

**EPSTEINBECKERGREEN**

**RETALIATION:  
THE NEW VOGUE IN EMPLOYMENT LITIGATION**

**GETTING MAD  
GETTING EVEN  
GETTING SUED**

by

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## INTRODUCTION

The Equal Employment Opportunity Commission (“EEOC”) recently reported retaliation charges have doubled in the past decades and constitute 25 percent of all charges before the EEOC. The EEOC collected over \$124,000,000 for retaliation in 2007.

Employers who face retaliation lawsuits can be found liable for reinstatement, backpay, front pay, damages for pain and suffering, double damages punitive damages and paying the plaintiff’s legal fees depending on the particular anti-retaliation law involved.

When managers are accused of violating the law, they usually get mad at their accuser. They can be even more irate when the charge is a trumped-up lie. It is especially difficult for supervisors who still have to direct, deal with and, if necessary, discipline their accuser. But they must be restrained from overreacting and getting even. Even if they are not guilty of the legal violation, if they get even, they may just lose a retaliation lawsuit.

In one case, a woman pilot complained of sex harassment and that she had been fired for complaining. The judge dismissed the sex harassment charge, but the jury awarded \$3.5 million in punitive damages for retaliation because she had complained.

This article will outline the elements of the retaliation cause of action, cite the statutes and laws involved and offer practical advice on avoiding retaliation lawsuits.

### I. ELEMENTS OF A RETALIATION CAUSE OF ACTION

#### A. “PAC”- Protected Protests, Adverse Action and Causal Connection

The issue in all suits contesting adverse employment actions is, “Why” did the employer do it? “Why” is an operation of an actor’s mind and alleged perpetrators invariably deny invidious discrimination. So, plaintiffs usually can offer no direct testimony to prove a discriminatory motivation. Because juries want to understand the employer’s motive, the best defense is always a “good” and “fair” reason, without which juries may decide that the ax fell for the wrong reason. It may not have been because of race or sex, but it might be because the person complained testified, sided with a victim or asked for their statutory rights.

Since the ultimate question in retaliation cases is the operation of the mind of the actor, the courts have approached this inquiry in much the same way as in discrimination cases - - finding that a claim of retaliation can be proven either by offering direct evidence of retaliation or by offering circumstantial evidence under the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (“McDonnell Douglas”) burden shifting model.

Plaintiffs do not get to the jury unless they make out a “prima facie case” of retaliation:

1. that plaintiff engaged in Protected activity,
2. that an Adverse employment action has occurred, and
3. that there was a Causal link between the protected activity and the adverse employment action.

The employer then has a burden to articulate a legitimate, non-discriminatory reason for the adverse employment action.

Then the burden shifts back to the employee to prove, if he/she can, that the stated reason was a pretext for retaliation. The plaintiff can often get to a jury (and juries like to be fair) if there is:

4. direct evidence of retaliation (the proverbial smoking gun admission); or
5. evidence that the reason offered by the employer is a lie and a cover up for retaliation; or
6. evidence that others who committed the same infraction, but had not engaged in Protected Activity, did not suffer the same adverse action, or
7. evidence that the employer advanced inconsistent reasons to justify the adverse employment action.

## 1. PROTECTED ACTIVITY (“P”)

An employer is prohibited from retaliating against an employee who takes part in protected activity. Protected activity can be: (a) “**Opposition**” to illegal activity, including prohibited discrimination; (b) “**Participation**” (in a proceeding concerning allegations of illegal actions); (c) **Whistleblowing**; or (d) **Claiming an employment-related Benefit**.

An employee engages in protected activity if he/she: (1) Opposed illegal activity, such as legally protesting or refusing to participate in a discriminatory employment or illegal practice in good faith; (2) Filed a charge with a government agency; (3) Participated in an investigation, proceeding or hearing; or (4) Exercised, claimed or asserted a protected right, such as requesting a reasonable accommodation under the Americans with Disabilities Act of 1990 (“ADA”) or filing for a benefit under Workers’ Compensation or the Employee Retirement Income Security Act of 1974, 29 U.S.C. §, et seq. (“ERISA”).

