EEOC	NOTICE	Number TBD
		Date

SUBJECT: **PROPOSED Enforcement Guidance on Retaliation and Related Issues**

PURPOSE: This transmittal submits for public input the Commission's proposed guidance to update and clarify its position on retaliation and related issues under EEOC-enforced laws.

This proposed sub-regulatory document would supersede EEOC COMPLIANCE MANUAL, VOLUME II, SECTION 8: RETALIATION (May 20, 1998). It is intended to provide the public with information about how the EEOC may guide its personnel in processing and investigating charges, making cause determinations, and considering litigation.

APPLICABILITY: EEOC enforcement staff and outside stakeholders

EFFECTIVE DATE: N/A – Proposal for public input

EXPIRATION DATE: This transmittal will remain available for public input for a period of 30 days after its publication.

ORIGINATOR: Office of Legal Counsel

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PROPOSED EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES

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I. INTRODUCTION

Effective compliance and enforcement under the federal employment discrimination statutes depends in large part on the willingness of individuals to challenge discrimination without fear of punishment. Individuals rely on the prohibitions against retaliation, also known as reprisal, when they are complaining to an employer about an alleged equal employment opportunity (EEO) violation, providing information as a witness in a company or agency investigation, or filing a charge with the Equal Employment Opportunity Commission (Commission or EEOC).

This document provides updated guidance to replace the Compliance Manual on Retaliation issued in 1998. Since that time, the Supreme Court and the lower courts have issued numerous significant rulings regarding employment-related retaliation.[1] Further, the percentage of EEOC charges alleging retaliation in the private sector has essentially doubled since 1998,[2] and retaliation is now the most frequently alleged basis of discrimination in both the private and federal sectors.[3]

This Enforcement Guidance serves as a reference for Commission staff investigating charges alleging retaliation and related issues under all the statutes EEOC enforces.[4] It also may be useful to EEOC staff conducting outreach, and to employers, employees, and practitioners seeking to learn more about this area of the law.

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[1] Supreme Court decisions handed down after issuance of the EEOC's 1998 Compliance Manual that concern retaliation under EEOC-enforced laws include *Univ. of Tex. SW Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011); *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *Burlington N. and Santa Fe Rwy v. White*, 548 U.S. 53 (2006); and *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). Note: issues related to waivers and releases that might be retaliatory are not addressed in this guidance.

[2] Beginning in fiscal year 2009, charges of retaliation eclipsed race discrimination as the most frequently alleged basis of discrimination. In FY 2014, retaliation claims were included in 42.8% of all charges received by the EEOC, and 48.4% of the Title VII charges received. *See* EEOC Charge Statistics, FY 1997 Through FY 2014 (Table) http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Jan. 12, 2016).

[3] In the federal sector, retaliation has been the most frequently alleged basis since 2008, and between fiscal years 2009 and 2015, retaliation findings comprised between 42% and 53% of all findings of EEO violations in the federal sector. *See* Equal Employment Opportunity Data Posted Pursuant to the No Fear Act, http://www.eeoc.gov/eeoc/statistics/nofear/index.cfm (last visited Jan. 12, 2016).

[4] The views set forth in this sub-regulatory document represent the Commission's well-considered guidance on its interpretation of the relevant law and a discussion of the principles with which it will investigate charges and consider litigation.

A. What Is Retaliation?

Retaliation occurs when an employer unlawfully takes action against an individual in punishment for exercising rights protected by any of the EEO laws. The EEO anti-retaliation provisions apply to ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without retribution or punishment.

Retaliation occurs when an employer unlawfully takes action against an individual in punishment for exercising rights protected by the EEO laws.[5] Each of the EEO laws prohibits retaliation and related conduct: Title VII of the Civil Rights Act of 1964,[6] the Age Discrimination in Employment Act,[7] Title V of the Americans with

[5] Where it appears that an allegation of retaliation may be *solely* subject to the jurisdiction of another federal agency or a state or local government, rather than EEOC, the charging party should be referred promptly to the appropriate agency. For example, claims of retaliation for union activity should be referred to the National Labor Relations Board. Similarly, claims of retaliation for demanding wages earned, in the form of withholding overtime pay, should be referred to the Department of Labor, Wage and Hour Division.

[6] Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[7] Section 4(d) of the ADEA, 29 U.S.C. § 623(d), provides:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Disabilities Act,[8] Section 505 of the Rehabilitation Act,[9] the Equal Pay Act,[10] and Title II of the Genetic Information Nondiscrimination Act (GINA).[11]

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[8] Section 503(a) (retaliation) and (b) (interference) of the ADA, 42 U.S.C. § 12203(a) and (b), provide that:

> (a) Retaliation. - 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.
>
> (b) Interference, coercion, or intimidation. - 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.
>
> (c) Remedies and procedures. - The remedies and procedures available under sections 12117, 12133, and 12188 of this title *[sections 107, 203 and 308]* shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III, respectively, of this chapter *[title I, title II and title III, respectively]*.

[9] Section 501 of the Rehabilitation Act, 29 U.S.C. § 791(g) ("Standards used in determining violation of section"), covering designated federal government applicants and employees, provides:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

[10] Although the EPA's anti-retaliation provision, 29 U.S.C. § 215(a)(3), does not delineate types of protected activity such as opposition and participation, its language has been construed to prohibit retaliation for both oral and written complaints, whether made internally to an employer, or externally to the EEOC or a state/local fair employment practice agency. *See Greathouse v. JHS Sec., Inc.*, 784 F.3d 105 (2d Cir. 2015) (concluding, consistent with all circuits to have addressed the issue, that the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), which the EPA incorporates as its retaliation provision, prohibits retaliation against employees who orally complain to their employers); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011) (interpreting the FLSA anti-retaliation provision to find that oral complaints may be protected activity, but declining to decide whether internally filed complaints to management suffice), *on remand*, 703 F.3d 966 (7th Cir. 2012) (holding that plaintiff's oral complaint to his manager was protected activity); *Minor v. Bostwick Labs, Inc.*, 669 F.3d 428 (4th Cir. 2012) (ruling that internally filed complaints are protected activity under the FLSA, consistent with the majority of circuits to have addressed the issue).

Government or private employers, employment agencies, or labor organizations[12] must not retaliate because an individual engaged in "protected activity." Generally, protected activity consists of either:

> **(1) participating in an EEO process**, such as providing witness information; assisting or otherwise participating in any manner in an investigation, proceeding, or hearing under the EEO laws, including making an internal complaint to an employer or union; participating in an employer's own internal investigation; or filing an administrative charge or lawsuit alleging discrimination in violation of the EEO laws;[13] or,

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[11] Section 207(f) of Title II of GINA, 42 U.S.C. § 2000ff-6(f), provides:

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 remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

[12] The term "employer" is used throughout this document to refer to all of these covered entities. The EEOC COMPLIANCE MANUAL, VOLUME II, SECTION 2: THRESHOLD ISSUES, http://www.eeoc.gov/policy/docs/threshold.html, provides guidance to determine whether a particular entity is covered under these laws based on its size or other characteristics. Federal employees are also protected against retaliation under each of the employment discrimination statutes. *See Gomez-Perez v. Potter*, 553 U.S. 474, 487 (2008) (inferring a cause of action in the federal sector for retaliation under the Age Discrimination in Employment Act, and describing § 633 of the ADEA as a "broad prohibition of 'discrimination' rather than a list of specific prohibited practices"); *see also Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 72 (1st Cir. 2011) ("Although [Title VII] contains no parallel [retaliation] prohibition applicable to the federal sector, this circuit and others have held that various provisions of Title VII operate, either alone or in concert, to the same effect [as the private sector retaliation prohibition]."); Section 207(3) of Title II of GINA, 42 U.S. C. § 2000ff-6(e) (incorporating Title VII's remedies, powers, and procedures) (citing decisions from the 1st, 4th, 10th, and D.C. Circuits). Although some courts have held that state and local government employers may have sovereign immunity from retaliation claims for money damages under Title V of the ADA, *see, e.g.*, *Demshki v. Monteith*, 255 F.3d 986, 988 (9th Cir. 2001), such employers are still subject to suit by the U.S. government, which can obtain full relief including damages for the individual. *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001); *U.S. v. Miss. Dep't of Pub. Safety*, 321 F.3d 495 (5th Cir. 2003). Therefore it is in the interest of such employers to take the same care as all others to comply with retaliation prohibitions.

[13] Courts often characterize EEO complaints made internally, for example to a company manager or human resources department, as opposition rather than participation. However, to date the Supreme Court has explicitly left open this legal question. *Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn.*, 555 U.S. 271, 280 (2009) (expressly stating that the Court was not reaching the question of whether conduct constituted participation in case alleging retaliation against an employee who spoke out as a witness in an employer's internal investigation: "Because Crawford's conduct is covered by the opposition clause, we do not reach her argument that the Sixth Circuit misread the participation clause as well."). Some courts

(2) opposing a practice made unlawful by one of the employment discrimination statutes (*e.g.*, communicating a reasonable belief that the employer's activity violates the EEO laws), or engaging in non-verbal acts of opposition (*e.g.*, resisting an unwanted sexual advance by a supervisor or refusing to carry out an order reasonably believed to be discriminatory).

- **Additional ADA protection.** In addition to retaliation, the ADA prohibits "interference" with the exercise of rights under the ADA. This additional protection is discussed in detail *infra* at § III.[14] The interference provision goes beyond retaliation to make it also unlawful to coerce, intimidate, threaten, or otherwise interfere with any individual's exercise of any right under the ADA, or with an individual who is assisting another to exercise ADA rights.

II. ELEMENTS OF A RETALIATION CLAIM

A retaliation claim has three elements:

(1) protected activity: "participation" in EEO activity or "opposition" by the individual to discrimination;

(2) adverse action taken by the employer; and

(3) causal connection between the protected activity and the adverse action.

expressly reject the view that internal complaints are protected as participation, limiting the participation clause to administrative charges or lawsuits filed to enforce rights under an EEO statute, or to include participation in internal investigations only after a charge has been filed. *See, e.g.*, *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41 (2d Cir. 2012); *infra* note 20 (collecting EEOC briefs and cases). For a further discussion of the case law and of the Commission's broad view of the scope of participation, *see infra* § II.

[14] Section 503(b) of the ADA, 42 U.S.C. § 12203(b); *supra* note 8.

A. Protected Activity

The first question when analyzing a charge of retaliation is whether there was an earlier complaint or other EEO activity that is protected by the law (known as "protected activity"). The "protected activity" must occur prior to the employer's alleged retaliatory adverse action. "Protected activity" may be established by demonstrating that the individual either "participated" in EEO activity or otherwise "opposed" discrimination.

1. Participation

The anti-retaliation provisions make it unlawful to discriminate against any individual because s/he has made a charge, testified, assisted, or participated "in any manner" in an investigation, proceeding, hearing, or litigation under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA. This protection, known as the "participation clause," applies even if the underlying charge is not meritorious or was not timely filed.[15]

Broad Protection, Even if Underlying Discrimination Claim Fails. In order to ensure that individuals are not deterred from raising alleged EEO violations and to avoid pre-judging the merits of a given allegation, the Commission takes the position that the participation clause applies regardless of the reasonableness of the underlying allegations of discrimination.[16] As an appellate court recognized:

> [r]eading a reasonableness test into section 704(a)'s participation clause would do violence to the text of that provision and would undermine the objectives of Title VII.

[15] *See Learned v. City of Bellevue*, 860 F.2d 928, 932–33 (9th Cir. 1988) ("[I]t is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation …. If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled.").

[16] In contrast, the opposition clause applies only to those who object to practices that they *reasonably* believe are unlawful. *Wyatt v. City of Bos.*, 35 F.3d 13, 15 (1st Cir. 1994) (while employee engaging in opposition activity must "have a reasonable belief that the practice the employee is opposing violates Title VII . . . , 'there is nothing in [the] wording [of the participation clause] requiring that the charges be valid, nor even an implied requirement that they be reasonable'"). In *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), the Court held that opposition must be reasonable; the decision did not address the participation clause.

> The plain language of the participation clause itself forecloses us from improvising such a reasonableness test. The clause forbids retaliation against an employee who "has made a charge, testified, assisted, or participated in any manner" in a protected proceeding. 42 U.S.C. § 2000e-3(a).[17]

The Supreme Court has reasoned that it is necessary to protect participation broadly in order to achieve the primary statutory purpose of "maintaining unfettered access to statutory remedial mechanisms."[18] Thus, the application of the participation clause cannot depend on the substance of testimony because, "[i]f a witness in [an EEO] proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forth-coming."[19] These protections ensure that employers cannot intimidate their employees into forgoing the complaint process and that those investigating can obtain witnesses' unchilled testimony.

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[17] *Glover v. S.C. Law Enf. Div.*, 170 F.3d 411 (4th Cir. 1999) (concluding that the application "of the participation clause should not turn on the substance of the testimony") (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir.1969) (noting that those who testify in Title VII proceedings are endowed with "exceptionally broad protection")). Similarly, in *Ayala v. Summit Constructors, Inc.*, 788 F. Supp. 2d 703 (M.D. Tenn. 2011), the court rejected the employer's argument that only EEOC charges that are reasonable and made in good faith should be protected by the participation clause. While observing that circuits are split as to the scope of protection under this clause, the court in *Ayala* followed Sixth Circuit precedent giving literal interpretation to Title VII's statutory language to protect anyone who has "participated in any manner" in Title VII proceedings. The court explained that such protection is "not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong." *Id.* at 719. Moreover, the court added that even if a reasonableness or good faith requirement were to apply, the Title VII charge at issue was not unreasonable or made in bad faith simply because it may have overstated charging party's concerns or misinterpreted the reasons for his treatment by the employer.

[18] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that Title VII extends to protect individuals from retaliation by current, former, or prospective employers).

[19] *Glover*, 170 F.3d at 414 (citing *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997), which held that the participation clause applies even where a witness does not testify for the purpose of assisting the claimant, or otherwise does so involuntarily). *See also Pettway*, 411 F.2d at 1005 ("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.") (internal quotation marks omitted). For this reason, if an employer takes a materially adverse action against an employee because it concludes that the employee has acted in bad faith in raising EEO allegations, it is not certain to prevail on a retaliation claim, since a jury may conclude that the claim was in fact made in good faith even if the employer subjectively thought otherwise. *Cf. Sanders v. Madison Square Garden*, 525 F. Supp. 2d 364, 367 (S.D.N.Y. Sept. 5, 2007) ("[I]f an employer chooses to fire an employee for making false or bad accusations, he does so at his peril, and takes the risk that a jury will later disagree with his characterization.").

Encompasses Internal Complaints. The Commission also views "participation" as encompassing internal EEO complaints to company management, human resources, or otherwise made within an employer's internal complaint process before a discrimination charge is actually filed with the EEOC or a state or local Fair Employment Practices Agency.[20] The text of Title VII prohibits retaliation against those who "participated *in any manner* in *an* investigation, proceeding, *or* hearing under this subchapter."[21] As courts have observed, these terms are broad, unqualified, and not expressly limited to investigations conducted by the EEOC.[22] Indeed, elsewhere in Title VII, Congress

[20] *See* Brief of the EEOC as Amicus Curiae in Support of Appellant and in Favor of Reversal, *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015) (No. 13-2278), http://www.eeoc.gov/eeoc/litigation/briefs/demasters.html ; Brief of the EEOC as Amicus Curiae in Support of Appellant and in Favor of Reversal, *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41 (2d Cir. 2012) (No. 09-0197-cv(L)), http://www.eeoc.gov/eeoc/litigation/briefs/townsend1.txt; Brief of the EEOC as Amicus Curiae in Support of Suggestion for Rehearing En Banc, *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346 (11th Cir. 1999) (No. 97-9229); *see also* Brief for the United States as Amicus Curiae Supporting Petitioner, *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009) (No. 06-1595), http://www.justice.gov/osg/brief/crawford-v-metropolitan-govt-nashville-amicus-merits.

Some courts have held that the participation clause applies to internal company investigations only when conducted in conjunction with a formal EEOC charge, citing the statutory reference to "proceedings…under this subchapter." *See, e.g., Townsend*, 679 F.3d at 49; *Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003) ("Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge."); *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 746-47 (7th Cir. 2010) (holding that the participation clause does not cover internal investigations before the filing of a charge with the EEOC; not addressing Supreme Court precedents); *Clover*, 176 F.3d at 1353 (declining to decide whether the participation clause covers all internal investigations, and ruling that "at least where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee's participation is participation 'in any manner' in the EEOC investigation"); *see also EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 n.3 (11th Cir. 2000) (distinguishing case from *Clover* on the ground that no EEOC charge had been filed before the alleged retaliatory act, the court concluded that plaintiff's internal sexual harassment complaint could not be protected under the participation clause).

[21] 42 U.S.C. 2000e-3(a) (emphasis added).

[22] *Merritt*, 120 F.3d at 1186 (reasoning that "[t]he word 'testified' is not preceded or followed by any restrictive language that limits its reach" and it is followed by the phrase "in any manner," indicating its intended broad sweep); *United States v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997) (reasoning that the statutory term "'any' is a term of great breadth").

demonstrated the use of language to limit provisions to EEOC investigations, but such limiting language does not appear in the "participation" clause.[23]

As a policy matter, deterring internal complaints could be to the detriment of employers, since an effective investigation requires that employees be willing to provide information, whether pro-employer, pro-employee, or neutral.[24] Relegating internal complaints to the "opposition" clause could discourage employees from coming forward at an early stage, out of concern that their statements would be deemed "unreasonable" and therefore unprotected. Yet it is such information that may lead an employer to take prompt corrective action, where needed to address an internal complaint of harassment, that may later shield the employer from liability.[25]

Does Not Immunize Employees From Non-Retaliatory Discipline. The breadth of the "participation" clause, however, does not mean that employees can immunize themselves from discipline for improper behavior by raising an internal EEO allegation, or by filing a discrimination complaint. Employers remain free to discipline or terminate employees for a legitimate, non-discriminatory, and non-retaliatory reason, notwithstanding any prior protected activity.[26] Whether an adverse action is taken

[23] *See, e.g.*, 42 U.S.C. § 2000e-9 (referring to "hearings and investigations conducted by the Commission or its duly authorized agents or agencies"); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

[24] Playing *any* role in an internal investigation should be deemed to constitute protected activity. Otherwise, those providing information that supports the employer rather than the complainant could be left unprotected from retaliation.

[25] *See, e.g., Beard v. Flying J., Inc.*, 266 F.3d 799 (8th Cir. 2001) (holding that affirmative defense was not established where employer interviewed only alleged harasser and victim, and not other employees who could have told of harassment, and where investigation ended only with a warning for the harasser to cease alleged conduct that included actions the court later characterized as "battery"); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1314-15 (11th Cir. 2001) (holding that an employer must have responded to an internal harassment complaint in a "reasonably prompt manner" to establish part of the defense); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (holding that no affirmative defense was established where the employer performed cursory investigation that culminated with forcing plaintiff to resign, rather than imposing discipline on harasser).

[26] *Glover v. S.C. Law Enf. Div.*, 170 F.3d 411, 414 (4th Cir. 1999) ("[A]n EEOC complaint creates no right on the part of an employee to miss work, fail to perform assigned work, or leave work without notice.") (quoting *Brown v. Ralston Purina Co.*, 557 F.2 570, 572 (6th Cir. 1977)); *Jackson v. Saint Joseph State Hosp.*, 840 F.2d 1387, 1390-91 (8th Cir. 1988) (upholding dismissal of employee for past conduct and for an "abusive attempt" to have a witness change her story). However, the Commission disagrees with those cases that extend this principle to exclude from protected participation those individuals who have behaved in a contentious manner during an adversarial EEO proceeding. *See, e.g., Benes v. A.B. Data, Ltd.*, 724 F.3d 752 (7th Cir. 2013) (holding that plaintiff's termination was not actionable as retaliation, where he

because of a legitimate, non-retaliatory reason or is because of the employee's protected activity depends on the facts.[27]

EXAMPLE 1
Retaliatory Motive

Jane, a saleswoman, has been employed at a retail store for more than a decade, and has always exceeded her sales quota and received excellent performance appraisals. Shortly after the company learned that Jane had provided a witness statement to the EEOC in support of a co-worker's sexual harassment claim, it terminated Jane, citing her failure to provide 48 hours advance notice to her supervisor of a shift swap with a co-worker. Because same-day notice of a shift swap was a widespread company practice that had commonly been permitted, and because of the proximity in time of her discharge to the company's learning of her protected activity, EEOC finds reasonable cause to believe that the discharge was retaliatory.

