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I. Introduction

Retaliation is an area of employment law that is on the rise. According to EEOC statistics, in 1992, retaliation allegations constituted 14.5% of Title VII charges filed at the agency. By 1999, that figure had risen to 25.4% of Title VII charges, and overall retaliation charges increased to 10% of the total charges under all statutes enforced by the EEOC. See Equal Employment Opportunity Commission, Charge Statistics for FY 1992 through FY 1999 at <http://www.eeoc.gov/stats/charges.html>. The purpose of this paper is to shed light on several of the facets of retaliation.

II. Statutory Provisions

A. Federal Statutes

Section 704(a) of Title VII of the 1964 Civil Rights Act ("Title VII") provides the basic guidelines for establishing a retaliation claim, and most federal employment discrimination statutes have adopted close variations of the Title VII formula. 42 U.S.C. § 2000e-3(a). The Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq., the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §

12203, the Equal Pay Act ("EPA") of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215, and the Family Medical Leave Act ("FMLA"), 29 U.S.C § 2612 et seq. all include retaliation provisions quite similar to Title VII. While additional federal employment rights statutes may be briefly discussed below, generally, these are the statutes most involved in private employment-related retaliation claims.

B. EEOC Guidelines

In May 1998, the United States Equal Employment Opportunity Commission ("EEOC") approved new guidelines regarding retaliation under the federal civil rights laws. The *EEOC Guidance on Investigating, Analyzing Retaliation Claims*, Section 8 of the Commission's new Compliance Manual ("*EEOC Guidance*"), replaces Section 614 of the Commission's existing Compliance Manual, Volume 2. See EEOC Guidance, reprinted in 405 FEP Manual 7581 (BNA). The *EEOC Guidance* was created in response to the Supreme Court's ruling in Robinson v. Shell Oil Co., 519 U.S. 337, 117 S.Ct. 843, 849, 72 FEP Cases 1856 (1997) in order to clarify the changes in retaliation laws and the EEOC's interpretation of those laws. The *EEOC Guidance* considers the private employment rights addressed in Title VII, the ADEA, Title I of the ADA, the EPA, and sections of the Civil Rights Act of 1991. See 405 FEP Manual at 7581. Finally, the *EEOC Guidance* presents the EEOC's broad interpretation of what constitutes an adverse employment action sufficient to support a charge of retaliation. See 405 FEP Manual at 7587-90.

III. Elements of a Claim

The formula for establishing a retaliation claim was first announced under Title VII, and its standards have been applied to retaliation claims under other employment law statutes as well. "Under the McDonnell Douglas proof scheme, [the plaintiff] must first offer evidence sufficient to establish a *prima facie* case of discriminatory retaliation." See Tinsley v. First Union Natl. Bank, 155 F.3d 435, 442, 77 FEP Cases 1753 (4th Cir. 1998) citing Karpel v. INOVA Health Sys. Servs., 134 F.3d 1222, 1228, 76 FEP Cases 25 (4th Cir. 1998). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 5 FEP Cases 965 (1973).

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must show: (1) he/she engaged in statutorily protected conduct or expression; (2) he/she was subjected to an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. Once the plaintiff has made a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. If the defendant is able to meet this burden, then the plaintiff is given an opportunity to demonstrate that the defendant's asserted reason for the employment action is a pretext for discriminatory retaliation. This standard appears to have been adopted in every federal circuit. See e.g., Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 78 FEP Cases 90 (1st Cir. 1998); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 78 FEP Cases 371 (2d Cir. 1998); Woodson v. Scott Paper Co., 109 F.3d 913, 73 FEP Cases 1237 (3d Cir. 1997); Tinsley, 155 F.3d 435 (4th Cir. 1998); Scrivner v. Socorro Indep. Sch. Dist., 169 F.3d 969, 79 FEP Cases 429 (5th Cir. 1999); Moore v. Kuka Welding Systems, 171 F.3d 1073, 79 FEP Cases 795 (6th Cir. 1999); Parkins v. Civil Contractors of Ill., Inc., 163 F.3d 1027, 78 FEP Cases 1329 (7th Cir. 1998); Artis v. Francis Howell North Band Booster Ass'n Inc., 161 F.3d 1178, 78 FEP Cases 1283 (8th Cir. 1998); Tarin v. County of Los Angeles, 123 F.3d 1259, 79 FEP Cases 1284 (9th Cir. 1997); Penry v. Federal Home Loan Bank of Topeka, 155 F.3d 1257, 79 FEP Cases 1165 (10th Cir. 1998); Berman v. Orkin Exterminating Co., Inc., 160 F.3d 697, 78 FEP Cases 720 (11th Cir. 1998); Thomas v. National Football League Players Assoc., 131 F.3d 198, 76 FEP Cases 1590 (D.C.Cir. 1997).