**a. OPPOSITION TO ILLEGAL ACTS**

- (1) **Protests and Whistleblowing:** Protected activity may come in the form of protests. Many laws protect expressions of views, whether through established grievance procedures or alternative forms of protest, balancing the employer's business interest in preventing those expressions against the overriding interests embodied in the statute. And public employers may be faced with challenges based upon constitutional free speech protections.
- (2) **Refusal to Participate in Illegal or Discriminatory Employment Practices:** Protected opposition may come in the form of a refusal to participate in discriminatory employment practices or other illegal employer actions.
- (3) **Good Faith or Reasonableness:** An employee's opposition is protected even if the employer violates no law if: (a) the employee reasonably believed that there is a violation; and (b) the belief is held in good faith, even if mistaken.
- (4) **But Illegal Opposition Tactics Are Not Protected:** It is settled that insubordinate or other disruptive opposition may not be considered protected employee activity.

**b. PARTICIPATION IN A PROCEEDING**

An employer cannot retaliate against an employee for filing a charge or suit, for testifying, or for assisting in an investigation, proceeding or hearing.

However, it is important to refer to the exact statutory language or case law to determine what Participation is "Protected" because there are differences between certain statutory protections. For example, while most federal antidiscrimination laws protect protesters who complain internally, the Fair Labor Standards Act has been ruled to protect only participation in Court or Department of Labor proceedings.

In addition, many statutes protect those who assist or aid others in seeking to vindicate their statutory rights, such as cooperating or testifying in administrative proceedings.

The United States Supreme Court recently ruled that giving evidence in connection with a Company investigation of sexual harassment allegations by another employee, is protected participation or protest action.

**c. EXERCISING, CLAIMING OR ASSERTING A PROTECTED RIGHT**

An employee who requests a reasonable accommodation or files for a benefit is also protected from employer retaliation.

(1) **Requesting Reasonable Accommodation:** An employee may be granted protection from retaliation under the Americans with Disabilities Act if they requested a reasonable accommodation, even if they do not file a formal charge and they are protected from adverse employment action for their request, even if they are not entitled to the accommodation. Similarly requests for Religious accommodation are also protected.

(2) **Filing for a Benefit:** The Employee Retirement Income Security Act ("ERISA") prohibits retaliation for seeking a benefit or exercising a right under an employee benefit plan. 29 U.S.C. §("ERISA §"). In the context of Workers' Compensation, most state laws prohibit retaliation for claiming a benefit.

## 2. ADVERSE EMPLOYMENT ACTION ("A")

On June 22, 2006 the United States Supreme Court in Burlington Northern Railway Co v. White 2006 WL 1698953. lowered the threshold for determining adverse impact.. The Supreme Court recognized that the anti-retaliation provisions of Title VII "protects an individual not from all retaliation, but from retaliation that produces an injury or harm" and that the standard of materiality or seriousness is that **"a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"** 2006 WL 1698953, at \*10 (citation omitted and emphasis added)

The Supreme Court went on to state:

We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth a 'general civility code for the American Workplace'.... An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1.B Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "snubbing' by supervisors and co-workers" are not actionable under Section 704(a) . . . normally petty slights, minor annoyances, and simple lack of good manners will not create ... deterrence [ from complaining to the EEOC, the Courts or the employer].

### Id.

The only other examples discussed by the Supreme Court in Burlington Northern were: (1) that a schedule change may make little difference to many workers but may matter enormously to a young mother of school age children; and (2) that a refusal to invite an employee to lunch is normally a trivial non-actionable petty slight, but excluding an employee from a

weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Thus, there is some room left to distinguish petty from significant adverse action as well as some room to argue that the change did not matter to the particular plaintiff on a subjective level.

But the clear import and impact of the Burlington Northern case is that many more retaliation cases will go to juries to decide whether the alleged adverse action would have deterred a reasonable employee from protected activity.