EXAMPLE 2
Lawful Motive

Plaintiff, the office manager of a service company, believed her non-selection for various managerial positions was due to sex discrimination, and she posted on Facebook: "anyone know a good EEOC lawyer? need one now." Management saw this and shared it with human resources. Less than a week after the post, plaintiff was discharged. She alleged it was retaliatory. However, the employer contended the termination was due to an audit that revealed

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was fired for "stalking out" of an EEOC arranged mediation after shouting at the employer's representative "you can take your proposal and shove it up you're a[--] and fire me and I'll see you in court").

[27] *See Cox v. Onondoga Cnty. Sheriff's Dept.*, 760 F.3d 139 (2d Cir. 2014) (explaining that employees "may not claim retaliation simply because the employer undertakes a factfinding investigation" about a pending EEOC charge, because if an employer takes an adverse action arising from something that occurred in connection with protected activity, the proper inquiry is into whether or not the action was motivated by retaliatory intent). In a retaliation claim arising out of disciplinary action for alleged misconduct in connection with protected activity (e.g., complainant allegedly lied or violated employer rules during an investigation), the employer's proffered non-retaliatory reason for the discipline will be viewed as a pretext for retaliatory motive unless the employer has independent corroborating evidence to support its finding of misconduct.

> plaintiff's extensive unauthorized use of overtime and her repeated violations of company finance procedures, for which plaintiff had been previously issued written discipline. Even though management was aware of plaintiff's protected activity (her stated intention to take action on a potential EEO claim), where the evidence shows the firing was in fact motivated by the audit results, plaintiff cannot prove retaliatory discharge.[28]

NOTE: *Employers need not refrain from taking appropriate action in response to an employee's conduct or performance problems even if that employee has filed an EEO charge or engaged in other protected activity. At the same time, it is important to recognize that some managers may be angry or hurt about employee allegations of discrimination. Therefore, if a manager recommends an adverse action in the wake of an employee's charge filing or other protected activity, employers may reduce the chance of potential retaliation by independently evaluating whether the adverse action is appropriate. This may include scrutinizing the legitimacy of the adverse action, and ensuring that it is consistent with pre-existing employer policies and equivalent to actions taken against similarly-situated employees.*[29]

2. Opposition

The EEO anti-retaliation provisions also make it unlawful to retaliate against an individual because he has opposed any practice made unlawful under the employment discrimination statutes.[30] The protection of the opposition clause applies if an individual explicitly or implicitly communicates a belief that the employer may be engaging in employment discrimination. "Courts have not limited the scope of the opposition clause to complaints made *to the employer;* complaints about the employer to others that the

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[28] *Deneau v. Orkin, LLC*, 2013 WL 2178045 (S.D. Ala. 2013). *See infra* § II.C., *Causal Connection.*

[29] *See generally* EEOC FACT SHEET, RETALIATION – MAKING IT PERSONAL, http://www.eeoc.gov/laws/types/retaliation_considerations.cfm (last visited Jan. 12, 2016).

[30] *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 280 (2009); *see also Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006) ("[P]rotected conduct includes not only the filing of administrative complaints . . . but also complaining to one's supervisors."); *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989-90 (6th Cir. 1992) (holding that retaliation claim was actionable under the FLSA, as incorporated into the Equal Pay Act, for complaint to supervisor about male counterparts being paid $1/hour more); *EEOC v. White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989). The same conduct may, depending on the facts, establish "participation" or, alternatively, "opposition." *See supra* notes 13, 20-24 and *infra* note 71.

employer learns about can be protected opposition."[31] The communication may be informal and need not include the words "harassment," "discrimination," or any other legal terminology, as long as circumstances show that the individual intended to convey opposition or resistance to a perceived EEO violation.[32]

> An individual is protected from retaliation for opposing any practice made unlawful under the EEO laws. Protected "opposition" activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination.

Expansive Definition. The opposition clause of Title VII has an "expansive definition" and courts have ruled that "great deference" is given to the EEOC's interpretation of opposing conduct.[33] For example, accompanying a co-worker to the human resources office in order to file an internal EEO complaint,[34] or complaining to management about discrimination against co-workers, could constitute protected

[31] *Lindemann, Grossman & Weirich*, EMPLOYMENT DISCRIMINATION LAW (Fifth ed., Vol. I) at 15-20 (collecting cases).

[32] *Okoli v. City of Baltimore*, 648 F.3d 216 (4th Cir. 2011) (ruling that it was sufficient to constitute "opposition" that plaintiff complained about "harassment" and described some facts about the sexual behavior in the workplace that was unwelcome; she did not need to use the term "sexual harassment" or other specific terminology); *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951 (9th Cir. 2009) (holding that allegations need not have identified all incidents of the discriminatory behavior complained of to constitute opposition; "a complaint about one or more of the comments is protected behavior"). *See also Ogden v. Wax Works, Inc*., 214 F.3d 999 (8th Cir. 2000) (ruling that reasonable jury could conclude plaintiff "opposed discriminatory conduct" when she told her harasser, who was also her supervisor, to stop harassing her).

[33] *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015) (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579, 580 n.8 (6th Cir. 2000)).

[34] *Crawford*, 555 U.S. at 279 n.3 ("[E]mployees will often face retaliation not for opposing discrimination they themselves face, but for reporting discrimination suffered by others."). For example, in *Collazo v. Bristol-Myers Squibb Mfg.*, 617 F.3d 39 (1st Cir. 2010), the court held that plaintiff engaged in protected activity by assisting a female scientist under his supervision in filing and pursuing an internal sexual harassment complaint, rejecting the employer's contention that the plaintiff did not oppose discrimination because he did not "utter words" when he and his subordinate met with a human resources official. The court explained that an employee can oppose discrimination through conduct, and is not required to verbally communicate his opposition. Thus, by repeatedly accompanying his subordinate to human resources to file and pursue her sexual harassment complaint, the plaintiff "effectively and purposefully communicated his opposition to" the alleged harasser's treatment of the female scientist. *Id.* at 47-48.

activity.[35] Opposition includes situations where "an employee [takes] a stand against an employer's discriminatory practices not by 'instigating' action, but by standing pat, say by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons."[36] Opposition also may take the form of answering an employer's questions about potential discrimination where the employee did not initiate the complaint.[37]

Protects All Employees, Even Managers, Human Resources Personnel, or Other EEO Advisors. Opposition encompasses employee exposure of, and objection to, perceived discrimination, even when those who engage in the opposition are managers, human resources personnel or other internal EEO compliance advisors to an employer. The EEOC and the U.S. Department of Labor have rejected the so-called "manager rule" adopted by some courts to require that managers must "step outside" their management role and assume a position adverse to the employer in order to engage in protected activity.[38] The "manager rule" originated as a judicially-created concept under the Fair

[35] *See, e.g., EEOC v. Mountaire Farms, Inc.*, Civil Action No. 7:13-CV-00182 (E.D.N.C. consent decree entered Nov. 2013) (settlement of claim of retaliation against company translator who allegedly made repeated complaints to supervisors and the human resources department about incidents of mistreatment of Haitian workers at the company in comparison to non-Haitian workers); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) (ruling that complaining about discrimination against co-workers and refusing to fulfill employer's request to gather derogatory information about those who complained was protected opposition).

[36] *Crawford*, 555 U.S. at 277.

[37] *Id.* at 277-78 (explaining that the opposition clause in Title VII extends beyond "active, consistent" conduct "instigat[ed]" or "initiat[ed]" by the employee, the court stated: "There is . . . 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."). Whether characterized as opposition or participation, the Commission's view is that even if an employee's responses to an employer's questions provided neutral or employer-favorable information rather than supporting a co-worker's discrimination allegations, the responses are nevertheless "protected activity" to which anti-retaliation protections apply.

In *Crawford*, the Court stated it was not reaching the issue of whether internal EEO complaints might be considered "participation" as well as opposition. As discussed *supra* at § II.A.1, the Commission has always maintained that internal EEO complaints to one's employer are protected participation, because Title VII's anti-retaliation provision states that it applies not only to those who file a charge, but also to employees who "participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a).

[38] *See* Joint Amicus Brief for the Secretary of Labor and the Equal Employment Opportunity Commission, *Rosenfield v. GlobalTranz Enterprises, Inc.*, __ F.3d __, 2015 WL 8599403 (9th Cir. Dec. 14, 2015) (No. 13-15292) (taking the position that a human resources manager's compliance advice to an employer is protected activity in a case arising under the anti-retaliation provision applicable in FLSA and Equal Pay Act cases), http://www.eeoc.gov/eeoc/litigation/briefs/globaltranz.pdf. The Commission maintains that a

Labor Standards Act (FLSA) more than thirty years after the enactment of Title VII,[39] has only been adopted by a minority of courts, and has no support in the statutory text.[40] Indeed, the Supreme Court's exposition of the scope of Title VII "opposition" in *Crawford v. Metropolitan Government of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009), did not "restrict[] [its] holding[] to non-managers or to employees whose job responsibilities are untethered to monitoring discrimination or enforcing non-discrimination policies."[41] As the Second Circuit has observed, this is "for good reason: The plain language of § 704(a)'s opposition clause—which prohibits employers from 'discriminat[ing] against *any* . . . employee[] . . .' 42 U.S.C. § 2000e-3(a) (emphasis added)—does not distinguish among entry-level employees, managers, and any other type of employee."[42] Rather, as the Supreme Court stated in *Crawford*, "'[w]hen an

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blanket "manager rule" should not apply to bar such individuals' retaliation claims under any of the EEO statutes. A number of appellate courts have agreed. *See Rosenfield*, __ F.3d __, 2015 WL 8599403 (concluding that the government amici's argument that managers should not be held to a different standard under the FLSA was persuasive and applying a "case-by-case" factual analysis to determine whether the employer was on "fair notice" that the individual was asserting rights protected by the statute); *DeMasters v. Carilion Clinic*, 796 F.3d 409, 422 (4th Cir. 2015) (holding that "the 'manager rule' has no place in Title VII jurisprudence," and stating: "Nothing in the language of Title VII indicates that the statutory protection accorded an employee's oppositional conduct turns on the employee's job description or that Congress intended to excise a large category of workers from its anti-retaliation protections.").

[39] *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478, 1486-87 (10th Cir. 1996) (holding that a personnel director who had urged her employer to address overtime violations had not engaged in protected activity under the FLSA's anti-retaliation provision because her job responsibilities included overseeing wage and hour compliance; reasoning that she did not "step outside [her] role of representing the company," such as by filing or threatening to file an action adverse to the employer, actively assisting other employees in asserting FLSA rights, or engaging in other activities that reasonably could be perceived as directed towards the assertion of FLSA rights). *See also Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 628 (5th Cir. 2008) (adopting the manager rule in FLSA case); *Claudio-Gotay*, 375 F.3d at 102-03 (same). *But see supra* note 38.

[40] Section 704(a) of the statute states: "It shall be an unlawful employment practice for an employer to discriminate against *any* of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately *of whatever kind*.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)) (emphasis added); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 9-10 (2011) (reasoning that "any" "suggests a broad interpretation" of which employees may invoke the protections of the opposition clause).

[41] *Littlejohn v. City of New York*, 795 F.3d 297, 318 (2d Cir. 2015) (discussing the scope of *Crawford*).

[42] *Id. See also Schanfield v. Sojitz Corp.*, 663 F. Supp. 2d 305, 342 (S.D.N.Y. 2009) (holding that *Crawford* "seems [to] foreclose[]" the defendant's argument that the plaintiff had

employee communicates to her employer a belief that the employer has engaged in … a form of employment discrimination, that communication' *virtually always* 'constitutes the employee's *opposition* to the activity.'"[43]

Section 704(a) cannot function, as intended, to protect efforts to end Title VII violations, if those employees best situated to call attention to and oppose an employer's discriminatory practices are outside its protective ambit. By depriving them of protections under the statute, courts create a disincentive for them to carry out their duties – especially for those whose duties often include ensuring compliance with anti-discrimination laws. Moreover, the statutory purpose is promoted by protecting all such communications about potential EEO violations by the very officials most likely to discover, investigate, and report them.[44]

Any other interpretation would also be at odds with Supreme Court precedent adopting an affirmative defense to supervisor harassment where an employer shows it acted promptly to prevent and remedy harassment and that the plaintiff unreasonably failed to prevent or mitigate harm. The affirmative defense creates incentives for employers to adopt policies and procedures that encourage the prompt reporting, investigation, and remedying of workplace harassment, whereas the "manager rule" discourages supervisory employees from fulfilling their duty to report harassment and participate in internal investigations because it leaves them unprotected from retaliation.

Therefore, in determining if protected opposition occurred, the focus should not be on the employee's "job duties" but rather on the "oppositional nature of the

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not engaged in protected activity because he had a duty to report discrimination issues; also stating it would be "utterly inconsistent" with the sweeping language of *Crawford* to hold that acts taken within an employee's job are not "oppositional").

[43] *Crawford*, 555 U.S. at 276 (first emphasis added) (adopting the Commission's position in the EEOC COMPLIANCE MANUAL, as quoted in Brief for the United States as Amicus Curiae).

[44] *See DeMasters*, 796 F.3d at 423 (declining to apply the "manager rule" because it would discourage those "best able to assist employees with discrimination claims—the personnel that make up . . . HR, and legal departments" from processing internal complaints of discrimination, as these employees "would receive no protection from Title VII if they oppose[d] discrimination targeted at the employees they are duty-bound to protect"); *Smith v. Sec'y of Navy*, 659 F.2d 1113, 1121 (D.C. Cir. 1981) (concluding that a federal agency EEO counselor had engaged in protected activity even though such activity was also part of the plaintiff's job duties, and noting that "[i]t is the explicit function of EEO officers to 'assist' in 'investigation(s)' and 'proceeding(s)' under Title VII, and it is for work of this kind that Smith was penalized"); *Rangel v. Omni Hotel Mgmt. Corp*, 2010 WL 3927744 (W.D. Tex. Oct. 4, 2010) (refusing to apply the "step outside" rule in a Title VII case because it would "strip" Title VII protection from "employees who are in the best positions to advise employers about compliance").

employee's complaints or criticisms, [and any other rule would be] inapposite in the context of Title VII retaliation claims."[45]

Rejection of the "manager rule" under Title VII does not mean that every human resources employee, or every managerial employee with a duty to report discrimination, will have a viable claim of retaliation. A managerial employee with a duty to report or investigate discrimination still must satisfy the same requirements as any other employee alleging retaliation under the opposition clause described below -- meeting the definition of "opposition," acting with a reasonable and good faith belief that the opposed practice is unlawful (or would be if repeated), and using a manner of opposition that is reasonable. A managerial employee who satisfies these requirements for oppositional conduct must also establish the other elements required for a valid retaliation claim, including a materially adverse action and causation. Moreover, when an employer identifies a legitimate, non-retaliatory reason for the adverse action, the employee will have to produce enough evidence to discredit the employer's explanation and prove the real reason was retaliation.

Although the opposition clause in the EEO statutes is broad, it does not protect every protest against perceived job discrimination. The following principles apply.

a. Manner of Opposition Must Be Reasonable

The opposition clause protects reasonable actions taken by an individual to protest perceived employment discrimination. This requirement that the manner of opposition be reasonable balances the right to oppose employment discrimination against the employer's need to have a stable and productive work environment.

Complaints to Someone Other Than Employer. Although opposition typically involves complaints to managers,[46] it may be a reasonable manner of opposition to

[45] *Littlejohn*, 795 F.3d at 317 n.16. Nevertheless, where courts have applied a different rule for human resources personnel or others whose job duties involve processing internal EEO complaints, a number of courts have concluded that opposition activity did involve "stepping outside" that role. *See, e.g., Littlejohn*, 795 F.3d at 318 (on retaliation claim by an employer's internal EEO director, holding that while fulfilling a job duty to report or investigate other employees' complaints of discrimination is not by itself protected opposition, when such an employee "actively 'support[s]' other employees in asserting their Title VII rights or personally 'complain[s]' or is 'critical' about the 'discriminatory employment practices' of her employer, that employee has engaged in a protected activity under § 704(a)'s opposition clause") (citing *Sumner v. U.S. Postal Serv.*, 899 F.3d 203, 209 (2d Cir. 1990)); *Collazo v. Bristol-Myers Squibb Manufacturing, Inc.*, 617 F.3d 39 (1st Cir. 2010) (reasoning that "an employer cannot be permitted to avoid liability for retaliation under Title VII simply by crafting equal employment policies that require its employees to report unlawful employment practices," and holding that even assuming *arguendo* that a "step outside" rule applies under Title VII, plaintiff stepped outside his managerial duties when he supported a subordinate in lodging and pursuing a sexual harassment complaint and was therefore protected).

inform others of alleged discrimination, including union officials, co-workers, an attorney, or even persons outside the company.[47] For instance, if an employee contacts the police to ask that criminal charges be filed because of a workplace assault on a co-worker with an intellectual disability, the employee has engaged in protected "opposition," even though it was not a complaint to managers or to a government agency that enforces EEO laws.[48]

Advising Employer of Intent to File, or Complaining Before Matter is Actionable. It is also a reasonable manner of opposition for an employee to tell the employer of her intention to file a charge with the Commission or a complaint with a state or local Fair Employment Practices Agency, union, court, the employer's human resources department, a higher-level manager, or the company CEO. For example, if an employee tells her manager that she intends to file an EEOC charge challenging a disparity in pay with a male co-worker as sex discrimination, the statement would be protected "opposition."[49] Moreover, it is reasonable opposition for an employee to inform the employer about alleged or potential discrimination or harassment, even if the alleged

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[46] *See, e.g., Crawford*, 555 U.S. at 276 (endorsing the EEOC's position that communicating to one's employer a belief that the employer has engaged in employment discrimination "virtually always" constitutes "opposition" to the activity, and stating that any exceptions would be "eccentric cases"); *Collazo*, 617 F.3d at 47 (ruling that an employee "opposed" a supervisor's harassment by, *inter alia*, speaking to the supervisor individually and eliciting a limited apology).

[47] *See Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) (relying on the EEOC Compliance Manual and case law, the court held that "there is no qualification on . . . the party to whom the complaint is made known," and it may include management, unions, other employees, newspaper reporters, or "anyone else"); *Pearson v. Mass. Bay Transp. Auth.*, 723 F.3d 36, 42 (1st Cir. 2013) (observing that "there is no dispute that writing one's legislator is protected conduct"); *Minor v. Bostwick Labs, Inc.*, 669 F.3d 428 (4th Cir. 2012) (holding that plaintiff's meeting with a corporate executive to protest a supervisor's direction to falsify time records to avoid overtime was protected activity under the FLSA anti-retaliation provision, and the fact of the meeting about plaintiff's complaints sufficed to show she had engaged in "opposition"); *Conetta v. Nat'l Hair Care Ctrs., Inc.*, 236 F.3d 67, 76 (1st Cir. 2001) (ruling that employee's complaints of sexual harassment to co-worker who was a son of general manager was protected opposition).

[48] "Although involving the police in an employment dispute will not always be considered part of the protected conduct that prohibits retaliatory action, where, as here, it allegedly derived from an effort to protect against actions that are intertwined and interrelated with alleged sexual harassment, it cannot be deemed the 'unprofessional' conduct for which an employee can be terminated." *Scarbrough v. Bd. of Trs. Fla. A&M Univ.*, 504 F.3d 1220 (11th Cir. 2007) (concluding a reasonable jury could find that plaintiff engaged in protected activity by involving the campus police after he was threatened and physically accosted as a result of rejecting his supervisor's sexual advances).

[49] *See infra* note 97.

harassment has not yet risen to the level of a "severe or pervasive" hostile work environment.[50]

Complaints Raised Publicly. Depending on the circumstances, calling public attention to alleged discrimination may constitute reasonable opposition, provided it is connected to an alleged violation of the EEO laws.[51] Opposition may include even activities such as letter writing, picketing, or engaging in a production slow-down.[52] It includes making informal protests of discrimination, "'including . . . writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges,'"[53] provided it is not done in so disruptive or excessive a manner as to be unreasonable.[54]

Moreover, going outside a chain of command or prescribed internal complaint procedure in order to bring forth discrimination allegations may be reasonable.[55]

Examples of Unreasonable Manner of Opposition. On the other hand, it is not reasonable opposition if an employee, for example, makes an overwhelming number of

[50] *See infra* notes 60-70 and accompanying text for extended discussions of this issue.

