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Reprisal and Revenge: The Epidemic of Retaliation Claims

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REPRISAL AND REVENGE:
THE EPIDEMIC OF RETALIATION CLAIMS, AND TEN PRACTICAL SOLUTIONS TO AVOIDING THEM

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INTRODUCTION

Consider this employment law nightmare: Janice Hetzel, a police officer in good standing, filed a complaint alleging that her employer unlawfully denied her a promotion on the basis of her sex and national origin. To remedy this alleged wrongdoing, Hetzel sought $9.3 million in compensatory damages, a back-pay award, a retroactive promotion, and further injunctive relief. At trial, the evidence showed that Hetzel, who remained employed during her litigation, received "stellar" performance reviews. The sole testimony concerning Hetzel's emotional distress came directly from Hetzel—who claimed to suffer headaches, stress, and difficulty in reading to her daughter. Hetzel, however, never saw a single doctor for her alleged emotional-distress injuries.

After an eight-day trial, the jury found that Hetzel's employer did not discriminate against her on the basis of her sex or national origin. However, this is precisely where the employment law nightmare begins: despite finding that no unlawful *discrimination* occurred, the jury found that Hetzel's employer unlawfully *retaliated* against Hetzel for "exercising her right of free speech" to be free from discrimination. The jury awarded Hetzel $750,000 in emotional-distress damages. Following the trial, the court reduced the jury verdict to $500,000, but awarded Hetzel $180,000 in attorney's fees. The court denied Hetzel's posttrial request for an injunction against "future retaliation," stating that "there is a likelihood that [Hetzel] would interpret any act of discipline as retaliation." *Hetzel v. County of Prince William*, 89 F.3d 169, 171 (4th Cir.).[1]

Hetzel illustrates many of the seemingly intractable problems that arise when an employee brings a retaliation claim, e.g., expensive, time-consuming litigation, that is independent of discrimination and harassment claims. Unfortunately, the problems illustrated by *Hetzel* are increasingly common. In 1990 employees filed approximately 7,500 charges of retaliation with the EEOC. By 1998 that number had more than doubled to 19,114. Significantly, the percentage of retaliation charges as a total percentage of the EEOC's workload has climbed more than 50 percent in the past seven years, and currently comprises

[1] The *Hetzel* decision has a significant amount of appellate history, which is discussed later in this paper.

approximately 24 percent of all EEOC charge-processing (charge statistics from the U.S. Equal Employment Opportunity Commission). Moreover, retaliation complaints lodged with parallel state EEO agencies are statistically significant. In 1997 employees lodged an additional 11,761 retaliation complaints with state EEO agencies. Littler Mendelson predicts that the number of retaliation charges filed by employees will continue to climb and that, eventually, retaliation charges will comprise the single largest percentage of charges processed by the EEOC and parallel state agencies. Indeed, it now appears as though a retaliation claim is an automatic "tack on" to an employee's complaint of discrimination. This paper examines the legal elements of a Title VII retaliation claim.

A PRIMER ON RETALIATION

The law of retaliation prohibits employers from taking adverse action against their employees for participating in protected activity or opposing unlawful employment practices. Several federal statutes prohibit retaliatory conduct, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, the Fair Labor Standards Act, the Americans with Disabilities Act, the Immigration Reform and Control Act (IRCA), 42 U.S.C. § 1981, the National Labor Relations Act, Executive Order 11246, section 503 of the Rehabilitation Act, the Occupation Safety and Health Act (OSHA), and the Vietnam Veterans' Readjustment Assistance Act. The essence of these statutory prohibitions against retaliation is that an employer may not take adverse employment action against an employee who engages in statutorily protected activity, e.g., an employee who complains about unlawful discrimination. The rationale for prohibiting retaliation is that, in the absence of such protection, employers could vitiate the substantive protection provided by these statutes by engaging in a host of adverse employment conduct.[2]

The antiretaliation clause found in Title VII provides that:

> It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this [title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title].

42 U.S.C. § 2000e-3(a). In order to demonstrate a violation of Title VII's prohibition against retaliation, the plaintiff must establish: (1) statutorily protected activity (i.e., that the employee engaged in protected participation or opposition), (2) an adverse employment action (e.g., discharge, failure to promote, suspension, or fines), and (3) a "causal connection" between the protected activity and the adverse employment action (i.e., intent to retaliate). Each of these issues is explored briefly below.

[2] In addition, many states have laws prohibiting retaliation, including whistleblower statutes and claims for wrongful termination in violation of public policy. This paper concentrates on retaliation claims under Title VII.

STATUTORILY PROTECTED ACTIVITY

The Participation Clause: Protecting Employees Who Exercise Their Title VII Rights

In order for an employee to state a claim under the participation clause, he or she must participate in some form of investigation, proceeding, or hearing. The classic example of participatory conduct is filing a formal administrative charge of discrimination with the EEOC. However, other, less obvious conduct is also considered protected participation, including expressing an intent to file an administrative charge or assisting fellow workers in their discrimination claims. As with Title VII generally, courts liberally interpret the participation clause to further the goal of eradicating unlawful employment discrimination. For an employer, this means that participatory conduct remains protected even if the employee is ultimately wrong on the merits of the administrative charge, even when the contents of the charge are malicious, defamatory, and false. *See, e.g.*, *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998, 1005 (5th Cir. 1969) (noting that Congress has evidenced a protective legislative intent, with the balance being "struck in favor of the employee in order to afford him the enunciated protection from an invidious discrimination, by protecting his right to file charges").

The Eleventh Circuit Court of Appeals recently addressed the scope of the participation clause. In *Clover v. Total System Services, Inc.*, 157 F.3d 824 (11th Cir. 1998), a data processor was asked to take part in an internal sexual harassment investigation. She showed up to the meeting with Human Resources late, and she then was tardy in returning to her department because she had left her wallet at home, and first drove home to retrieve it. Because she had been warned earlier about her tardiness, she was terminated. She then filed suit for retaliation, claiming she had been discharged for participating in the investigation and opposing sexual harassment. The Court ruled that her participation in the company's internal investigation was not protected activity under Title VII, because Title VII protects employees from retaliation for participating in investigations conducted by the EEOC. On rehearing, the Court reversed the prior ruling, explaining that the previous opinion "erred by its exclusive focus on whether the employee was participating in an EEOC investigation or an internal investigation conducted by the employer." *Clover v. Total Sys. Serv., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999). The court held that by participating in her employer's investigation *conducted in response to an EEOC notice of charge of discrimination*, plaintiff engaged in statutorily protected conduct under the participation clause. The Eighth has also recently addressed this issue, holding that an employee who visited an EEO counselor and then threatened to bring a civil suit failed to establish that she had participated in a proceeding or investigation under Title VII. The court explained that *at a minimum* "there would have to be factual allegations of discrimination against a member of a protected group and the beginning of a proceeding or investigation under Title VII." *Brower v. Runyan*, 178 F.3d 1002, 1006 (8th Cir. 1999).

