



# Retaliation Claims under Federal Civil Rights Statutes and the Constitution

Lisa Brown, Thompson & Horton, Houston, TX

Presented at the 2017 School Law Seminar, March 23-25, Denver, Colorado

*The NSBA Council of School Attorneys is grateful for the written contributions of its members. Because Seminar papers are published without substantive review, they are not official statements of NSBA/COSA, and NSBA/COSA is not responsible for their accuracy. Opinions or positions expressed in Seminar papers are those of the author and should not be considered legal advice.*

© 2017 National School Boards Association. All rights reserved.

# Retaliation Claims Under Federal Civil Rights Statutes and the Constitution



Lisa A. Brown  
Thompson & Horton LLP  
3200 Southwest Freeway, Suite 2000  
Houston, Texas 77027-7554  
713-554-6741  
[lbrown@thompsonhorton.com](mailto:lbrown@thompsonhorton.com)  
[www.thompsonhorton.com](http://www.thompsonhorton.com)

March 2017  
Presented to the Council of School Attorneys

# Before you embark on a journey of revenge, dig two graves.

***Confucius, 551 BC - 479 BC***

## I. Overview

Numerous laws bar school districts from retaliating against employees who engage in legally protected activities such as complaining about discrimination or reporting wrongdoing to a law enforcement agency. Today, retaliation complaints are the most frequently filed charges at the Equal Employment Opportunity Commission (EEOC) and “continue to be the leading concern raised by workers across the country.”<sup>1</sup> Since 2005, the number of retaliation charges filed with the EEOC has grown by 78 percent, and it doubled between 1997 and 2012.<sup>2</sup> In August 2016, the EEOC issued new enforcement guidance exclusively on the subject of retaliation.<sup>3</sup>

Numerous factors appear to have contributed to the increase in claims and the growing popularity and success of the retaliation cause of action. First, Congress and the state legislatures have continued to adopt statutes that expand anti-retaliation protections for employees. The Supreme Court has described these laws as a “powerful network of legislative enactments” that “protect the rights of employees against improper retaliation or discipline.” *Bureau of Duryea v. Guarnieri*, 564 U.S. 379 (2011) (quotation and citation omitted). Second, the increase in claims over the last two decades coincides with the growth of the Internet and the ability of workers to access legal information and resources. Third, employee-side attorneys have learned that when a retaliation claim is filed in tandem with a discrimination claim, the employee has a better shot at avoiding summary judgment and prevailing at trial.

Although plaintiffs bear the burden of proof in an employment lawsuit, it is often the case that school districts and other employers are put in the position of having to “prove a negative” – prove that retaliation *did not* occur. Courts and juries expect educators to have good reasons for making employment decisions, and they expect that the paperwork will support those reasons. The absence of paperwork and the appearance of inconsistent reasons may sabotage an otherwise fair and non-

---

<sup>1</sup> Retaliation charges increased by nearly 5 percent from 2015 to 2016, comprising 45 percent of all charges filed with the EEOC. “EEOC Releases Fiscal Year 2015 Enforcement and Litigation Data” (2/11/16), *available at* [www.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm](http://www.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm).

<sup>2</sup> “Retaliation-Based Charges FY 1997 – FY 2015,” *available at* [www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm); *see also* *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2531 (2013) (discussing the “ever-increasing frequency” of retaliation claims).

<sup>3</sup> *See* EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (Aug. 25, 2016), *available at* [www.eeoc.gov/laws/guidance/retaliationsguidance.cfm](http://www.eeoc.gov/laws/guidance/retaliationsguidance.cfm) [hereinafter EEOC Enforcement Guidance].

retaliatory decision. Due to the significant legal risk associated with retaliation claims, school administrators must be vigilant in protecting employees against retaliation, ensuring that supervisors follow procedures, and creating a good record with each employment decision.

This paper will provide an overview of the most common types of federal anti-retaliation claims and will describe the typical anatomy of a retaliation claim and the supervisory errors that may lead to legal liability. This paper will conclude by providing practical tips for avoiding claims.

## II. Anatomy of the Retaliation Claim

Although the surge in anti-retaliation claims is of fairly recent vintage, anti-retaliation laws date back to the New Deal and to early protections for unionizing workers. For example, in 1938, when Congress adopted the Fair Labor Standards Act, which instituted a minimum wage for the first time, it enacted an anti-retaliation provision that protects employees who file complaints about their wages.<sup>4</sup> In 1964, Congress adopted a similar anti-retaliation provision when it enacted Title VII of the Civil Rights Act.<sup>5</sup>

The foundational anti-retaliation cases of the modern era are *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which defined the elements of a retaliation claim arising under the First Amendment and 42 U.S.C. § 1983. In these free speech cases, the Supreme Court defined the now-familiar analysis that examines whether the employee engaged in a “protected act,” whether the employee experienced an adverse employment action, and whether the employee’s protected act motivated or prompted the employer’s adverse decision.

Today, regardless of the cause of action asserted, plaintiffs generally must establish these three essential elements. **First**, the employee must show that he or she engaged in a *protected act*. Identification of protected acts will depend on the statute. For example, under Title VII, a protected act includes filing a discrimination complaint or testifying on behalf of another employee, while taking medical leave would be protected under the Family and Medical Leave Act. **Second**, the employee must demonstrate that he or she experienced an *adverse employment action*. Across the spectrum of statutes, a termination will always constitute an adverse action. Today’s litigation disputes tend to focus on lesser actions, such as whether a poor evaluation is sufficiently adverse. **Third**, the employee must demonstrate causation or a connection between the protected activity and the adverse employment decision.

## III. Common Retaliation Claims

---

<sup>4</sup> Pub. L. No. 75-718, 52 Stat. 1060 (June 25, 1938).

<sup>5</sup> Pub. L. No. 88-352, 78 Stat. 241 (July 21, 1964).

Numerous federal statutes contain an anti-retaliation provision. Anti-retaliation claims also exist under state law, the most common of which are laws that protect workers who receive workers' compensation benefits and laws that prohibit punishment of whistleblowers. An examination of individual state laws is beyond the scope of this paper.

Common claims under federal law are as follows:

**A. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3)**

One of the oldest retaliation provisions in employment law is found in the Fair Labor Standards Act, which was enacted in 1938. The FLSA protects employees who have "filed any complaint" regarding the Act "or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). Protected activities including filing a wage complaint internally or with the Department of Labor, communicating with investigators from the Wage and Hour Division, participating in a DOL audit, circulating a petition to protest a wage policy, testifying in a civil or criminal proceeding, or interfering with a former employee's job search.

The anti-retaliation provision is designed to prevent "fear of economic retaliation" that induces workers to "quietly accept substandard conditions." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 13 (2011) (citation omitted). In *Kasten*, the employee claimed that he was discharged for orally complaining that his employer's time clock failed to record all compensable time. The Supreme Court held that an oral complaint is sufficient under this statute. The phrase "filed any complaint" contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns."

The retaliation cause of action under the FLSA reflects a policy judgment by Congress that favors of employee enforcement of the law:

For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.... For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.... By the proscription of retaliatory acts set forth in [section] 15(a)(3), and its enforcement in equity by the Secretary pursuant to [section] 17,

Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.

*Mitchell v. Robert DeMario Jewelry Inc.*, 361 U.S. 288, 292 (1960).

Initially, the anti-retaliation provision did not prompt individual employee lawsuits against employers due to the absence of language authorizing damages, and the theory remained ill-defined. The remedies provision for retaliation claims was added to the FLSA in 1977. *See Pineda v. JTCH Apartments LLC*, 2016 WL 7367799 (5th Cir. Dec. 19, 2016) (citation omitted). Prior to the 1977 amendments, plaintiffs only had a cause of action for minimum wage and overtime violations. For those claims, Section 216(b) was limited, as it still is today, to awarding lost pay, liquidated damages, and attorneys' fees. *Id.*; 29 U.S.C. § 216(b). The amendment, however, provided a private cause of action to enforce the FLSA's anti-retaliation provision (before 1977, the DOL had to bring an enforcement action). *See Pineda*, 2016 WL 7367799 at \*2 (citing Fair Labor Standards Act Amendments of 1977, Pub. L. No. 95-151, 91 Stat. 1252 (Nov. 1, 1977)). In granting employees the ability to enforce the anti-retaliation provision on their own, Congress allowed them to recover not just wages and liquidated damages but also "such legal or equitable relief as may be appropriate." 29 U.S.C. § 216(b). Remedies for retaliation under the FLSA include reinstatement, lost wages, and compensatory damages, including mental anguish damages. *See Pineda*, 2016 WL 7367799 at \*4. Liquidated damages also are available; however, unlike claims for unpaid wages, liquidated damages are not automatic in a retaliation action. *See Moore v. Appliance Direct Inc.*, 708 F.3d 1233 (11th Cir. 2013) (As matter of first impression, FLSA did not mandate imposition of liquidated damages after finding of liability for retaliation, unless excused by proof of reasonable good faith of employer, the same as it did after finding of liability for unpaid minimum wages and overtime, and liquidated damages were discretionary in retaliation case.).