[51] *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1993) (observing that all actions of opposition to an employer's practices constitute some level of disloyalty, and therefore in order to reach the level of being unreasonable, such opposition must "significantly disrupt[ ] the workplace" or "directly hinder[ ]" the plaintiff's ability to perform his or her job); *EEOC v. Kidney Replacement Servs., P.C.*, 2007 WL 1218770 (E.D. Mich. 2007) (concluding that medical workers engaged in reasonable opposition when they raised their sexual harassment complaints directly to the onsite supervisor at the correctional facility to which their employer had assigned them, even though they were in effect raising a complaint to their employer's customer).

[52] *See, e.g., Crown Zellerbach*, 720 F.2d at 1013-14 (9th Cir. 1983) (holding that employer violated Title VII when it imposed disciplinary suspension in retaliation for public protest letter by several employees of an "affirmative action award" given to a major customer; even though the letter could potentially harm the employer's economic interests, it was a reasonable manner of opposition since it did not interfere with job performance); *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1136 (5th Cir. 1981) (holding that picketing in opposition to employer's alleged unlawful practice was protected activity under § 704(a) even though employer's business suffered); EEOC Dec. 71-1804, 3 FEP 955 (1971) (holding that right to strike over unlawful discrimination cannot be bargained away in union contract).

[53] Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990)

[54] *See, e.g., Matima v. Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000) (collecting cases).

[55] *See supra* notes 46-51.

patently specious complaints,[56] or badgers a subordinate employee to give a witness statement in support of an EEOC charge and attempts to coerce her to change that statement.[57] The activity will not be considered reasonable if it involves an unlawful act, such as committing or threatening violence to life or property.

Opposition to perceived discrimination does not serve as license for the employee to neglect job duties. If an employee's protests render the employee ineffective in the job, the retaliation provisions do not immunize the employee from appropriate discipline or discharge.[58]

b. Opposition Need Only Be Based on Reasonable Good Faith Belief, Even if Matter Complained of Not Ultimately Deemed Unlawful

A retaliation claim, whether based on participation or opposition, is not defeated merely because the underlying challenged practice ultimately is found to be lawful.[59] An individual need only have had a reasonable belief that the matter complained of violates the EEO laws in order for his statements or actions to constitute protected "opposition."[60]

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[56] *Rollins v. Fla. Dep't of Law Enforcement*, 868 F.2d 397 (11th Cir. 1989) (describing "the sheer number and frequency" of plaintiff's "mostly spurious" discrimination complaints "was overwhelming," and holding that the manner of opposition was not reasonable).

[57] *Jackson v. Saint Joseph State Hosp*., 840 F.2d 1387 (8th Cir. 1988).

[58] *See, e.g., Coutu v. Martin Cnty. Bd. of Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (ruling that retaliation was not proven where plaintiff was criticized by her supervisor not because she was opposing discrimination, but because she was spending an inordinate amount of time in "employee advocacy" activities and was not completing other aspects of her personnel job).

[59] *Trent v. Valley Elec. Ass'n, Inc*., 41 F.3d 524, 526 (9th Cir. 1994) ("[A] plaintiff [in an opposition case] does not need to prove that the employment practice at issue was in fact unlawful under Title VII . . . [plaintiff] must only show that she had a "reasonable belief" that the employment practice she protested was prohibited under Title VII.").

[60] *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (per curiam) (holding that plaintiff's harassment complaint arising out of statement made by coworker while they were serving together on a hiring panel was not reasonable in the circumstances); *Wasek v. Arrow Energy Servs., Inc*., 682 F.3d 463, 470 (6th Cir. 2012) (holding that complaints of sexual harassment were protected opposition even though there was insufficient evidence to prove the alleged harassment was based on sex; "[a] plaintiff does not need to have an egg-shell skull in order to demonstrate a good faith belief that he was victimized"). While opposition is often reasonable, the unusual facts in *Breeden* led the Court to hold in that case that no reasonable person could have believed that a male, serving with plaintiff on a panel screening job applicants, had engaged in potential unlawful harassment when he, on one occasion, read aloud a job applicant's description of sexual conduct, stated that he did not know what it meant, and then laughed when another male employee said, "I'll tell you later." The Court in *Breeden* noted: "The ordinary terms and conditions of the [plaintiff'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 the plaintiff "conceded that it did

As the Seventh Circuit explained, limiting retaliation protections to those individuals whose discrimination claims are meritorious would "undermine[] Title VII's central purpose, the elimination of employment discrimination by informal means; destroy[] one of the chief means of achieving that purpose, the frank and non-disruptive exchange of ideas between employers and employees; and serve[] no redeeming statutory or policy purposes of its own."[61]

Thus, for example, an employee's internal harassment complaint constitutes reasonable opposition even if the harassment falls far short of "severe or pervasive" harassment,[62] since the entire hostile work environment liability standard is predicated on

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not bother or upset her" to read the statement in the application. Accordingly, the Court held that the plaintiff's complaints about the incident did not constitute protected opposition, and she could not maintain a retaliation claim under Title VII. *See Collazo v. Bristol-Myers Squibb Mfg.*, 617 F.3d 39, 48 (1st Cir. 2010) ("[T]he challenged conduct [in *Breeden*] amounted to a single, mild incident or offhand comment, such that no reasonable person could have believed that this conduct violated Title VII."). Similarly, in *Daniels v. Sch. Dist. of Philadelphia*, 776 F.3d 181 (3d Cir. 2015), plaintiff failed to show she engaged in protected opposition when she complained to the principal that his comment during a staff meeting that many of the teachers looked old enough to be grandparents was offensive and ageist. The court in *Daniels* ruled that since the remark was simply an offhand non-derogatory comment directed at no one in particular, plaintiff could not have had an "objectively reasonable belief" that the comment would violate the ADEA. However, the court held plaintiff did engage in protected activity by later sending a letter to human resources that complained about age discrimination, citing the "grandparent" comment, increased scrutiny, being referred to as "old school" by colleagues, lack of assistance in disciplining her students, negative evaluations, the principal questioning students about the plaintiff's pedagogy, and his failure to inform her about her teaching status until after the new school year started despite multiple requests for information. *See also Wright v. Monroe Community Hospital*, 493 Fed.Appx. 233 (2d Cir. 2012) (unpublished) (ruling that nurse's claim of racial harassment by patient with dementia was not protected activity); *Brannum v. Missouri Dep't of Corr.*, 518 F.3d 542, 548 (8th Cir. 2008) (concluding that plaintiff who corroborated "single, relatively tame" sexist remark could not have reasonably believed her conduct constituted protected activity); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000) (employee's complaint of reverse discrimination was objectively unreasonable absent any supporting evidence).

[61] *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980).

[62] *Boyer-Liberto v. Fontainbleau Corp.*, 786 F.3d 264 (4th Cir. 2015); *Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008) (explaining that a plaintiff need only have a "sincere and reasonable belief" that she was opposing an unlawful practice, so the conduct complained of need not have been persistent or severe enough to be unlawful, but need only "fall[] into the category of conduct prohibited by the statute"); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007) (reasoning that the *Faragher-Ellerth* "design works only if employees report harassment promptly, earlier instead of later, and the sooner the better"). *But see Grosdidier v. Broad. Bd. of Governors*, 709 F.3d 19, 24 (D.C. Cir. 2013) ([I]f "a plaintiff contends that the practices she opposes constitute a hostile work environment, the court must assess whether she could have reasonably believed that the workplace was permeated with

encouraging employees to report harassment and employers to act on early complaints, before the harassment becomes "severe or pervasive." Such complaints play a critical role in EEO compliance and enforcement:

> In most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability. An effective complaint procedure 'encourages employees to report harassing conduct before it becomes severe or pervasive,' and if an employee promptly utilizes that procedure, the employer can usually stop the harassment before actionable harm occurs.[63]

A contrary reading of the opposition clause renders an employee unprotected from retaliation for complaints of harassment, even though the employee's personal safety as well as the employer's interest in limiting liability both mitigate in favor of complaining as soon as possible. If internal complaints of harassment that have not yet become severe or pervasive were not protected from retaliation, it would, as the Fourth Circuit explained, "be at odds with the hope and expectation that employees will report harassment early," since "the victim is compelled by the *Ellerth/Faragher* defense to make an internal complaint, i.e., 'to take advantage of any preventive or corrective opportunities provided by the employer.'"[64] "Complaining about alleged sexual harassment to company management is classic opposition activity."[65] Moreover, it would undermine long-standing Supreme Court precedent expressly linking liability for both supervisor and co-worker harassment to the actions employers take after being put on notice of potential harassment, which expressly encourages complaints to be made before the harassment becomes "severe or pervasive."[66] For these reasons, the

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discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.").

[63] EEOC ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, http://www.eeoc.gov/policy/docs/harassment.html.

[64] *Boyer-Liberto v. Fontainbleau Corp.*, 752 F.3d 350 (4th Cir. 2015) (quoting *Faragher*, 524 U.S. at 807).

[65] *Wasek v. Arrow Energy Servs., Inc.* 682 F.3d 463, 470-71 (6th Cir. 2012). *See also supra* notes 59-64 and *infra* notes 66-72, 81.

[66] Contrary rulings such as *Grosdidier* cannot be harmonized with the Supreme Court's jurisprudence under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S.742 (1998), which strongly encourage employees to complain promptly about harassment so that employers can take prompt corrective action before it becomes severe or pervasive and thus violates the law. Moreover, contrary court rulings often are factually distinguishable from the typical harassment complaint because, as in *Breeden*, they involve opposition to a trivial matter that a court finds no reasonable person could believe could lead to a

Commission disagrees with cases that have found no protection from retaliation for employees complaining of harassment that is not yet "severe or pervasive."[67]

The Fourth Circuit concurs that many aspects of Title VII's harassment liability standards compel protecting these early complaints of harassment as reasonable opposition:

> Similarly, the victim of a co-worker's harassment is prudent to alert her employer in order to ensure that, if the harassment continues, she can establish the negligence necessary to impute liability. *See Vance*, 133 S. Ct. at 2453. The reporting obligation is essential to accomplishing Title VII's 'primary objective,' which is "not to provide redress but to avoid harm." *See Faragher*, 524 U.S. at 806. Thus, we have recognized that the victim is commanded to 'report the misconduct, not investigate, gather evidence, and then approach company officials.' *See Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269 (4th Cir. 2001). Further, we have emphasized that an employee's 'generalized fear of retaliation does not excuse a failure to report . . . 'harassment,' particularly where 'Title VII expressly prohibits any retaliation against [the reporting employee].' *See Barrett*, 240 F.3d at 267.[68]

To encourage the "early reporting vital to achieving Title VII's goal of avoiding harm," even reporting an isolated single incident of harassment is protected opposition if the employee "reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create such an environment

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violation of the EEO laws. *See, e.g., Grosdidier*, 709 F.3d at 24 (complaint about circulation of an e-mail with a suggestive image of a well-known musician and excessive hugging and kissing between a female coworker and several male coworkers and visitors was not protected opposition); *Huang v. Continental Cas. Co.*, 754 F.3d 447 (7th Cir. 2014) (complaint that supervisor engages in favoritism and made comment that the plaintiff was "pissing him off" was not protected opposition). *See also supra* note 60.

[67] For example, in the Commission's view, an employee who reports sexual harassment through the employer's accepted channels has engaged in protected opposition under Title VII, even if the harassment complained of was not yet actionable. Brief of EEOC as Amicus Curiae Supporting Appellant, *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015) (No. 13-2278), http://www.eeoc.gov/eeoc/litigation/briefs/demasters.html. *See also Wasek*, 682 F.3d at 470-71 (holding that complaints of sexual harassment were protected opposition even though there was insufficient evidence to prove the alleged harassment was based on sex).

[68] *Boyer-Liberto*, 752 F.3d at 282-83.

or that such an environment is likely to occur."[69] Furthermore, an employee might reasonably complain about even a single incident.[70]

The Commission also takes the position that individuals who raise EEO allegations internally or contribute to such investigations voluntarily or when required are, under the plain terms of the statute, "participating" in investigations. Some courts, however, have analyzed such actions as protected under the "opposition" clause. Whether viewed as participation or opposition, the statutory anti-retaliation protection in the Commission's view extends not only to those who complain about potential EEO violations, but also, for example, to those who provide neutral or employer-favorable information about an alleged violation.[71] Encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of the EEO laws, so an employee who acts reasonably to assist the employer in any way with this endeavor is, by definition, supporting enforcement of the law and thereby opposing practices made unlawful by an EEO statute.[72]

A complaint about an employment practice constitutes protected opposition only if the individual explicitly or implicitly communicates the belief that the practice could constitute unlawful employment discrimination.[73] However, because individuals often may not know the specific requirements of the anti-discrimination laws enforced by the EEOC, they may make broad or ambiguous complaints of unfair treatment. Such

[69] *Id.* at 282.

[70] *Id.* at 268 ("[A]n employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone.").

[71] *See supra* notes 13, 20-24, and accompanying text. The two clauses of the anti-retaliation provision do not operate in isolation. An employee who testifies in support of a charging party in an EEOC investigation, for example, would be opposing conduct proscribed by Title VII and also participating in an investigation "under this subchapter." The two subsections of section 704(a) are best read not as mutually exclusive sub-types of retaliation, but as complementary provisions designed to prohibit all retaliation that could reasonably deter the exercise of rights protected under Title VII.

[72] For this reason, the Commission disagrees with those cases requiring an "objectively" reasonable belief that one is opposing discrimination. *See, e.g., Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351-52 (11th Cir. 1999). However, even assuming an "objectively" reasonable belief is required, an employee's participation in his employer's own investigation should always satisfy this standard.

[73] *See, e.g., Barber v. CSX Distrib. Servs.*, 68 F.3d 694 (3d Cir. 1995) (ruling that plaintiff's letter to defendant's human resources department complaining about unfair treatment and expressing dissatisfaction that job he sought went to a less qualified individual did not constitute ADEA opposition, because letter did not explicitly or implicitly allege that age was reason for alleged unfairness).

communication is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination. Similarly, it is reasonable for an employee to believe conduct violates the EEO laws if the Commission, as the primary agency charged with enforcement, has adopted that interpretation.

EXAMPLE 3
Protected Opposition – Complaints to Management Based on Legal Position Taken by EEOC

An employee believes he is being harassed by co-workers based on his sexual orientation, and complains to his manager and human resources. This is protected activity under Title VII, because in light of EEOC's stated legal position and enforcement efforts, individuals could have a reasonable belief that sexual orientation discrimination is actionable as sex discrimination under Title VII.[74]

EXAMPLE 4
Protected Opposition – Reasonable and Good Faith Belief

CP complains to her office manager that her supervisor failed to promote her because of her gender after an apparently less qualified man was selected. She then files an EEOC charge alleging subsequent retaliatory actions. EEOC finds reasonable cause to believe that CP has engaged in protected opposition regardless of whether the promotion decision was in fact discriminatory because she had a reasonable and good faith belief that discrimination occurred.

[74] *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015), http://www.eeoc.gov/decisions/0120133080.pdf; *see also* Brief of EEOC as Amicus Curiae in Support of Panel Rehearing in *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014) (12-1723) ("To hold otherwise would require discrimination victims or witnesses – usually 'lay' persons – to master the subtleties of sex-discrimination law before securing safe harbor in the broad remedial protections of Title VII's anti-retaliation rule."), http://www.eeoc.gov/eeoc/litigation/briefs/caterpillar2.html. *See, e.g., Berg v. La CrosseCooler Co.*, 612 F.2d 1041 (7th Cir. 1980) (holding that employee, who advised co-worker that employer's pregnancy disability policy was illegal, engaged in protected opposition even though it was not yet settled law that such policies constitute sex discrimination in violation of Title VII); *Birkholz v. City of New York et al.*, 2012 WL 580522, at *7-8 (E.D.N.Y. Feb. 22, 2012) ("If opposition to sexual-orientation-based discrimination was not protected activity, employees subjected to gender stereotyping would have to base their decision to oppose or not oppose unlawful conduct on a brittle legal distinction [between sexual orientation and sex discrimination], a situation that might produce a chilling effect on gender stereotyping claims.")

The opposition clause, however, does not protect complaints about trivial matters that no reasonable person could believe could become harassment or other discrimination.[75]

EXAMPLE 5
Not Protected Opposition –
Complaint Not Motivated By
Reasonable and Good Faith Belief

Same as above, except the job sought by CP was in accounting and required a CPA license, which CP lacked and the selectee had. CP knew that it was necessary to have a CPA license to perform this job. CP has not engaged in protected opposition because she did not have a reasonable and good faith belief that she was rejected because of sex discrimination.

c. Examples of Opposition

Protected opposition includes actions such as: complaining about alleged discrimination against oneself or others, or threatening to complain; providing information in an employer's internal investigation of an EEO matter; refusing to obey an order reasonably believed to be discriminatory; advising an employer on EEO compliance; resisting sexual advances or intervening to protect others; passive resistance (allowing others to express opposition); and requesting reasonable accommodation for disability or religion.

- **Complaining about alleged discrimination against oneself or others, or threatening to complain**[76]

EXAMPLE 6

CP complains to her supervisor about graffiti in her workplace that is derogatory toward women. Although CP

[75] See discussion of *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), and similar cases, *supra* notes 60 & 66.

[76] The Commission also views internal complaints of discrimination to management as participation, but if alternatively characterized as opposition, the analysis here would apply. This issue is also discussed *supra* at notes 13, 20-24, 58-71 and the accompanying text.

does not specify that she believes the graffiti creates a hostile work environment based on sex, her complaint reasonably would have been interpreted by the supervisor as opposition to sex discrimination, due to the sex-based content of the graffiti. The graffiti does not need to rise to the level of severe or pervasive hostile work environment harassment in order for her complaint to be reasonable opposition.

- **Providing information in an employer's internal investigation of an EEO matter**

EXAMPLE 7

An employee who has not lodged any complaint of her own is identified as a witness in an employer's internal investigation of a co-worker's sexual harassment allegations. The employee is interviewed by the employer and provides corroborating information about sexual harassment she witnessed and/or experienced. This is protected opposition, even though she has not lodged an internal complaint of her own.[77]

[77] Reversing summary judgment in favor of the employer, the Supreme Court in *Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn.*, 555 U.S. 271, 279-80 (2009), held that the plaintiff's participation in an employer's internal investigation of another worker's harassment complaint constituted opposition to unlawful discrimination protected by Title VII. During the employer's investigation of sexual harassment complaints made by coworkers, the plaintiff reported that she also had been sexually harassed. The Court held that the opposition clause in Title VII extends beyond "active, consistent" conduct "instigat[ed]" or "initiat[ed]" by the employee. "There is. . . 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." *Id*. at 277-78. The Court also concluded that requiring "active" opposition would undermine the *Faragher-Ellerth* framework. "If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others." *Id*. at 279; *see also Jute v. Hamilton Sundstrand Corp*, 420 F.3d 166 (2d Cir. 2005) (holding that Title VII's anti-retaliation provision protects a person who volunteers to testify on behalf of a coworker, even if the person is never actually called to testify; the evidence indicated that the coworker identified the plaintiff as a witness to alleged unlawful harassment, and although the parties settled the coworker's complaint and the plaintiff was never called to testify, the employer was put on notice that had she been called, she would have testified for the coworker); *EEOC v. Creative Networks, L.L.C.*, 108 Fair Emp. Prac. Cas. (BNA) 542, 2010 WL 276742 (D. Ariz. Jan. 15, 2010) (ruling that Title VII's retaliation provision protected plaintiff who was named by coworker as witness in discrimination claim; Title VII protects a worker

- **Refusing to obey an order reasonably believed to be discriminatory**

Refusal to obey an order constitutes protected opposition if the individual reasonably believes that the order requires him or her to carry out unlawful employment discrimination.[78]

EXAMPLE 8

> Plaintiff, who works for an employment agency referring individuals to fill temporary and permanent positions with corporate clients, is instructed by his manager not to refer any African-Americans to a particular client per the client's request. Plaintiff tells the manager this would be discriminatory, and proceeds instead to refer employees to this client on an equal opportunity basis. The EEOC finds reasonable cause to believe that Plaintiff's refusal to obey the order constitutes "opposition" to an unlawful employment practice. The plaintiff could show that his enforcement of the policy would have made engaging in race discrimination a term or condition of *his* employment with the employment agency.[79]

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whether "poised to support co-worker's discrimination claim, dispute the claim, or merely present percipient observations").

