged a causal connection between her protected activity under Title VII and the termination of her employment. Her employer presented evidence showing that it had consistently disciplined [plaintiff] for the same performance and attendance issues throughout her employment, both before her complaint and after. The hospital further showed it received several complaints about the plaintiffs behavior, and it followed its internal policies by issuing an informal reprimand and a series of formal reprimands before ultimately discharging her. Because at least four of these reprimands pre-dated the plaintiffs first discrimination complaint, the court affirmed summary judgment in favor of the employer.

- *Williams v. Trans States Airlines, Inc.*, 281 S.W. 3d 854 (Mo. Ct. App. 2009). Aimee Williams alleged that her employer retaliated against her in violation of a Missouri anti-retaliation provision after she complained of sexual harassment Under that state provision, Williams only needed to establish that her complaint was a "contributory factor" in the decision to terminate her employment. Williams presented evidence showing that her employer had no complaints about her job performance prior to her sexual harassment claim. In fact, her employer had recognized her "outstanding performance" on three separate occasions. The court thus held a reasonable jury could have found a causal connection between Williams's sexual harassment complaint and her termination.

B. Rebutting the Prima Facie Case

Once an employee establishes a prima facie case of retaliation, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the adverse employment action.'

The following contains recent cases where employers have rebutted an employee's prima facie retaliation case by articulating a legitimate, nondiscriminatory reason for the alleged adverse employment action.

- *Munoz v. Mabus*, No. 08-16374, 2010 WL 5263141 (9th Cir. Dec. 27, 2010). Although the Navy did have a need for new technicians for a missile launch system, budget constraints and the lack of any existing vacancies constituted legitimate reasons for the Navy's refusal to train the plaintiff on the missile launch system.

- *Nathaniel v. Miss. Dep't of Wildlife*, No. 10-60552, 2010 WI. 5298085 (5th Cir. Dec. 27, 2010). The Fifth Circuit held the Department of Wildlife offered legitimate, nondiscriminatory reasons for promoting a part-time co-worker instead of the plaintiff. Unlike the plaintiff, the co-worker had a long and stable work history and a college degree. The state legislature had also issued a directive to move part-time employees into full-time positions.

- *Cothran v. Potter*, No. 10-10396, 2010 ML 4068794 (5th Cir. Oct 18, 2010). The Fifth Circuit also recently held that failure to meet individual performance objectives set by a previous supervisor constituted a legitimate, nondiscriminatory reason for an adverse employment action sufficient to rebut a prima facie case of retaliation against the plaintiffs current supervisor.

- *Tiggs-Vaughn v. Tuscaloosa Hous. Auth.*, 385 Fed. App'x 919(11th Cir. 2010). The Eleventh Circuit held that an employer can rebut a prima facie retaliation claim simply by showing an employee was "disruptive," and that showing can be made in part by alleging the plaintiffs actual claims of retaliation were false.

C. Pretext

Finally, if the employer is able to articulate some legitimate reason for the adverse employment action, the burden shifts back to the plaintiff to show the employer's stated reason was pretext for discrimination.

The following contains recent cases where courts have considered employee claims that an employers stated reasons were pretext for retaliation.

- *Darvishian v. Geren*, No. 08-1672,2010 WL 5129870 (4th Cir. Dec. 14, 2010). The Fourth Circuit held the plaintiff failed to meet his burden of showing pretext. While the Army initially told the plaintiff he only faced a suspension, a superior's decision to remove him from the service for insubordination did not suggest pretext where that decision was consistent with Army regulations. The court noted the 'possibility that a different decision maker may have imposed a less severe penalty if presented with similar circumstances' does not support the conclusion that the adverse employment decision was motivated by a desire to discriminate or retaliate. This was true even in light of evidence suggesting the superior who made the decision to remove the plaintiff "disliked [the plaintiff] personally" and had called him "a crazy Muslim."

- *Spengler v. Worthington Cylinders*, 615 F.3d 481 (6th Cir. 2010). The Sixth Circuit applies a three-part test in its pretext analysis. In order to show pretext, a plaintiff must show "(1) the employer's stated reason for terminating the employee has no basis in fact, (2) the reason offered for terminating the employee was not the actual reason for the termination, or (3) the reason offered was insufficient to explain the employer's action." The *Spengler* court noted that the plaintiff presented evidence suggesting the rule leading to his termination was selectively enforced and showing he was a valuable employee at the time of his discharge. The court thus held a reasonable jury could find the employer's offered reason was not the actual reason why the employer terminated the plaintiffs employment

- *Singleton v. Select Specialty Hosp.*, 391 Fed. App'x 395 (6th Cir. 2010). Will Singleton alleged his employer, Select Hospital, retaliated against him in violation of Title VII's anti-retaliation provision. Select argued that it terminated Singleton because of "horrific" narcotic distribution documentation, failure to properly control

narcotics, and improper patient pain assessment. Applying the *Spengler* three-part test supra, the court held Singleton could not show pretext under any of the three tests. First, Singleton could not show Select's stated reasons had no basis in fact, only that the initial impetus for reviewing his narcotic distribution may have been motivated by retaliation. Further, Singleton could not show Select's stated reasons were not the actual reasons for his termination, nor could he show Select's stated reasons were insufficient to explain his termination. Singleton produced no evidence suggesting the investigation into his narcotics distribution proceeded differently than investigations into similar incidents, and he could not show that a co-worker's allegedly fabricated notes had any influence on Selects investigation. Nor did Singleton produce any evidence showing he was treated differently than any similarly situated workers under similar circumstances. Thus, the Sixth Circuit affirmed summary judgment in favor of Select.