To be covered by the FLSA, an employee's complaint need not reference the "FLSA"; however, the complaint must pertain to conduct covered by the FLSA and cannot be a generalized grievance about workplace conditions. *See, e.g., Richard v. Carson Tahoe Reg'l Healthcare*, 635 F. App'x 371 (9th Cir. 2016) (complaint about a lack of break time was not a protected act under the FLSA; employee was not complaining about wages, and FLSA did not require breaks); *Barquin v. Monty's Sunset, L.L.C.*, 975 F. Supp. 2d 1309 (S.D. Fla. 2013) (general complaint about being "improperly paid" was too vague to constitute a "protected activity").

## **B. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a)**

### **1. Overview**

Title VII prohibits retaliation against employees who opposed any practice made unlawful by Title VII or who made a charge, testified, assisted, or participated

in an investigation. *See Crawford v. Metropolitan Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009). The statute protects, not just those who file complaints, but also those who answer their employer's questions during an investigation. *Id.*

After the passage of Title VII in 1964, federal courts frequently turned to anti-retaliation cases involving the FLSA and the National Labor Relations Board for guidance to define the concept of a protected activity. *See, e.g., Pettway v. American Cast Iron Pipe*, 411 F.2d 998, 1005-07 (5th Cir. 1968). In 1968, for example, the Fifth Circuit found that the filing of an EEOC charge was a protected act under Title VII even if the employee's allegations were malicious:

There can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights.... [T]he filing of charges and the giving of information by employees is essential to the Commission's administration of Title VII.... This activity, essential as it is, must be protected. What the Supreme Court said in *NLRB v. Burnup and Sims, Inc.*, 1964, 379 U.S. 21, 23, 85 S. Ct. 171, 173, 13 L. Ed. 2d 1, 4, is certainly true here in a situation in which a single poor, ignorant employee with a grievance, not a sling shot in his hand, faces a huge industrial employer in this modern day David and Goliath confrontation:

'A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.'

... While we find the language of Title VII even broader than that contained in the NLRA or the FLSA and hold that the courts must protect an individual filing charges with EEOC, we should emphasize that reliance on the Labor Acts for interpretive guidance must necessarily be guarded because the differences between those Acts and Title VII may well outnumber the similarities. Notwithstanding these differences, abundant support can be found under such Acts for the conclusion here that protection must be afforded to those who seek the benefit of statutes designed by Congress to equalize employer and employee in matters of employment.

*Pettway*, 411 F.2d at 1005-1007.

The protection of Title VII's anti-retaliation provision extends to former employees. *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The provision also protects an employee whose fiancée filed an EEOC charge against the same company. *See Thompson v. North Am. Stainless*, 131 S. Ct. 863 (2011) (examining whether the third party falls within the "zone of interests" sought to be protected by the retaliation

provision). When there is actionable third-party harassment, both the employee who engaged in the protected activity and the third party who experienced the adverse action may have a claim. EEOC Enforcement Guidance at 20.

## **2. Elements of a cause of action**

In the absence of direct evidence of retaliation, the employee may prove his or her case with circumstantial evidence using the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under this framework, the plaintiff carries the burden of proving by a preponderance of the evidence a *prima facie* case of retaliation. The plaintiff must demonstrate a protected act, an adverse employment action, and a causal connection. If the plaintiff is able to prove a *prima facie* case, then the burden shifts to the employer to articulate some legitimate, non-retaliatory reason for its decision. If the employer is able to carry this burden, then the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered were not true reasons but were a pretext for unlawful discrimination. See generally *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 252-53 (4th Cir. 2015) (explaining shifting burden in retaliation case).

### **a. “Protected” activities under Title VII**

A protected act generally consists of *participating* in the EEO process or *opposing* conduct made unlawful by Title VII. “Commentators have noted that ‘[i]t is essential to the analysis of § 704(a) to recognize its two different clauses.... The distinction is significant because the levels of statutory protection differ.’” *Slagle v. Cnty. of Clarion*, 435 F.3d 262, 266 (11th Cir. 2006) (citation omitted). Unfair treatment, absent discrimination based on race, sex, or other protected categories, is not an unlawful employment practice under Title VII. See *Knott v. DeKalb Cnty. Sch. Dist.*, 624 F. App’x 996 (11th Cir. 2015) (citing *Coutu v. Martin Cnty. Bd. of Cnty. Com’rs*, 47 F.3d 1068 (11th Cir. 1995)).

#### **i) “Participation” as a protected activity**

“Participation” includes making a charge, testifying, serving as a witness, assisting in an investigation, or participating in an investigation, hearing, or proceeding. EEOC Enforcement Guidance at 6-7. The EEOC has opined that “participation” is a protected act regardless of the good faith of the employee or the merits of the claim. *Id.* The EEOC “disagrees with decisions holding to the contrary.” *Id.*; see, e.g., *Gilooly v. Missouri Dep’t of Health & Senior Servs.*, 421 F.3d 734 (8th Cir. 2005) (holding that it “cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees without suffering repercussions....”).

In *Slagle v. County of Clarion*, 435 F.3d 262 (11th Cir. 2006), the court held that the participation prong does not apply to an employee who files a facially invalid EEOC charge. The employee must allege discrimination based on race, color,

religion, sex, or national origin to be protected from retaliatory discharge under Title VII. In *Slagle*, the employee's EEOC charge said that the employer "discriminated against me because of whistleblowing, in violation of my Civil Rights, and invasion of privacy." The EEOC dismissed the charge because "the facts [he] alleg[ed] failed to state a claim under any of the statutes enforced by the Commission." The court rejected plaintiff's argument "that an employee is protected when s/he files any charge, regardless of its content" because it would "render the phrase 'under this subchapter' meaningless."

In contrast to the "participation" prong, the EEOC and courts agree that the "opposition" prong protects an employee only if the employee has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful. EEOC Enforcement Guidance at 7.

The EEOC also takes the view that participation and opposition have "some overlap" and that certain acts, such as serving as a witness or participating in an internal investigation, could satisfy either prong. *Id.* at 7. Although the Supreme Court has not held that participating in an internal employer investigation may constitute "opposition," it has not decided whether such conduct constitutes "participation." See *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009).

## **ii) "Opposition" as a protected activity**

"Opposition" includes a wide range of activities, including answering questions during an employment investigation.

In *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009), the plaintiff was a 30-year employee who was a witness during a sexual harassment investigation. She alleged that she, too, had been harassed and that three other employees had made statements about the accused. Crawford was terminated several months later for alleged embezzlement and drug use. Crawford filed suit alleging that her termination was in retaliation for her providing information during the employer's investigation. The lower courts held that Crawford's actions were not "opposition activity" under Title VII's retaliation clause. The Supreme Court unanimously reversed, holding that Crawford's statements during the internal investigation were covered by the opposition clause of Title VII's prohibition against retaliation. According to the Court: "There is, then, no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

An employee's complaint may qualify as protected opposition, satisfying the first element of Title VII's test for retaliation, so long as the employee has a good faith, reasonable belief that she was opposing an employment practice made unlawful

by Title VII; the reasonableness of the employee's belief is to be assessed in light of the totality of the circumstances. *See Kelly v. Howard I. Shapiro & Assoc.*, 716 F.3d 10 (2d Cir. 2013).

In *Clark County School District v. Breeden*, 532 U.S. 268 (2001), the Supreme Court rejected the retaliation claim of a plaintiff who served on a hiring panel to screen job applicants. The panel reviewed psychological evaluation reports of four job applicants. The report for one of the applicants disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." The plaintiff's supervisor read the comment aloud, looked at the plaintiff, and stated, "I don't know what that means." Another panel member said, "Well, I'll tell you later," and both men chuckled. Plaintiff later complained about the incident and alleged that she was punished for these complaints. "No reasonable person could have believed that the single incident recounted above violated Title VII's standard. The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants. Her co-workers who participated in the hiring process were subject to the same requirement, and indeed, in the District Court respondent 'conceded that it did not bother or upset her' to read the statement in the file.... [The allegations] are at worst an 'isolated incident[t]' that cannot remotely be considered 'extremely serious,' as our cases require...."

In *Kelly*, 716 F.3d 10, the employee failed to state a claim because her complaint suggested only that she believed her brothers, who were the employer's vice presidents, were undermining her authority in favor of another female worker with whom one of her brothers was having an affair, and that she believed such misconduct constituted unlawful discrimination, but nothing about those allegations indicated that there was discrimination against anyone on the basis of sex. Similarly, a black police officer who "reported overhearing racial slurs made by [other] police officers against black citizens" did not engage in protected activity despite "opposing discrimination by co-employees against non-employees" because his "opposition was not directed at an unlawful *employment practice* of his employer." *Wimmer v. Suffolk Cnty. Police Dep't*, 176 F.3d 125, 134-35 (2d Cir. 1999) (emphasis in original); *see also Drumm v. SUNY Geneseo Coll.*, 486 F. App'x 912, 914 (2d Cir. 2012) ("[P]laintiff's allegations that her supervisor 'berated' her and made other harsh comments ... amount only to general allegations of mistreatment, and do not support an inference that plaintiff had a reasonable good faith belief that she was subject to gender discrimination.").