[78] Protected opposition to discriminatory conduct can also include refusal to implement a discriminatory policy. *Crawford*, 555 U.S. at 277 ("[W]e would call it 'opposition' if an employee took a stand against an employer's discriminatory practices not by 'instigating' action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons."). *See, e.g., EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998) (ruling that personnel director's refusal to fire employee because of his race constituted protected activity because he was opposing the employer's discriminatory policy of excluding African-American employees from important positions).

[79] *Foster v. Time Warner Ent. Co.*, 250 F.3d 1189 (8th Cir. 2001) (holding that customer service manager engaged in statutorily protected opposition activity where she repeatedly questioned her new supervisor about how a revised sick leave policy affected ADA accommodations previously granted to an employee with epilepsy whom she supervised, and then refused to implement the new policy by continuing to allow the employee to work flexible hours); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (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).

- **Advising an employer on EEO compliance**

EXAMPLE 9

Plaintiff, XYZ Corp.'s human resources manager, came to believe that the company was improperly denying certain requested reasonable accommodations to which individuals with disabilities were entitled to under the Americans with Disabilities Act, as amended. Shortly after she reported these ADA violations to supervisory management, her employment was terminated. Even though her oral reports to supervisors fell within the ambit of her managerial duties, her reports of unlawful company actions were protected opposition. Protected activity includes EEO complaints by managers, human resources staff, and EEO advisors -- even when those complaints happen to be made as part of the individual's job duties -- provided the complaint meets all the other relevant requirements for protected activity.[80]

- **Resisting sexual advances or intervening to protect others**

EXAMPLE 10
Protected Opposition – Resisting
Supervisor's Sexual Advances

In response to a supervisor's repeated sexual comments to her, an employee tells the supervisor "leave me alone" and "stop it." A co-worker intervenes on her behalf, also asking the manager to stop. The employee's resistance and the co-worker's intervention both constitute protected opposition. Any retaliation by the supervisor would be actionable.[81]

[80] *Foster*, 250 F.3d 1189. *See also supra* notes 38-45.

[81] In *EEOC v. New Breed Logistics*, 783 F.3d 1057 (6th Cir. 2015), the court held that an employee's demand that a supervisor cease harassing conduct constitutes protected activity under Title VII. The court explained that "[i]f an employee demands that his/her supervisor stop engaging in this unlawful practice—i.e., resists or confronts the supervisor's unlawful harassment—the opposition clause's broad language confers protection to this conduct." Relying in part on the statutory text, the court observed that "[i]mportantly, the language of Title VII does not specify to whom protected activity must be directed." *See also Warren v. Ohio Dept. of Public Safety*, 24 Fed.Appx. 259, 265 (6th Cir.2001) ("Under the opposition clause, ... [t]here is no qualification on who the individual doing the complaining may be or on who the party to whom the complaint is made."); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000) (holding that a reasonable jury could conclude plaintiff opposed discriminatory conduct when she told her

- **Passive resistance**

Passive opposition is the act of allowing others to express opposition. Such an action may itself be protected under the opposition clause.

EXAMPLE 11
Protected Opposition – Refusal to Implement Instruction to Interfere with Exercise of EEO Rights

A supervisor does not carry out his management's instruction to discourage subordinates from filing discrimination complaints.[82] Any adverse action by management against the supervisor in reprisal for his refusal to prevent complaints would be actionable retaliation.

- **Requesting reasonable accommodation for disability or religion**

A request for reasonable accommodation of a disability constitutes protected activity under the ADA, and therefore retaliation for such requests is unlawful.[83] By the same rationale, persons requesting religious accommodation under Title VII are protected against retaliation for making such requests.[84] Although a person making such a request

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harasser, who was also her supervisor, to stop harassing her); *EEOC v. IPS Indus., Inc.*, 899 F. Supp. 2d 507 (N.D. Miss. 2012) (ruling that an employee's complaint to a supervisor about sexual harassment, including confronting the supervisor about his insinuations that the employee was involved in a relationship with a coworker, telling the supervisor not to touch her again after he reached around behind her, and informing him that she would only return to work if he stopped touching her, were not "mere rejections" of inappropriate sexual conduct, but rather constituted protected conduct under Title VII's opposition clause); *Ross v. Baldwin Cnty. Bd. of Ed.*, No. 06–0275, 2008 WL 820573, at *6 (S.D. Ala. Mar. 24, 2008) ("It would be anomalous, and would undermine the fundamental purpose of the statute, if Title's VII's protections from retaliation were triggered only if the employee complained to some particular official designated by the employer."). These protections could also extend to even non-verbal resistance to an unwanted sexual advance by a supervisor. *But see Lemaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383 (5th Cir. 2007) (concluding that rejecting sexual advances is not protected activity for purposes of a Title VII retaliation claim).

[82] *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (ruling that employee stated cause of action for retaliation when he alleged that his employer retaliated against him for failing to prevent subordinate from filing a sexual harassment complaint).

[83] *Kelley v. Correctional Med. Servs., Inc.*, 707 F.3d 108 (1st Cir. 2013) (concluding that evidence of supervisor's ongoing hostility about an accommodation the employee received could support an inference of retaliatory intent); *Cloe v. City of Indianapolis*, 712 F.3d 1171 (7th Cir. 2013); *Ellison v. Napolitano*, 901 F. Supp. 2d 118 (D.D.C. 2012).

might not literally "oppose" discrimination or "participate" in a complaint process, s/he is protected against retaliation for making the request. As one court stated: "[i]t would seem anomalous . . . to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge. This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation."[85]

EXAMPLE 12
Protected Opposition – Request for Exception to Uniform Policy as a Religious Accommodation

After a retail employee's supervisor denies her request to wear her religious headscarf as an exception to the new uniform policy, the corporate human resources department instructs the supervisor to grant the request because there is no undue hardship. Motivated by revenge, the supervisor thereafter gives the employee an unjustified poor performance rating and denies her request to attend training that he approves for her co-workers. The EEOC finds reasonable cause to believe that the supervisor retaliated against the employee in violation of Title VII.[86]

[84] *Schellenberger v. Summit Bancorp., Inc.*, 318 F.3d 183, 190 (3d Cir. 2003).

[85] *Soileau v. Guilford of Me.*, 105 F.3d 12, 16 (1st Cir. 1997); *see also Garza v. Abbott Labs.*, 940 F. Supp. 1227, 1294 (N.D. Ill. 1996) (ruling that plaintiff engaged in statutorily protected expression by requesting accommodation for her disability). The courts in *Soileau* and *Garza* only considered whether accommodation requests fall within the opposition or participation clause in Section 503(a) of the ADA. Note, however, that Section 503(b) more broadly makes it unlawful to interfere with "the exercise or enjoyment of . . . any right granted or protected" by the statute.

[86] *See, e.g., Wilkerson v. New Media Tech. Charter Sch.*, 522 F.3d 315, 319-20 (3d Cir. 2008) (ruling that employee's refusal to participate in school ceremony because of her religious beliefs was protected opposition activity, and school's subsequent decision not to rehire her due to her nonparticipation was actionable as retaliation).

d. Inquiries and Other Discussions Related to Compensation[87]

Protections against retaliation for inquiring about or otherwise discussing compensation information include: protections enforced by the EEOC that prohibit retaliation for protected activity; protections enforced by the U.S. Department of Labor that prohibit adverse action against employees who discuss their compensation; and protections enforced by the National Labor Relations Board for discussion of wages as concerted activity.

According to the U.S. Department of Labor, approximately 60% of private sector workers surveyed nationally reported that they were either contractually forbidden or strongly discouraged by management from discussing their pay with their colleagues.[88] While most private employers are under no obligation to make wage information public, actions taken by an employer to prohibit employees from discussing their compensation with one another may deter protected activity, whether pursuant to a so-called "pay secrecy" policy or simply an employer action. Reprisal for discussing compensation may implicate a number of different federal laws, including the following:

(1) Compensation Discussions as Opposition Under the EEO Laws

Materially adverse actions against employees for protected opposition activity relating to discussion of their pay may constitute retaliation in violation of the EEO laws. For example, when an employee communicates to management or co-workers to complain or ask about compensation, or otherwise discusses rates of pay, the communication may constitute protected opposition under the EEO laws, making employer retaliation actionable based upon the facts of a given case. The anti-retaliation provisions under the EEO laws "deter the many forms that effective retaliation can take" and "prohibit a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in their exercise of protected activities."[89]

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[87] This section provides examples of existing federal authorities. Furthermore, various states have additional protections. A potential future protection that has been introduced but not enacted is the proposed federal legislation known as the Paycheck Fairness Act, S. 862 and H.R. 1619, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/862/all-info (last visited Jan. 12, 2016), that would, if passed by Congress and enacted, provide an explicit statutory protection to employees from retaliation related to wage disclosure.

[88] WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, PAY SECRECY FACT SHEET (Aug. 2014) (noting results from 2010 Institute for Women's Policy Research/Rockefeller Survey of Economic Security), http://www.dol.gov/wb/media/pay_secrecy.pdf (last visited Jan. 12, 2016).

[89] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63, 66-67 (2006). Talking to co-workers to gather information or evidence in support of a potential EEO claim is protected

EXAMPLE 13
Protected Opposition –
Wage Complaint Reasonably Interpreted as EEO-Related

A temporary janitor learns that she is being paid a dollar less per hour than previously-hired male counterparts. She approaches her supervisor and says she believes they are "breaking some sort of law" by paying her lower wages than previously paid to male temporary custodians. This is protected opposition.[90]

EXAMPLE 14
Protected Opposition –
Discussion of Suspected Pay Discrimination Despite Employer's Policy Prohibiting Discussions of Pay

CP was disciplined by R because she discussed with co-workers her belief that she was being discriminated against based on sex because her pay was lower than that of male employees doing similar work. R considered the CP's discussions of pay to violate R's "Code of Conduct," which prohibits discussions of pay, and therefore disciplined CP for engaging in discussions about suspected pay discrimination. R's discipline of CP constitutes unlawful retaliation for protected opposition.

EXAMPLE 15
Not Protected Opposition –
Wage Complaint Would Not Reasonably Have Been Interpreted as EEO-Related

CP, who is African American, requests a wage increase from R, arguing that he deserves to get paid a higher salary. He does not state or suggest a belief that he is being subjected to wage discrimination based on race or any other

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opposition, provided the manner of opposition is reasonable. *See Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1390-91 (8th Cir. 1988) (majority and dissent agreeing that gathering information or evidence from co-workers is protected activity, though reaching different conclusions about whether employee's manner of opposition was reasonable on facts of the case).

[90] *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989-90 (6th Cir. 1992) (holding that retaliation claim was actionable under FLSA, as incorporated into the Equal Pay Act, based on reprisal against female temporary custodian for her complaint to supervisor that male counterparts earned $1/hour more).

protected characteristic. There is no basis to conclude that R would reasonably have interpreted CP's complaint as opposition to race or other discrimination prohibited by the EEO laws, because nothing indicated the alleged unfairness was challenged based on an EEO-protected reason. CP's protest therefore does not constitute protected "opposition."

(2) Related Protections Under Other Federal Authorities

In addition to protections under the EEO laws, there are related protections under other federal authorities which may protect employees from punitive employer actions for discussions related to compensation.

(a) Department of Labor Regulation - Federal Contractors and Subcontractors

Under Executive Order 11246, as amended by Executive Order 13665 (April 8, 2014), federal contractors are prohibited from taking adverse action against employees who discuss, disclose, or inquire about their compensation or that of other employees or applicants.[91] The Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor enforces this prohibition and issued implementing regulations, available at http://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22547.pdf (last visited Jan. 12, 2016). Federal contractors and subcontractors subject to E.O. 11246 are required to refrain from discharging, or otherwise discriminating against, employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants. The OFCCP rule does not protect these conversations in all instances, and contains certain defenses (e.g., where access to compensation information is necessary to perform an essential job function or another routinely assigned business task, or the function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information).[92] In addition, the OFCCP rule provides a defense for contractors in the event that compensation inquiries are made while violating a consistently and uniformly applied workplace rule, so long as that rule does not generally prohibit compensation disclosures.

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[91] Regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) implementing the amended Executive Order took effect on January 11, 2016. See http://www.dol.gov/ofccp/PayTransparency.html (providing links to the OFCCP regulations and related publications) (last visited Jan. 12, 2016).

[92] The OFCCP rule does, however, allow such employees to discuss their own compensation with other employees, or to discuss possible disparities involving another employee's compensation with a management official, or while using the contractor's internal complaint process, or in response to a formal complaint or charge, investigation, proceeding, hearing or action.

Contractors and stakeholders covered by OFCCP's regulations may contact the OFCCP's Customer Service Desk at 1–800–397–6251, the OFCCP District or Area offices, or the OFCCP's public e-mail box at OFCCP–Public@dol.gov with questions about the application of the OFCCP regulatory requirements or for information on filing a complaint within applicable time deadlines. More information is also available in the OFCCP publications FREQUENTLY ASKED QUESTIONS: EO 13665 FINAL RULE, http://www.dol.gov/ofccp/regs/compliance/faqs/PayTransparencyFAQs.html, and KNOW YOUR RIGHTS – PAY TRANSPARENCY FACT SHEET, http://www.dol.gov/ofccp/pdf/OFCCPPaySecrecyFactSheetKnowYourRights_ES_QA_508c.pdf (last visited Jan. 12, 2016).

(b) National Labor Relations Act (NLRA)

The NLRA protects non-supervisory employees who are covered by the Act from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved in the effort.[93] The NLRA prohibits employers from discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants. The NLRA protection, however, does not extend to supervisors, managers, agricultural workers, and employees of rail and air carriers. More information about the scope of the NLRA protections, charge filing, and compliance and enforcement can be found on the National Labor Relations Board website at www.nlrb.gov.

3. Range of Individuals Who Engage in Protected Activity

Anti-retaliation protections extend to many individuals, including those who make formal or informal allegations of EEO violations (whether or not successful), those who serve as witnesses or participate in investigations, those who exercise rights such as requesting religious or disability accommodation, and even those who are retaliated against after their employment relationship ends.

[93] *See, e.g., NLRB v. Main Street Terrace Care*, 218 F.3d 531 (6th Cir. 2000) (concluding that employer violated NLRA by promulgating a rule prohibiting pay discussions, even though it was unwritten and not routinely enforced, and improperly fired plaintiff because, in violation of oral instruction by managers, she discussed wages with co-workers to determine whether they were being paid fairly); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510 (9th Cir. 1993) ("As [the employer] concedes, an unqualified rule barring wage discussions among employees without limitations as to time or place is presumptively invalid under the Act."); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (holding that employer's rule broadly prohibiting wage discussions was an unfair labor practice under § 8(a)(1), because "wage discussions can be protected activity" and "an employer's unqualified rule barring such discussions has the tendency to inhibit such activity").

As the above discussion illustrates, protected activity can take many forms. Individuals who engage in protected activity include:

- those who participate in the EEO process in any way, including as a complainant, representative, or witness for any side, and regardless of their job duties or managerial status;[94]

- those who oppose discrimination on behalf of themselves or others,[95] even if their underlying discrimination allegation ultimately is not successful;[96]

- those who tell their employer they intend to file a charge or lawsuit, even if the filing is not ultimately made;[97]

- those whom an employer mistakenly believes have engaged in protected activity;[98]

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[94] *See infra* §§ II.A.1. (discussion of participation as protected activity) and II.A.2. (discussion of opposition as protected activity). However, the anti-retaliation provisions are not a "catch-all" providing rights to anyone who has challenged their employer in the past for any reason. *See, e.g., Rorrer v. City of Stowe*, 743 F.3d 1025 (6th Cir. 2014) (holding that plaintiff's prior arbitration of non-EEO claims was not protected activity that could support subsequent ADA retaliation claim).

[95] *Kelley v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008) (concluding that attorney who represented city in EEO mediation was protected against retaliation when his opposing counsel, who subsequently was elected mayor, terminated his employment); *Moore v. City of Philadelphia*, 461 F.3d 331 (3d Cir. 2006) (holding that white employees who complain about a racially hostile work environment against African-Americans are protected against retaliation for their complaints); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993) (ruling that § 704(a) protects plaintiff against retaliation even where plaintiff did not himself engage in protected activity, but rather his co-worker engaged in protected activity on his behalf).

[96] *Supra* note 17; *see also Learned v. City of Bellevue*, 860 F.2d 928, 932–33 (9th Cir. 1988) ("[I]t is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation … If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled.").

[97] *See, e.g., EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) (holding that plaintiff engaged in protected activity when she informed her supervisor that she intended to file charge); *Gifford v. Atchison, Topeka & Santa Fe Ry Co.*, 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) (ruling that writing a letter to employer and union threatening to file EEOC charge is protected); *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997) (ruling that federal employee's contact with agency EEO Counselor is protected activity under Title VII).

[98] *Fogleman v. Mercy Hospital*, 283 F.3d 561, 572 (3d Cir. 2002) (holding that employee who did not engage in protected activity could nevertheless challenge retaliation where employer took adverse action because it erroneously believed plaintiff had engaged in protected activity);

- those whose protected activity involved a different employer (e.g., employer refuses to hire an applicant because she filed an ADA charge against her former employer for failure to provide a sign language interpreter, or because she opposed her previous employer's exclusion of qualified applicants with hearing impairments);[99]

- those whose protected activity occurred against a former employer, even though the retaliation occurs later, after the employment relationship ends[100] (e.g., former employer later retaliates by giving an unjustified, untruthful negative job reference, by refusing to provide a job reference, or by informing an individual's prospective employer about the individual's prior protected activity);[101]

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see Brock v. Richardson, 812 F.2d 121, 123-25 (3d Cir. 1987) (holding that FLSA's anti-retaliation provision prohibits retaliation by employer where employer believed employee had engaged in protected activity, even though employee had not done so).

[99] For example, in *McMenemy v. City of Rochester*, 241 F.3d 279 (2d Cir. 2001), a firefighter who brought a Title VII action alleging that he was denied a promotion in retaliation for having initiated an investigation into a union president's sexual assault of a union secretary engaged in "protected activity." The court rejected a lower court ruling that "protected activity" only includes opposition to unlawful employment practices by the same covered entity that engaged in the alleged retaliatory acts. In rejecting this argument, the court adopted the EEOC's position that "[a]n individual is protected against retaliation for participation in employment discrimination proceedings involving a different entity." This is especially true, the court held where, as here, "the two employers have a relationship that may give one of them an incentive to retaliate for an employee's protected activities against the other." *See also Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870, 873-74 (6th Cir. 1991) (concluding that defendant's frequent reference to plaintiff's sex discrimination action against prior employer warranted inference that defendant's refusal to hire was retaliatory).

[100] *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (ruling that plaintiff may sue a former employer for retaliation when it provided a negative reference to a prospective employer where the plaintiff subsequently applied to work).

[101] *See, e.g., infra* Examples 22-24 and notes 171-172*; Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004) (holding that plaintiff may allege retaliation from an unjustified negative job reference and need not prove that she would have received the job absent the reference); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166 (2d Cir. 2005) (reversing a grant of summary judgment to the employer on a retaliatory reference claim because the evidence could support a finding that the job offer was rescinded after prospective employer was told by former employer that plaintiff, who had been listed as a favorable witness in a co-worker's EEO litigation, "had a lawsuit pending" against the company). As EEOC's amicus curiae brief filed in *Jute* explained: "An employer's practice of informing prospective employers that a former employee is involved in litigation with his former employer is likely to harm the former employee's ability to obtain future employment and, therefore, is reasonably likely to deter persons from filing charges." *See also EEOC v. L.B. Foster Co.*, 123 F.3d 746 (3d Cir. 1997); *Ruedlinger v. Jarrett*, 106 F.3d 212 (7th Cir. 1997)); *Serrano v. Schneider, Kleinick, Weitz, Damashek & Shoot, P.C.*, No. 02-CV-

- those who raise discrimination allegations but are ultimately determined not to be protected by the substantive provisions of the discrimination laws (e.g., retaliation against an individual for filing a disability discrimination charge, even if it is ultimately determined that she is not qualified for the position held or desired,[102] or retaliation against an individual for raising an age discrimination allegation, even if he is not age 40 or over);[103] and,

- those whose protected activity related to any provision of the ADA, not just the employment discrimination title of the statute (e.g., opposition to discrimination in state and local government services, public accommodations, commercial facilities, or telecommunications).[104]

See also "Third Party Retaliation," *infra*, at § II.B.4.