Former Employees: Gone But Not Forgotten

Conduct protected by the participation clause extends beyond the duration of the employment relationship. Thus, a former employee may sue for retaliation. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). In *Robinson,* the United States Supreme Court clarified this issue by ruling that a former employee may maintain a cause of action under the participation clause against a former employer for acts of retaliation that occurred after the employment relationship has ended. The Court noted that Title VII affords protection to employees who file a charge of unlawful discharge. Because former employees necessarily make claims involving unlawful discharge, the Court reasoned that failing to extend

the antiretaliation provision to former employees "would effectively vitiate much of the protection" afforded by Title VII. *Id*. at 848. The court also relied upon Title VII's liberal construction to reach this result.

Reluctant Employee Witnesses: Protection For The Alleged Wrongdoer

Some courts have held that an employee who reluctantly gives deposition testimony for use in a Title VII proceeding has "testified in a protected proceeding." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997). In the *Merritt* case, the employee provided relevant testimony because he was accused of harassing another employee. However, because the alleged harasser's testimony was considered "most damning" to the employer's case, he was fired. The alleged harasser then brought suit claiming that his employer retaliatorily terminated him for participating in protected activity. The court of appeals agreed that the terminated employee could bring such a claim. The court explained that, even where an employee witness's testimony is both reluctant and harmful to the employer, Title VII's broad antiretaliation provision still applies. Ironically, therefore, an employee who is accused of harassment and who participates in the litigation process has engaged in protected activity, even if the employer subsequently determines that disciplinary action against the employee is warranted. The lesson for employers is that in investigating complaints of unlawful conduct, great care must be taken with respect to the accused wrongdoer. Although the *Merritt* court recognized that discipline can still be taken against an employee because he or she engages in unlawful conduct, such discipline must not occur because of employee's participation in protected activity. *Id*. at 1188.

Unwilling Employee Witnesses: Protection For The Uncooperative?

Although Title VII may protect against reluctant participation in a protected proceeding, it probably does not protect an employee who refuses to participate in an employer's investigation. *See Merkel v. Scovill, Inc.*, 787 F.2d 174 (6th Cir.), *cert. denied*, 479 U.S. 990 (1986); *see also Williams v. West*, 172 F.3d 54 (7th Cir. 1998) (Title VII's protection does not extend to retaliation for employee's refusal to file formal discrimination charges against alleged discrminators about whom employee had complained). In the *Merkel* case, the court found that an employee who claimed he was fired for refusing to aid the employer in its investigation of an age retaliation claim was not a victim of retaliation under the ADEA. The court, however, also noted that there may be exceptions to this rule, such as where an employer seeks cooperation from an employee who it knows has absolutely no information concerning the claim being investigated.

The Opposition Clause: Protecting Employees Who Oppose Unlawful Employment Practices

Employees may also engage in statutorily protected activity by opposing unlawful employment practices. Certain types of employee are clearly protected in "opposition," such as filing a complaint or protesting to the employer about an employment practice. Additionally, meetings or requests for meetings to discuss an employment practice generally are found to constitute protected opposition. *See, e.g.*, *Lindsey v. Mississippi Research & Dev. Ctr.*, 652 F.2d 488 (5th Cir. 1981). Other protected opposition activity includes complaining to an employer about sexual harassment, asking an employer whether a protected classification under Title VII played a part in an employment decision, and reporting to or contacting an attorney after complaining about sex harassment.

Good-Faith Opposition: Mistaken Employees Can Still State A Claim For Retaliation

An interesting question is whether the opposition clause protects only opposition that is, in fact, found to be unlawful. Here, courts have rejected an "oppose at your own risk" interpretation of the opposition clause. Rather, courts generally find that opposition is protected when the employee has a good-faith (subjective) and reasonable (objective) belief that the practice they opposed violated Title VII. *See, e.g.*, *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 685 F.2d 1149 (9th Cir. 1982); *see also Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) (employee did not meet the first element of a retaliation claim as a matter of law because employee could not have reasonably believed that single isolated racist comment made by a co-worker could possibly constitute a violation of Title VII; plaintiff's assertion that he reasonably believed the co-worker's racist remark violated Title VII was "implausible at best"). The dominant rationale driving this rule is that employees should not be deterred from opposing what they believe are unlawful practices by a fear of retaliation. Here, again, courts rely on the liberal construction given to Title VII. Hence, employers should keep in mind that an employee who engages in opposition, e.g., complains about unlawful conduct, does not have to be correct in his or her belief that the conduct violates Title VII for the antiretaliation provision to apply.

Disloyal Opposition Versus The Right To Operate An Efficient Workplace

Courts do not protect all forms of employee conduct as lawful opposition. An employee's self-help activities, such as insubordination, may become so disruptive or violent they may be found outside the bounds of the opposition clause. Indeed, one of the landmark employment discrimination Supreme Court decisions provides reasoning that is instructive in the retaliation context. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *McDonnell-Douglas* involved an employer who refused to rehire a former employee because he was arrested and convicted of participating in an unlawful "stall-in" as part of a civil rights protest against the employer. The employee brought suit, claiming racial discrimination and retaliation. The district court ruled in the employer's favor, finding that the employer refused to hire the plaintiff solely because of his involvement in the illegal demonstration, not due to legitimate civil rights activities. Although the Supreme Court did not directly rule on the employee's retaliation claim, the Court's reasoning also applies in the retaliation context: "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it." *Id.* at 803. *McDonnell-Douglas* can be read for the proposition that an employee's deliberate and unlawful conduct may exceed the scope of protection afforded to complainants.

Additionally, if an employee's opposition substantially interferes with his or her job performance, Title VII's retaliation provision will not prevent the employer from taking adverse action. *See, e.g.*, *Rosser v. Laborers' Int'l Union*, 616 F.2d 221 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980). However, opposition to discrimination cannot automatically be equated with poor performance. When faced with such circumstances, courts balance Title VII's goal of allowing opposition to unlawful employment practices with an employer's right to maintain an efficient work environment. Thus, for example, an employer was held justified in taking adverse employment action against an employee who, in the course of objecting to alleged sex discrimination, (1) complained about her colleagues in a manner that damaged work relationships, (2) told employees that their employer may lose its federal grant money, (3) challenged a supervisor to take sides with her in an ongoing dispute, and (4) improperly disclosed the employer's confidential information. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976). On the other hand, where an employee addressed a letter to the employer's major customer that protested the employer's receipt of an affirmative action award, the court found such conduct to be protected. The court reasoned that although the

employee's activity threatened to disrupt the relationship between the employer and its important customer, it did not disrupt the workplace and had no effect on the employee's job performance. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983).

ADVERSE EMPLOYMENT ACTIONS

Once an employee has engaged in statutorily protected participation or opposition, the question becomes whether the employer has taken "adverse employment action" against the employee. Title VII's retaliation provision does not itself contain language specifying what action constitutes an adverse employment action in order to state a claim of retaliation. Courts have held that prohibited employer conduct includes many traditional employment decisions, including those that would subject the employer to liability under Title VII for discrimination, including: (1) refusal to hire; (2) failure to promote; (3) failure to rehire; (4) refusal to award a deserved pay raise; (5) suspension; (6) fine; (6) discharge; (7) constructive discharge; (8) unfavorable letters of recommendation.