In *Knott v. DeKalb County Sch. Dist.*, 624 F. App'x 996 (11th Cir. 2015), the court rejected the plaintiff's "opposition" claim because she did not establish that she had a good faith reasonable belief that the district discriminated against her based on gender. "Although Knott alleges she in good faith and subjectively believed that Principal James Jackson discriminated against her based on her gender because of his hostility to toward her, she failed to provide any evidence that this was an

objectively reasonable belief. Knott alleged that Jackson demonstrated hostility towards her by excessively monitoring her classroom, failing to provide her with a prompt and sufficient orientation, calling a conference with a student and parent without consulting Knott or attending himself, and referring Knott to two teacher support programs. However, these allegations reflect only potentially unfair treatment, which is not actionable under Title VII.” The only evidence suggestive of gender was the fact that the principal had originally hired a male for the position that she filled. “But this does not lead to an objectively reasonable conclusion that she was discriminated against on the basis of her gender.” *Knott*, 624 F. App’x at 998.

Although “vague complaints” will not suffice, the law does not require “that the plaintiff’s complaint be lodged with absolute formality, clarity, or precision.” *Stevens v. Saint Elizabeth Med. Ctr., Inc.*, 533 Fed. Appx. 624, 631 (6th Cir. 2013). For example, in *Yazdian v. ConMed Endoscopic Tech. Inc.*, 793 F.3d 634 (6th Cir. 2015), the court found that the following six statements were sufficient to raise a question of fact on the question of a protected activity: “I’m going to respond with counsel,” “I’m going to bring you up on charges before,” “Bring a lawsuit against [Sweatt],” “Hostile work environment,” “I will have an attorney respond,” and “I will be responding with charges.” In addition, “the record shows that ConMed understood Yazdian’s complaints as opposition to Sweatt’s conduct because the legal department told Hutto to investigate Yazdian’s claim after learning that Yazdian had accused Sweatt of creating a hostile work environment and not liking his ‘race.’ Employers should, of course, investigate complaints like Yazdian’s. But Hutto’s response to Yazdian’s assertions is evidence that a reasonable employer would understand Yazdian’s comments as opposition to perceived unlawful employment practices.”

In *EEOC v. Rite Way Service Inc.*, 819 F.3d 235 (5th Cir. 2016), the court found that the employee engaged in a protected activity when she was asked to answer questions about acts of harassment that she observed involving other co-workers. Although the underlying harassment was not severe or pervasive, “the reasonable belief standard recognizes there is some zone of conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII.” Could this plaintiff, who was not educated on the law, “reasonably believe that she was providing information about a Title VII violation?” The court answered yes. The incident involved a comment about a male supervisor admiring a female employee’s rear end. The context also affected the analysis. The supervisor said he was “gonna look” at the female’s rear end, suggesting future action.

The 2016 EEOC Guidance states that the opposition clause applies if the individual “explicitly or implicitly communicates his or her belief that the matter complained of is, or could become, harassment or other discrimination.” EEOC Enforcement Guidance at 8. The individual’s communication may be “informal” and need not include legal terms like “harassment” or “discrimination.” *Id.* The EEOC contends that protected acts include “broad or ambiguous complaints of unfair

treatment” if the complaint could reasonably be interpreted as opposition to employment discrimination. *Id.* This language appears broader than judicial interpretations that have held that general complaints about workplace treatment will not constitute a protected activity.

In addition to holding a good faith, reasonable belief, the employee must demonstrate that his or her opposition activities were conducted in a reasonable manner. For example, an employee does not engage in a protected activity when he or she violates the employer’s confidentiality policies. *See Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008) (employee’s disclosure of confidential and proprietary documents to her attorneys during discovery phase of Equal Pay Act and Title VII sex discrimination class action against employer, in violation of employer’s privacy policy, was not reasonable and thus did not constitute protected “opposition” under Title VII retaliation provision; documents did not relate to equal pay claim but rather were meant to jog employee’s memory to support her anticipated retaliation claim, and employee could have preserved evidence of alleged retaliation in other ways).

One issue that continues to be litigated is whether, or to what extent, an employee with human resources responsibilities can claim retaliation based on actions that the employee took within the course and scope of employment as a human resources manager or EEO manager. *See generally* Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 31 (2014). In *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015), the court held that an employee who worked in the employer’s employee assistance program engaged in protected “opposition” by communicating to the employer a belief that the employer had engaged in a form of employment discrimination against the coworker who was allegedly the victim of sexual harassment by a supervisor. “We conclude from this review of the statute and case law that we must examine the course of a plaintiff’s conduct through a panoramic lens, viewing the individual scenes in their broader context and judging the picture as a whole.” *See also Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581 (6th Cir. 2000) (concluding that action taken by a university vice president, in his capacity as an affirmative action official, to respond to hiring decisions that he believed discriminated against women and minorities, constituted protected opposition under Title VII).

In contrast, in *Brush v. Sears Holding Corp.*, 466 Fed. Appx. 781 (11th Cir., March 26, 2012), the court held that a managerial-level employee did not engage in a protected activity. The manager was a loss prevention employee who disagreed with the way in which her employer conducted its internal investigation into a second female employee’s allegations of sexual harassment by the second employee’s supervisor. The loss prevention employee was neither the aggrieved nor accused party in underlying allegations, rather she was one of the employees tasked with conducting internal investigations, and she acted solely as a manager during such

investigations. Similarly, in *Weeks v. State of Kansas*, 503 F. App'x 640 (10th Cir., Nov. 29, 2012), the court held that an in-house attorney did not engage in protected “opposition” when she advised the fire marshal to take seriously an employee’s complaints of discrimination, as required to make a *prima facie* case of retaliation under Title VII. In *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015), the court held that an internal EEO director does not engage in protected “opposition” by fulfilling a job duty to report or investigate another employee’s discrimination complaint, but that stepping outside one’s role and actively supporting another employee in exercising his or her Title VII rights could constitute “opposition”.<sup>6</sup>

### **b. Adverse Employment Action**

In *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Supreme Court held that Title VII prohibits “materially adverse actions” against employees who engage in protected activity. In *Burlington Northern*, Sheila White was a forklift operator at a railroad site. Her supervisor made demeaning comments about women. White complained, and the supervisor was disciplined. Subsequently, White was removed from forklift duty and assigned to more physically strenuous tasks. White filed a charge with the EEOC alleging sex discrimination and retaliation. She filed a second charge after allegedly being placed under surveillance. A few days after she filed the second charge, White was suspended without pay for alleged insubordination. She filed a grievance and was reinstated after going 37 days without pay. White filed a third charge complaining about the suspension. She later filed suit, and a jury found for White. The court of appeals affirmed.

The Supreme Court also affirmed. The Court held that a decision is actionable if it is materially adverse, which means that it would dissuade a reasonable worker from bringing a discrimination claim against their employer. The company argued that the suspension without pay was not retaliatory because it was later reversed. The Court, however, found that the suspension without pay was serious enough to cause a chilling effect. Although the employee received back pay, “White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship.... That is to say, an indefinite

---

<sup>6</sup> In retaliation cases involving the Fair Labor Standards Act, courts have employed the “manager rule” and have held that the employee must “step outside his or her role of representing the company” in order to engage in protected activity. *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1486 (10th Cir.1996); *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102 (1st Cir. 2004). This rule addresses a concern that, if counseling and communicating complaints are part of a manager’s regular duties, then “nearly every activity in the normal course of a manager’s job would potentially be protected activity,” and “[a]n otherwise typical at-will employment relationship could quickly degrade into a litigation minefield.” *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008).

suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay.”

The EEOC has interpreted *Burlington Northern* to apply to denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, discharge, work-related threats, warnings, reprimands, transfers, and negative or lower evaluations. EEOC Enforcement Guidance at 17. It also has taken the position that the prohibition applies to disparaging an individual in the media, making a false report to a government authority, filing a civil action, and threatening to take action against a family member. *Id.* Examples of **materially** adverse actions: *Wheat v. Florida Parish Juvenile Justice Comm’n*, 811 F.3d 702, 707 (5th Cir. 2016) (assignment of janitorial duties on rehiring); *Szienbach v. Ohio State Univ.*, 493 F. App’x 690 (6th Cir. 2012) (accusations of misconduct in plaintiff’s academic research, made in emails to a journal editor and other universities); *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 479-80 (5th Cir. 2008) (verbally harassing behavior from co-workers); *Holloway v. Dep’t of Veterans Affairs*, 309 F. App’x 816, 817 (5th Cir. 2009) (denial of leave of absence and statements from supervisors to co-workers that the employee “was creating problems”). Examples of **non-material** actions: *Roncallo v. Sikorksi Aircraft Inc.*, 447 F. App’x 243 (2d Cir. 2011) (temporary transfer from an office to a cubicle consistent with office policy); *Fanning v. Potter*, 614 F.3d 845 (8th Cir. 2010) (occasional brief delays in issuing small refund checks).