B. Adverse Action

Retaliation expansively reaches any action that is "materially adverse," meaning any action that might well deter a reasonable person from engaging in protected activity.

1. General Rule

The anti-retaliation provisions make it unlawful to take an "adverse action" against an individual because s/he engaged in protected activity. The definition of "adverse action" in the anti-retaliation provisions is broader than an "adverse action" under the non-discrimination provisions.[105] Instead, retaliation expansively reaches any

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1660, 2004 WL 345520, at *7-8 (S.D.N.Y. Feb. 24, 2004) (holding that informing a prospective employer about an employee's lawsuit constitutes an adverse action under 704(a) where "surely" the plaintiff's former supervisor "knew or should have known" that, by revealing the fact that the plaintiff had sued her former employer, "he could severely hurt her chances of finding employment").

[102] *Krouse v. Am. Sterilizer*, 126 F.3d 494 (3d Cir. 1997) (ADA). The ADA contains an additional protection for individuals who have been subject to interference with the exercise of rights under the ADA, by virtue of coercion, threats, or other pressure. Such interference is separately prohibited under the ADA, in addition to retaliation 42 U.S.C. § 12203(b); *see infra* § IV.

[103] *Anderson v. Phillips Petrol.*, 722 F. Supp. 668, 671-72 (D. Kan. 1989) (ADEA).

[104] 42 U.S.C. § 12203(a).

[105] *See Burlington N.*, 548 U.S. at 67 ("Title VII's substantive [discrimination] provision and its antiretaliation provision are not coterminous" because the "scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm …

action that is "materially adverse," meaning any action that might well deter a reasonable person from engaging in protected activity.[106] An action need not be materially adverse standing alone, as long as the employer's retaliatory conduct, considered as a whole, would deter protected activity.[107] This standard and its underlying rationale apply to retaliation under all the statutes enforced by the EEOC, and also apply to both private and federal sector employers.[108] The standard can be satisfied even if the individual was not in fact deterred.[109]

Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

[106] *Id.*

[107] *See, e.g., Wooten v. McDonald Transit Assocs., Inc.*, 775 F.3d 689, 696 (5th Cir. 2015) (holding that plaintiff satisfied adverse action requirement by describing "variety of concrete actions . . . that together might amount to an adverse employment action"); *Sanford v. Main Street Baptist Church Manor, Inc.*, 327 F. App'x 587, 599 (6th Cir. 2009) ("[W]hile some of the incidents alone may not rise to the level of an adverse employment action, the incidents taken together might dissuade a reasonable worker from making or supporting a discrimination charge.").

[108] This broad definition of "materially adverse" from *Burlington Northern* applies not only to private, and state and local government employment, but also to federal sector employment. Although the federal sector retaliation provision of Title VII refers to "personnel actions affecting employees or applicants," rather than actions that "affect employment or alter the conditions of the workplace," the Commission has taken the position that these two retaliation standards must be the same. *See* 77 FR 43498 (July 25, 2012), Preamble to Final Rule, 29 C.F.R. Part 1614 (July 25, 2012), https://federalregister.gov/a/2012-18134. Indeed, all the appellate courts to have considered this issue appear to agree. *See, e.g., Caldwell v. Johnson*, 289 F. App'x. 579, 589 (4th Cir. 2008) (unpublished) (applying *Burlington Northern* and expressly rejecting different standards for retaliation claims in the private sector and for federal employees, the court noted that the language proscribing discrimination by the federal government in "[a]ll personnel actions," 42 U.S.C. §2000e-16(a), "covers a broader range of activity than does the private anti-discrimination statute, which must involve activity related to 'compensation, terms, conditions, or privileges of employment'"); *see also De-Caire v. Mukasey*, 530 F.3d 1, 19 (1st Cir. 2008) (applying *Burlington Northern* to retaliation claim of deputy U.S. Marshal); *Thomas v. Miami Veterans Med. Ctr.*, 290 Fed.App'x. 317, 320 (11th Cir. 2008) (applying *Burlington Northern* to retaliation claim of employee of Department of Veterans Affairs and stating, "[t]he Supreme Court has held that in order to sustain a Title VII retaliation claim, an employee must show that `a reasonable employee would have found the challenged action materially adverse'"); *Lapka v. Chertoff* 517 F.3d 974, 985 (7th Cir. 2008) (applying *Burlington Northern* to retaliation claim by employee of the Department of Homeland Security); *Novak v. Nicholson*, 231 Fed.App'x. 489, 495 (7th Cir. 2007) (applying *Burlington Northern* to retaliation claim by former employee of Department of Veterans Affairs); *Patterson v. Johnson*, 505 F.3d 1296, 1299 (D.C. Cir. 2007) (applying *Burlington Northern* standard to claim by employee of the United States Environmental Protection Agency); *Weber v. Battista*, 494 F.3d 179, 186 (D.C. Cir. 2007) (applying *Burlington Northern* to retaliation claim by employee of the National Labor Relations Board); *Nair v. Nicholson*, 464 F.3d 766, 768-69 (7th Cir. 2006) (applying *Burlington Northern*

2. Types of Materially Adverse Actions

Work-Related Actions. The most obvious types of adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.[110] Other types of adverse actions include work-related threats, warnings, reprimands,[111] transfers,[112] negative or lowered evaluations,[113] verbal or physical abuse (whether or not

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to retaliation claim by employee of Department of Veteran Affairs and stating, "[w]hile it is now settled that retaliation to be actionable need not take the form of adverse employment action ... [t]he test is whether the conduct alleged as retaliation would be likely to deter a reasonable employee from complaining about discrimination."); *de Jesus v. Potter*, 211 Fed.App'x. 5, 11-12 (1st Cir. 2006) (remanding retaliation claim by employee of United States Postal Service in light of *Burlington Northern*, which "chang[ed] the legal standard to be applied to claims of retaliation brought under Title VII"); *see also Hare v. Potter*, 220 F. App'x. 120 (3d Cir. 2007) (unpublished) (applying *Burlington Northern* to retaliatory hostile work environment alleged by U.S. Postal Service employee); *Twisdale v. Paulson*, 595 F. Supp. 686 (S.D. W.Va. 2009) (rejecting government's argument that *Burlington Northern* does not apply in the federal sector, based on appellate case law).

[109] *See, e.g., Patane v. Clark*, 508 F.3d 106, 116 (2d Cir. 2007) (rejecting the employer's argument that the challenged action was not sufficiently adverse under *Burlington Northern* since it did not dissuade the plaintiff herself from reporting sexual harassment again when it recurred, the court also commented that this argument was "entirely unconvincing, since it would require that *no* plaintiff who makes a second complaint about harassment could *ever* have been retaliated against for an earlier complaint") (emphasis in original).

[110] *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (observing that suspensions and terminations "are by their nature adverse").

[111] *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) (applying the Title VII retaliation standard for materially adverse action in an FMLA retaliation claim, the court held that a letter of reprimand is materially adverse even if it "does not directly or immediately result in any loss of wages or benefits, and does not remain in the employment file permanently"); *Ridley v. Costco Wholesale Corp.*, 217 F. App'x. 130 (3d Cir. 2007) (upholding jury verdict finding that although demotion was not retaliatory, the post-demotion transfer to warehouse, counseling notices for minor incidents, and failure to investigate complaints about these actions were unlawful retaliation).

[112] *Kesler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 209 (2d Cir. 2006) (holding that transfer of high level executive without any loss of pay was actionable as retaliation where he was relegated to a non-supervisory role and non-substantive duties).

[113] *See generally Walker v. Johnson*, 798 F.3d 1085 (D.C. Cir. Aug. 18, 2015) ("Whether an assessment is adverse does not hinge on whether it was lowered; rather, the question is whether discrimination or retaliation caused a significant, tangible harm . . . Proof that a rating unchanged from a prior period was nonetheless materially adverse could be difficult, but cannot categorically be ruled out. An employee whose volume and quality of work demonstrably improved, or who had significant difficulties at work in the prior period that she had overcome, might fairly deserve a significantly improved rating and would be materially harmed if discrimination prevented appropriate recognition."); *Peques v. Minetta*, 2006 WL 2434936

it rises to the level of creating a hostile work environment), transfers to less prestigious or desirable work[114] or work locations,[115] or any other type of adverse treatment that in the circumstances might well dissuade a reasonable person from engaging in protected activity. For example, as one appellate court has observed, "[a] formal reprimand issued by an employer is not a 'petty slight,' 'minor annoyance,' or 'trivial' punishment; it can reduce an employee's likelihood of receiving future bonuses, raises, and promotions, and it may lead the employee to believe (correctly or not) that his job is in jeopardy."[116] Another court of appeals reasoned that the same can be said of lowered performance appraisals:

> If the Supreme Court views excluding an employee from a weekly training lunch that contributes significantly to the employee's professional development as materially adverse conduct, *see Burlington* [*Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006)], then markedly lower performance-evaluation scores that significantly impact an

(D.D.C. Aug. 22, 2006) (holding that the lowering of an evaluation to "proficient" after prior assessments of "distinguished" or "meritorious," along with harassing actions at a company meeting and a supervisor's comments that plaintiff's EEO complaint will "come back to haunt you," were sufficient to permit retaliation claim to proceed to jury).

[114] *Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008) (ruling that while the plaintiff's own displeasure, standing alone, would be insufficient to render an action materially adverse, there was sufficient evidence for a jury to find that in retaliation for complaining about sexual harassment she had been subject to an adverse action when she was transferred to an objectively less prestigious position that reported to a lower-ranked supervisor, provided much less contact with the Board of Selectmen, the Town, and members of the public, and required less experience and fewer qualifications).

[115] *Loya v. Sebelius*, 840 F. Supp. 2d 245 (D.D.C. 2012) (holding that it was materially adverse to move plaintiff's office to a different building in the same complex, where the move isolated her from her colleagues, made it difficult for her to complete her job duties, diminished her standing as a senior staff member, contributed to a loss of responsibilities, cut off her access to administrative support services, forced her to travel between buildings in dangerously wet or icy walking conditions, and made it difficult for her to manage her diabetes).

[116] *Millea*, 658 F.3d at 165; *see also Alvarado v. Metro. Transp. Auth.*, 2012 WL 1132143 (S.D.N.Y. Mar. 30, 2012) (holding that retaliation claim could proceed to trial where "Letter of Instruction" was permanently placed in the plaintiff's personnel file and could be used in future disciplinary actions); *cf. White v. Dep't of Corr. Servs.*, 814 F. Supp. 2d 374, 388 (S.D.N.Y. 2011) (ruling that while a counseling memo and negative comment in a performance evaluation may not be adverse actions in themselves, a jury could find them actionable when considered in combination with a notice of discipline). *See also supra* notes 111-113 and *infra* note 122.

> employee's wages or professional advancement are also materially adverse.[117]

Actions That Are Not Work-Related. An adverse action may also be an action that has no tangible effect on employment, or even an action that takes place exclusively outside of work, as long as it might well dissuade a reasonable person from engaging in protected activity. Prohibiting only employment-related actions would not achieve the goal of avoiding retaliation because "an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."[118] The Supreme Court in *Burlington* observed that, while the substantive antidiscrimination provisions seek elimination of discrimination that affects employment opportunities because of employees' racial, ethnic, or other protected status, the anti-retaliation provisions seek to secure that objective by preventing an employer from interfering in a materially adverse way with efforts to enforce the law's basic guarantees.[119]

Additional Examples. For purposes of a retaliation claim, a materially adverse action not only includes any action that affects the terms or conditions of employment that would be actionable as discrimination (*e.g.*, termination, constructive discharge, reassignment to a lower paying or otherwise less desirable job, transfer to a position that is less prestigious or onerous, denial of overtime, or harassment), but also more broadly encompasses any action that would be reasonably likely to deter protected activity. Additional examples may include:

- disparaging the person to others or in the media;[120]

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[117] *Halfacre v. Home Depot, U.S.A., Inc.*, 221 Fed. App'x. 424, 433 (6th Cir. 2007) (citing *Burlington N.*, 548 U.S. at 69-70, in which the Supreme Court stated that excluding an employee from a weekly training lunch "might well deter a reasonable employee from complaining"); *Perez-Cordero v. Wal-Mart P. R., Inc.*, 656 F.3d 19, 31 (1st Cir. 2011) ("Although Pérez–Cordero did not suffer a tangible employment detriment in response to this protected activity, such as a retaliatory firing, we have previously held that the escalation of a supervisor's harassment on the heels of an employee's complaints about the supervisor is a sufficiently adverse action to support a claim of employer retaliation.").

[118] *Burlington*, 548 U.S. at 63 (emphasis in original).

[119] *Id.* at 63-64.

[120] *Szeinbach v. Ohio St. Univ.*, 493 F. App'x 690 (6th Cir. 2012) (holding that retaliatory accusations of misconduct in plaintiff's academic research, made in emails to a journal editor and professors at other universities, could be materially adverse); *Dixon v. Int'l. Bhd. of Police Officers*, 504 F.3d 73, 84 (1st Cir. 2007) (affirming jury verdict in plaintiff's favor, the court held that comments by a union president on television program regarding plaintiff being unfit for her job and implying she would pay a price for her discrimination claim constituted retaliation).

- making false reports to government authorities;[121]
- threatening reassignment;
- scrutinizing work or attendance more closely than that of other employees, without justification;
- giving an inaccurately lowered performance appraisal or job reference, even if not unfavorable;[122]

[121] *Greengrass v. Int'l Monetary Systems, LTD*, 776 F.3d 481 (7th Cir. 2015) (ruling that employer's listing of employee's name in public filing with the Securities and Exchange Commission was materially adverse); *Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2010) (ruling that a statement to the press that employee had stolen paychecks could be found to be materially adverse action, because "though not affecting the terms or conditions of Lore's employment, [the statement] might well have dissuaded a reasonable police officer from making a complaint of discrimination"); *see also Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (holding that instigating criminal theft and forgery charges against former employee who filed EEOC charge was retaliatory).

[122] *See, e.g., Jones v. Bernanke*, 557 F.3d 670 (D.C. Cir. 2009) (allowing retaliation claim to proceed where plaintiff received an evaluation rating his performance as "commendable," even though in prior years he had received higher ratings of "outstanding" or "exceptional"); *Halfacre*, 221 Fed. App'x. at 432-33 (explaining that because "markedly lower performance-evaluation scores that significantly impact an employee's wages or professional advancement are also materially adverse," an overall "achiever" performance rating might nevertheless be an adverse action because it was a lower rank than plaintiff received before filing his discrimination charge, and resulted in a 55-cents rather than 75-cents-per-hour raise); *Parikh v. N.Y.C. Transit Auth.*, 2010 WL 364526 (E.D.N.Y. Feb. 2, 2010) ("[W]hether a professional in mid-career, attempting to establish a record of good performance in order to obtain a higher position, would be deterred from engaging in protected activity by the receipt of marginal ratings in his permanent record is a question that should be answered by the jury."); *Pequees v. Mineta*, 2006 WL 2434936 (D.D.C. Aug. 22, 2006) (denying employer's summary judgment motion in case alleging retaliatory lowering of an evaluation to "proficient" after prior evaluations of "distinguished" and "meritorious"); *Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997) (ruling retaliatory job reference violated Title VII even though it did not cause failure to hire); s*ee also Porter v. Shah*, 606 F.3d 809 (D.C. Cir. 2010) (ruling that an interim performance of "borderline acceptable" was not materially adverse because it was delivered orally, with no written record placed in the plaintiff's personnel file, and the evaluation was superseded by the plaintiff's year-end review). *But see Sutherland v. Mo. Dep't of Corr.*, 580 F.3d 748 (8th Cir. 2009) (affirming summary judgment for the employer on claim alleging performance evaluation was reclassified from "highly successful" to "successful" in retaliation for plaintiff's complaints about sexual harassment, the court held that the plaintiff was not subjected to a materially adverse action since the lower satisfactory evaluation did not, by itself, materially alter the plaintiff's employment, and the lowered evaluation did not result in any reductions in pay, salary, benefits, or prestige).

- removal of supervisory responsibilities;[123]

- abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment;

- requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities;[124] or,

- any other action that might well deter reasonable individuals from engaging in protected activity.[125]

[123] *Geleta v. Gray*, 645 F.3d 408, 412 (D.C. Cir. 2011) (ruling that fact issue for jury existed as to material adversity when, among other things, plaintiff went from supervising 20 employees to supervising none); *Burke v. Gould*, 286 F.3d 513, 515, 521-22 (D.C. Cir. 2002) (denying employer's motion for summary judgment on retaliation claim challenging removal of supervisory duties from "supervisory computer systems analyst"); *see also Higbie v. Kerry*, 2015 WL 1262499 (5th Cir. Mar. 20, 2015) (unpublished).

[124] *EEOC v. Queen's Med. Ctr.*, Civil Action No. 01-CV-00389 (D. Haw. consent decree entered July 2002) (settlement of retaliation case alleging that shortly after employee lodged an internal complaint, employer contacted the Immigration and Naturalization Service to retract its support for his permanent visa application, resulting in the INS initiating a hearing into his immigration status and therefore requiring him to hire a lawyer to defend his lawful resident status; case was settled for $150,000 for emotional distress damages); *EEOC v. Holiday Inn Express*, No. 0:00-cv-0034 (D. Minn. consent decree entered Jan. 11, 2000) (employer who allegedly reported workers to INS after they engaged in protected activity under NLRA and Title VII settled discrimination and retaliation claims for $72,000; INS deferred deportation action for two years to allow the workers time to be witnesses in case); *cf. EEOC v. The Restaurant Co.*, 490 F. Supp. 2d 1039 (D. Minn. 2006) (denying summary judgment for the employer, the court ruled that timing of human resources director asking plaintiff to submit valid I-9 documentation two days after reporting sexual harassment could be found by a jury to support an inference of retaliatory motive for her subsequent termination); *see also Bartolon-Perez v. Island Granite & Stone, Inc.*, 2015 WL 3644095 (S.D. Fla. June 10, 2015) (citing Title VII case law, the court held that a factfinder could conclude an employer engaged in retaliation under the FLSA where it knew about plaintiff's immigration status but waited until after he engaged in protected activity to "hold it … over his head").

[125] *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253 (11th Cir. 2010) (ruling that terminating plaintiff sooner than planned due to her protected activity was actionable as retaliation); *Passer v. Am. Chem. Soc.*, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding that canceling a symposium in honor of retired employee who filed ADEA charge was retaliatory). *See also EEOC v. Cardiac Sci. Corp.*, Civil Action No. 2:13-cv-01079 (E.D. Wis. consent decree entered July 2014) (settlement of retaliation claim based on employer's alleged refusal to provide severance payments and benefits and payments previously promised because it learned employee had previously filed an EEOC charge).

To the extent lower courts applying *Burlington Northern* have found that some of the above-listed actions are not significant enough to deter protected activity, the Commission concludes that those decisions are contrary to the broad reasoning and examples provided by the Supreme Court. The Court has made clear that whether an action is reasonably likely to deter protected activity depends on the surrounding facts and circumstances -- although the standard is "objective," it is phrased in "general terms" because the "significance of any given act will often depend on the particular consequences. Context matters."[126] An "act that would be immaterial in some situations is material in others."[127] Indeed, the Supreme Court has held that transferring plaintiff to a harder, dirtier job within the same pay grade and job category and suspending her without pay for 37 days even though the lost pay was later reimbursed, were both "materially adverse actions" that could be challenged as retaliation.[128] Other examples of actionable retaliation cited by the Supreme Court include the FBI's refusing to investigate "death threats" against an agent, the filing of false criminal charges against a former employee, changing the work schedule of a mother with school-age children, and excluding an employee from a weekly training lunch that contributes to professional advancement.[129]

In addition, termination of the union grievance process or other action relating to blocking access to otherwise available remedial mechanisms could constitute a materially adverse action in violation of the anti-retaliation provisions of the EEO statutes.[130]

The Commission and courts use the foregoing fact-specific analysis to determine if the employer action in question would be likely to deter participation or opposition. Petty slights and trivial annoyances are not actionable as retaliation, as they are not likely to dissuade an employee from engaging in protected activity. For example, courts have concluded on the facts of given cases that failing to grant a retired professor "emeritus" status was not a materially adverse action [131] and that occasional brief delays by an

[126] *Burlington N.*, 548 U.S. at 69 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998)).

