Retaliation Claims under Federal Law

Lisa A. Brown
Thompson & Horton LLP
Houston, Texas

Council of School Attorneys
March 2017

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

Confucious, 551 B.C. – 479 B.C.
The High Cost of Getting Even

• The number of retaliation charges filed with the Equal Employment Opportunity Commission (EEOC) has grown exponentially over the last decade and a half.

• Today, retaliation charges are the most frequently filed charge at the EEOC.

• In August 2016, the EEOC issued a new enforcement guidance exclusively on retaliation.

The High Cost of Getting Even

• Juries understand the emotions that may lead individuals to engage in retaliation.

• Damages can be high.
  • e.g., Everhart v. Board of Educ., 2016 WL 4928836 (4th Cir., Sept. 16, 2016) – affirming judgment against school board for $350,000 in damages and $198,000 in back pay.
Why the Increase in Claims?

• More statutes prohibit retaliation than ever before.
• Workers have a greater understanding of their rights due to the Internet.
• Employees get a double shot at winning. Even if the employee loses the underlying discrimination claim, he or she still may prevail on the retaliation claim.

Why Do Supervisors Retaliate?

• “The process of retaliation begins with a perceived offense (e.g., initiating a discrimination claim). If those accused sincerely believe that they have done nothing wrong, or if they believe that their offensive behavior was somehow justified, they may begin to ruminate and desire retaliation. In this regard, retaliation is a coping mechanism – a way of alleviating the psychological discomfort associated with perceived injustice.”

Source: EEOC, “Retaliation: Making It Personal.”
Why Do Supervisors Retaliate?

• “[T]hose with a sense of entitlement will experience offenses much more emotionally than others and take them much more personally. As such, these individuals are more likely to ruminate over the offense, ultimately seeking retaliation. Similarly, authoritarian personalities, people who place a high value on status in group settings, are predisposed to retaliation when offended, particularly if that offense is from someone of a ‘subordinate’ status.”

Source: EEOC, “Retaliation: Making It Personal.”

Why Do Supervisors Retaliate?

• “[P]eople seek retaliation when they feel the workplace is not fair and that they cannot depend on formal channels for fair or just treatment.” Individuals are more likely to retaliate, if:
  • The accusation is very serious;
  • The accusation will negatively impact future relationships with others at work;
  • The accused feels that he or she is being judged;
  • The accused believes that his job is in jeopardy or that future employability will be impaired.

Source: EEOC, “Retaliation: Making It Personal.”
Prohibitions on Retaliation

• Numerous federal laws prohibit retaliation against employees who engage in protected activities. Common claims include:
  • Title VII of the Civil Rights Act of 1964
  • Americans with Disabilities Act
  • Age Discrimination in Employment Act
  • Family & Medical Leave Act
  • Fair Labor Standards Act
  • Genetic Information Non-Discrimination Act
  • Equal Pay Act

Prohibitions on Retaliation

• Title IX of the Education Amendments of 1972
• Title VI of the Civil Rights Act
• First Amendment to the U.S. Constitution (claims brought pursuant to 42 U.S.C. 1983)
• 42 U.S.C. 1981
• Federal Claims Act, 31 U.S.C. 3729
Anatomy of a Claim

• Regardless of the legal theory, most retaliation claims have three common elements:
  • A protected act (such as filing a complaint or reporting wrongdoing);
  • An adverse employment decision; and
  • Causation – a link between the protected act and the adverse employment decision.

Spotlight on Title VII Retaliation Claims

• Prohibits retaliation against persons who oppose any practice made unlawful by Title VII or who make a charge, testify, or participate in an investigation or proceeding. 42 U.S.C. 2000e-3(a).
  • Protects current employees (Crawford v. Metro. Gov’t of Nashville & Davidson, 555 U.S. 271)
  • Protects former employees (Robinson v. Shell Oil Co., 519 U.S. 337)
  • Protects persons who are closely connected, e.g., two co-workers who are engaged (Thompson v. N. American Stainless, 131 S.Ct. 863)
Title VII – Elements of a Claim

① The employee must show that he or she engaged in a **protected activity**, which is defined as “**opposition**” to unlawful conduct or “**participation**” in a protected proceeding or investigation.

② The employee must show a **materially adverse employment decision**.

③ The employee must show “**but for**” **causation** – “but for” the protected activity, the adverse action would not have happened.