It remains to be seen whether Burlington Northern will overturn the many prior cases which distinguished the consequential from the trivial, including the following: e.g., Haywood, 323 F.3d 524 (a one-month delay in an employee's transfer did not amount to an adverse employment action) Foley v. University of Houston Sys., 355 F.3d 333 (5th Cir. 2003) (University professors were alleged to have schemed to remove a fellow professor from the chairmanship of a department and to undermine programs with which she was associated. was not held to constitute adverse employment action), Jacob-Mua v. Veneman, 289 F.3d 517 (8th Cir. 2002) (no adverse employment action where an employee's position was marked for elimination in the ordinary course of business, he was offered a substitute position, and he did not suffer a loss in grade or pay when transferred to another state); Stone v. Board of Directors of Tenn. Valley Auth., No. 00-6328, 2002 WL 1001031 (6th Cir. May 15, 2002), (requirement to take a fitness for duty test was not adverse employment action)..

As recently as January 31, 2006, the Third Circuit, in a case of first impression, ruled that a retaliation claim predicated upon a hostile work environment is cognizable under Title VII. In Jensen v. Potter, 435 F.3d 444 (3d Cir. 2006), Judge Samuel A. Alito Jr., writing for a unanimous panel, noted that since Title VII's general discrimination provision applies to hostile work environment claims, there is no reason to conclude that such claims would not be covered under Title VII's retaliation provision. Id. In addition, the First, Ninth and Tenth Circuits have all held that the creation of a hostile work environment can be retaliatory adverse employment action. See, e.g., Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005); Che v. Massachusetts Bay Transp. Auth., 342 F.3d 31, 40 (1st Cir. 2003); Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000); Gunnell v. Utah Valley State Coll., 152 F.3d 1253 (10th Cir. 1998).

On the other hand, recent cases involving "shunning" by coworkers, which the Courts have found not to constitute actionable adverse employment action, still seem to be viable precedent. EEOC v. Journal Cmty. Group, No. 04-C-0326, 2006 WL 801024 (E.D. Wis. Mar. 28, 2006); Brown v. Colgate-Palmolive Co., No. 1:04-CV-0782-DFH-WTL, 2006 WL 517684 (S.D. Ind. Mar. 2, 2006); Mlynczak v. Bodman, 442 F.3d 1050 (7th Cir. 2006). But if the employer refuses to act after there is a complaint of coworker adverse employment action, the employer may still be found responsible. See Pellier v. British Airways, Plc, No. 02-CV-4195, 2006 WL 132073 (E.D.N.Y. Jan. 17, 2006).

What questions remain for the courts (rather than the juries) to decide? What about the effect of negative evaluations of employee performance? Would a reduction this year from outstanding to above average or a drop to average be actionable? If performance slips, is the plaintiff nevertheless protected from honest evaluation? Will the judgments of supervisors and Human Resource Professionals be second guessed by lay jurors? Is Brown v. Snow, 440 F.3d 1259 (11th Cir. 2006) holding that such evaluations are not adverse action still good law?

Will a selection of another employee or applicant for a job or promotion be submitted to a jury? Must employers act at their peril in not promoting the protester?

When a protester asks to have their schedule changed, or for a day off, will rejection be looked at under a jury's microscope?

Will warnings about job performance, even if warranted, now be considered adverse employment action? Will Powell v. Yellow Book, USA Inc., 445 F.3d 1074 (8th Cir. 2006 ); Tapia v. City of Albuquerque, No. 05-2028, 170 Fed. Appx. 529 (10th Cir. Feb. 10, 2006); Linson v Lockheed Martin Energy Sys., Inc., No. 3:06-CV-39, 2006 WL 180611 (E.D. Tenn. June 29, 2006), all refusing to hold job evaluations as adverse employment action, be overturned? Will the jury or judge decide whether the warning is proper?

Employers now act at their peril in dealing with members of the protected class who ask for employment advantages. And it is more important than ever to be sure those persons who did not engage in protected activity not be treated better than those protected from retaliation, since disparate treatment will surely influence the jury in its deliberations.