However, once the elementary types of adverse employment actions are considered, the question becomes an incredibly divisive issue. In this area, the United States courts of appeals are developing two lines of cases, one that is more favorable to employers, the other more favorable to employees. Those courts applying a employer-friendly standard require an *ultimate* employment decision, such as discharge, demotion, or refusal to hire. Those courts using a employee-friendly standard allow less flagrant, *mediate or interlocutory* decisions to constitute an adverse employment action. Despite this split of authority regarding what constitutes an adverse employment action, the law is clear that not every workplace slight is redressable—and that no claim will lie in the absence of a significant, material impact on the terms and conditions of employment. Indeed, most circuits have recognized that, although Title VII's prohibition on retaliation reaches beyond acts of retaliation such as termination and demotion, the act must be "materially adverse," or serious and tangible enough to alter the terms and conditions of employment. *See, e.g.*, *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996), *Welsh v. Derwinski*, 14 F.3d 85 (1st Cir. 1994), *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465 (2d Cir. 1997); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996). As one court articulated:

> In a retaliation case, as in virtually any other employment discrimination case premised on disparate treatment, it is essential for the plaintiff to show that the employer took a materially adverse employment action against him. Determining whether an action is materially adverse necessarily requires a case-by-case inquiry. Moreover, the inquiry must be cast in objective terms. *Workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.*

Blackie v. State of Maine, 75 F.3d 716, 725 (1st Cir. 1996) (citations omitted, emphasis added). Clearly not every negative employment decision amounts to an adverse employment action.

In May of 1998, the EEOC issued a new Compliance Manual on Retaliation providing guidance and instructions for investigating and analyzing claims of retaliation under the statutes enforced by the EEOC, Title VII, ADEA, ADA and the EPA. In the new Guidance, the EEOC explicitly disagrees with courts that have concluded that retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. The EEOC also disagrees with courts that require the action to materially affect the terms, conditions, or privileges of employment. Concluding that such constructions are unduly restrictive, the EEOC provides that:

> [S]tatutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged regardless of the level of harm. As the Ninth Circuit has stated, the degree of harm suffered by the individual "goes to the issues of damages, not liability."

EEOC Compliance Manual, Notice No. 915.003, May 20, 1998, 8-IID3 (*quoting Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1803 (1998)). Some of the less obvious adverse employment actions are explored briefly below.

Icy Coworker Treatment

Once an employee files a claim against his or her employer, the workplace frequently becomes a more tense and difficult place in which to work. An important question thus arises as to whether icy treatment by coworkers constitutes adverse employment action for retaliation purposes. A recent Fourth Circuit decision, *Munday v. Waste Management of N. Am., Inc.*, 126 F.3d 239 (4th Cir. 1997), *cert denied*, 118 S. Ct. 1053 (1998), addressed this issue. In *Munday,* an employee's Title VII retaliation claim failed, in part, because the complained-of conduct—a supervisor's yelling at the plaintiff and telling other employees to ignore and spy on her—did not rise to the level of an adverse employment action within the meaning of the Act. The court reasoned: "In no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore and spy on an employee who engaged in protected activity, without evidence that the terms, conditions, or benefits of her employment were adversely affected."

Similarly, in *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686 (8th Cir. 1997), the Eighth Circuit rejected the employees' claim that the hostility and personal animus directed toward them by their supervisors collectively constituted an adverse employment action. The Eighth Circuit rejected the employees' claim, explaining that "[a]bsent evidence of some more tangible change in duties or working conditions that constituted a material employment disadvantage, we must agree with the district court that [plaintiffs] did not present evidence sufficient to demonstrate any adverse employment action that constitutes the sort of ultimate employment decision intended to be actionable under Title VII." *Id*. at 692.

Finally, in *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 712 n.3 (2d Cir. 1996), the court noted that the employee could not "fairly characterize [her manager's] occasional nastiness, which other employees also were subjected to, as an adverse employment decision or action disadvantaging her, which is a prerequisite for a retaliation claim." *See also Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996) ("mere ostracism in the workplace is not enough to show an adverse employment decision"). *But see Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 446 (2nd Cir. 1999) (adopting the view that "unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action").

Postcomplaint Discipline Or Reprimands

Some courts have found that certain postcomplaint discipline is not, as a matter of law, adverse employment conduct within the purview of Title VII. *See, e.g.*, *Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 707 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997). In *Mattern* an employee who filed a sexual harassment charge with the EEOC subsequently received bad reviews and a written reprimand, was threatened with termination, and endured acts of animosity from other coworkers. The court stated that "harassment alone does not constitute retaliation," and held that the employee could not sue for retaliation because the company

did not fire her or make an "ultimate employment decision." *Id*. Ultimate employment decisions do not include those actions that have a "mere tangential effect on a possible future employment decision." *Id*. at 708. The court reasoned that "to hold otherwise would be to expand the definition of 'adverse employment action' to include events such as disciplinary filings, supervisor's reprimands, or anything which might jeopardize employment in the future." *Id*. Although the *Mattern* decision establishes a bright-line test as to what constitutes an adverse employment action, it has not been endorsed by all courts. *See, e.g.*, *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998) (joining circuits holding that Title VII's protection against retaliatory discrimination extends to adverse actions that fall short of ultimate employment decisions); *Unrein v. Payless Shoesource, Inc.*, ___ F. Supp. 2d ___, 1999 WL 455455 (D. Kan., June 3, 1999) (given Tenth Circuit's "liberal" view of the definition of "adverse employment action," written reprimand held to constitute such an action). Therefore, an employer must carefully consider the risk of a retaliation claim by an employee who, while employed, complains that a workplace reprimand constitutes unlawful retaliation. Of course, discipline in the form of a suspension could constitute an adverse employment action.

In *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1300 (3d Cir. 1997), the court also found that postcomplaint reprimands do not constitute an adverse employment action. The court rejected the employee's retaliation claim, in part, because "unsubstantiated oral reprimands" and "unnecessary derogatory comments" of which the employee complained following her initial complaint did not rise to the level of an 'adverse employment action.'" *Id.* In explaining the applicable standard, the court wrote:

> Retaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee. It follows that not everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.

Lateral Transfers

Once an employee makes a claim against an employer, that employer may consider transferring the complaining employee to prevent icy coworker retaliation. Alternatively, an employer might transfer a complaining employee as part of its normal business operations. While a transfer to a position with lesser pay certainly constitutes adverse employment action, a more interesting question is whether a lateral transfer, which does not affect an employee's salary, may also constitute an adverse employment action. In *Caussade v. Brown*, 924 F. Supp. 693, 701 (D. Md. 1996), *aff'd*, 107 F.3d 865 (4th Cir. 1997), a purely lateral transfer was not an adverse employment action because the employee did not lose prestige or suffer a reduced opportunity for future reassignments or salary grade increases.

Another decision where a lateral transfer was held not to constitute an adverse employment action is *Kocsis v. Multi-Care Management, Inc*., 97 F.3d 876 (6th Cir. 1996). In *Kocsis*, the plaintiff complained that her reassignment constituted a retaliatory act. The court observed that reassignment, without an accompanying salary or work-hour changes, does not ordinarily constitute a materially adverse employment decision. The court held that the plaintiff had not suffered an adverse employment action because she enjoyed the same rate of pay and benefits, and her duties had not been materially modified. *Id*. at 887.