Direct vs. Circumstantial Evidence

- The plaintiff can prove his or her case through direct or circumstantial evidence.
- **Direct evidence** = does not require the fact-finder to draw any inferences to conclude that the decision-maker was motivated by retaliatory intent.
Direct vs. Circumstantial Evidence

- **Circumstantial** = Employee establishes a *prima facie* case (protected act, adverse action, causal connection). The burden then shifts to employer to articulate a legitimate, non-retaliatory reason for its action. The burden shifts back to the employee to show that the employer’s proffered reasons are not true but are pretextual and that retaliation is the real reason.

Pretext

- The plaintiff can show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the district’s explanation that a rational fact-finder could rationally find them unworthy of credence.
Title VII – “Opposition” as a Protected Act

• “Opposition” includes filing an internal grievance or answering questions during the employer’s investigation (Crawford).

• The employee’s opposition must relate to conduct prohibited by Title VII (e.g., discrimination on the basis of race or sex). Comments about general mistreatment are not covered by the statute.

Title VII – “Opposition” as a Protected Act

• The employee must have a good faith, reasonable belief that he or she was opposing unlawful discrimination.

• Knott v. DeKalb County Sch. Bd. (11th Cir. 2015) – rejecting teacher’s opposition claim; although principal may have mistreated her, there was no evidence the mistreatment was based on gender.
Title VII – “Opposition” as a Protected Act

• The employee’s “opposition” must be undertaken in a reasonable manner. Not reasonable:
  ▪ Violating established policies
  ▪ Being disruptive
  ▪ Refusing to perform one’s duties
  ▪ Badgering coworkers to provide a statement

Title VII – “Opposition” as a Protected Act

• “Opposition” claims by administrators with EEO/HR responsibilities
  • EEOC’s 2016 guidance states that employees with human resources responsibilities can claim retaliation based on actions undertaken in the course and scope of their employment.
  • Not all courts agree with this view.
Title VII – “Opposition” as a Protected Act

• “Opposition” claims by administrators with EEO/HR responsibilities
  • *DeMasters* (11th Cir. 2015) – job-related activities by EAP employee were protected opposition
  • *Weeks* (10th Cir. 2012) – job-related activities by in-house attorney were not protected opposition

Title VII – Participation as a Protected Act

• The 2016 EEOC guidance states that “participation” is protected *regardless of the employee’s good faith*.
• Not all courts agree. *See, e.g.*, *Gilooly* (8th Cir. 2005) (“it cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees without suffering repercussions”).

© 2017 National School Boards Association. All Rights Reserved.
Title VII – Participation as a Protected Act

- Some courts also have held that the participation prong does not apply to persons who file facially invalid EEOC charges (*i.e.*, the charge does not reflect any type of unlawful discrimination prohibited by Title VII). *See, e.g.*, Slagle (11th Cir. 2006).

Title VII – Adverse Employment Action

- The question is whether the action would dissuade a reasonable worker from bringing a discrimination claim against his or her employer.
- “[P]etty slights, minor annoyances, and simple lack of good manners” are normally not sufficient to deter a reasonable person.
Title VII – Adverse Employment Action

• “Materially adverse” generally includes termination, demotion, denial of promotion, refusal to hire, and denial of job benefits.

• “Materially adverse” under the EEOC’s 2016 guidance includes work-related threats, reprimands, lower evaluations, acts of public disparagement, false reports to the government, filing a lawsuit.

Title VII – Adverse Employment Action

• Whether an act is sufficiently adverse will depend on the overall context and the nature of the employee’s job.

• Examples of adverse actions: 37-day suspension that was later reversed (Burlington Northern); assignment of janitorial duties upon rehire (Wheat); accusations of misconduct in plaintiff’s academic research made to a journal editor (Szienbach); verbal harassment (Holloway)
Title VII – Causation

• The employee must show that the unlawful retaliation would not have occurred “but for” the protected activity. *Univ. of Tex. Southwestern Med. Ctr.,* 133 S.Ct. 2517 (2013).