This proof scheme has also remained virtually unchanged and used in most federal anti-

retaliation statutes. However, each statute prohibits retaliation against individuals who engage in the activities that are protected under the particular statute. See e.g., Sanchez v. Denver Public Schools, 164 F.3d 527, 79 FEP Cases 624 (10th Cir. 1998) (utilizing the Title VII analysis to evaluate an ADEA retaliation charge); Kersting v. Wal-Mart Stores, Inc., No. 00-3020, 2001 WL 527623 (7th Cir. May 18, 2001) (applying Title VII evidentiary framework for proving retaliation claim under the ADA); King v. Preferred Technical Group, 166 F.3d 887, 892 (7th Cir. 1999) (explaining that the McDonnell Douglas framework should apply to FMLA cases where the plaintiff does not have direct evidence of retaliation).

In recent decisions, however, courts have continued to refine the definition of protected activity, the scope of liability, and the type of adverse action required to establish a retaliation claim.

A. Protected Activity

In Section 2000e-3(a), Title VII classifies the actions protected under Title VII either as opposition or participation activities. It prohibits any employer, employment agency, or labor organization addressed under Title VII from imposing discriminatory employment actions upon any individual protected under Title VII,

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.

42 U.S.C. § 2000e-3(a).

These protected activity classifications, the "opposition clause" and the "participation clause," have been adopted under the ADA, the ADEA, and the FMLA. The ADEA and the ADA have a similar provision. 42 U.S.C. § 623(d); 42 U.S.C. § 12203(a), respectively. The ADA adds specifications of its own by stating:

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 aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(b).

The FMLA states that, to insure the availability of reinstatement for an employee returning from FMLA leave, the Act makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). Further, an employer may not consider the taking of FMLA leave as a negative factor in employment actions. See 29 C.F.R. § 825.220(c); see also *King*, 166 F.3d at 891.

In addition to the aforementioned statutes, although the EPA does not expressly contain an opposition clause, several courts have incorporated provisions of Title VII's opposition clause into the EPA. In E.E.O.C. v. Romeo Community Schools, 976 F.2d 985, 989-90, 60 FEP Cases 705 (6th Cir. 1992), for example, the Sixth Circuit held that a female temporary custodian was denied a promotion to a permanent custodial position in retaliation for her informal complaints to her employer regarding the disparity in wages between male and female temporary custodians. Citing the Third,

Eighth, Tenth, and Eleventh Circuits, the court stated that the EPA's protections extended to opposition activities such as unofficial complaints at work regarding suspected violations of statutory rights. See *id.* at 989 (*internal citations omitted*). "[I]t is the assertion of statutory rights which is the triggering factor, not the filing of a formal complaint." *Id.* (*internal citations omitted*).

Not all Circuits agree with this interpretation, however. In *Lambert v. Genesee Hospital*, 10 F.3d 46, 55, 62 FEP Cases 1638 (2d Cir. 1993), the court cited the dissenting opinion in *Romeo* and held that Section 215(a)(3) of the EPA plainly "limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." *Id.* at 55. The Lambert court added that the unambiguous language of the statute eliminated the need to "defer to the EEOC's interpretation in its compliance manual that the EPA retaliation provisions should encompass informal workplace complaints." *Id.* *citing Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781 (1984) (stating "[i]f the intent of Congress is clear, that is the end of the matter.").

Since each of these statutes uses as its model the protected activity provisions of Title VII, the opposition and participation clauses of Title VII will be the basis for examining protected activities under each of the federal private employment rights statutes.