The EEOC enforcement guidance states that terminating a union grievance process may constitute an adverse action. However, materiality will depend on the context. In *Coffman v. Alvin Community College*, 642 F. App’x 472 (5th Cir. 2016), the court of appeals held that a college did not engage in unlawful retaliation when it abated the processing of an internal grievance after the employee filed an EEOC charge. “Mrs. Coffman’s remaining claim alleges that the College’s decision to abate her grievance during the pendency of her EEOC complaint constituted retaliation in violation of Title VII and the ADEA. The EEOC agreed with Mrs. Coffman’s contentions, concluding that (1) the College’s abatement effectively denied her access to the grievance process; (2) deprivation of access to the grievance process constituted an adverse employment action; and (3) the abatement was made in retaliation for Mrs. Coffman’s EEOC filing. The EEOC dismissed the College’s argument that the abatement avoided duplicative proceedings and suggested conciliation while also providing Mrs. Coffman a right to sue letter.... Mrs. Coffman did not suffer any permanent or serious alteration in her employment because of the abatement.... The reduction in her course load and the associated decline in pay occurred before her filing with the EEOC — they were, in fact, the basis of her EEOC complaint. The only action the College took against Mrs. Coffman *after* her complaint was to abate the internal grievance she filed in parallel with her EEOC complaint. The abatement did not diminish Mrs. Coffman’s position at the College; at worst it may have delayed Mrs. Coffman’s chances of improving her situation by convincing the administration to reassign courses to her. It seems unlikely she could have obtained that outcome,

even without abatement of the grievance, because the Department suffered the same enrollment difficulties in 2010 and 2011 that first caused the reduction and Mrs. Coffman's qualifications remained the same in comparison with other teachers throughout the process. The College's decision to abate its internal grievance pending the EEOC complaint is a transient harm that does not rise to the level of materiality required by *Burlington Northern*."

**c. Causation**

- i) ***The employee ultimately must show that "but for" his protected activity, the adverse action would not have been taken.***

The claimant must show that the unlawful retaliation would not have occurred "but for" the claimant's protected activity. See *University of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). The claimant may satisfy this burden by showing that the employer's reasons for its action are pretextual. A plaintiff may demonstrate pretext by showing that the employer's proffered explanation is false and not the real reason for the action. See generally *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 252-53 (4th Cir. 2015).

In *Nassar*, a physician worked at a university and at a hospital that had an affiliation agreement with the university. The physician claimed that one of his supervisors was discriminating against him. The physician arranged to continue working at the hospital without working at the university. After resigning from the university, he sent a letter to the university repeating his allegations of harassment. Subsequently, a university official objected to the hospital's job offer to the physician, and the hospital revoked the offer. The physician sued, and a jury found in his favor. The court of appeals reversed the judgment on the discrimination claim but affirmed the retaliation verdict, holding that the retaliation claim required only a showing that retaliation was a "motivating factor" for the conduct. The Supreme Court reversed, holding that the plaintiff must prove "but for" causation. This standard "requires the plaintiff to show 'that the harm would not have occurred' in the absence of – that is, but for – the defendant's conduct." *Nassar*, 133 S. Ct. at 2525. The proper interpretation and implementation of the anti-retaliation provision and its causation standard "have central importance to the fair and responsible allocation of resources in the judicial and litigation systems." *Id.* at 2531. "This is of particular significance because claims of retaliation are being made with ever-increasing frequency." Diluting the causation standard could "contribute to the filing of frivolous claims, which would siphon resources from efforts by employers, administrative agencies, and courts to combat workplace discrimination." *Id.* The court gave the example of an employee who knows that he or she is about to be fired for poor performance but then makes an unfounded charge of discrimination. *Id.*

To establish pretext, the plaintiff may demonstrate “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.” *Knott v. DeKalb Cnty. Sch. Dist.*, 624 F. App’x 996, 998 (11th Cir. 2015) (citation omitted). “But a reason cannot be proved to be a ‘pretext for discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason.” *Id.* (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)); *see also Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 252-53 (4th Cir. 2015).

The EEOC Enforcement Guidance identifies several factors that may support a finding of retaliation: suspicious timing; oral or written statements made by the individuals recommending or approving the challenged action; comparative evidence that shows that similarly situated employees were not disciplined; and inconsistent or shifting explanations (such as explanations in a position statement that are different from a termination letter). EEOC Enforcement Guidance at 22. Generally speaking, a combination of too many supervisory mistakes may preclude early dismissal or, at a minimum, result in expensive litigation.

**ii)     *The claimant must show that the decision-maker was aware of the protected activity.***

One common defense to retaliation claim is that the decision-maker was unaware of the protected activity. For example, in *Clark County School District v. Breeden*, 532 U.S. 268 (2001), the plaintiff claimed that she was punished for filing an EEOC charge and for filing her lawsuit. Plaintiff filed her lawsuit on April 1, 1997. On April 10, 1997, her supervisor Rice “mentioned to Allin Chandler, Executive Director of plaintiff’s union, that she was contemplating transferring plaintiff to the position of Director of Professional Development Education” and this transfer was “carried through” in May. The district court, however, found that respondent did not serve petitioner with the summons and complaint until April 11, 1997, one day after Rice had made the statement, and Rice filed an affidavit stating that she did not become aware of the lawsuit until after April 11. The Supreme Court held that evidence of causation was lacking. “Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.” Additionally, the passage of time undercut any inference of causality. “The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be ‘very close’.... Action taken (as here) 20 months later suggests, by itself, no causality at all.”

In *Knott v. DeKalb County Sch. Dist.*, 624 F. App'x 996 (11th Cir. 2015), the court held that the school employee failed to establish causation because she filed an EEOC charge *after* the school district failed to renew her contract.

In *Brown v. Unified School Dist. No. 501*, 459 Fed. App'x 705 (10th Cir., Feb. 1, 2012), Plaintiff was a black male who was employed by the school district from 1980 to 1996 as a physical education teacher and coach. During that period, he received a number of critical teacher evaluations, was transferred from coaching girls' basketball based on a report of inappropriate conduct, and was discharged as a boys' coach due to performance issues. He sued the school district for race discrimination and retaliation, and lost. He continued teaching in the school district, moved away, but then returned and applied for a position. He received a letter from human resources that, due to his past employment record with the school district, he "will not be considered for rehire by this district." He continued to apply for positions. He claimed that a high school principal told him that he would hire Brown as head coach if the current coach left. Although Brown later complained that he was denied an assistant coach position, it is undisputed that he did not apply for the assistant coach position. A school board member allegedly reported to Brown that another board member commented during a meeting that "*All [Mr. Brown] wants to do is sue us.*" The board member also told Brown that the board's lawyer advised the Board that the School District might face liability if Brown were hired and a sexual incident occurred between a student and Brown. Brown was later told he would not be considered for any position. He sued. The trial court granted summary judgment, and the appeals court affirmed.

On appeal, Brown contended that the following evidence demonstrated pretext: (1) the School District retained him as an employee from 1980 to 1996, and his performance reviews during that period included positive statements; (2) his 2001 meeting with the School District's human resources manager demonstrated her view that he was a "worthy candidate"; (3) the principal's comment that he would hire Brown for a head coaching position indicated that Brown was eligible for rehire; (4) a substitute services coordinator's invitation to meet demonstrated that "certain members of the district felt [Mr. Brown's] qualifications were sufficient for rehire,"; (5) the superintendent who made the decision in 2001 not to rehire Brown did not consult Brown's personnel file before making the decision; (6) Brown was improperly required to go through the formal job-application process, while some employees were hired outside the process, as evidenced by a newspaper article and his own opinion; (7) between 1999 and 2009, the school district hired numerous white female teachers and few African-American teachers; (8) other employees who were "convicted of crimes," were not discharged and still others were rehired even though they had been terminated for misconduct; (9) the school district had a fear of litigation and acted upon that fear when it refused to rehire Brown; and (10) the remarks allegedly made at school board meetings. The court rejected these contentions. "The decision not to rehire Mr. Brown was made solely by Dr. Singer, not the school board or any of its

members. Dr. Singer stated that although he was aware of Mr. Brown's prior lawsuits, neither those lawsuits nor Mr. Brown's race affected his decision not to rehire him." Accordingly, Brown's reliance on statements allegedly made by other employees such as the human resources manager or the high school principal, was "misplaced." Finally, the statement by the board's lawyer was privileged, while the statement by the board member was hearsay. The board member was not involved in the decision-making process affecting the employment action involved, so the statement did not qualify as an admission of a party opponent.

**iii) Documented prior performance problems or unrelated instances of misconduct may defeat a retaliation claim.**

Another common defense is for the district to establish a legitimate, non-retaliatory reason for the adverse decision, such as a preexisting poor performance or misconduct. For example, in *Knott v. DeKalb County Sch. Dist.*, 624 F. App'x 996 (11th Cir. 2015), the school employee claimed retaliation after her contract was not renewed. The court found legitimate, non-retaliatory reasons for the nonrenewal of her contract, including deficiencies noted in her classroom instruction, her failure to comply with improvement requirements, and her insubordination by not meeting with administrators when requested.