### **3. CAUSAL CONNECTION WITH THE PROTECTED ACTIVITY ("C")**

Under many statutory and common law retaliation causes of action, plaintiff need not prove that the protected activity was the sole motivating factor in the adverse employment action. Under Title VII of the Civil Rights Act and many similar statutes, the jury will be charged that they may find liability if the protected activity was "a motivating factor" in the decision to take adverse employment action. It does not have to be the sole motivating factor. But employers may avoid back pay liability if it satisfies a burden of proof that it would have discharged the employee for good cause even if there had not been protected activity.)

Management and their representatives create an appreciable risk that their conduct will be found unlawful if they make overt statements or create documents (or e-mail) that indicate that they intend to, or have fired, demoted or taken any perceivably adverse action against employees who engage in protected activity. But few managers baldly state they are retaliating. So the courts have indicated that proof of causation of the third element of PAC, can be established either indirectly by means of circumstantial evidence, for example, by showing that the protected activity was soon followed by adverse treatment in employment, or directly by

evidence of retaliatory animus. Because such direct proof is rare, however, much of the discussion of causation in the case law is directed at circumstantial proof, such as temporal proximity, disparate treatment, inconsistent management actions or asserting inconsistent reasons for the adverse employment action.

#### a. TEMPORAL PROXIMITY

Even though the Mafia aphorism that “revenge is a dish best eaten cold” may be true, a plaintiff can satisfy the third requirement of PAC (causation) by showing proximity in time between the protected activity and the adverse employment action and many courts dismiss retaliation claims for actions months and years after the protected activity. Absent other evidence, however, the courts will only infer a causal connection based on very close proximity to the adverse employment action. Therefore, the United States Supreme Court, (in a case summarily reversing a Ninth Circuit decision without further briefing or oral argument) has upheld summary judgment against an employee retaliation claim when the employer either did not know of the EEOC action just before taking adverse employment action or knew about the filing of the charge 20 months earlier. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). There is no clear-cut answer, however, as to what constitutes sufficient proximity in time.

The Supreme Court, in *Breeden*, has stated definitively, however, that 20 months will be considered too long to support a temporal causality finding as a matter of law. The following periods have been held by many Courts to be too long: 17 months and one year. Most Courts will find that retaliation for protected activity known to the employer one year or more previously will not pass the temporal proximity test.

On the other hand, knee jerk reactions after only several days or a few months have been found proximate enough to support a prima facie case or finding of retaliation.

**But** the time is measured from when the alleged perpetrator found out about the protected activity as one Court said: “the proximity ... is meaningless unless those who caused the alleged retaliatory act to occur are shown to have been aware of the specific activity.” *Hernandez v. Data Sys. Int’l, Inc.*, 266 F.Supp. 2d 1285, 1307 (D. Kan. 2003) (internal quotations and citations omitted).

#### b. DISPARATE TREATMENT

Most employers seek to defend retaliation charges by asserting that they took the adverse employment action for “good cause.” When, however, the plaintiff can show that others who did the same thing but did not engage in protected activity were treated less harshly, the case will usually go to the jury.

Another Achilles heel for employers is giving inconsistent reasons for the adverse action so a Court will leave the liability question to the jury.

Thus, circumstantial evidence, which often could involve temporal proximity, disparate treatment, or employer inconsistency; as well as direct evidence which could involve expressed animus, may all be considered in determining whether a "C" or causal connection exists between the "P" or protected activity of the employee, and the prohibited "A" or adverse employment action of the employer.

**c. PLAINTIFF MUST PROVE EMPLOYER KNEW OF PROTECTED ACTIVITY**

There are any number of cases which dismiss retaliation claims where the employee does not establish that the actor who took adverse employment action knew of the protected activity.

**II. STATUTORY AND COMMON LAW DEFINITIONS OF PROTECTED ACTIVITY**

Virtually every employment-related statute contains an add-on cause of action for retaliation.