In *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997), the district court held that the plaintiff satisfied her burden of establishing an adverse employment action because she suffered a loss of status and prestige with the reassignment of her staff. The Eighth Circuit, however, reversed, noting that the plaintiff "failed to establish how such consequences effectuated a material change in the terms or conditions of her employment. While the action complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII." *Id*. at 1144.

Finally, the Ninth Circuit has stated that a job transfer "is just barely—if at all—characterizable as 'adverse' employment action." *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1465 n.6 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (no adverse employment decision as a matter of law where employee "was not demoted, or put in a worse job, or given any additional responsibilities") (citing *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987) (a temporary transfer not resulting in a loss of salary or benefits is not an adverse employment action). These cases are in line with the theory that the adverse employment action must involve some job detriment. However, employers must be particularly careful on this divisive issue because no absolute uniform standard exists. Thus, in *de la Cruz v. New York Human Resources Administration Dep't of Social Services*, 82 F.3d 16, 21 (2d Cir. 1996), the court held that the transfer of a social services employee from the adoption unit to the foster-care unit constituted an adverse employment action because the transfer was to a different department, with different, and arguably inferior, responsibilities. Additionally, in *Rodriguez v. Board of Education*, 620 F.2d 362, 366 (2d Cir. 1980), the court held that the transfer of a teacher from a junior high school to an elementary school adversely affected the teacher's employment status because it rendered useless her twenty years of art program experience. *See also DiIenno v. Goodwill Indus.*, 162 F.3d 235 (3d Cir. 1998) (lateral transfer could be considered an "adverse employment action" if the employer knows that the employee could not perform the job).

Special Training Courses

In *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995), the court held that denying an employee the opportunity to attend a training conference, giving false information regarding award nomination processes, and denying a desk audit that might restrict subsequent promotional opportunities were not sufficient bases on which to form a cause of action for retaliation. *Id*. at 779-82. The court held that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." Similarly, in *Bullock v. Widnall*, 953 F. Supp. 1461, 1473 (M.D. Ala. 1996), *aff'd*, 149 F.3d 1196 (11th Cir. 1998), the court ruled that the employee failed to establish that his employer's failure to select him to attend a training course was an adverse employment action: the employee could not effectively demonstrate how his nonselection negatively impacted the terms or conditions of his employment.

Forced Relocation

In *Montandon v. Farmland Indus., Inc*., 116 F.3d 355 (8th Cir. 1997), the adverse actions alleged by the employee were: (1) the requirement that he relocate and (2) his allegedly negative employment evaluation. The court reasoned and held as follows:

> Although "actions short of termination may constitute adverse actions within the meaning of the statute," "not everything that makes an employee unhappy is an actionable adverse action." [Citations omitted.] Rather, the action must have had some adverse impact on Montandon to constitute an adverse employment action. [Citations omitted.] *The requirement that Montandon move did not entail a change in position, title, salary, or any other aspect of his employment. However unpalatable the prospect may have been to him, the requirement that Montandon move to Denison did not rise to the level of an adverse employment action.*

Loss Of Office Space

Courts have also considered whether the loss of a certain office space constitutes adverse employment conduct. In *Connell v. Bank of Boston*, 924 F.2d 1169, 1179-80 (1st Cir.), *cert. denied*, 501 U.S. 1218 (1991),

the court found the "only detriment to [the employee] as a result of the . . . sudden eviction . . . was the loss of the use of his office . . . to contact prospective employers." The court noted that "most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote." *Id.* It thus rejected the employee's retaliation claim.

In *Nelson v. Upsala College*, 51 F.3d 383 (3d Cir. 1995), a choir director was terminated by a college. She filed a charge of race discrimination and was subsequently barred from the campus absent express approval by the college. Though no longer employed at the college, the plaintiff claimed that the prior approval requirement was retaliation growing out of her discrimination charge. The court rejected the plaintiff's contention that Title VII prohibits "all retaliation which arises out of or is related to the employment relationship." *Id*. at 387. The court held that "an adverse employment action within section 704 requires a harm which impedes plaintiff's' employment situation." *Id*. at 388.

Finally, in *Wanamaker v. Columbian Rope Co*., 108 F.3d 462, 465 (2d Cir. 1997), the court held that "the loss of an office and phone by an employee who has already been informed of a termination decision does not, in and of itself, amount to adverse employment action." *Id*. the court explained that, even though the employee was terminated, he continued to receive full salary and benefits. Hence, the court cautioned that "[b]ecause there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse.'" *Id.* The court also stated that "not every unpleasant matter short of [discharge or demotion] creates a cause of action for retaliatory discharge." *Id.*

Workplace Restrictions

In *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996), the court held that an employee's lower performance rating and workplace restrictions (including limited break times, required check-in with a supervisor before leaving for the day, denial of secretarial use, and a restriction of the employee's conversations with others in the office to only business matters) did not constitute adverse employment actions because the alleged actions were mere inconveniences, not "material" actions affecting the employee's terms and conditions of employment. According to the *Rabinovitz* court:

> a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Id. at 488.

Performance Evaluations

In *Smart v. Ball State University*, 89 F.3d 437, 442 (7th Cir. 1996), the Seventh Circuit held that a postcomplaint poor performance evaluation alone, even if undeserved, did not constitute an adverse action under Title VII because the employee's salary and other terms of employment remained unaffected. *See also Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (explaining that low performance review is not an adverse employment action with purview of retaliation). These decisions, however, seems somewhat suspect because employees' performance evaluations are frequently used as the basis for changes in compensation, benefits, and responsibility. If an employee is able to draw a connection between his or her performance review and yearly pay increases (which should not be that difficult a task), then the risk of finding an adverse employment action increases substantially. For example, in *Sprott v. Franco*, 1997 WL 79813 (S.D.N.Y.

1997)), the court found that an employee's negative performance review was an adverse employment action because it caused the employee to miss a managerial merit salary increase.

Causing A Criminal Investigation

In *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996), the Eleventh Circuit held that an employer's decision to cause a criminal investigation into the acts of a former employee constituted an adverse employment act. The employer argued that reporting a suspected crime was not an unlawful employment practice, and attempted to distinguish such conduct from other adverse actions such as failing to provide a letter of recommendation, demoting, and giving an adverse evaluation, on the grounds that the latter are "integrally connected with the employment relationship." *Id*. at 985. The Eleventh Circuit rejected the employer's argument for two reasons. First, the court observed that because former employees are included within the definition of employees protected from retaliation, it is illogical to simultaneously define an adverse employment action narrowly to only those formal practices linked to an existing employee-employer relationship. Second, the court reasoned that retaliatory prosecution may have a direct effect on a former employee's future employment prospects.

Lesson For Employers

As the foregoing cases demonstrate, there is no simple, clear-cut answer as to what does and does not constitute adverse employment action. Indeed, the fact that so many cases are litigated to the appellate level on this issue signifies the divisiveness associated with the "adverse employment action" issue. Few rules are well settled, and the foregoing cases turn largely on their facts. As one court recognized, "[t]he law does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit." *Knox v. State of Ind.*, 93 F.3d 1327, 1334 (7th Cir. 1996). The important lesson for employers is that once an employee has engaged in statutorily protected activity, great care must be taken with respect to that employee's subsequent workplace treatment.