In *Chavez v. City of San Antonio*, 657 F. App'x 246 (5th Cir. 2016), the court rejected a retaliation claim where the evidence showed that the plaintiff's transfer out of the police academy was based on his performance and the fact that he was "apparently incapable or unwilling to control his emotions, anger, and speech, especially when considering the cadets," despite having been repeatedly counseled and warned about his profane and abusive language.

**iv) Temporal proximity, in conjunction with the absence of prior documentation of performance or discipline problems, may support an inference of retaliatory motive.**

The absence of prior, documented poor performance or disciplinary problems may give rise to an inference of improper motive. See, e.g., *Evans v. City of Houston*, 246 F.3d 344, 354-56 (5th Cir. 2001) (commenting on the "the lack of any documentary evidence" establishing that the employee was a discipline problem before she spoke at a grievance hearing).

In *EEOC v. Rite Way Service Inc.*, 819 F.3d 235 (5th Cir. 2016), the court found "competing evidence" that would allow a jury to find that the "customer complaints" were a pretextual reason for firing the plaintiff after she corroborated a co-worker's harassment complaint. First, there was a strong temporal proximity. Second, her prior record was excellent until she spoke up. Third, there were two "cryptic"

statements, including an HR manager saying “you know what they do to people who do stuff like this” and another supervisor noting that Mississippi was an at-will employment state and that she would be denied unemployment benefits when she was fired.

In *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 252-53 (4th Cir. 2015), the court of appeals reversed a summary judgment. The university claimed that it fired the plaintiff because she used too much leave time, was inflexible and unwilling to accommodate changes in her schedule, and moved furniture and edited forms without permission. The plaintiff raised a question as to pretext by showing that her immediate supervisor and the department scheduler testified that she was not inflexible, there was no documentation of prior concerns regarding inflexibility, a supervisor testified that she had permission to edit the forms, a supervisor had praised her work before she made the sexual harassment complaint, and the university did not initially provide the plaintiff with a reason for her termination.

**v) *Failure to follow procedure may support an inference of retaliatory motive.***

In *Morris v. Bessemer Board of Educ.*, 2013 WL 549896 (N.D. Ala., Feb. 13, 2013), the plaintiff, Connie Morris, is a woman who “roared for years about equality for the girls’ basketball program in the Bessemer City School system.” She filed EEOC charges and a lawsuit. In her latest case, she challenged her “termination as Head Girls Basketball Coach, noted that the Board hired a younger woman for the position, and claimed that it discriminated against Morris on the basis of age. Further, she claimed that beginning in March 2010, the board subjected her to retaliation and discrimination based on gender in the terms and conditions of her employment, including refusing to hire her for positions of either Training Coach or Strengthening Coach, and hiring men instead.” The court denied the school district’s summary judgment motion as to many of Morris’s claims. The court’s ruling indicated the following:

- The human resources director and the high school principal, Cook, testified differently about the interview process.
- The principal told the superintendent that he was not going to rehire Morris even though she had a successful year with no complaints. Cook testified that he wanted a “change in direction.” That spring, all coaches received notices of non-renewal.
- Assistant Principal Douglas testified that in the spring of 2010 Cook advised him that he had personal issues with Coach Morris, calling Morris a “b-i-t-c-h ... any time he would say anything to her ... she would sue or threaten to sue or something along that line.”
- After the girls’ head coach position was posted, Morris informed Cook of her interest in remaining in her position and confirmed that communication with a Letter of Interest. Morris was not offered or

scheduled for an interview.

- Another woman, Benita Gordon, allegedly applied for the position by sending an email. However, Gordon testified that she did not recognize the email and she did not recall being interviewed for the position. Gordon was not a teacher at the high school and had no coaching experience at the high school or collegiate level.
- “Cook testified that because he was looking for a change and because only two people applied for the Girls Head Basketball Coach position, he felt no need to interview Morris for the job. He did call Gordon and talk to her about the position over the phone, but he did not establish a panel to interview her. Despite the posted requirement that the candidate have prior experience coaching at the high school or college level, Cook deemed Gordon’s coaching experience at the middle school level to be satisfactory.”
- The superintendent said that that Cook’s recommendation of Gordon instead of Morris did not raise any red flags. However, the HR director said that the recommendation did raise red flags because of Morris’s successful coaching history.
- In his deposition testimony, Cook explained that “different direction” meant he wanted to increase the potential for capturing a state title. He further testified that although Gordon had learned under Morris, he hoped Gordon could identify better with her players and provide new energy because she was younger.
- Although Cook never told Morris, he testified that another reason for replacing her was that she violated state athletic association rules. Cook acknowledged, however, that he did not keep any record of the violation, the year it occurred, and the fine, if any, that the school may have paid. The evidence presented did reflect letters advising Cook of violations and related fines involving the *boys’* football and basketball programs but not the *girls’ basketball* program, and those coaches were reappointed.

Summary judgment was denied because “Morris has presented evidence that, if the jury believed it and/or accepted the inferences raised, could establish that the Board’s articulated reasons were false and that retaliation was the real reason for the adverse employment actions.” For example, “Douglas’s testimony about Cook’s real reason for his ‘new direction’ indicates that Cook was tired of Morris’s complaints and wanted to get rid of her for that reason.” Further, the replacement, Benita Gordon, did not meet the posted qualifications for the position. The evidence also was in dispute “regarding whether Cook had the ability to make a unilateral decision to deem Gordon’s qualifications satisfactory even when they varied from the posted qualifications, and whether he had the ability to make a unilateral decision to hire her for a new position without invoking an interview panel.” In light of these disputes, “a jury could find that Cook deviated from Board policies and procedures by hiring

Gordon for the Head Coach position without invoking an interview panel and/or without obtaining Board approval for alternatives to the posted qualifications. Once again, a deviation from Board policies and procedures evidences pretext.”

In *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000), a tenured professor lost on his discrimination claim but prevailed on his retaliation claim based on modifications to a job posting that prevented him from obtaining a position. The professor held a position in the petroleum engineering department, which was slated to close. The university had a policy of considering displaced faculty for open positions in other departments. Three positions opened in the chemical engineering department. Although the plaintiff did not possess a doctorate in chemical engineering, he had all of the coursework necessary for a doctorate in chemical engineering. The plaintiff was not offered one of the three open positions. The third position was filled in 1993 by an inexperienced, external American candidate who had just received her Ph.D. The plaintiff, who was Iranian, filed an EEOC charge alleging race and national origin discrimination. Subsequently, a chemical engineering faculty member died, and the university sought to fill the vacancy. The qualifications for the position were changed from requiring a degree in a “related area” to requiring a Ph.D. in chemical engineering, which the plaintiff did not have. The plaintiff was not hired. The plaintiff filed a retaliation charge, and he later sued. A jury found in his favor on the discrimination and retaliation claims, and the plaintiff was awarded \$300,000 for mental suffering. On appeal, the court of appeals reversed on the discrimination claim but it affirmed the judgment in favor of the plaintiff on the retaliation claim. Although the university claimed that the plaintiff lacked a requirement for the job (a chemical engineering doctorate), a jury reasonably could have concluded – as the plaintiff argued – that the requirement was manufactured to eliminate him from consideration. The evidence in the case included the faculty’s “emotional” reaction to a newspaper article that said that the professor planned to sue over his original non-selection in 1993; the fact that the university failed to apply its displaced faculty policy, and the fact that, at the time of trial, the chemical engineering department was advertising yet another vacancy but the new vacancy did not require a doctorate in chemical engineering.

### **C. Americans with Disabilities Act, 42 U.S.C. § 12203**

Section 12203(a) states: “No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.” The EEOC’s retaliation guidance states that a request for a reasonable accommodation of a disability constitutes a protected activity for purposes of a retaliation claim. EEOC Enforcement Guidance at 13. The Guidance further states that “protected activity” will include activity pertaining to any provision of the ADA, not just the employment discrimination title of the ADA. *Id.* at 16. To establish an ADA retaliation claim, the plaintiff must have reasonably believed that the district’s actions “were unlawful

*under the ADA.” DeBlanc v. St. Tammany Parish Sch. Bd.*, 640 F. App’x 308 (5th Cir., Feb. 18, 2016) (emphasis in original) (attorney’s demand letter to school district was not a protected act under the ADA because employee did not yet know that her firing was potentially discriminatory).

The ADA utilizes the Title VII analysis. *See generally Adams v. Anne Arundel Cnty. Pub. Schs.*, 789 F.3d 422, 430 (4th Cir. 2015). The employee must show that her protected act caused the adverse employment decision. *See, e.g., Bell v. Bd. of Educ.*, 2016 WL 5340272 (7th Cir. Sept. 22, 2016) (rejecting ADA retaliation claim based on termination where school board established a non-retaliatory reason). In *Adams*, an assistant principal was investigated for harming a child and subsequently went on leave (see discussion of this case in Section III(B)(2)(c) of this paper). The employee claimed that numerous incidents were retaliatory, including the board’s investigation of the child injury incident, the principal’s berating of him, the reprimand he received for the incident, and a mandatory exam with a board-appointed doctor. The court found that none of the actions “cross[ed] the threshold” and thus were not actionable. As for the transfer to a new, less-stressful school, this was done at the employee’s request and was a reasonable accommodation. Although the employee’s pay eventually was slightly reduced, this was due to a system-wide collective bargaining agreement and was not retaliatory.