- 1. Anti-discrimination Laws (Title VII, ADEA, ADA, EPA)**
- 2. The Employee Retirement Income Security Act**
- 3. The Fair Labor Standards Act**
- 4. The Family and Medical Leave Act**
- 5. The Longshoremen and Harbor Workers Act**
- 6. The Migrant and Seasonal Workers Act**
- 7. The Occupational Safety and Health Act**
- 8. The Railroad Employees Liability Act**
- 9. The "Federal Aviation Act of 1958"**
- 10. Labor Management Relations Acts**
- 11. The National Labor Relations Act**
- 12. The Railway Labor Act**

## B. THE SARBANES-OXLEY ACT

The Corporate Criminal and Fraud Accountability Act ("SOX"), was passed lickeredity-split following the Enron debacle with virtually no statutory history. SOX has the following key provisions:

1. Prohibits retaliation against certain whistleblowers in publicly traded corporations;
2. Provides a mechanism for enforcing civil SOX retaliation violations before the Occupational Safety and Health Administration;
3. Imposes new criminal sanctions for anyone who corruptly:
  - a. knowingly and intentionally retaliates against whistleblowers providing governmental agencies with "any truthful information relating to the commission of any federal offense";
  - b. destroys or conceals records, documents or other objects with the intent to impair the object's integrity or availability for use in an official proceeding; or
4. otherwise obstructs, influences or impedes any official proceeding or attempts to do so.

SOX provides civil whistleblower protection with respect mail fraud and swindles (18 U.S.C. §) and bank fraud (18 U.S.C. §), as well as violations of SEC rules or regulations or any provision of federal law relating to fraud against shareholders.

Both internal and external whistleblowing is protected. Whistleblowers are protected if they provided information in-house to a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover or terminate misconduct). And they are protected for dealing with government agencies. Protection is available for filing, causing to be filed, testifying or otherwise participating in a proceeding regarding fraud, etc. without any reasonableness requirement.

But whistleblowing employees are only protected if he/she has a reasonable belief that there has been a prohibited violation.

Whistleblowers who have been retaliated against can only recover under SOX reinstatement, back pay, interest and litigation costs and there is a short 90-day limitations period for filing a complaint of SOX violation with the Occupational Safety and Health Administration.

## C. STATE LAWS

There are two sources of potential retaliation protection under state laws:

1. the doctrine under many state's common law that individuals are protected against adverse employment action for a reason against "public policy"; and
2. statutory protections.

Common law doctrines vary state by state from the broad protections in California and New Jersey to those states, like New York, which refuses to recognize such protections under common law notions, but has passed several very specific statutes which provide similar protection to inter alia whistleblowers but only on matters of public health or safety.

Among the activities often protected from retaliation by state common law or legislation are:

1. serving on a jury
2. filing workers' compensation claims
3. whistleblowing about specified violations
4. objecting to illegal activities
5. engaging in after hours legal recreational activities (a statute often lobbied through by the tobacco industry)
6. political activity, or
7. as part of employment discrimination statutes similar to federal statutes.

The list of state common law and statutory protections is simply too long to exhaust here. Suffice it to say that each jurisdiction must be carefully researched when considering or defending a lawsuit prohibiting adverse employment action or when advising clients on compliance.

### III. AVOIDING RETALIATION LAWSUITS

Here are some steps to be considered in planning to avoid retaliation liability.

#### A. PROMULGATE AND PUBLICIZE POSITIVE PREVENTION POLICIES

1. EEO Statement
2. Written Anti-Retaliation Rules
3. Clear Work Rules signed for by all employees (to provide evidence to support disciplinary action)
4. Grievance Procedure (with appropriate time limits - - otherwise claim deemed waived so failure to exhaust internal procedures may be a defense) so employees have a venue to settle their claims in-house
  - (a) Step 1: Oral with supervisor or HR
  - (b) Step 2: Written with next highest management group
  - (c) Writing Required to state:
    - (i) What is the problem?
    - (ii) When did you present it orally to supervisor or HR?
    - (iii) What response did you get?
    - (iv) Why do you disagree?
    - (v) What do you think should be done?
  - (d) Step 3: Final In-house Resolution (consider a committee with some management and some rank and file participating)
  - (e) Step 4: Mediation
  - (f) Final and Binding Arbitration
5. Prompt and Fair Investigation Procedures
6. Supervisory Training in EEO and Retaliation Prevention and Anger Management