Title VII – Causation

• **Factors that may support a causation finding:**
  • Suspicious timing/temporal proximity
  • Oral or written statements made the decision-makers
  • Comparative evidence showing that other employees were treated differently
  • Inconsistent or shifting explanations by decision-makers
Title VII – Defeating Causation

• **Common defenses**
  • Decision-maker was unaware of the protected activity (*Clark County Sch. Dist. v. Breeden*, 532 U.S. 268)
  • Too must time between the protected act and the adverse act (*Clark County*)
  • Protected act occurred after the adverse decision (*Knott, 11th Cir. 2015*)

• **A legitimate, non-retaliatory reason may defeat a retaliation claim.**
  • Example: A teacher claimed that her nonrenewal was retaliatory. However, the evidence showed that the deficiencies in her classroom performance were long-standing (*Knott, 11th Circuit 2015*)
  • Example: The employee was repeatedly counseled about his profane and abusive language (*Chavez v. City of San Antonio, 5th Cir. 2016*)
Title VII – Establishing Causation

• Conversely, the absence of prior negative documentation may support an inference of retaliation.
  • Example: Plaintiff’s record was excellent until she complained. (*EEOC v. Rite Way*, 5th Cir. 2016)

Title VII – Establishing Causation

• Procedural irregularities and inconsistencies may support an inference of retaliatory motive.
  • *Morris v. Bessemer Bd. of Educ.*, 2013 WL 549896 (N.D. Ala. 2013) – Successful girls’ basketball coach was not rehired after filing EEOC charges and a lawsuit. A younger woman was hired to replace her. School district’s motion for summary judgment was denied.
Title VII – Establishing Causation

• *Morris* (cont’d) – The plaintiff, Morris, was never interviewed. The high school principal and the HR director testified differently about how the interview process was supposed to work.

• The assistant principal testified that the principal said that Morris was 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.”

Title VII – Establishing Causation

• *Morris* (cont’d) – The successful applicant, Gordon, had no coaching experience at the high school or collegiate level. This was a mandatory job posting requirement. Gordon had taught only at the middle school.

• Gordon was hired without applying or interviewing. Although the principal claimed that Gordon did show interest in the position by sending an email, Gordon did not remember sending an email and did not recognize the email shown to her at her deposition.
Title VII – Establishing Causation

- *Morris* (cont’d) – The principal alleged that an additional reason for not hiring Morris was her violation of state athletic association rules, but there were no records of such violations, and no violations had been communicated to Morris.
- There were records of violations involving the boys football and basketball programs, but those male coaches were reappointed.

FLSA Retaliation Claims

- The FLSA protects employees who have “filed any complaint” regarding the FLSA or “instituted or caused to be instituted” any proceeding relating to the Act.
- “Filed any complaint” includes oral complaints. *(Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1)*
- The complaints must relate to the FLSA. General complaints about wages and breaks are not actionable. *(Richard v. Carson Tahoe Regional Healthcare, 9th Cir. 2016)*
**FLSA Retaliation Claims**

- Although mental anguish damages are not available in a traditional FLSA unpaid wages action, such damages are available in an FLSA retaliation action (*Pineda v. JTCH Apartments LLC*, 5th Cir. 2016)
- Liquidated damages also are available but are not mandatory (*Moore v. Appliance Direct Inc.*, 11th Cir. 2013)

**ADA Retaliation Claims**

- A protected activity includes making a complaint or participating in a proceeding but it also includes requesting a reasonable accommodation of a disability.
- A protected activity includes any activity pertaining to the ADA, not just activities related to employment.
- Courts will use the Title VII analysis for evaluating claims.
ADA Retaliation Claims

• The ADA also prohibits “interference, coercion, and intimidation.” The 2016 EEOC guidance views this provision as broader than the anti-retaliation provision. The EEOC does not require employees to satisfy the “materially adverse” standard in an interference claim.

• Example of interference: threatening an employee with adverse treatment if he does not “voluntarily” submit to a medical exam.

ADA Retaliation Claims

• *Adams v. Anne Arundel County Pub. Schs. (4th Cir. 2015)* – An assistant principal went on leave after a child injury incident that led to an investigation. Held: the school’s investigation, subsequent reprimand, and mandatory medical exam were not retaliatory. Nor was the transfer to a new school even though the pay was slightly less.
### ADEA Retaliation Claims

- Courts employ a Title VII approach.
- *Daniels v. School Dist. of Philadelphia* (3d Cir. 2015) – Teacher claimed that she was subjected to retaliation at her new school based on her complaints at her prior school; however, there was no evidence that the new supervisors were aware of her prior protected activities.
- *Heffmeier v. Caldwell County* (5th Cir. 2016) – The court rejected the employee’s claim where the evidence showed that he was promoted after making his age complaint and did not suffer an adverse action until 21 months later.