The ADA also prohibits interference, coercion, and intimidation. Section 12203(b) states: “It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.” The EEOC views this provision as providing broader protection than the anti-retaliation provision. EEOC Enforcement Guidance at 25. Consequently, in an “interference” case, the EEOC will not require employees to satisfy the “materially adverse” standard required in retaliation cases under Title VII. *Id.* Prohibited interference may include threatening an employee with adverse treatment if he does not “voluntarily” submit to a medical exam or issuing a policy that limits an employee’s leave rights, such as a rigid fixed leave policy that does not allow any exceptions. *Id.*

In *Leon v. New York City Department of Education*, 612 F. App’x 632 (2d Cir., May 22, 2015), an administrative hearing officer found that the teacher was terminated for cause. The cause finding, however, did not preclude the teacher from suing for disability discrimination or retaliation because the administrative hearing did not address or decide these issues.

#### **D. Age Discrimination in Employment Act, 29 U.S.C. § 623(d)**

The ADEA “makes it unlawful for an employer to retaliate against an employee for opposing the employer’s discriminatory practices or participating in any

investigation or proceeding under the ADEA[.]” *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996). Courts apply the Title VII standard to ADEA claims. *See Daniels v. Sch. Dist. of Philadelphia*, 776 F.3d 181, 192-93 (3d Cir. 2015); *Hashimoto v. Dalton*, 118 F.3d 671, 675 n.1 (9th Cir. 1997) (“[T]he ADEA anti-retaliation provision is ‘parallel to the anti-retaliation provision contained in Title VII,’ and . . . ‘cases interpreting the latter provision are frequently relied upon in interpreting the former.’”) The plaintiff must show a protected activity, an adverse employment action, and a causal connection. *Daniels*, 776 F.3d at 193; *Heffemeier v. Caldwell Cnty., Tex.*, 826 F.3d 861 (5th Cir. 2016). If the plaintiff makes these showings, the burden of production of evidence shifts to the employer to present a legitimate, non-retaliatory reason for its action. If the employer makes this showing, then the burden shifts back to the employee to demonstrate that the employer’s reason is a pretext and that retaliation is the real reason.

In *Daniels v. School District of Philadelphia*, 776 F.3d 181 (3d Cir. 2015), an older teacher was transferred to a new school. The principal gave her a poor evaluation, allegedly made an ageist comment about some teachers being as old as grandparents, and subjected the teacher to differential treatment. At the end of the year, the principal allegedly told two students that she had written plaintiff out of the budget and that the plaintiff would not return to campus. The plaintiff complained to human resources. The teacher allegedly was subjected to disparate treatment at her new school, and she complained again. She went on leave due to stress and eventually transferred to a new school where she again experienced problems and again went on medical leave. The district required an examination by an independent doctor who found her fit for duty. The teacher disagreed with this opinion and did not return to duty. She was terminated, and she eventually sued. The court rejected her retaliation claims because she was unable to show that the decision-makers at her new schools had knowledge of her prior complaints. Temporal proximity was not enough, and it was speculation for the plaintiff to claim that the decision-makers learned about her complaints from other employees. The teacher also complained about the loss of wage continuation benefits. The court found that the school district reasonably relied on the opinion of an independent doctor even though this opinion conflicted with the opinion of the teacher’s doctor.

In *Heffemeier v. Caldwell County, Tex.*, 826 F.3d 861 (5th Cir. 2016), a county administrator complained that he was terminated after complaining that the county’s health insurance program violated the ADEA. The court affirmed summary judgment for the employer. The evidence showed that the employee actually was promoted after making his complaint and did not suffer any adverse action until 21 months later. He failed to show a causal connection.

### **E. Family and Medical Leave Act, 29 U.S.C. § 2615(a)(2)**

The FMLA makes it unlawful to “interfere” with, “restrain” or “deny” the exercise of, or attempt to exercise, rights provided by the FMLA. The U.S. Department of Labor has interpreted this language to proscribe retaliation. DOL regulations make it unlawful to “discriminate” against employees who have used FMLA leave or to use the taking of FMLA leave as a negative factor in hiring, promotion decisions, discipline or other employment actions. 29 C.F.R. § 825.220(c).

Courts will employ a Title VII approach when evaluating retaliation claims under the FMLA. See, e.g., *Adams v. Anne Arundel Cnty. Pub. Schs.*, 789 F.3d 422 (4th Cir. 2015); *Millea v. Metro-North R.R.*, 658 F.3d 154, 164 (2d Cir. 2011) (citing cases). In *Millea*, the court explained: “The *Burlington Northern* materiality standard is intended to ‘separate significant from trivial harms’ so that employee protection statutes such as Title VII and the FMLA do not come to create ‘a general civility code for the American workplace.’” 658 F.3d at 164. “*Millea* is entitled to recover not just lost wages and benefits but also any ‘actual monetary losses sustained’ as a direct result of Metro-North’s retaliation. *Millea* has asserted that he sustained such losses: As a result of Metro-North’s actions, he felt compelled to transfer to a lower paying job, thereby losing income. *Millea* should have an opportunity before the trial court to show that the letter of reprimand — if the jury determines that it constituted retaliation — caused this loss (and others).”

In *Adams v. Anne Arundel County Public Schools*, 789 F.3d 422 (4th Cir. 2015), an assistant principal was involved in an incident with a student in which he allegedly grabbed her by the arms and pinned her against the wall. CPS investigated, and the assistant principal was temporarily reassigned. On the day that he was transferred back to his regular campus, he went on medical leave due to stress, anxiety, and other conditions. He returned to campus after his leave but then had a panic attack and the principal allegedly berated him. The assistant principal went back on leave, saw a psychiatrist, then returned to campus. He claimed that the principal again berated him. Two weeks later, he began a third medical leave. His doctor told the district that the assistant principal needed to transfer to a different school to prevent future panic attacks. The district directed the assistant principal to meet with a doctor selected by the district. That doctor cleared the employee to return to duty, but he too agreed that a less stressful environment would be appropriate. Meanwhile, the child abuse investigation concluded, which resulted in a formal reprimand. The employee accepted a transfer to a new, smaller school, and his salary eventually was reduced in accordance with policy due to the smaller population of the school. The assistant principal sued for interference and retaliation. The court rejected both theories. He claimed that the district unlawfully required him to visit with a doctor that the district selected. The court rejected this claim, noting that the FMLA expressly allows an employer to seek a second opinion. The assistant principal also complained about a meeting during his leave which required him to “work.” “In certain circumstances required meetings may unlawfully interrupt

an employee's leave. Here, however, the one-time conference was a legitimate piece of an ongoing investigation into the January 19 incident." The court found that the district was obligated to investigate the student incident which the employee "has not adequately linked to his ample FMLA leaves." Involving the employee in that process "did not constitute an impermissible interference" with his FMLA leave. Further, the employee never objected or sought an extension of time that he did not receive. The court also rejected the claim that the principal's comments, the reprimand, or transfer to a new school were adverse actions. As for the reprimand, it was the final step in a legitimate investigatory process. "The FMLA and the ADA impose important obligations on educational, and indeed all, covered employers. What they do not impose, however, are extra statutory obstacles to the investigation of what in other cases might be serious instances of child abuse. Schools have an obligation to safeguard the safety and welfare of those students in their charge. A proper reading of the FMLA and ADA does not impair the ability of school systems to responsibly exercise this duty."

**F. Title IX, 20 U.S.C. § 1681, and Title VI, 42 U.S.C. § 2000d *et seq.***

Title IX prohibits discrimination on the basis of gender by educational institutions that receive federal aid. Title VI prohibits discrimination on the basis of race, national origin, or color by educational institutions that receive federal aid.

Although neither statute contains an express cause of action for discrimination or retaliation, the Supreme Court has judicially implied private rights of action for discrimination (*Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 290 (1998)) and retaliation (*Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)). In *Jackson*, the Supreme Court held that a coach could sue for retaliation based on his complaints about discrimination against female athletes.

The Title VII retaliation framework applies to retaliation claims brought under these statutes. *See generally Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378 (7th Cir. 2012). For example, in *Lucero v. Nettle Creek Corp.*, 566 F.3d 720 (7th Cir. 2009), the court held that a teacher's reassignment to teach 7th grade students, instead of 12th grade students, was not a materially adverse employment action, as would support the teacher's retaliation claims under Title VII or Title IX. The reassignment did not dissuade other teachers from making or supporting charges of discrimination, and the teacher did not suffer a cut in pay, benefits, or privileges of employment. *See also Burton v. Bd. of Regents*, 171 F. Supp. 3d 830 (W.D. Wis. 2016) ("Caywood's public criticism of how Burton handled the student incident was not a materially adverse action.... The other instances of Caywood being less than collegial to Burton do not amount to actionable retaliation.").