[127] *Id.* (citation omitted). *See, e.g., O'Neal v. City of Chi.*, 588 F.3d 406, 409-10 (7th Cir. 2009) (holding that alleged repetitive reassignments negatively affecting plaintiff's eligibility to be promoted from sergeant to lieutenant on the police force constituted materially adverse action).

[128] *Burlington N.*, 548 U.S. at 71-73.

[129] *Id.* at 63, 69 (citations omitted). *See also Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1090 (10th Cir. 2007) (denying summary judgment because defendants' threats to ruin plaintiff's family and marriage, and opposition to her employment benefits, constituted adverse actions that would have dissuaded a reasonable person from engaging in protected activity).

[130] *See, e.g., EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1992).

[131] *Zelnick v. Fashion Inst. of Tech.*, 464 F.3d 217 (2d Cir. 2006).

employer in issuing refund checks to an employee that involved small amounts of money were not materially adverse.[132] Such actions are considered trivial in comparison to the transfer to harder work, the exclusion from a weekly training lunch, or the unfavorable schedule change described by the Supreme Court in *Burlington Northern* as likely to deter protected activity.

If the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation regardless of the level of harm. It is no defense that the employer's actions fell short of their goal.[133] As one court stated, "an employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result."[134] The degree of harm suffered by the individual "goes to the issue of damages, not liability."[135] Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing charges.[136] An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions. Thus, for example, the fact that a retaliatory reference did not affect the individual's job prospects may affect the relief that is due, but would not preclude a finding of liability.[137]

EXAMPLE 16
Workplace Surveillance

> CP filed a charge alleging that he was racially harassed by his supervisor and co-workers. After learning about the charge, CP's manager asked two employees to keep CP under surveillance and report back about his activities. The EEOC finds reasonable cause to believe that the surveillance constitutes a materially adverse action because

[132] *Fanning v. Potter*, 614 F.3d 845, 850 (8th Cir. 2010) (ruling that a brief delay in payment of $300 quarterly health benefit refund representing less than two percent of plaintiff's monthly income was not materially adverse).

[133] *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997).

[134] *EEOC v. L. B. Foster*, 123 F.3d, 746, 754 (3d Cir. 1997).

[135] *Hashimoto*, 118 F.3d at 676; *see also L. B. Foster*, 123 F.3d at 754 n.4 (ruling that plaintiff need not prove retaliatory denial of job reference caused prospective employer to reject her; such a showing is relevant only to damages, not liability); *Smith v. Sec'y of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981) ("The questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination, whether based on race or some other factor such as a motive of reprisal, is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [damages].").

[136] *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986) (citation omitted).

[137] *See supra* note 135.

it is likely to deter protected activity, and is unlawful if it was conducted because of CP's protected activity.

EXAMPLE 17
Threats to Report Immigration Status

R, a contractor, employs farm workers and other laborers whom it places in rural agricultural and manufacturing facilities operated by R's corporate clients. Together, R and these facilities are joint employers under the EEO laws. R and its clients suspect that many of the employees may be undocumented workers who may have presented false documentation when hired, but, in order to meet their staffing needs, do not attempt to verify their status. Several of R's employees, who are undocumented, complain to a client supervisor and to R about sexual harassment by male co-workers, including physical assaults and persistent unwelcome sexual remarks and advances. The client supervisor and R order the workers to return to work and threaten to expose the workers' immigration status if they continue to complain about the harassment. Threatening to report the workers' immigration status to government authorities, or actually reporting the workers, is materially adverse and actionable as retaliation against workers who have engaged in protected activity under the EEO laws because it is likely to deter them from engaging in protected activity. If an EEOC charge is filed, both R and the facility owner can be found jointly liable for retaliation. Neither the workers' undocumented status, nor the fact they were placed by a contractor acting as a staffing firm, is a defense.[138]

[138] *See supra* note 124; *see also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) ("Tit[le] VII protects all individuals from unlawful discrimination, whether or not they are citizens of the United States."); *EEOC v. DeCoster Farms*, No. 3:02-cv-03077-MWB (N.D. Iowa, consent decree entered September 2002) (EEOC alleged that supervisors sexually harassed and raped female workers, especially those of Mexican and other Hispanic national origin - some of whom were undocumented at the time - and threatened to deport and terminate any of the victims who cooperated with EEOC; consent decree provided $1.525 million; undocumented victims were granted deferred status and visas); *EEOC v. Quality Art*, No. 2:00-cv-01171-SMM (D. Ariz. consent decree entered August 2001) (case involved sexual and national origin harassment; employer threatened to report employees to the INS and subsequently contacted INS in an attempt to secure arrest and/or deportation; consent decree provided $3.5 million to victims).

EXAMPLE 18
Fact-Specific Determination

CP filed an EEOC charge alleging that she was denied a promotion because of her gender. One week later, her supervisor invited a few employees out to lunch. CP believed that her supervisor excluded her from lunch because of her charge. Even if the supervisor chose not to invite CP because of her charge, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity. By contrast, if CP's supervisor invites all employees in CP's unit to regular weekly lunches, and CP is excluded from these lunches after she files the sex discrimination charge, this might constitute unlawful retaliation since it could reasonably deter CP or others from engaging in protected activity.[139]

EXAMPLE 19
Workplace Sabotage, Assignment to Unfavorable Location, and Abusive Scheduling Practices

After CP cooperated in a workplace investigation of a co-worker's race discrimination complaint, a supervisor intentionally left a window ajar to prevent CP from setting the building alarm (one of his job duties) and thereby subjected him to discipline. The supervisor also engaged in punitive scheduling, including shortening off-duty time between workdays and changing the employee's work schedule in a way that would require him to work alone at a more dangerous facility than the one at which he usually worked. The EEOC finds reasonable cause to believe that these acts of workplace sabotage, assignment to an unfavorable location, and punitive scheduling constitute materially adverse actions.[140]

[139] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) ("A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.").

[140] *Hicks v. Baines*, 593 F.3d 159 (2d Cir. 2010) (applying *Burlington* standard to retaliation claims under § 1981, § 1983, and state law).

EXAMPLE 20
Disclosure of Confidential EEO Information and Assignment of Disproportionate Workload

> Three weeks after a federal employee sought EEO counseling regarding her complaint of disability and gender discrimination, her supervisor posted the EEO complaint on the agency's intranet where coworkers accessed it. The supervisor also increased her workload to five to six times that of other employees. Both of the supervisor's actions are materially adverse and actionable as alleged retaliation.[141]

3. Harassing Conduct as Retaliation

Some forms of retaliatory conduct are commonly characterized as "retaliatory harassment," but such conduct, like any other retaliation, is unlawful if it is reasonably likely to deter protected activity. As a result, harassing conduct that is alleged to be both discriminatory (e.g., based on race, sex, or disability) and retaliatory may prove to be sufficiently material to deter protected activity yet, at the same time, insufficiently severe or pervasive to create a hostile work environment. In other words, retaliation and hostile work environment set different thresholds for demonstrating actionable discrimination.

4. Third Party Retaliation

a. Materially Adverse Action Against Another

Sometimes an employer takes a materially adverse action against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee.[142] The Supreme Court explained that it is "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[143] Similarly, if an employer punishes an employee for engaging in protected activity by cancelling a vendor contract with the employee's husband (even though he was employed by a contractor, not the employer)

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[141] *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166-67 (D.C. Cir. 2010) (holding that publicizing an employee's EEO complaint is a materially adverse action because it can chill a reasonable employee from engaging in further protected activity; similarly, an employee might be dissuaded from filing a complaint if she reasonably thought that her employer would retaliate by "burying her in work").

[142] *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011); *see also EEOC v. Fred Fuller Oil Co., Inc.*, 2014 WL 347635 (D.N.H. Jan. 31, 2014) (refusing to dismiss retaliation claim involving close friend of individual who had filed EEOC charge).

[143] *Thompson*, 562 U.S. at 174.

that action would dissuade a reasonable worker from engaging in protected activity.[144] Although there is no "fixed class of relationships for which third-party reprisals are unlawful[,] . . . firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so."[145]

b. Standing to Challenge: "Zone of Interests"

Under such circumstances, the employee who engaged in protected activity has a retaliation claim. Moreover, not only may the employee who engaged in protected activity bring a claim, but so too may the third party who was directly harmed by the employer's retaliation.[146] As the Supreme Court stated, the third party was not an "accidental victim"; "[t]o the contrary, injuring him was the employer's intended means of harming the [employee who engaged in protected activity]."[147] Thus, the third party "falls within the 'zone of interests' sought to be protected by [the retaliation provision]" and therefore has standing under it to seek recovery from the employer for his harm.[148]

[144] *McGhee v. Healthcare Servs. Group, Inc.*, 24 A.D. Cas. (BNA) 410, 2011 WL 818662 (N.D. Fla. Mar. 2, 2011) (ruling that plaintiff could proceed with a Title VII retaliation claim based on allegations that after his wife filed an EEOC charge against her employer, plaintiff was fired from his job with a company that held a contract with his wife's employer, allegedly at the request of his wife's employer).

[145] *Thompson*, 562 U.S. at 178.

[146] The third party may bring a claim even though the third party did not engage in the protected activity, and even if the third party has never been employed by the defendant employer. *Tolar v. Cummings*, No. 2:13-cv-00132-JEO, 2014 WL 3974671, at *12 (N.D. Ala. Aug. 11, 2014) ("Regardless of whether the plaintiffs are employed by the defendant, . . . the harm they suffered is no less a product of the defendant's purposeful violation of the anti-retaliation provision.").

[147] *Id*.

[148] *Id.* at 177 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (internal quotation marks omitted)); *see also* Brief for the United States as Amicus Curiae at 18, *Thompson v. N. Am. Stainless, L.P.*, 562 U.S. 170 (2011) (arguing petitioner was "aggrieved" by his own dismissal, which was the employer's means of retaliating against his fiancée for alleging sex discrimination).

C. Causal Connection

A materially adverse action does not violate the EEO laws unless the employer took the action *because* the charging party engaged in protected activity.

Unlawful retaliation is established when it is proven that the employer took the adverse action *because* the charging party engaged in protected activity.[149] There are instances in which this motivation is self-evident because the employer acknowledges or betrays a retaliatory motive for the adverse action, verbally or in writing.[150] However, where instead the employer identifies a lawful reason, the charging party will have to produce enough evidence to discredit the employer's explanation and prove the real reason was retaliation. In private sector and state and local government cases, the individual must show that "but for" a retaliatory motive, the employer would not have taken the adverse action.[151] It does not require that retaliation be the "sole cause" of the

[149] The retaliatory animus need not necessarily be held by the individual who takes the final challenged action. An employer still may be vicariously liable for an adverse action if one of its agents other than the ultimate decision maker is motivated by discriminatory or retaliatory animus and intentionally and proximately causes the action. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) (applying "cat's paw" theory to a retaliation claim under the Uniformed Services Employment and Reemployment Rights Act, which is "very similar to Title VII"); *Zamora v. City of Houston*, 798 F.3d 326 (5th Cir. 2015) (applying *Staub* and *Univ. of Tex. SW Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), the court held there was sufficient evidence to support jury verdict finding retaliatory suspension); *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546 (8th Cir. 2013) (applying Supreme Court's *Staub* cat's paw rationale, the court upheld jury verdict in favor of white workers who were laid-off by management after complaining about their direct supervisors' use of racial epithets to disparage minority coworkers, and the supervisors recommended them for lay-off shortly after their original complaints were found to have merit).

[150] For example, in one case the employer told the employee being terminated that "[y]our deposition was the most damning to [the employer's] case, and you no longer have a place here. . . ." *Merritt*, 120 F.3d at 1190-91.

[151] *Nassar*, 133 S. Ct. at 2534 (holding that "but for" causation is required to prove Title VII retaliation claims raised under 42 U.S.C. § 2000e-3(a), even though Title VII claims raised under other statutory provisions only require "motivating factor" causation); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (holding that "but for" causation is required to prove ADEA claims brought under 29 U.S.C. § 623). In *Burrage v. United States*, 134 S. Ct. 881, 888-89 (2014), the Supreme Court recognized that "but for" causation can include multiple causes, and clarified its earlier decisions in *Nassar* and *Gross* by describing the causation standard as "a but for cause":

> Given the ordinary meaning of the word "because," we held that § 2000e–3(a) "require[s] proof that the desire to retaliate was [a] but-for cause of the challenged employment action." *Nassar*, …133 S. Ct., at 2528. The same result obtained in an earlier case interpreting a provision in the Age Discrimination in Employment Act … we held that "[t]o establish a disparate-treatment claim

action.[152] "But for" causation, however, precludes a burden-shifting "mixed motives" analysis.[153]

For example, an employer may contend that it could not have been motivated by retaliation because it was not aware of the protected activity,[154] or that it was aware the employee had made complaints but did not know they concerned discrimination.[155] Or,

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> under the plain language of [§ 623(a)(1)] ... a plaintiff must prove that age was [a] 'but for' cause of the employer's adverse decision." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S. Ct. 2343, 174 L.Ed.2d 119 (2009).

134 S. Ct. at 889. The Commission has held that the "but for" standard does not apply to retaliation claims by federal sector applicants or employees under Title VII or the ADEA because the relevant federal sector statutory language does not employ the "because of" language on which the Court based its holdings in *Nassar* and *Gross*. *Petitioner v. Dep't of Interior*, EEOC Petition No. 0320110050 (July 16, 2014). Rather, these federal sector provisions contain a "broad prohibition of 'discrimination' rather than a list of specific prohibited practices." *See Gomez-Perez*, 553 U.S. at 487-88 (holding that the broad prohibition in 29 U.S.C. § 633a(a) that personnel actions affecting federal employees who are at least 40 years of age "shall be made free from any discrimination based on age" prohibits retaliation by federal agencies); *see also* 42 U.S.C. § 2000e–16(a) (personnel actions affecting federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin").

[152] *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013) ("'[B]ut-for' causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of a retaliatory motive.").

Circuit courts analyzing "but for" causation under other EEOC-enforced laws also have explained that the standard does not require "sole" causation. *See, e.g.*, *Ponce v. Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012) (explaining in Title VII case where the plaintiff chose to pursue only but for causation, not mixed motive, that "nothing in Title VII requires a plaintiff to show that illegal discrimination was the sole cause of an adverse employment action"); *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 777 (5th Cir. 2009) (rejecting defendant's challenge to Title VII jury instructions because "a 'but for' cause is simply not synonymous with 'sole' cause."); *Miller v. Am. Airlines, Inc.*, 525 F.3d 520, 523 (7th Cir. 2008) ("The plaintiffs do not have to show, however, that their age was the sole motivation for the employer's decision; it is sufficient if age was a "determining factor" or a "but for" element in the decision.").

[153] *Nassar*, 133 S. Ct. at 2545.

[154] *See, e.g.*, *Henry v. Wyeth Pharm.*, 616 F.3d 134, 148 (2d Cir. 2010) (ruling that jury instruction erroneous where it did not allow finding that decisionmakers had requisite knowledge of plaintiff's protected activity based on evidence they acted under instructions from management officials who had knowledge).

[155] *Compare Zokari v. Gates*, 561 F.3d 1076, 1081-82 (10th Cir. 2009) (holding that plaintiff failed to adduce any evidence that employer knew he had refused English class because he believed employer's suggestion to attend was discriminatory) *with Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255 (10th Cir. 2010) (holding that given employer's awareness of plaintiff's

an employer may contend that it was not motivated by retaliation but by a legitimate unrelated reason, such as: poor job performance or misconduct;[156] inadequate qualifications for the position sought;[157] or, with regard to negative job references, truthfulness of the information in the reference.[158] The employer will prevail if it produces credible unrebutted evidence that the adverse action was based on a legitimate reason, such as excessive absenteeism, and the employee cannot show other evidence of retaliation, such as more favorable treatment of another employee who had a similar record of absenteeism but had not engaged in protected activity.[159]

The charging party may discredit the defendant's explanation and demonstrate a causal connection between the prior protected activity and the challenged adverse action by what one appellate court has described as a "'convincing mosaic'" of circumstantial evidence that would support the inference of retaliatory animus.[160] The Commission has interpreted and applied this concept to mean that a charging party may cite different

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charge, that plaintiff's supervisor was specifically named as a transgressor in the charge, and that the supervisor lowered the plaintiff's performance evaluation the day after the employer received the charge, a reasonable jury could infer that the supervisor was aware of the charge when he lowered the evaluation).

[156] *Brown v. City of Jacksonville*, 711 F.3d 883 (8th Cir. 2013) (concluding that employer was not liable for retaliation based on evidence that termination was based on plaintiff's mistreatment of co-workers and inefficient work performance); *Hypolite v. City of Hous.*, 493 Fed. App'x. 597, 606 (5th Cir. Oct. 15, 2012) (concluding that evidence showed suspension was not motivated by retaliatory animus but by employee's using e-mail improperly and making racial slurs).

[157] *E.g.*, *Hoppe v. Lewis Univ.*, 692 F.3d 833 (7th Cir. 2012) (concluding that employer had legitimate, non-retaliatory reason for firing aviation ethics teacher because she had never worked in aviation field, lacked formal aviation training, and had no relevant degrees, regardless of her past experience teaching and positive student reviews); *but see Patrick v. Ridge*, 394 F.3d 311 (5th Cir. 2004) (holding that employer's assertion that applicant for promotion was "not sufficiently suited" was vague and, if left unexplained, might not even qualify as a nondiscriminatory reason).

[158] *E.g., Fields v. Phillips Sch. of Bus. & Tech.*, 870 F. Supp. 149 (W.D. Tex.), *aff'd mem.*, 59 F.3d 1242 (5th Cir. 1994) (concluding that employer established that negative reference for plaintiff, a former employee, was based on the former supervisor's personal observations of plaintiff during his employment and contemporary business records documenting those observations).

[159] *Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996).

[160] *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1181 (7th Cir. 2013) (citation omitted); *see also Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 671 F.3d 49, 56 (1st Cir. 2012) ("When all of these pieces are viewed together and in [plaintiff's] favor, they form a mosaic that is enough to support the jury's finding of retaliation" under the ADEA even though challenged termination occurred five years after he filed his ADEA lawsuit.).

pieces of evidence which, in combination, are sufficient to allow an inference of retaliatory intent.[161] The pieces of that "'mosaic'" may include, for example, suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the employer's proffered reason for the adverse action, or any other "bits and pieces" from which an inference of retaliatory intent might be drawn.[162]

Suspicious timing. The causal link between the adverse action and the protected activity is often established by evidence that the adverse action occurred shortly after the plaintiff engaged in protected activity.[163] However, such temporal proximity is not necessary to establish a causal link. Even if the time between the protected activity and the adverse action was lengthy, other evidence of a retaliatory motive can establish the link. For example, a 14-month interval between the plaintiff's filing of an EEOC charge and her termination would not conclusively disprove retaliation where the plaintiff's manager frequently mentioned the EEOC charge during the interim, and termination occurred just two months after the EEOC dismissed her charge and issued a notice of right to sue.[164] Similarly, there may be other evidence that the protected activity, even if it occurred many years earlier, was in fact the motive for the challenged action.[165] For

[161] *Petitioner v. Dep't of Interior*, EEOC Petition No. 0320110050 (July 16, 2014) (adopting and applying the "convincing mosaic" standard, the Commission rejected the employer's contention that this standard requires plaintiff to make all the evidence fit in an interlocking pattern with no spaces).

[162] *Cloe*, 712 F.3d at 1181.

[163] *See, e.g., Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir. 2006) (concluding that jury could infer causation from evidence that harassment by supervisors intensified shortly after plaintiff filed an internal complaint); *Hossaini v. W. Mo. Med. Ctr.*, 97 F.3d 1085 (8th Cir. 1996) (holding that a reasonable factfinder could infer that defendant's explanation for plaintiff's discharge was pretextual where defendant launched investigation into allegedly improper conduct by plaintiff shortly after she engaged in protected activity).

[164] *Shirley v. Chrysler First, Inc.*, 970 F.2d 39 (5th Cir. 1992). *See also Benuzzi v. Bd. of Educ.*, 647 F.3d 652, 665 (7th Cir. 2011) (holding that retaliation could be shown where discipline imposed for "petty misdeeds" that allegedly occurred months earlier); *Abbott v. Crown Motor Co.*, 348 F.3d 537 (6th Cir. 2003) (ruling that causation shown notwithstanding 11-month interim because supervisor stated his intention to "get back at" those who had supported the discrimination allegations); *Kachmar v. Sunguard Data Sys.*, 109 F.3d 173, 178 (3d Cir. 1997) (ruling that district court erroneously dismissed plaintiff's retaliation claim because termination occurred nearly one year after her protected activity; when there may be reasons why adverse action was not taken immediately, absence of immediacy does not disprove causation).