ESTABLISHING PROOF OF INTENT

The final element in a Title VII retaliation claim is commonly referred to as the "causal connection" issue. In other words, to establish a claim of unlawful retaliation, an employee must establish the employer's adverse conduct was caused by the employee's protected activity. Here, the employee's burden is quite minimal. In fact, suspicious timing frequently constitutes sufficient proof for an employee to create a factual question for a jury. The longer the time between the adverse employment action and the filing of the complaint, the lesser the proof of causation. However, a lapse in time is not conclusive evidence that no retaliation occurred.

In *Medlock v. Ortho Biotech*, *Inc.*, 164 F.3d 545 (10th Cir. 1999), *petition for cert. filed*, 67 USLW 3717 (May 12, 1999), an employee had a history of poor attitude accompanied by verbal fits. He verbally assailed his supervisors about the company's policies, and on one occasion, he physically threatened a supervisor. Despite multiple requests by supervisors to terminate the employee, upper management decided to give him another chance. The following year, the employee filed a racial discrimination lawsuit; one month after his deposition was taken, he was suspended and, shortly thereafter, was terminated. He then claimed retaliation. Although the company asserted that it had legitimate reasons for the discharge—the company learned at the employee's deposition that he had secretly taped conversations with coworkers and disclosed confidential information to competitors—the court of appeals found that due to the timing of the employee's discharge, a jury could find that it was retaliatory.

Adverse action which occurs *before* an employee engaged in protected activity does not support a retaliation claim. Additionally, an employer must be found to know about the employee's protected activity before a retaliation claim will be successful. *See, e.g*., *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982); *Hicks v. St. Mary's Honor Ctr.*, 90 F.3d 285 (8th Cir. 1996). The question of retaliatory intent is often one for the jury; thus, if an employee establishes protected activity and adverse employment action, an employer must usually proceed to an expensive trial or settle a claim to avoid liability exposure, assuming the other legal requirements are met.

MODEL SETTINGS FOR RETALIATION CLAIMS

Once the basic legal elements of a retaliation claim are understood, it becomes important to understand the practical models that surround these types of claims. We believe that retaliation claims can be characterized broadly into four different models:

THE VALUED EMPLOYEE VICTIM

Retaliation claims brought by a valued employee involve allegations of wrongdoing brought by current, high-performing employees with a proven track record of outstanding employment. One common valued-employee-victim scenario results when an employee complains of sexual harassment by a supervisor or coworker. Regardless of the harasser, the employee may feel that his or her complaint has brought increased scrutiny to their work performance or has otherwise jeopardized their career. This is particularly the case if the accused harasser also has an outstanding record of workplace performance. Another example is where an employee with an outstanding record of performance gets injured on the job and seeks workers' compensation benefits. Subsequently to filing for workers' compensation benefits, that employee may feel that his or her employment is being scrutinized more closely. As a result, the employee may claim workers' compensation retaliation. A final example of the valued-employee-victim scenario concerns complaints about unsafe working conditions. If an employer is slow to improve questionable working conditions, or simply disregards an employee's complaint, then the complaining employee may feel compelled to bring a retaliation claim. Valued-employee-victim claims are particularly challenging because the employee's work performance is not at issue.

THE MARGINAL EMPLOYEE VICTIM

The marginal-employee-victim model includes employees who engage in statutorily protected activity to bolster or secure their otherwise marginal employment status. A marginally performing employee may wish to ensnare other employees or supervisors in his or her web of marginal performance. For example, an employee who receives a performance review that is fair, but not favorable, may claim that his or her performance problems began when he or she voiced a complaint to a certain manager, e.g., "This all started when I complained about unsafe working conditions to my supervisor." Following the employee's initial complaint, complaints of retaliation may escalate. Marginal-employee-victim claims are frustrating because the employee's performance is at issue, and the complaint may complicate or stifle dialogue about improved performance.

FALSE-CLAIM RETALIATION

The false-claim-retaliation model includes employees (and former employees) who claim retaliation primarily because of a "litigation lottery" mentality. False-claim retaliation may occur when an employee simply lies about making an initial complaint and subsequent retaliatory conduct. Additionally, as noted above, an employee or former employee must only have a good-faith belief that he or she is opposing unlawful employment practices in order to have engaged in statutorily protected activity. This is an incredibly minimal burden. Hence, an employee may claim that he or she was harassed on any given number of levels and then claim to have suffered unlawful retaliation. The retaliation claim may take days or months or even years to surface and can be costly to litigate. We believe that the false-claim-retaliation model is particularly applicable to poor performing employees, who seem to have a knack for preserving their employment status through nonperformance mechanisms, or to employees who are forced involuntarily to leave their employment.

COWORKER RETALIATION

As noted above, the question of whether icy treatment by workers constitutes adverse employment conduct is a divisive issue. Without question, coworker retaliation claims are more likely if the complaining employee feels that the employer has endorsed or ratified the conduct. A particularly unsettled issue in the coworker retaliation model is the standard for employer liability when a coworker retaliates against another coworker. Courts are split on the standard for liability of an employer for this type of retaliation. *See, e.g*., *Jansen v. Packaging Corp. of Am*., 123 F.3d 490, 494-95 (7th Cir. 1997) (en banc) (per curiam) (fractured opinions addressed different aspects of employer liability, observing that a majority of courts agree on a "know or should have known" standard for hostile-environment claims and a strict liability for quid pro quo harassment, but not clearly placing retaliation claims in either category), *aff'd sub nom. Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 (1998); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1190 (2d Cir. 1996) (discussing the application of "agency" principles for employer liability for coworker practices, including retaliation, and applying a "knew but did nothing" standard); *Gary v. Washington Metro. Area Transit. Auth*., 886 F. Supp. 78, 88 (D.D.C. 1995) (holding that "[i]n a retaliation case, as in the quid pro quo case, the employer should be held strictly liable").

A very recent decision by the Eighth Circuit, *Cross v. Cleaver*, 142 F.3d 1059 (8th Cir. 1998), reviewed the competing employer liability standards. The *Cross* case involved allegations of retaliatory conduct following a complaint of sexual harassment by a female police officer. The retaliation consisted of postcomplaint investigations, various suspensions—including one without pay for four months, and job transfers. The jury found in favor of the plaintiff and awarded her $70,000 in compensatory damages and $20,000 in punitive damages. In resolving the standard of employer liability, the court observed that "employment actions that are sufficiently adverse to sustain a retaliation claim are also often actions in which the retaliator wields the employer's authority—either actually or apparently—to effect the retaliation, which must take the form of a material employment disadvantage. It would follow that employer liability would also be imputed for such retaliatory acts, because in such circumstances, the retaliator is, by definition, acting as the employer." *Id.* (citations omitted). In *Cross*, the court found that because the acts of retaliation involved conduct by the chief of police, strict liability should attach. It stated:

> We hold that, where a supervisory employee with the power to hire, fire, demote, transfer, suspend, or investigate an employee is shown to have used that authority to retaliate for the filing of a charge of sexual harassment, the plaintiff need not also prove that the employer participated in or knew or should have known of the retaliatory conduct to hold the employer liable. Indeed, in the circumstances where the employer is a board, and that board delegates authority to an individual to run day-to-day operations of a department, application of the "knew or should have

> known" standard to the members of the board would have the effect of insulating the employer from Title VII liability.