**B. IDENTIFY POTENTIAL PLAINTIFFS AND SEEK TO TREAT THEM FAIRLY**

1. Grievants
2. Complainers
3. Charge Filers
4. Litigants
5. Witnesses
6. Protesters
7. Those who refuse to act because of claimed illegality
8. Employees requesting accommodations to a disability
9. Benefit Plan beneficiaries

**C. LOOK BEFORE YOU LEAP—BEFORE TAKING ADVERSE EMPLOYMENT ACTION**

1. Be sure you understand
  - (a) The reason supporting the Adverse Employment Action
  - (b) Whether it will seem fair to a judge or jury
  - (c) Whether the punishment fits the crime
  - (d) What the personnel history of the miscreants and comparators look like - first time offender or recidivist
  - (e) How you treated other miscreants and comparators who were not protected potential retaliation plaintiffs.
  - (f) Whether the miscreant receive fair warning (enough rope) before
  - (g) The adverse employment action.
2. Review the Paper Trail
  - (a) The potential plaintiff's personnel file—unblemished record or repeat offender

- (b) The personnel files of those similarly situated who are not potential retaliation plaintiffs
- (c) The records of progressive discipline of the plaintiff.
- (d) The records of the grievance procedure on the issue

3. Involve HR and Counsel before the ax falls.

#### **D. TREAT PROTESTER WITH KID GLOVES**

- 1. Control the emotions of supervisors who have been accused—Introduce a level head, if necessary
- 2. Give the potential retaliates enough rope—Have them write their complaints and rebut or correct them
- 3. Don't suddenly
  - (a) Nit pick their performance
  - (b) Transfer them to worse jobs
  - (c) Unfairly deny them benefits
  - (d) Downgrade their evaluations
  - (e) Give them bad references when they leave and seek another job

#### **E. GUT CHECK THE ADVERSE ACTION REMEMBER THAT JURIES (the next six people in line at the supermarket) MAY DECIDE ON WHAT THEY BELIEVE IS "FAIR"**

So put on your neutral hat and ask your spouse, significant other, in laws or children what they would do on a jury.

#### **F. DO YOU HAVE OTHER DEFENSES?**

- 1. Did the employer and the alleged perpetrator know of the protected activity when they took adverse action?
- 2. Did the employer begin the progressive disciplinary action which led up to the adverse employment action before the protected activity was known?

3. Did the alleged victim unreasonably fail to avail themselves of the employer's fair grievance and arbitration system which objectively offered them a means of redressing the adverse employment action?
4. Did the employer exercise reasonable care to prevent and promptly correct retaliatory harassment?
5. Did the alleged victim raise the charge of retaliation timely?
  - (a) SOX has a 90-day statute of limitations
  - (b) Title VII and ADA have a 300-day period to file a charge (if there is no state discrimination law - - if not, 180 days)
  - (c) State and other limitations periods vary — so check the particular law and jurisdiction
  - (d) Did the alleged victim fail to submit the complaint timely under the employer's grievance and arbitration system?
6. Should the matter be taken away from a jury in Court because the employer has a valid arbitration requirement?
7. Did the charging party specify retaliation in the EEOC charge upon which the lawsuit was based?

### CONCLUSION

The time and defense costs and the potential for runaway jury verdicts, makes retaliation lawsuits a fertile field for extortionate settlement demands. If defense can cost tens or hundreds of thousands, plaintiffs and their attorneys are encouraged to "take a shot" and offer a "nuisance" settlement figure of a large fraction of the defense cost as a bottom line savings to the employer. For this reason alone, there are inherent savings in training supervisors, managers and HR administrators in dealing effectively and fairly with those protected from retaliation.