[165] *Muñoz*, 671 F.3d at 56-57 (concluding that evidence supported jury's finding that plaintiff, a doctor, was discharged in retaliation for ADEA lawsuit filed 5 years earlier; evidence showed plaintiff was fired for common conduct for which others were not disciplined, he was not given an opportunity to defend himself, and had been threatened years earlier by one of the

example, there may have been a recent fact-finding conference or development in ongoing litigation that provoked or stoked retaliatory animus and motivated the adverse action, or evidence that the protected activity occurred much earlier, but the opportunity for the adverse action did not present itself until the alleged retaliatory action occurred.[166]

Verbal or written statements. Verbal or written statements made by the individuals recommending or approving the challenged adverse action may reveal a retaliatory intent by revealing inconsistencies, pre-determined decisions, or other indications that the reasons given for the adverse action are false.[167] Such statements may have been made to the charging party or to others.[168]

Comparative evidence. Evidence that the employer treated more favorably a similarly situated employee who had not engaged in protected activity also would support an inference that the adverse action was motivated by retaliation. For example, where a disciplinary action was taken for alleged retaliatory reasons, evidence that another employee who committed the same infraction was not disciplined, or was not disciplined as severely, could be sufficient to infer a retaliatory motive.[169] Similarly, absent evidence of new performance problems, a retaliatory motive might be inferred where an employee herself had higher performance appraisals prior to engaging in protected activity.[170]

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decisionmakers that if he filed the suit he would never work at the hospital or in Puerto Rico again).

[166] *Rao v. Tex. Parks & Wildlife Dep't*, 2014 WL 1846102, 122 Fair Empl. Prac. Cas. (BNA) 1484, (S.D. Tex. May 8, 2014) (holding that denial of promotion could be shown to be in retaliation for complaint filed three years earlier, where decisionmaker said to plaintiff "you didn't do anything wrong, but you filed that complaint").

[167] *Pantoja v. Am. NTN Bearing Mfg. Corp.*, 495 F.3d 840 (7th Cir. 2007) (ruling that inconsistent explanations by employer presented issue for jury).

[168] *See, e.g., Burnell v. Gates Rubber Co.*, 647 F.3d 704, 709-10 (7th Cir. 2011) (concluding that evidence of plant manager's statement that African-American employee was "playing the race card" was sufficient to deny employer's motion summary judgment on claim of retaliatory termination for race discrimination complaints); *Abbott*, 348 F.3d at 544 (ruling that summary judgment for employer on retaliation claim was improper where evidence showed supervisor stated he would "get back at those who had supported the charge of discrimination," and had told another individual he fired plaintiff because he had put his nose in other people's business by testifying in support of co-worker's discrimination allegations).

[169] *Spengler v. Worthington Cylinders*, 615 F.3d 481, 494-95 (6th Cir. 2010) (concluding that evidence showed that plaintiff, who was discharged after raising an age discrimination allegation, was a valuable employee and that the rule pursuant to which he was terminated had been selectively enforced).

[170] *See supra* notes 113 & 122.

Inconsistent or shifting explanations. If the employer changes its stated reason for the challenged adverse action over time or in different settings (e.g., reasons stated to employee in termination meeting differ from reasons employer cites in position statement filed with EEOC), pretext may be inferred. However, the inference of discrimination drawn from such changes will be undermined to the extent the inconsistencies are innocuous or can be credibly explained by the employer (*e.g.*, additional information is discovered).

Other evidence that employer's explanation was pretextual. The respondent's justification will fail if its explanation is not believable or there is other evidence that the explanation is a pretext designed to hide the true retaliatory motive.[171] Any kind of evidence that undermines the believability of the employer's justification or otherwise reveals a retaliatory motive can be used to show pretext. If an employer's proffered explanation is shown to be false, that can be sufficient to infer that the real reason was retaliation, but a fact finder may alternatively conclude that the falsehood was given for a different reason (e.g., to cover up embarrassing facts) and does not show a retaliatory motive. Likewise, a negative job reference about an individual who engaged in protected activity does not constitute unlawful retaliation unless the reference was based on a retaliatory motive. The truthfulness of the information in the reference may serve as a defense unless there is proof of pretext,[172] such as evidence that the former employer routinely declines to offer information about its former employees' job performance, but

[171] *See, e.g.*, *Tuli v. Brigham & Women's Hosp.*, 656 F.3d 33 (1st Cir. 2011) (concluding that although supervisor contended that his actions were designed simply to give credential review committee a legitimate assessment of complaints against plaintiff, the evidence showed he overstated his objections and failed to disclose that he had been the subject of several prior complaints by plaintiff, which could lead the jury to conclude that his motives were attributable to discriminatory and/or retaliatory animus); *Loudermilk v. Best Pallet Co.*, 636 F.3d 312 (7th Cir. 2011) (ruling that pretext could be shown because between the EEOC investigation and the litigation, the employer shifted its explanation for plaintiff's termination from reduction in force to mutual decision and then to violation of a company policy); *Spengler*, 615 F.3d at 495 (ruling that pretext could be shown because employer's explanation that seasonal employees are discharged after 12 months was inconsistent with testimony that the policy was only applied in the event of a production slowdown, which had not occurred); *Franklin v. Local 2 of the Sheet Metal Workers Int'l Ass'n*, 565 F.3d 508 (8th Cir. 2009) (ruling that defendant's reading aloud at union meetings of legal bills identifying employees who had filed discrimination charges against the union may have been retaliatory, since degree of detail disclosed was not necessary given proffered non-retaliatory explanation that it was done in order to obtain member approval for expenditures).

[172] *See Jute*, 420 F.3d at 178-79 (allowing retaliation claim about negative reference to proceed where the information provided by the former employer was false).

departed from that policy with regard to an individual who engaged in protected activity.[173]

EXAMPLE 21
Explanation for Non-selection Was Pretext for Retaliation

CP alleges that R denied her a promotion because she opposed the under-representation of women in management jobs and was therefore viewed as a "troublemaker." R asserts that the selectee was better qualified for the job because she had a master's degree, whereas CP only had a bachelor's degree. The EEOC investigator finds reasonable cause to believe that this explanation is pretextual because CP has significantly greater experience working at R Company and experience has long been R's most important criterion for selecting managers.

EXAMPLE 22
Negative Reference Was Truthful, Not Retaliatory

CP alleges that R gave him a negative job reference because he had filed an EEOC charge. R produces evidence that its negative statements to CP's prospective employer were honest assessments of CP's job performance. Absent proof of pretext, the investigator does not find reasonable cause to believe that retaliation has occurred.

EXAMPLE 23
Manager Violated Company Neutral Reference Policy – Evidence of Retaliatory Intent

Same as prior example, except there is evidence that R routinely follows a so-called "neutral reference" policy, declining to offer information about former employees' job performance, instead simply confirming dates of employment. R fails to offer a credible explanation for why it violated this policy with regard to CP. Therefore,

[173] *Cf. Thomas v. iStar Financial, Inc*., 448 F. Supp. 2d 532, 536 (S.D.N.Y. 2006) (ruling that providing a neutral reference was not evidence of retaliatory motive where such references are consistent with established company policy).

the EEOC finds reasonable cause to believe that R's stated reasons constituted pretext.

EXAMPLE 24
Manager Advised No-Hire Based on Prior EEO Activity – Evidence of Retaliatory Intent

CP filed suit against Respondent A, alleging that her supervisor sexually harassed and constructively discharged her. The suit was ultimately settled. CP applied for a new job with Respondent B and received a conditional offer subject to a reference check. When B called A, CP's former supervisor said that CP was a "troublemaker," started a sex harassment lawsuit, and was not anyone B "would want to get mixed up with." B then withdrew its conditional offer. CP, suspecting that A gave her a negative reference, filed retaliation charges against both A and B. The EEOC investigator discovered notes memorializing the phone conversation between A and B. These notes prove that A's negative job reference was based on CP's protected activity. Although the notes do not establish B's motive for rejecting CP, B's withdrawal of the conditional job offer shortly after learning of her protected activity is strong evidence that B, too, had a retaliatory motive. Based on this evidence, the EEOC finds reasonable cause to believe that A provided a negative job reference because of a retaliatory motive, and B rescinded its job offer based on CP's prior protected activity.

D. Liability

Employer liability requires either that the retaliation was committed by someone with explicit or implicit delegated authority, or that the employer granted the individual who engaged in the retaliation power that materially assisted him in carrying out the retaliation.

In the vast majority of situations, an employer's liability for retaliatory conduct is not at issue, since the challenged conduct entailed the exercise of official responsibilities taken by a supervisor or other agent.[174] If retaliatory conduct, however, does not involve the explicit or implicit abuse of delegated authority, then the applicable liability standard

[174] *See, e.g.*, 42 U.S.C. § 2000e-(b) (Title VII defines "employer" as including "any agent"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (holding that when a supervisor makes a decision based on delegated authority, "he 'merges' with the employer, and his act becomes that of the employer").

turns on whether the power that the employer granted the individual who engaged in the retaliation materially assisted him in carrying out the retaliation.[175] Most commonly, this will apply if the retaliator had supervisory authority over the targeted individual. However, because unlawful retaliation is not limited to conduct affecting terms or conditions of employment, a retaliator may be materially assisted by non-supervisory forms of authority, such as the authority to decide whether to investigate an inmate's alleged death threats against a law enforcement officer and his family.[176]

If delegated authority materially assisted the retaliator in carrying out his retaliation, then the employer is automatically liable for the retaliation, and there are no defenses. Under this standard, employers are subject to more stringent liability as compared to that imposed for supervisor discriminatory harassment (e.g., based on race, sex, or disability) creating a hostile work environment, which limits employer liability for supervisor harassment in some situations where the targeted employee unreasonably failed to complain about the supervisor's conduct.[177] Fundamental to the employer's ability to establish this affirmative defense to liability for a hostile work environment is that the employee did not reasonably fear retaliation and therefore was not reasonably deterred from complaining.[178] An employer could not establish this defense if an employee has been subjected to unlawful retaliation. Therefore, employers are automatically liable for retaliation by supervisors and other agents whose retaliation was enhanced by delegated authority.

Finally, if a retaliator's delegated authority was insufficient to justify automatic employer liability, then the employer is liable if it unreasonably failed to prevent the retaliation[179] or if it failed to take appropriate corrective action once it knew, or

[175] *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2461 (2013) (Ginsburg, J., dissenting) (quoting Restatement (Second) of Agency § 219(2)(d) (a principal is liable for agent's tort if agent was "aided in accomplishing the tort by the existence of the agency relation")).

[176] *See Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006), cited in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63-64 (2006).

[177] See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S.742 (1998).

[178] *See Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009) (noting that fear of retaliation is "leading reason" employees do not complain about discrimination) (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005) (internal quotation marks omitted)); *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 437 (7th Cir. 2012) (holding that employee may have been justified in not reporting assistant manager's harassment to district manager because she had previously been treated harshly by a different harasser after reporting his conduct to the district manager).

[179] *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2454 (holding that employer is liable for harassment if it was negligent in permitting it to occur).

reasonably should have known, about the retaliation.[180] For instance, in one case in which an employee was subjected to retaliation by coworkers after complaining about sexual harassment by a well-liked supervisor, the court held that a jury could find that the employer was liable for the retaliation based on evidence that senior supervisors knew about the retaliation but did not take any action, and one supervisor even speculated that the retaliation would get much worse.[181]

III. ADA INTERFERENCE PROVISION

The ADA prohibits not just retaliation, but also "interference" with the exercise or enjoyment of ADA rights. The interference provision is broader than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights.

In addition to retaliation, the ADA prohibits "interference" triggered by any attempted or actual exercise or enjoyment of ADA rights, or by assistance of another in exercising or enjoying those rights.[182] The scope of the interference provision is broader

[180] *See, e.g.*, *Hawkins v. Anheuser- Busch, Inc.* 517 F.3d 321, 346-47 (6th Cir. 2008) (ruling that coworker retaliation claims are actionable, and noting that the analysis for coworker harassment liability should apply, requiring that supervisors or management had actual or constructive knowledge of the conduct and "have condoned, tolerated, or encouraged acts of retaliation, or have responded ... so inadequately that the response manifests indifference or unreasonableness...."); *Noviello v. City of Boston*, 398 F.3d 76, 89 (1st Cir. 2005) (holding "explicitly that a [coworker-created] hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action" under Title VII). *But see Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644 (5th Cir. 2012) (holding that employer is liable for coworker retaliation only if retaliatory conduct was "furtherance of the employer's business," which requires "direct relationship between the allegedly discriminatory conduct and the employer's business") (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996) (internal quotation marks omitted)). The Commission disagrees with the Fifth Circuit's liability standard for coworker retaliation in *Hernandez* and *Long*. The Supreme Court has long recognized that employers can be liable under EEO law for failing to take reasonable steps to protect employees against the conduct of coworkers and other individuals who are acting without the employer's authorization. *See Faragher*, 524 U.S. at 799 (citing uniform case law and EEOC policy holding employer liable for discriminatory coworker conduct that employer knew or should have known about). Given that the EEO laws provide broader protections against retaliation than against substantive discrimination, employers cannot logically face more stringent liability for coworker discriminatory harassment than for coworker retaliation. *See Hawkins*, 517 F.3d at 346 (applying liability standards for coworker harassment to coworker retaliation and citing similar decisions from the 1st, 2d, 3d, 7th, 9th, and 10th Circuits). Therefore, the Fifth Circuit standard cannot be reconciled with well-established legal principles.

[181] *Noviello*, 398 F.3d at 96-97.

[182] The ADA interference provision uses the same language as a parallel provision in the Fair Housing Act, and Congress apparently intended it to be interpreted in the same way. H.R.

than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights. 42 U.S.C. § 12203(b). As with ADA retaliation, an applicant or employee need not establish that he is an "individual with a disability" or "qualified" in order to prove interference under the ADA.[183]

The statute, regulations, and court decisions have not separately defined the terms "coerce," "intimidate," "threaten," and "interfere." Rather, as a group, these terms have been interpreted to include at least certain types of actions which, whether or not they rise to the level of unlawful retaliation, are nevertheless actionable as interference.[184] Of course, many instances of employer threats or coercion might in and of themselves be actionable under the ADA as a denial of accommodation or as retaliation, and many examples in this section could be actionable under those theories of liability as well. However, because the "interference" provision is broader, it will reach even those instances when conduct does not meet the "materially adverse" standard required for retaliation.

Examples of conduct by an employer prohibited under the ADA as interference would include:

- coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;

Rep. No. 101-485 (II), at 138 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 421 ("The Committee intends that the interpretation given by the Department of Housing and Urban Development to a similar provision in the Fair Housing Act…be used as a basis for regulations for this section."). The National Labor Relations Act (NLRA) also contains an interference provision with similar language to the ADA provision. *See* 29 U.S.C. §158(a)(1) (making it unlawful under the NLRA for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [the Act]").

[183] *See Brown v. City of Tucson*, 336 F.3d 1181, 1192 (9th Cir. 2003) (holding that in comparison to the retaliation provision, the interference provision protects a broader class of persons against less clearly defined wrongs; demands that plaintiff stop taking her medications and perform duties contrary to her medical restrictions or be forcibly retired constituted actionable threats).

[184] The EEOC regulation implementing the interference provision additionally includes the term "harass." 29 C.F.R. § 1630.12(b) ("unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or because the individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part"). The inclusion of the term "harass" in the regulation does not create a separate cause of action for disability-based or retaliatory harassment (which is already actionable under the ADA), but rather is intended to characterize the type of adverse treatment that may in some circumstances violate the interference provision.

- intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;

- threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;

- issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (*e.g.*, a fixed leave policy that states "no exceptions will be made for any reason");

- interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and

- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a co-worker in requesting reasonable accommodation.

The interference provision does not apply to any and all threats or statements that an individual finds intimidating.[185] It only prohibits threatening or coercive conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights, such as threatening an employee with transfer, demotion, or forced retirement unless the individual forgoes a statutorily-protected accommodation.

EXAMPLE 25
Manager Pressures Employee Not to Advise Co-worker of Right to Reasonable Accommodation

Joe, a mail room employee with an intellectual disability, is having difficulty remembering the supervisor's instructions that are delivered orally at morning staff meetings. Dave, a co-worker, explains to Joe that he may be entitled to written instructions as a reasonable accommodation under the ADA and then takes Joe to the human resources department to assist him in requesting accommodation. When the supervisor learns what has happened, he is annoyed that he may have to do "more work" by providing written instructions, and he tells Dave that if he continues to "stir things up" by "putting foolish ideas in Joe's head"

[185] *Brown*, 336 F.3d at 1192-93 (ruling that the ADA's interference provision is not so broad as to prohibit "'any action whatsoever that in any way hinders a member of a protected class'") (citation omitted).

with this "accommodation business," he will regret it. Based on this evidence, the EEOC finds reasonable cause to believe that the supervisor's threat against Dave for assisting another employee in exercising his rights under the ADA is a violation of the ADA interference provision.

EXAMPLE 26
Manager Refuses to Consider Accommodation Unless Employee Tries Medication First

When reviewing medical information received in support of an employee's request for accommodation of her depression, the employer learns that, while the employee's physician had previously prescribed a medication that might eliminate the need for the requested accommodation, the employee chose not to take the medication because of its side effects. The employer advises the employee that if she does not try the medication first, he will not consider the accommodation. The EEOC finds reasonable cause to believe that the employer's actions constitute both denial of reasonable accommodation and interference in violation of the ADA.

A threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.[186]

EXAMPLE 27
Manager Threatens Employee Against Requesting Accommodation

An employee with a vision disability needs special technology in order to use a computer at work. She requests paid administrative leave as an accommodation to visit an off-site vocational technology center with employer's human resources manager in order to decide on appropriate equipment, as well as for several subsequent appointments at the center during which she will be trained on the computer program selected. Her supervisor objects, but the human resources manager advises him that this is part of the process of accommodating the employee with the equipment under the ADA, and that the leave should be

[186] Nevertheless, conclusory allegations -- without more -- are insufficient to state a violation of 503(b). *Id.* at 1193.

granted. The supervisor calls the employee into his office and tells her that he will allow it this time, but if she ever brings up the ADA again, she "will be sorry." The EEOC finds reasonable cause to believe that the supervisor's threat constitutes interference with the exercise of ADA rights in violation of the statute, even if not accompanied or followed by any adverse action.

EXAMPLE 28
Manager Conditions Accommodation on Withdrawal of Formal Accommodation Request

After a lengthy interactive process, an employee with multiple sclerosis is granted a change in schedule as an accommodation. When her condition subsequently worsens, she requests additional accommodations, including telecommuting on days when her symptoms flare up and prevent her from walking. The employer has a policy that prohibits telework. When her supervisor consults human resources, he is advised that the ADA may require making an exception to the usual policy as a reasonable accommodation, unless it would pose an undue hardship. Instead of proceeding with the interactive process, the supervisor tells the employee that if she withdraws her request for accommodation, he will informally allow her to work from home one day per week, but that, if she persists with her formal accommodation request, he will tell human resources that her job cannot be performed from home. The EEOC finds reasonable cause to believe that the supervisor's actions constitute interference in violation of the ADA.

EXAMPLE 29
Manager Threatens Employee with Adverse Action if She Does Not Forgo Accommodation Previously Granted

Due to post-traumatic stress disorder following a nighttime attack, an employee is accommodated with shift assignments that assure that she can commute to and from work during daytime hours. She is subsequently assigned a new supervisor, who threatens to have her transferred, demoted, or placed on medical retirement if she does not work a "normal schedule." Based on these facts, the EEOC finds reasonable cause to believe that the supervisor has violated the interference provision of the ADA.

EXAMPLE 30
Refusal to Consider Applicant Unless He Submits to Unlawful Pre-Employment Medical Examination

A job applicant declines an interviewer's request to submit to a pre-offer medical examination, citing the ADA's prohibition against conducting medical examinations prior to making a conditional offer of employment. The interviewer refuses to consider the application without the examination, so the applicant submits to it. Regardless of whether or not the applicant is qualified or is hired, the EEOC finds reasonable cause to believe that the employer engaged in interference as well as an improper disability-related examination in violation of the ADA.