In *Collins v. Jackson Public School District*, 609 F. App'x 792 (5th Cir., April 20, 2015), the plaintiff was a math teacher and baseball coach. In July 2009, he drafted a Title IX complaint alleging discrimination against female athletes by the

District. A parent of a student filed the complaint with the United States Department of Education's Office for Civil Rights. In October 2009, the OCR notified the District's then-superintendent that it was conducting a Title IX investigation. In February 2010, Collins alleges Dr. Pamela Self, then-assistant principal of plaintiff's school, created fraudulent observation documents that were used to support Collins's less-than-favorable summary-evaluation. In March, Collins filed an internal grievance with the District's human resources department about the evaluation. Collins alleges that HR Director Carol Dorsey never investigated the grievance. In June, Collins filed a retaliation complaint with the OCR. In August 2010, Collins was transferred to the District's Capital City Alternative School. In December, the OCR informed Collins that it was closing its investigation of his retaliation complaint due to insufficient evidence. On April 13, 2012, Collins received notice of nonrenewal of his teaching contract for the 2012-13 school year due to an expiring endorsement on his license. The court affirmed dismissal because Collins failed to establish causation as to his retaliation claims based on Dr. Self's evaluation and Dorsey's failure to investigate the grievance, because neither Dr. Self nor Dorsey knew of Collins's involvement with the Title IX complaint. As to Collins's retaliation claim based on his transfer to the Alternative School, the court explained that the Fifth Circuit takes a "narrow view of what constitutes an adverse employment action...." "We have held that a transfer can be the equivalent of a demotion, and thus constitute an adverse employment action ... if the new position proves objectively worse — such as being less prestigious or less interesting or providing less room for advancement." Here, there was no evidence that the Alternative School was objectively worse than his previous school.

The Supreme Court has not addressed whether Title VII preempts Title IX and Title VI when school employees seek redress for discrimination and retaliation unrelated to their students. The lower courts disagree whether employees may use these statutes to bypass Title VII's pre-litigation administrative procedures. Some courts have held that allowing employees to bypass Title VII's administrative procedures would undermine congressional intent. *See, e.g., Lowrey v. Texas A&M Univ.*, 117 F.3d 242, 247 (5th Cir. 1997); *Cooper v. Georgia Gwinnett College*, 2016 WL 6246888 (N.D. Ga. 2016); *Merriweather v. Holmes Cnty. Sch. Dist.*, 2016 WL 837937 (S.D. Miss., March 3, 2016); *Torres v. Sch. Dist. of Manatee Cnty.*, 2014 WL 4185364 (M.D. Fla. 2014). The U.S. Department of Justice "takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations." U.S. Dep't of Justice, Title IX Manual, <https://www.justice.gov/crt/title-ix#3.%C2%A0%20Retaliation>.

#### **G. 42 U.S.C. § 1981**

Section 1981 provides that any "person within the jurisdiction of the United States" has the same right to "make and enforce" contracts, regardless of their skin color. Section 1981 protects parties from discriminatory treatment both at the time when contracts are formed, and in post-formation conduct. In *CBOCS West Inc. v.*

*Humphries*, 128 S. Ct. 1511 (2008), an associate manager at Cracker Barrel Restaurant sued after he was fired, claiming that he was terminated because of his race and in retaliation for complaining to management about the discriminatory treatment of another black employee. The Supreme Court held that Section 1981 encompasses a prohibition against retaliation. The Court observed that the Senate and House committee reports on the 1991 amendments to the statute indicated that it would include protection against retaliation.

## **H. First Amendment Claims Asserted Pursuant to 42 U.S.C. § 1983**

### **1. Overview**

For nearly 50 years, the First Amendment has been a major source of litigation for public schools. Since the 1960s, the Supreme Court has recognized the right of public school employees to speak out on matters of public concern and to join controversial organizations without fear of retaliation. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). A public employee's speech is protected by the First Amendment when the interests of the employee "as a citizen commenting upon matters of public concern" outweigh the interests of the state "as an employer, in promoting the efficiency of the services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). To state a claim, the plaintiff must show: (1) that the plaintiff spoke as a citizen on a matter of public concern; (2) that the plaintiff suffered an adverse employment action; (3) that the plaintiff's interest in commenting on the matter of public concern outweighed the employer's interest in promoting workplace efficiency; and (4) that the plaintiff's protected speech motivated the adverse decision. Whether speech is protected is a question of law. *Connick v. Myers*, 461 U.S. 138, 147 n.7 (1983).

Employees may seek compensatory damages via 42 U.S.C. § 1983.<sup>7</sup> Compensatory damages may include out-of-pocket loss and other monetary harms, and injuries such as impairment of reputation, personal humiliation, and mental anguish and suffering. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986). However, damages may not be recovered based on the abstract "importance" of a constitutional right. *Id.*

### **2. Key Cases**

#### **a. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)**

A school board authorized a bond election to raise taxes to build two high schools. A teacher, Marvin Pickering, wrote a letter to the editor, charging that the

---

<sup>7</sup> Section 1983 creates no substantive rights, but merely provides a damages remedy for the deprivation of existing constitutional or federal statutory rights. *See Wilson v. Garcia*, 471 U.S. 261, 278 (1985).

board was being misleading about use of the money and alleging that the board was diverting funds to promote athletics. Pickering was later discharged. The Supreme Court voted 8-1 in favor of the teacher. If speech addresses a matter of public concern, then the employer must balance the employee's interest in promoting the efficiency of the public services it performs through its employees. The Court found that the speech here was on a matter of public concern and that his comments did not target the people that he directly worked with. The speech did not interfere with his teaching or with the operation of the school.

**b.     *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)**

The teacher was involved in an altercation with another teacher, an argument with school cafeteria employees, an incident in which he swore at students, and an incident in which he made obscene gestures to girl students. Subsequently, he conveyed through a telephone call to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. Thereafter, the school board accepted the recommendation of the superintendent not to rehire the teacher, citing his lack of tact in handling professional matters, with specific mention of the radio station and obscene-gesture incidents. The district court ordered the teacher's reinstatement with backpay because his call to the radio station had played a "substantial part" in the decision not to rehire him. The court of appeals affirmed. The Supreme Court vacated and remanded. "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." An employee may not use protected speech to prevent his employer from assessing his performance and making a decision based on that record. *Mt. Healthy*, 429 U.S. at 286.

**c.     *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)**

The Supreme Court held that a teacher's private remarks in a conversation with her principal were protected speech. The teacher had expressed concern that certain policies and practices of the newly integrated district were meant to sustain school segregation. Following these conversations, the principal recommended that the district not rehire her. The Supreme Court held that the private nature of the conversation did not prevent the speech from qualifying as protected speech. The Court remanded the case to the district court to apply the *Mt. Healthy* test and

evaluate if the school district had other legitimate reasons for discharging the teacher.

**d. *Connick v. Myers*, 461 U.S. 138 (1983)**

Whether speech constitutes speech on a matter of “public concern” is a question of law. The main thrust of the speech must relate to a matter of social, political, or other concern to the community. To examine the main thrust, the court must consider the “content, form, and context of a given statement.” *Connick*, 461 U.S. at 147-48. In *Connick*, an assistant district attorney challenged a transfer by distributing a questionnaire that asked fellow employees about their views and experiences with the District Attorney’s management. The attorney was subsequently fired, and she sued, claiming that the questionnaire was protected speech. The Supreme Court found that most of the items on the questionnaire pertained to matters of personal concern and that her conduct had damaged the harmonious relations necessary for the efficient operation of the district attorney’s office.

**e. *Rankin v. McPherson*, 483 U.S. 378 (1987)**

After an assassination attempt on President Reagan, a low-level clerical employee told a co-worker: “If they go for him (Reagan), I hope they get him.” Someone overheard the remark, and the employee was fired. The Supreme Court held that the employee’s speech “plainly dealt with a matter of public concern.” Further, there was no disruption. No member of the public heard the comment, and it was “unrelated to the functioning of the office.” “Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency’s successful functioning from that employee’s private speech is minimal.”

**f. *Garcetti v. Ceballos*, 547 U.S. 410 (2006)**

An assistant district attorney was concerned that a search warrant was based on a deputy’s affidavit that turned out to contain serious misrepresentations. The attorney told his supervisors and recommended dismissal of the case. The office proceeded with the prosecution. The attorney claimed that he was subsequently subjected to retaliation. The Supreme Court held that the attorney’s speech was not protected speech. The Court held that the First Amendment does not protect “expressions made pursuant to [the employee’s] official duties,” even if the speech involves reports of wrongdoing or is otherwise of great social importance. 547 U.S. at 416-18. The First Amendment was never intended to “constitutionalize the employee grievance.” *Id.* at 419 (citation omitted).