Although the court applied a strict liability for coworker retaliation on the facts presented by the case, it also observed that:

> We can envision the circumstance, however, in which a supervisory employee who engages in retaliation is neither so high in the hierarchy that his or her conduct is necessarily imputed to the employer, nor does the retaliatory conduct in which the supervisor engages necessarily involve wielding the actual or apparent authority of the employer. *Thus, the standard of employer liability applicable to a retaliation claim may well depend upon both the status of the retaliator and the nature of the retaliatory conduct.*

The *Cross* decision illustrates the difficult policy and legal implications of employer liability for coworker retaliation. We believe that other courts will soon be forced to address this issue as the coworker retaliation model continues to develop in the case law. *See, e.g.*, *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1265 (10th Cir. 1998) (holding that employer can only be liable for co-workers' retaliatory harassment where supervisory or management personnel either: (1) orchestrate the harassment; or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage co-workers' actions).

THE *HETZEL* CASE REVISITED

As noted in the Introduction, Janice Hetzel's employer appealed the final damage award of $500,000 rendered on her retaliation claim. *See Hetzel v. County of Prince William*, 89 F.3d 169, 171-73 (4th Cir. 1996). The court of appeals found the large damage award unacceptable. It vacated the jury's award of damages to Hetzel, and remanded the case for a new calculation of damages. In important language, the court stated:

> The evidence presented at trial concerning Hetzel's emotional distress consisted almost entirely of Hetzel's own brief conclusory statements— . . . that she had headaches, stress, trouble reading to her daughter, and problems with her family life as a result of appellants' actions. Hetzel presented no evidence corroborating any of her supposed specific harms. She remains [employed by her defendant employer], continues to perform her duties with no noticeable diminution in performance as her most recent performance evaluation, which was nothing short of stellar, confirms. She has no observable injuries or physical ailments. Indeed, although Hetzel insists that she was devastated and humiliated by [her employer's] actions, she has never once seen a doctor, therapist, or other professional, or even sought the counsel of a friend, to help her deal with what is supposedly an enormous problem overshadowing all aspects of her life.
>
> Hetzel's thin evidence of rather limited damages would in-and-of-itself entitle her to only a minimum damage award for intangible injuries. *However, only a part of Hetzel's harms are properly attributable to* [her employer's] *retaliatory actions. Much if not all, of Hetzel's claimed distress was actually caused by her erroneous belief that she was the victim of invidious discrimination, and of course, given the jury's findings for the defendant on all Hetzel's claims of discrimination, Hetzel is entitled to no damages for any injuries which were caused by her belief that she was the victim of invidious discrimination . . . .*

(Citations omitted.)

Based on the foregoing, the court of appeals concluded that:

> Simply put, the jury was presented with insufficient evidence "to place a high dollar value on plaintiff's emotional harm." . . . Hetzel suffered no discrimination, was not physically injured, is not under the care of a physician, and remains an employee in good standing [with her employer] . . . . Here, the award of $500,000 was grossly excessive when compared to the limited evidence of harm presented at trial and would result in a "miscarriage of justice" if upheld. Accordingly, we set aside the damage award and remand the case to the district court for recalculation of damages for emotional distress.

Unfortunately for Hetzel's employer, the favorable court of appeals decision is not the end of the story. On remand, the district court awarded Hetzel fifty thousand dollars in damages, and provided her the option of a new trial in lieu of a reduced damage award. Hetzel's employer claimed that Hetzel was not entitled to a new trial, and again sought relief in the court of appeals. Again, the court of appeals agreed with Hetzel's employer, and stayed the scheduled retrial. Additionally, the court of appeals reiterated its position that Hetzel's claimed damages were too high, and it ordered the district court to *again* calculate her damages. This time, the district court awarded Hetzel only fifteen thousand dollars in damages. However, at this point, the United States Supreme Court became involved in the case, and issued a brief, per curiam decision that reversed the court of appeals decision that a new trial was not warranted. *Hetzel v. Prince William County*, 118 S. Ct. 1210 (1998). The Supreme Court held that the court of appeals had violated Hetzel's Seventh Amendment right to a jury trial by requiring the district court to enter judgment for a lesser amount than that originally determined by the jury without allowing Hetzel the option of a new trial. On remand from the Supreme Court, the court of appeals directed the district court to recalculate plaintiff's award of damages for emotional distress. Pursuant to an earlier mandate, the district court was further ordered to closely examine certain comparable awards. Finally, following recalculation, the district court was ordered to offer the plaintiff the choice of accepting the reduced award or proceeding to a new trial. *In re Board of County Supervisors*, 143 F.3d 835, 842 (4th Cir. 1998)

Critically, it is the type of problems presented by the *Hetzel* case, e.g., ongoing litigation by current employees and a sizeable expenditure of capital and human resources, that force employers to pay close attention to retaliation claims. The fact that employees are entitled to a jury trial for Title VII retaliation claims (which may reach a "runaway" damages figure) compounds these difficulties. Employers cannot always rely on appellate courts to reduce astronomical verdicts. Hence, ten innovative and practical solutions for avoiding and coping with such claims are discussed in the accompanying materials.

RETALIATION REVIEW QUESTION

The following "Retaliation Review" question is extracted from *Winning through Prevention*, and kindly authorized by Employment Law Training, Inc.

The Build-Rite Construction Company employs a number of carpenters; it recently hired Ruth, a carpenter's apprentice. During the next several months, Ruth complains that she is treated differently than the males and files an Equal Employment Opportunity Commission (EEOC) charge alleging gender discrimination. A few weeks later, Ruth has a verbal confrontation with a foreman concerning her refusal to wear safety goggles on the job. Ruth becomes irate, yells obscenities at the foreman and storms off. The foreman then tells her that she's fired. Ruth then files a new charge with the EEOC, claiming that she was terminated in retaliation for having filed the earlier EEOC charge. In all likelihood, Build-Rite's decision to terminate Ruth was:

A. unlawful, because Build-Rite fired Ruth after she recently filed a gender discrimination charge.

B. unlawful, because the short duration between Ruth's filing of the EEOC charge and Build-Rite's decision to terminate her establish that the discharge was retaliatory;

C. unlawful, if Ruth can establish that the safety goggle requirement constituted an intolerable working condition;

D. lawful, because Ruth's termination was based upon her insubordinate conduct toward her foreman;

E. lawful, because until the EEOC charge is actually prosecuted, no retaliation claim can be filed.

POSSIBLE RESPONSES

Answer A: Unlawful, because Build-Rite fired Ruth after she recently filed a gender discrimination charge.

- This is incorrect. If Ruth engaged in conduct which would normally result in termination whether or not an EEOC charge had been filed, Build-Rite will be successful in defeating Ruth's retaliation charge.

Answer B: Unlawful, because the short duration between Ruth's filing of the EEOC charge and Build-Rite's decision to terminate her establishes that the discharge was retaliatory.

- This also is incorrect. The shorter the period of time between the filing of a discrimination charge and an adverse employment action, the greater the inference that the adverse action was retaliatory. However, if an employee engages in conduct which would normally warrant termination, the fact that the employee has filed the charge should not prevent the discipline.

Answer C: Unlawful, if Ruth can establish that the safety goggle requirement constituted an intolerable working condition.