### FMLA Retaliation Claims

- The FMLA makes it unlawful to “interfere” with, “restrain,” or “deny” an employee’s FMLA rights.
- Courts will evaluate these claims using the Title VII framework.
FMLA Retaliation Claims

• *Adams v. Anne Arundel County Pub. Schs.* (4th Cir. 2015) – An assistant principal was investigated by CPS for a child injury. He went on medical leave. He complained about having to be examined by a doctor selected by the district, and he complained about a meeting regarding the investigation during his medical leave.

**FMLA Retaliation Claims**

• *Adams* (cont’d) – “In certain circumstances required meetings may unlawfully interrupt an employee’s leave. Here, however, the one-time conference was a legitimate piece of an on-going investigation ...” “The FMLA and the ADA impose important obligations ... 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.”
Title IX and Title VI Retaliation Claims

• Title IX prohibits discrimination on the basis of gender in programs that receive federal funds, while Title VI prohibits discrimination on the basis of race, national origin, and color.

Title IX and Title VI Retaliation Claims

• The Title VII retaliation framework applies to retaliation claims brought under Title IX. *See Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378 (7th Cir. 2012).
Title IX and Title VI Retaliation Claims

- *Lucero v. Nettle Creek Corp.*, 566 F.3d 720 (7th Cir. 2009) - Teacher's reassignment to teach 7th grade students, instead of 12th grade students, was not materially adverse employment action, as would support teacher's retaliation claims under Title VII and Title IX; reassignment did not dissuade other teachers from making or supporting charges of discrimination, and teacher did not suffer cut in pay, benefits, or privileges of employment.

- *Burton v. Board 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.”
Title IX and Title VI Retaliation Claims

- *Atkinson v. Lafayette College*, 653 F.Supp.2d 581 (E.D. Pa. 2009) – “Plaintiff’s Title IX activities fail to fall within the realm of ‘protected conduct’ because she never engaged in activity that was either adverse to the College or outside the scope of her position as Athletic Director.”

Title IX and Title VI Retaliation Claims

- 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.
- Lower courts disagree whether employees may use these statutes to bypass Title VII’s pre-litigation administrative procedures.
Title IX and Title VI Retaliation Claims


Title IX and Title VI Retaliation Claims

• 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, www.justice.gov/crt/title ix#3.%C2%A0%20Retaliation A.
Claims Prevention

✓ School districts must develop and promote a culture that encourages the reporting of discrimination and other complaints.
✓ In addition to disseminating appropriate anti-retaliation policies, districts must provide training for employees at all levels.

Claims Prevention

✓ Training and leadership development for supervisors should address the following:
  ✓ Acceptance of the fact that employees occasionally will complain and vent;
  ✓ Supervisors play a valuable role in assisting the district in resolving employee concerns;
  ✓ Supervisors need to learn how to react (and how not to overreact) to employee complaints when they occur;
  ✓ Supervisors need to understand the concept of a “protected activity.”
Claims Prevention

✓ Information on EEOC charges and grievances should be shared only a need-to-know basis.
✓ e.g., if a teacher with a pending complaint transfers to a new school, the new supervisor ordinarily will not have a right to know about the pending complaint against the prior supervisor.

Claim Prevention

✓ When a grievance, EEOC charge, or other claim identifies a specific supervisor, the supervisor may react with shock or anger. Human Resources (or other appropriate official) may acknowledge the supervisor’s feelings but must encourage the individual to allow the investigation process to work and to avoid actions that could be perceived as retaliatory.
Claim Prevention

✓ After an employee has engaged in a protected activity, the district must carefully evaluate all subsequent recommendations regarding the employee to ensure that the recommended action is legitimate and is consistent with policy, procedure, and the handling of similar situations.

Claims Prevention

• Remind supervisors of the importance of timely, accurate performance evaluations. Such documentation can establish that misconduct or performance problems existed prior to the employee’s protected act.
• Exercise care when preparing a grievance response or EEOC response. Inconsistency with prior documentation may raise a red flag.
Lisa A. Brown
Thompson & Horton LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027
713-554-
6767
lbrown@thompsonhorton.com
www.thompsonhorton.com