Under *Garcetti*, before examining the subject matter of the speech and reaching the “public concern” element, the court first must analyze whether the employee was speaking as an employee or as a citizen. *Davis v. McKinney*, 518 F.3d

304, 311 (5th Cir. 2008). If the employee spoke as an employee regarding matters relating to his job, the speech is not protected, and the court's inquiry ends. *See id.* at 312. If, however, the employee spoke as a citizen, then the court determines whether the employee spoke on a matter of "public concern." *Id.*

Non-dispositive factors for determining whether the speech was "employee" speech include the internal versus external nature of the speech and whether the subject matter concerned the speaker's employment. *See Garcetti*, 547 U.S. at 421. When a public employee speaks pursuant to his employment responsibilities, "there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424; *see also Weintraub v. Bd. of Educ.*, 593 F.3d 196 (2d Cir. 2010) (teacher's filing of grievance was pursuant to his official duties as teacher and thus was not protected by the First Amendment).

Although special knowledge gained from one's job is not in and of itself dispositive, it remains a relevant factor in assessing whether the employee spoke as an employee. *See, e.g., Tucker v. Parish*, 2014 WL 4565334 at \*2 (5th Cir., Sept. 16, 2014) (unpublished) (affirming dismissal of retaliation claim; "Tucker reported the alleged forging of government documents to Wylie, Parish, and Fowler, and never to anyone outside his chain of command. And even assuming his duties as a probation officer did not include reporting misconduct that occurred in his presence, Tucker's speech consisted of reporting information he gained because of his employment as a probation officer.")

**g. *Lane v. Franks*, 134 S. Ct. 2369 (2014)**

Petitioner Lane was the director of a program. He conducted an audit of the program's expenses and discovered that Schmitz, a state legislator on the agency's payroll, had not been reporting for work. Lane eventually terminated Schmitz' employment. Shortly thereafter, federal authorities indicted Schmitz on charges of mail fraud and theft concerning a program receiving federal funds. Lane testified, under subpoena, regarding the events that led to his terminating Schmitz. Schmitz was convicted. Meanwhile, the agency was experiencing significant budget shortfalls. Lane was terminated along with 28 other employees in a claimed effort to address the financial difficulties. A few days later, however, Franks rescinded all but 2 of the 29 terminations — those of Lane and one other employee. Lane claimed he was fired in retaliation for testifying against Schmitz. The Supreme Court held that Lane's external speech was protected. The speech involved "sworn testimony, compelled by a subpoena, outside the scope of his ordinary job responsibilities." The Supreme Court held that the plaintiff, like every other citizen, had an obligation "to the court and society at large, to tell the truth." This obligation was "distinct and independent" from those obligations the plaintiff owed to his employer. The Supreme Court observed that the sworn testimony in *Lane* was "far removed" from the internal work memorandum in *Garcetti*.

**h.     *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412 (2016)**

Heffernan was a police officer. He was observed picking up a campaign sign for the mayoral candidate running against the incumbent mayor. He also was observed speaking to campaign staff while holding the yard sign. A supervisor questioned him. Heffernan claimed that he was picking up the sign on behalf of his bedridden mother and alleged that he could not vote in the city limits. Heffernan was demoted for engaging in “overt involvement in political activities.” He sued, but the case was dismissed on the ground that he had not actually engaged in constitutionally protected speech. The court of appeals agreed, but the Supreme Court reversed. The Court held that, when an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that action, even if the employer is mistaken.

The Court assumed that the activities Heffernan’s supervisors thought he had engaged in were constitutionally protected. Unlike *Waters v. Churchill*, 511 U.S. 661 (1994), in which the supervisors thought the employee had *not* engaged in protected speech, Heffernan’s supervisors thought that he *had* engaged in protected speech. “We conclude that, as in *Waters*, the government’s reason for demoting Heffernan is what counts here.” The “upshot” is that a discharge or demotion based upon an employer’s belief that the employee has engaged in protected activity can cause the same kind and degree of constitutional harm whether that belief does or does not rest upon a factual mistake. Finally, the Court noted that there was evidence in the record that Heffernan was disciplined pursuant to a neutral policy prohibiting police officers from overt involvement in any political campaign. The case was remanded for further development.

**i.     Political patronage cases**

The First Amendment protects employees from being discharged due to their political affiliation unless party affiliation is an appropriate requirement for the effective performance of the public office involved. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party*, 497 U.S. 62 (1990).

**j.     *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986)**

A tenured teacher was suspended following parents’ complaints about his teaching methods in a seventh-grade life science course. Although he was later reinstated, he claimed that his suspension deprived him of liberty and property without due process of law and violated his First Amendment right to academic freedom. He sought both compensatory and punitive damages. The district court instructed the jury that compensatory damages could be awarded based on the value

or importance of the constitutional rights that were violated. The jury found petitioners liable, awarding both compensatory and punitive damages. The Court of Appeals affirmed. The Supreme Court reversed. Compensatory damages are available for actual harm, which could include out-of-pocket loss and other monetary harms, impairment of reputation, personal humiliation, and mental anguish and suffering. Damages are not available based on the perceived “importance” of the constitutional right.

#### **IV. Prevention of Claims**

To minimize the risk of retaliation, organizations must recognize both the potential for retaliation and the interaction of psychological and organizational characteristics that contribute to the likelihood of retaliation.<sup>8</sup> Several factors may affect whether a manager is the type of individual to engage in retaliation. These include the manager’s psychological traits, employee perceptions of the organizational culture, and organizational opportunities.<sup>9</sup> Because it is impossible for a school district to change the psychological or emotional traits of its managers, school districts must focus on the latter: changing the culture and perceptions of that culture. Suggested prevention practices include the following:

- **Policy Dissemination and Training**

Most school districts maintain anti-retaliation policies. The key is making sure that all employees are aware of the policies – what the policies mean and how they work. Administrators need specialized training that goes beyond a generic warning about not retaliating. Supervisors need to know the basics of EEO law, the First Amendment, and state whistleblower laws. They need to know what a “protected act” is and how certain superficially innocuous actions can be perceived as retaliatory. Supervisors also need training on how to respond to employees who bring forth discrimination claims and whistleblower issues. Training must convey that the district is committed to a work environment free of retaliation, that grievance mechanisms provide a valuable opportunity to peacefully resolve concerns, and that supervisors do not get a free pass just because they are supervisors.

- **Confidentiality of Complaints and Grievances**

When an employee files an EEOC charge or internal grievance, this information must be carefully guarded and transmitted only on a need-to-know basis. For example, if an employee is a candidate for a promotion but also recently filed a complaint, the members of the interview committee should be shielded from this information. If a teacher with an EEOC charge transfers to a new campus, the new

---

<sup>8</sup> See generally Equal Employment Opportunity Commission, “Retaliation: Making It Personal,” [www.eeoc.gov/laws/types/retaliation\\_considerations.cfm](http://www.eeoc.gov/laws/types/retaliation_considerations.cfm).

<sup>9</sup> *Id.*

principal does not need to know about the EEOC charge.

In some instances, it will be necessary for a particular manager to learn about the grievance or charge, such as when the manager is the target of the grievance and has a right to respond to it or is an essential witness who must be consulted in order for the district to prepare a response. In that case, the human resources director or other official should notify the affected manager in writing that a charge has been filed and that the manager must avoid discussing the matter with the grievant or others and must refrain from taking an action that could remotely be perceived as retaliatory. Administrators who react emotionally to the filing of a discrimination complaint may benefit from additional in-person counseling in which their feelings are acknowledged but accompanied by a reminder to remain professional and to allow the grievance process to work. Additionally, in reminding a concerned administrator about the fairness of the process, the human resources department and legal counsel must avoid taking sides against the grievant.

- **Review and monitor subsequent employment decisions.**

When a charge or grievance is pending and once it is concluded, the school attorney, human resources director, or other relevant administrator should review all subsequent, significant employment decisions affecting the grievant to ensure that the decision is consistent with policy, procedure, and the handling of similar situations. For example, if a principal proposes to terminate or transfer an employee who recently settled an EEOC charge or who recently returned from FMLA leave, the human resources department should carefully review all documentation pertaining to the recommendation and “go behind” the documentation as necessary to ensure that the evidence is solid and consistent with the handling of similarly situated employees.

- **Document employee performance regularly and professionally.**

Remind supervisors that one of the best ways to prevent a successful retaliation claim is through the timely, accurate, and regular issuance of performance evaluations and documentation. The existence of such documentation can establish that the conduct or performance issue existed prior to the employee’s protected act.

- **Exercise care when preparing grievance responses and EEOC charge responses.**

A hastily prepared response to a grievance or EEOC charge may cause problems down the road if it fails to provide an accurate summary of the reasons for the employment decisions or if it is inconsistent with documentation prepared at the time of the employment decision.

- **Discourage the making of employment decisions via email.**

The casualness of email, combined with the propensity of people to conduct business from their smartphones, can lead to the creation of ill-advised emails. Administrators should refrain from commenting off-the-cuff and should take the time to discuss major employment decisions in person or over the phone. A person-to-person conversation provides a better opportunity to explore the issues and to ask questions that will help analyze the problem and solutions.