- The answer is incorrect. Ruth would not be able to establish that the requirement to wear safety goggles would be an intolerable working condition. However, if Build-Rite only required Ruth to wear goggle after she filed the EEOC charge, and the company did not require any other employees to wear goggles, the requirement could be seen as part of the company's attempt to retaliate against her. However, requiring Ruth to wear safety goggles still would not excuse her insubordinate conduct.

Answer D: Lawful, because Ruth's termination was based upon her insubordinate conduct toward her foreman.

- This is the best answer. Ruth's termination is lawful because Ruth can still be held to the same standards of conduct as other employees, even though she filed an EEOC charge.

Answer E: Lawful, because until the EEOC charge is actually prosecuted, no retaliation claim can be filed.

- This is incorrect. Retaliation can occur when an EEOC charge is filed; actual prosecution does not need to take place.

Answer D Is Most Correct

In the scenario presented by this question, the short length of time between the filing of the first EEOC charge and the discharge could raise an inference of retaliation. However, an employee's termination will not be retaliatory if it is based upon sufficient reasons which are not connected with the filing of the EEOC charge. An employee who files an EEOC charge is not protected from disciplinary action if her conduct warrants it.

KEY LEARNING POINT

- Title VII protects employees who file EEOC charges from being punished or retaliated against by their employers. However, the filing of an EEOC charge does not protect an employee from being disciplined or discharged, if the employee engages in conduct which normally would result in such action. It is wise for employers to compare the disciplinary action taken against an employee who has filed an EEOC charge with that given to employees who have not filed such charges, when they have committed the same or similar offenses.

TEN PRACTICAL SOLUTIONS FOR AVOIDING OR RESOLVING RETALIATION CLAIMS

Two of the most critical questions for employers are how to prevent retaliation claims and how to defuse a potentially explosive retaliation claim. Unfortunately, off-the-shelf answers have been limited in supply and effectiveness. Nonetheless, Littler has developed ten practical solutions which are published here for the first time. These possible solutions require custom tailoring to fit the unique circumstances of the affected employer.

ONE: IMPLEMENT A STAND-ALONE ANTIRETALIATION POLICY

Employers should consider the implementation of a separate antiretaliation policy that announces that unlawful retaliation will not be tolerated. This policy should contain internal reporting mechanisms similar to those in an unlawful harassment policy. If the alleged retaliation is originating from one's supervisor, then clearly an alternative channel for complaint should be provided. The policy should promise an investigation and appropriate action.

Customarily, employers rely on antiretaliation language contained within other policies. A classic example is a statement against retaliation set forth within a sexual harassment policy. Such references are appropriate, often legally required, and usually underwhelming. The employer should affirmatively take every reasonable action to encourage the reporting of alleged retaliation while building a meaningful record of compliance with the legal duty to prohibit retaliation.

The employer clearly benefits from an early internal retaliation complaint. It provides an opportunity to investigate, document what is occurring, and, in appropriate cases, take action. This is the employer's best defense in avoiding escalation into litigation. Moreover, a separate policy is tangible evidence that the employer takes retaliation very seriously and is committed to preventing its occurrence. Finally, the failure of an employee to timely use such a visible and available complaint procedure raises serious questions about the merits of a later retaliation allegation.

TWO: TRAIN EMPLOYEES ON YOUR ANTIRETALIATION POLICY AND DOCUMENT THAT THE TRAINING HAS OCCURRED

An essential part of your employment-law training program should include coverage of your antiretaliation policy and how it operates. For team leaders and managers this is an important part of giving meaning to your written policies and underscoring the importance of preventing retaliation. Managers need to be reassured that it is natural to feel anger toward an employee who might accuse them of unlawful conduct. Nonetheless, to show anger or to act on it is unprofessional and may legally worsen the situation. The true nightmare of a retaliation claim occurs when the underlying allegation (such as a claim of sex discrimination) is defeated but the retaliation claim is found to have merit. Training on how a manager should respond could

be invaluable in avoiding actual retaliation as well as the appearance of retaliation. Role-playing exercises, the use of simulations, and playing the Littler employment-law training game (*Winning through Prevention*) are all valuable teaching tools in understanding how to avoid retaliation as well as responding to a claim of retaliation. As the law in this area is evolving rapidly, such training should be reviewed at least annually. Additionally, evidence that managers have undergone such training is evidence of the seriousness given the topic by the employer and makes it more credible that the team leader or manager did not engage in retaliation.

Concerning employees, it is also recommended that training take place on the content and procedures of the antiretaliation policy. This increases the likelihood of early reporting, emphasizes the importance placed on this topic by the employer, and makes the failure to complain harder for the employee to explain. Moreover, it is a solid advantage to the employer to learn about alleged unlawful conduct in the workplace as soon as possible. Early detection frequently means that corrective steps can be taken before the problem becomes worse. When false or questionable complaints are received, it is to the employer's advantage to build a record while memories are fresh and the witnesses are still reachable. Clearly, employees are more likely to file complaints if they believe that the employer is serious about protecting them from retaliation.

THREE: IDENTIFY AND DOCUMENT WHEN STATUTORY PROTECTED ACTIVITY OCCURS

Unlawful retaliation can occur if some form of legally protected activity has occurred. This could be as clear as the filing of a charge with the EEOC or a state agency or as vague as a verbal complaint to a supervisor regarding alleged illegal treatment. Since complaints to the employer could be protected and open the door to a later retaliation allegation, it is important to identify and document when the original complaint occurred. Team leaders and managers need to be sensitive to such complaints even when made verbally. They should be reported to human resources so that appropriate action can be taken. By identifying this activity, one is better situated to prevent application of the retaliation doctrine to claims prior to the initial complaint. It is very common for a plaintiff to allege unlawful retaliation by a supervisor for weeks prior to a discharge when, in fact, the supervisor had no idea prior to the discharge that there was even a hint that the employee was alleging protection under a statute. One of the best defenses is to have a clear record of when the first statutorily protected complaint was received from the employee.

FOUR: PREEMPT RETALIATION CLAIMS AS SOON AS STATUTORILY PROTECTED ACTIVITY OCCURS

Commence building a record of nonretaliation from the moment a complaint is received (such as one alleging sexual harassment). Make it a practice to immediately reassure the complaining employee that the employer takes its antiretaliation policy seriously. Provide the employee with an additional copy of the policy, review its content and procedures with the employee, and document that this action was taken. Following this meeting, identify those managers affected by the complaint and/or supervising the complaining employee. Consider the value of providing them with the same antiretaliation policy and information as was supplied to the employee. The purpose is, in fact, to discourage actual retaliation while establishing a record of nonretaliation.

FIVE: ESTABLISH AN EARLY WARNING SYSTEM

Establishing an early warning system for detecting possible retaliation is one of the most important and practical preventive steps an employer can initiate. Of course, the employee should be reminded of the antiretaliation policy and reporting procedures when an initial complaint is received and this reminder should be documented. However, the employer should not rely exclusively upon the employee to initiate a retaliation complaint. One or two days after the initial protected activity consider having an employer representative (usually a human resources manager) contact the employee. Apart from inquiring further about the original complaint, key questions can be asked to determine whether any indications of retaliation are being perceived. Practical questions such as the following may be helpful: "How are you doing?" "Is there anything more we can do for you while the investigation is taking place?" "Since our meeting, is there anything more you think I (we) should know?" These questions are designed to solicit potential retaliation problems while not planting suggestions in the mind of the employee. Moreover, negative answers should be documented as evidence that the antiretaliation policy is working.