IV. REMEDIES

A. Temporary or Preliminary Relief

The EEOC has the authority to sue for temporary or preliminary relief before completing its processing of a retaliation charge. Section 706(f)(2) of Title VII[187] authorizes the Commission to seek temporary injunctive relief before final disposition of a charge when a preliminary investigation indicates that prompt judicial action is necessary to carry out the purposes of Title VII. Section 107 of the ADA and section 207 of GINA incorporate this provision. While the ADEA and the EPA do not authorize a court to give interim relief pending resolution of an EEOC charge, the EEOC can seek such relief as part of a lawsuit for permanent relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Temporary or preliminary relief allows a court to stop retaliation before it occurs or continues. Such relief is appropriate if there is a substantial likelihood that the challenged action will be found to constitute unlawful retaliation and if the charging party and/or the EEOC will likely suffer irreparable harm because of the retaliation. Although courts have ruled that financial hardships are not irreparable, other harms that accompany loss of a job may be irreparable. For example, in one case, forced retirees showed irreparable harm and qualified for a preliminary injunction where they lost work and

[187] 42 U.S.C. § 2000e-5(f)(2) ("Whenever a charge is filed . . . and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.").

future prospects for work, consequently suffering emotional distress, depression, a contracted social life, and other related harms.[188]

EXAMPLE 31
Preliminary Relief Granted to Prohibit Retaliatory Transfer During Pendency of EEO Case

> Plaintiff filed an enforcement action in court to obtain compliance with the relief obtained in his Title VII national origin discrimination case. Within two months, his employer ordered him to transfer from its Los Angeles office to its facility in Detroit or be discharged. The court granted preliminary relief to forestall the alleged retaliatory transfer and permit plaintiff to retain employment pending its adjudication of the merits.[189]

In addition, a temporary injunction also is appropriate if the respondent's retaliation will likely cause irreparable harm to the Commission's ability to investigate the charging party's original charge of discrimination. For example, if the alleged retaliatory act might discourage others from providing testimony or from filing additional charges based on the same or other alleged unlawful acts, preliminary relief is justified.[190]

EXAMPLE 32
Preliminary Relief Prohibiting Intimidation of Witnesses

[188] *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984); *see also EEOC v. City of Bowling Green*, 607 F. Supp. 524 (D. Ky. 1985) (granting preliminary injunction preventing defendant from mandatorily retiring police department employee because of his age; although plaintiff could have collected back pay and been reinstated at later time, he would have suffered from inability to keep up with current matters in police department and would have suffered anxiety or emotional problems due to compulsory retirement).

[189] *Garcia*, 805 F.2d at 1405-06 (9th Cir. 1986).

[190] *Id*. at 1405-06 (ruling that the employer's retaliation would have a chilling effect on other employees' willingness to exercise their rights or testify for plaintiff, and therefore would cause irreparable harm). *See also EEOC v. Peters' Bakery*, 13-CV-04507-BLF (N.D. Cal. preliminary injunction issued July 2015) (ruling that harassment about the pending claim, combined with the lack of any lawful reason for discharge, may support entry of a preliminary injunction prohibiting an employer from terminating an employee during the pendency of a federal EEO lawsuit, because "permitting [the charging party] to be terminated under such circumstances may well have a chilling effect on other employees who might wish to file charges with the EEOC, and thus could interfere with the EEOC's mission").

> During the EEOC's systemic investigation of sexual harassment at a large agricultural producer with many low-wage, seasonal employees, the Commission learned that management was creating an environment of intimidation to deter current and former employees from cooperating as witnesses. The court granted the Commission preliminary relief prohibiting any retaliatory measures against the EEOC's potential class members, witnesses, or their family members, as well as any actions that would discourage free association with those individuals. It also enjoined the company from paying or offering to pay for favorable testimony in the EEOC's case.[191]

B. Compensatory and Punitive Damages for Retaliation

1. Title VII and GINA

Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, compensatory and punitive damages are available for a range of violations under Title VII, including retaliation. A cap on combined compensatory and punitive damages (excluding past monetary losses) ranges from $50,000 for employers with 15-100 employees, to $300,000 for employers with more than 500 employees. Section 207 of GINA incorporates all the same remedies available under Title VII. Punitive damages are available when a practice is undertaken "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," which simply means that the employer acted in the face of a perceived risk that its actions will violate federal law. The same evidence used to establish retaliatory intent is often sufficient to establish malice or reckless indifference under this standard.[192]

[191] *See EEOC v. Evans Fruit Co., Inc.*, 2010 WL 2594960 (E.D. Wash., June 24, 2010) (granting EEOC's request for preliminary injunction while the investigation continues, citing the likelihood of irreparable injury if alleged witness tampering was allowed to continue, in that "(a) the Commission's prosecution of its case is likely to be chilled; (b) the Commission's investigation of retaliation charges now pending . . . is likely to be chilled; and (c) current and past . . . employees are likely to be deterred from exercising their rights under Title VII").

[192] *Hunter v. Allis-Chalmers*, 797 F.2d 1417, 1425, (7th Cir. 1986) (holding punitive damages were warranted because the defendant had deliberately fired a worker for making well-founded complaints with a state FEP agency about persistent acts of racial harassment); *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1260 (6th Cir. 1985) (ruling that manager's threat to hurt plaintiff economically for pursuing his complaints of harassment may constitute malice).

2. ADEA and EPA

Compensatory and punitive damages are available for retaliation claims brought under the ADEA and the EPA, even though legal relief is more limited for non-retaliation claims under those statutes.[193] Any compensatory and punitive damages obtained under the EPA and the ADEA are not subject to statutory caps.

3. ADA and Rehabilitation Act

Title V of the ADA sets forth the retaliation and interference provisions but contains no remedy provision of its own, instead incorporating for employment claims the remedies available under Title I of the ADA. The Commission maintains that compensatory and punitive damages are available for retaliation or interference in violation of the ADA, because prevailing plaintiffs under Title I of the ADA may recover compensatory and punitive damages.[194] Pursuant to the Civil Rights Act of 1991, availability of these damages is assessed under the standards applicable to Title VII, and also is available under the same terms for Rehabilitation Act.[195] Among courts, there remains a split of authority regarding whether compensatory and punitive damages are available for retaliation or interference in violation of the ADA.[196]

[193] For non-retaliation EPA claims, liquidated damages up to the amount of backpay for willful violations are available, but not compensatory and punitive damages. Similarly, for non-retaliation ADEA claims, pecuniary damages related to the job are available, but not damages for emotional distress. However, these limitations do not apply to retaliation claims under those statutes. The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes broader relief applicable to retaliation claims under both the EPA and the ADEA, permitting proven compensatory and punitive damages. *See Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004) (discussing availability of damages under anti-retaliation provision of the FLSA); *see also Moskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279, 283-84 (7th Cir. 1993) (holding that FLSA amendment allows common law damages in addition to back wages and liquidated damages where plaintiff is retaliated against for exercising his rights under the ADEA); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543 (7th Cir. 1991) (holding that FLSA amendment authorizes compensatory and punitive damages for retaliation claims under the EPA, in addition to lost wages and liquidated damages); *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108 (7th Cir. 1990) (holding punitive and compensatory damages available for FLSA retaliation claims, but not available for other FLSA violations; *cf. Thomas v. Ala. Home Const.*, 2008 WL 819288 (11th Cir. Mar. 28, 2008) (unpublished) (upholding punitive damage award for retaliation under Title VII).

[194] 42 U.S.C. § 1981a(a)(2).

[195] *Id.*

[196] *Compare Arredondo v. S2 Yachts*, 498 F. Supp. 2d 831, 835 (W.D. Mich. 2007) (ruling compensatory and punitive damages are available because the ADA retaliation provision refers to 42 U.S.C. § 12117 for its remedy, which in turn adopts the remedies set forth in Title VII, specifically 42 U.S.C. § 2000e–5 and 42 U.S.C. § 1981a(a)(2)); *Edwards v. Brookhaven Sci. Assocs.*, LLC, 390 F. Supp. 2d 225, 236 (E.D.N.Y. 2005) (same); *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236, 240-41 (W.D.N.Y. 2003) (same); *Ostrach v. Regents of*

C. Other Relief

Under all the statutes enforced by the EEOC, relief may also potentially include back pay if the retaliation resulted in termination, constructive discharge, or non-selection, as well as front pay or reinstatement. Equitable relief also frequently sought by the Commission includes changes in employer policies and procedures, managerial training, reporting to the Commission, and other measures designed to prevent violations and promote future compliance with the law.

V. BEST PRACTICES

To reduce the incidence of retaliation, employers can recognize both the potential for retaliation and the interaction of psychological and organizational characteristics that contribute to the likelihood of retaliation. While each workplace is different, there are many different policy, training, and organizational changes that employers may wish to consider implementing to achieve this goal.

The following are examples of best practices for employers to utilize in an effort to minimize the likelihood of retaliation violations**.** Best practices are not themselves legal requirements, but rather are steps that may help reduce the risk of violations.

A. Written Employer Policies

Employers should maintain a written, plain-language anti-retaliation policy,[197] and provide practical guidance on the employer's expectations with user-friendly examples of what to do and not to do.[198] The policy should include:

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the Univ. of Cal., 957 F. Supp. 196, 201 (E.D. Cal. 1997) (same), *with Rhoads v. Fed. Deposit Ins. Corp.*, 94 Fed. Appx. 187, 15 A.D. Cases 960 (4th Cir. Apr. 16, 2004) (unpublished); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009) (following *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002) (ruling that compensatory and punitive damages are not available for ADA retaliation)); *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961 964-66 (7th Cir. 2004) (same). Further, several appellate courts, without analyzing the availability of compensatory damages, have affirmed awards to plaintiffs who have prevailed in retaliation claims under the ADA. *See, e.g., Salitros v. Chyrsler Corp.*, 306 F.3d 562, 570 (8th Cir. 2002); *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999).

[197] *EEOC Meeting on Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention* (June 17, 2015) ("*EEOC Meeting"*) (written statements of Karen M. Buesing, Partner, Akerman LLP and Sharon L. Sellers, Society for Human Resource Management (SHRM-SCP), President, SLS Consulting, LLC), http://www.eeoc.gov/eeoc/meetings/6-17-15/buesing.cfm and http://www.eeoc.gov/eeoc/meetings/6-17-15/sellers.cfm; Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 132 (2014) (citing Marc Bendick, Jr., Mary Lou Egan & Suzanne M. Lofhjelm, *Workforce Diversity Training: From Anti-Discrimination Compliance to Organizational Development*, 24 HUM. RESOURCE PLAN., no. 2, 2001 at 10, 11); Donna Rutter, *Managing an Employee Litigant: What to do to and How to Avoid Retaliation Claims*, 8 PSYCHOLOGIST-MANAGER J., 141, 153 (2005); Stephen J. Vodanovich & Chris

- examples of retaliation that managers may not otherwise realize are actionable, including actions that would not be cognizable as discriminatory disparate treatment but are actionable as retaliation because they would deter a reasonable person from engaging in protected activity;[199]

- proactive steps for avoiding actual or perceived retaliation, including interactions by managers and supervisors with employees who have lodged discrimination allegations against them;[200]

- a reporting mechanism for employee concerns about retaliation, including access to a mechanism for informal resolution;[201] and

- a clear explanation that retaliation can be subject to discipline, up to and including termination.[202]

Piotrowski, *Workplace Retaliation: A Review of Emerging Case Law*, 17 The Psychol.-Mgr. J. 71, 76 (2014).

[198] Transcript, *EEOC Meeting on Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention*, http://www.eeoc.gov/eeoc/meetings/6-17-15/transcript.cfm (testimony of Karen Buesing, Partner, Akerman, LLP and Lisa J. Banks, Partner, Katz, Marshall & Banks, LLP).

[199] *See supra* § II.B. *See also* Transcript, *EEOC Meeting*, *supra* note 198 (testimony of Banks) ("There has to be more frequent and more effective training on retaliation so that employers have a better understanding of what they can and cannot do in the face of … protected activity. But I also think that employees need to be trained as well so that they can understand how to protect their rights but also to understand that not all actions taken by an employer are retaliatory even if they occur after protected activity; and also, that complaints of protected activity will not protect them from legitimate discipline, particularly if it's already in the works. So the education and training needs to happen on both sides.")

[200] *Id.*

[201] Brake, supra note 197, at 133 (citing Catherine R. Albiston, Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights, 39 LAW & SOC'Y REV. 11, 14-15 (2005)); see also Lilia M. Cortina & Vicky J. Magley, Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace, 8 J. OCCUPATIONAL HEALTH PSYCH. 247, 263 (2005) (based on study of repercussions for workers who vocalized complaints of mistreatment by more powerful colleagues, urging that "[v]ocal resistance to mistreatment should be the right of all employees, and organizations should empower them to exercise that right and raise their voices without retribution").

[202] Rutter, *supra* note 197, at 152-54; Alix Valenti & Lisa A. Burke, *Post-Burlington: What Employers and Employees Need to Know About Retaliation*, 22 EMPLOY. RESPONS. RTS. J. 235, 246 (2009).

The policy itself also should not include terms that make the employee fear retaliation, such as warning employees that reports of discrimination found to be false will subject the worker to disciplinary action.[203]

Employers should also determine if they maintain any policies that may deter employees from engaging in protected activity, such as policies that would impose materially adverse actions for inquiring, disclosing, or otherwise discussing wages.[204] While most private employers are under no obligation to disclose or make wages public, actions that deter or punish employees with respect to pay inquiries or discussions may constitute retaliation.

B. Training

Employers should consider these ideas for training:

- Train all managers, supervisors, and employees on the employer's written anti-retaliation policy.[205]

- Send a message from top management that retaliation will not be tolerated, provide information on policies and procedures in several different formats, and hold periodic refresher training.[206]

- Tailor training to address any specific deficits in EEO knowledge and behavioral standards that have arisen in that particular workplace,[207] ensuring that employees are aware of what conduct is "protected

[203] Blair T. Jackson & Kunal Bhatheja, Easy as P.I.E.: Avoiding and Preventing Vicarious Liability for Sexual Harassment by Supervisors, 62 DRAKE L. REV. 653, 662 (2014) (citing Williams v. Spartan Communications, Inc., 210 F.3d 364 (4th Cir. 2000) (unpublished) (finding a sexual harassment complaint policy was ineffective in part due to the threat of discipline for false reports)).

[204] *Cf.* Transcript, *EEOC Meeting*, *supra* note 198 (testimony of Buesing and Banks).

[205] *EEOC Meeting*, *supra* note 197 (written statements of Buesing and Sellers); Brake, *supra* note 1987 at 132 (citing Marc Bendick, Jr., Mary Lou Egan & Suzanne M. Lofhjelm, *Workforce Diversity Training: From Anti-Discrimination Compliance to Organizational Development*, 24 HUM. RESOURCE PLAN., no. 2, 2001, at 10, 11); Rutter, *supra* note 197 at 152. *See also* Vodanovich & Piotrowski, *supra* note 197 (make supervisors "cognizant of what constitutes retaliatory behavior").

[206] Valenti & Burke, *supra* note 202, at 246-47.

[207] Rutter, *supra* note 197, at 152.

activity"[208] and providing examples on how to avoid problematic situations that have actually manifested or might be likely to do so.[209]

- Offer explicit instruction on alternative pro-active, EEO-compliant ways these situations could have been handled.[210] In particular, managers and supervisors may benefit from scenarios and advice for ensuring that discipline and performance evaluations of employees are motivated by legitimate, non-retaliatory reasons.[211]

- Emphasize that those accused of EEO violations, and in particular managers and supervisors, cannot act on feelings of revenge or retribution,[212] although also acknowledge that those emotions may occur.

- Do not limit training to those who work in offices. Provide EEO compliance and anti-retaliation training for those working in a range of workplace settings, including for example employees and supervisors in lower-wage manufacturing and service industries, manual laborers, and farm workers.[213]

- Consider overall efforts to encourage workplace civility, which some social scientists have suggested may help curb retaliatory behavior.[214]

[208] Valenti & Burke, *supra* note 202, at 248.

[209] *EEOC Meeting*, *supra* note 197 (written statements of Buesing and Sellers); Valenti and Burke, *supra* note 202, at 247.

[210] Brake, *supra* note 197, at 132.

[211] Karl Aquino, Robert J. Bies, & Thomas M. Tripp, Getting Even or Moving On? Power, Procedural Justice, and Types of Offense as Predictors of Revenge, Forgiveness, Reconciliation, and Avoidance in Organizations, 91 J. OF APPLIED PSYCHOL. 653, 666 (2006).

[212] Valenti and Burke, *supra* note 202 at 247.

[213] Transcript, *EEOC Meeting*, *supra*, note 198 (testimony of Daniel Werner Sr., Supervising Attorney, Southern Poverty Law Center).

[214] *See, e.g.*, Vodanovich & Piotrowski, *supra* note 197, at 77 ("Establish an organizational climate that encourages civility and condemns retaliatory actions."); Andra Gumbus & Patricia Meglich, *Lean and Mean: Workplace Culture and the Prevention of Workplace Bullying*, 13 J. APPLIED BUS. & ECON. 11, 15-18 (2012). We nonetheless recognize that EEO laws do not impose a "general civility code" on the workplace. *Burlington N. v. White*, 548 U.S. at 68 (quoting *Oncale v. Sundower Offshort Servs., Inc.*, 523 U.S. 75, 80 (1998)).

C. Provide Anti-retaliation Advice and Individualized Support for Employees, Managers, and Supervisors

An automatic part of an employer's response and investigation following EEO allegations should be to provide information to all parties and witnesses regarding the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it.[215] As part of this debriefing, managers and supervisors alleged to have engaged in discrimination should be provided with guidance on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace.

- Remind supervisors and managers that it is best not to discuss an employee's pending EEO matters with other employees and managers,[216] but that they are welcome to access designated employer resources for support.[217]

- Provide tips for avoiding actual or perceived retaliation,[218] as well as access to a resource individual for advice and counsel on managing the situation.[219] This may occur as part of the standard debriefing of a manager, supervisor, or witness immediately following an allegation having been made, ensuring that those alleged to have discriminated received prompt advice from a human resources, EEO, or other designated manger or specialist both to air any concerns or resentments about the situation and to assist with strategies for avoiding actual or perceived retaliation going forward.

D. Proactive Follow-Up

Employers may wish to check in with employees, managers, and witnesses during the pendency of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation, and to provide guidance**.**[220] This provides an opportunity to

[215] *EEOC Meeting*, *supra* note 197, and Transcript, *EEOC Meeting*, supra note 198.

[216] Rutter, *supra* note 197, at 152-154.

[217] *EEOC Meeting*, *supra* note 197 (written statement of Banks).

[218] *EEOC Meeting*, *supra* note 197 (written statement of Buesing).

[219] Brake, *supra* note 197, at 131-35; Transcript, *EEOC Meeting*, *supra* note 198 (testimony of Banks).

[220] *EEOC Meeting*, *supra* note 197 (written statement of Sellers); *see* Valenti & Burke, *supra* note 202, at 246 (provide updates to complainants about the status of their claims, and HR oversight of internal investigation process to "ensure objective, timely and professional handling of … complaints").

identify issues before they fester, and to re-assure employees and witnesses of the employer's commitment to protect against retaliation. It also provides an opportunity to give ongoing support and advice to those managers and supervisors who may be named in discrimination matters that are pending over a long period of time prior to reaching a final resolution.

E. Review Consequential Employment Actions to Ensure EEO Compliance

Consider ensuring that a human resources or EEO specialist, a designated management official, in-house counsel, or other resource individual review proposed employment actions of consequence to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons.[221] These reviewers should:

- Require decision-makers to "know, understand, and easily identify" their reasons for taking consequential actions, and ensure that necessary documentation supports the decision.[222]

- Scrutinize performance assessments to ensure they have a sound factual basis and are free from unlawful motivations.

Additional suggestions for reducing incidences of retaliation are available in the EEOC FACT SHEET, RETALIATION – MAKING IT PERSONAL, http://www.eeoc.gov/laws/types/retaliation_considerations.cfm.

[221] Aquino, Bies, & Tripp, *supra* note 211, at 666; Valenti & Burke, *supra* note 202 at 247.

[222] Valenti & Burke, *supra* note 202, at 247-48.