The early warning system may, in appropriate situations, incorporate technology. Human resource representatives could have electronic reminders to follow up with the complaining employee at set intervals and e-mail exchanges could substitute for or supplement a personal visit. If there is an exchange of voice-mail messages, consider saving a recording (or at least the text) of a message indicating that no problem has occurred. Of course, caution and a consideration of unique circumstances is needed since the record created could document possible liability, especially if a complaint of retaliation is received and no follow-up investigation is commenced.

Another key element in building an early warning system is to consider who might be accused of retaliation and periodically check on their reactions to the situation. As stated above, emotions can run high in such situations and considerable debriefing of the involved management members may be necessary. Just-in-time guidance can be offered on how to interact with the complaining employee. The manager can be reassured that he or she does not have to handle this matter alone. Moreover, any action potentially affecting the employee's conditions of employment can be reviewed to ensure that retaliation is not present. Involvement of the legal department is especially recommended since the matters can become complex and their review would likely be protected by attorney-client privilege.

SIX: TAKE RETALIATION COMPLAINTS SERIOUSLY AND CONDUCT A SEPARATE INVESTIGATION

Retaliation complaints expose an organization to significant potential liability even if the original underlying complaint appears frivolous. Several juries have cleared the employer of discrimination (for example) only to conclude that later discipline was the result of having made the original complaint. This is a classic compromise by a jury. Retaliation complaints are serious business and as such receive priority treatment.

A retaliation complaint is an opportunity to take swift action and avoid litigation and/or minimize possible damages. When the complaint is not justified, early documentation is invaluable. Moreover, it may be possible to reassure a complaining employee that concern about a particular action had nothing to do with the employee's earlier complaint. Failure to get invited to meetings, slow reports, or other such events are likely to have perfectly valid explanations which can be documented and shared with the complaining employee.

Regarding the investigation of a complaint of retaliation, it is highly recommended that this be handled independently from the underlying investigation of the original complaint (such as of sex discrimination). This is an opportunity to have a different investigator review allegations separately from the original investigator. If it is determined that neither the underlying complaint nor the retaliation complaint has validity, two separate investigators and investigations support that conclusion.

SEVEN: CONSIDER USING AN OUTSIDE INVESTIGATOR FOR MAJOR RETALIATION COMPLAINTS

Clearly, certain statutorily permissible complaints from an employee, especially a current employee, can upset management (even at the highest levels). Claims of illegal conduct by management are normally not taken lightly. A marginal employee who suddenly alleges that the employer's president is falsifying documents submitted concerning government contracts is usually not viewed favorably. In such cases, the ability to show a neutral investigation is difficult. The employee is likely to be disliked and disbelieved. This may justify considering the use of an independent, neutral evaluator who possesses high credentials, who will do a thorough investigation, and who will make a strong employer witness in the event of litigation. If the outside investigator concludes that retaliation may exist, the investigation should be structured such that the organization can take quick corrective action. This may occur at an interim stage in the investigation before the evaluator is forced to reach his or her ultimate conclusions. On the other hand, if the investigation shows there is no merit to the charge of retaliation, this should be presented to the party alleging retaliation. Thereafter, if the claim of retaliation is not withdrawn, the evaluator should finalize his or her report. The legal department should be closely involved in structuring the form of the investigation and its findings. Issues of attorney-client privilege may be present, especially if the investigator is an attorney.

EIGHT: DON'T BECOME A VICTIM OF LITIGATION FEAR

Retaliation complaints should be taken seriously, and they demand a careful investigation and follow-up action to correct abuses which could include disciplinary action (up to and including termination) against retaliators. Nonetheless, a complaint of retaliation does not cast a lifetime protective shield around the complaining employee. Such employees can often be marginal performers who may be evaluated negatively by the employer. It is essential that the employer continue to document deficiencies and discipline complaining employees for workplace offenses. The difference is that this must be done under floodlights. The documentation will likely be challenged and the employer's real motives examined. This requires close review and the involvement of the human resources and legal departments. However, fundamental employment policies and practices must be maintained and enforced. The same floodlights which will show retaliatory actions will also disclose favoritism toward the complaining employee. If an employer is paralyzed from acting, precedents will be set making it twice as hard to act in the future. Consistency of treatment is critical. An employer should treat the complaining employee like other employees. Nonetheless, the employer needs to be even more careful than usual to ensure that its actions are based on solid foundations and in fact are consistent. It should be assumed that the matter might lead to litigation and one needs to be prepared. Welcome to the twenty-first century!

NINE: CONSIDER "OUTSIDE THE BOX" PRACTICAL SOLUTIONS FOR AVOIDING RETALIATION

Occasionally, the personal chemistry of a situation will not support maintaining the status quo. If an immediate supervisor is accused of sex discrimination, it may be impractical to have this supervisor act as though it is business as usual. A negative evaluation is certain to be interpreted as retaliation (and in the mind of the employee this might actually be believed). A creatively restructured working environment may be the best temporary (or long-term) solution. The employee might receive a new evaluator, a voluntary transfer might be offered, or a carefully reviewed administrative transfer to an equivalent position considered. A telecommuting option may also be explored. Obtaining the employee's consent to make a change will help defend against subsequent retaliation claims. Nonetheless, consultation with the legal department is essential to ensure that no adverse employment action occur. The overriding objective is to find a practical solution that reduces the potential interpersonal explosion between the accused and the accuser, while respecting the need for consistency and business as usual.

TEN: CONSIDER ULTIMATE LITIGATION SOLUTIONS

A current employee bringing a lawsuit against his or her employer is fully protected from retaliation by appropriate statutes. Nonetheless, the reality of the situation is one in which the employer and the employee are sentenced to a tense working relationship. Long after the litigation has ended, the employee may still view any negative act as one likely motivated by the past litigation. Legally, the employee has every right to remain in the workplace and sometimes the situation can eventually be made to work. However, often other solutions may be possible.

In litigation, it may become possible for the current employment to be included in the settlement mix. This is not something the employer can insist upon, but especially in mediation, it is a topic both parties will have considered. Ironically, it is common that both parties privately desire such an outcome. Thus, a more expensive settlement of the underlying claim (perhaps sexual harassment) may become acceptable because the employee voluntarily resigns. This may even occur months after the settlement, so other employees do not get the message that if you raise a complaint, you lose your job. In other situations, a more creative approach might involve a voluntary resignation and a release regarding the resignation with the underlying lawsuit continuing. The employee obtains payment for the release which is kept regardless of the outcome of the lawsuit and the employer can now fully focus on the lawsuit without worrying about the potential for retaliation. Fashioning such complex arrangements requires the active involvement of counsel and careful attention to issues such as how a jury might envision the resigned employee even if the resignation itself is covered by a confidential settlement-and-release document. The bottom-line message is that a practical solution has been forged to address an area of litigation (retaliation) that has the promise of being a nightmare for even the most responsible and law-abiding employer.