1. Opposition Clause

Title VII's "opposition clause" protects anyone who Aopposes any practice made an unlawful employment practice by this subchapter . . ." 42 U.S.C. ' 2000e-3(a). This clause does not provide absolute protection, however. The form of opposition must be reasonable, and the opposing party must have a good faith belief that there has been a Title VII violation. See McDonnell Douglas, 93 S.Ct. at 1824 (stating that providing protection for certain activities "was not intended to immunize insubordinate, disruptive, or nonproductive behavior at work" where past employees opposed allegedly discriminatory employment practices by blocking road to business entryway and barricading doors of facility). For example, in Cruz v. Coach Stores, Inc., 202 F.3d 560, 566-67, 81 FEP Cases 1762 (2d Cir. 2000), the court held that the plaintiff's act of slapping the alleged harasser, even though she may have been reacting to conduct prohibited under Title VII, her conduct was not protected activity. The Court stated that Title VII "& does not constitute a license for employees to engage in physical violence to protest discrimination." *Id.* at 567. See also Robbins v. Jefferson County Sch. Dist., 186 F.3d 1253, 80 FEP Cases 795 (10th Cir. 2000) (finding plaintiff's frequent, voluminous, often specious complaints and antagonistic behavior towards her superiors did not constitute protected activity under Title VII).

Not every act of opposition to discrimination will be considered protected activity; the act must be in opposition to what is reasonably believed to be an unlawful employment practice by the employer. In Wimmer v. Suffolk County Police Dept., 176 F.3d 125, 134-35, 79 FEP Cases 125 (2d Cir. 1999), the plaintiff alleged that he was given poor performance evaluations and was eventually terminated after he reported that he overheard co-workers making racial slurs towards black citizens and after he questioned whether two traffic stops made by a fellow officer were racially motivated. As an issue of first impression, the Second Circuit ruled that opposition to discrimination by co-

employees against non-employees did not constitute protected activity under Title VII because plaintiff's opposition was not directed at an unlawful employment practice of his employer. See *id.* at 135 citing Little v. United Technologies, 103 F.3d 956, 959-60 (11th Cir. 1997). But see McMenemy v. City of Rochester, 241 F.3d 279, 85 FEP Cases 237 (2d Cir. 2001)(finding city firefighter engaged in protected opposition when he initiated an investigation into possible sexual harassment by the union president because the employer may have had an interest in retaliating against the plaintiff for his complaints about the union).

The underlying allegation of discrimination, however, does not need to be proven in favor of the employee for a retaliation claim to have merit. For example, in Hocevar v. Purdue Frederick Co., 223 F.3d 721, 83 FEP Case 1196 (8th Cir. 2000) the employee was allowed to proceed to trial on her retaliation claim even though her hostile work environment sexual harassment claim was defeated on summary judgment. See also Sanchez, 164 F.3d at 533 (stating that "[a] meritorious retaliation claim will stand even if the underlying discrimination claim fails" and holding that retaliation claims could be evaluated by the court despite finding in favor of defendant on underlying Title VII and ADEA claims); Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976 (7th Cir. 2000) (allowing plaintiff's retaliation claim to proceed to trial despite a finding of insufficient evidence to sustain plaintiff's sexual harassment claim).

However, in Clark County Sch. Dist. v. Breeden, ___ U.S. ___, 121 S.Ct. 1508, 1510, 85 FEP Cases 730 (April 23, 2001), the Supreme Court held that no reasonable person could have believed that a single incident of sex discrimination implicated Title VII thus not supporting the plaintiff's retaliation claim based on opposition. In this case, Breeden, her male supervisor and a male co-worker were reviewing applicant's files. In one of the files there was a report from an applicant's co-worker stating that the applicant once said "I hear making love to you is like making love to the Grand Canyon." *Id.* at 1508. When Breeden's supervisor commented "I don't know what that means," her male co-worker stated "Well, I'll tell you later," and the two men chuckled. Breeden later complained about the incident to other supervisors in the school district. *Id.* The Supreme Court held that this was an isolated incident and that no reasonable person could have believed that it violated Title VII's standards. *Id.* at 1510. See also Hamner v. St. Vincent Hosp. and Health Care Center, Inc., 224 F.3d 701, 83 FEP Cases 1265 (7th Cir. 2000)(finding homosexual plaintiff's retaliation claim fails because his belief that he was opposing unlawful conduct, i.e. sexual orientation discrimination, was unreasonable).

In its *Guidance on Investigating, Analyzing Retaliation Claims*, the EEOC clarified that the anti-retaliation provisions under the ADA apply to opposition to practices made unlawful by the entire Act. Not just the employment provisions. See EEOC Guidance 405 FEP Manual at 7581. Thus, the ADA prohibits retaliation against those opposing discrimination against individuals with disabilities in public accommodations, telecommunications, commercial facilities and state and local government services.

2. Participation Clause

Activities protected from retaliatory action include those falling within Title VII's "participation clause" which protects anyone who has "made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. ' 2000e-3(a). In contrast to opposition activities, participation activities are more likely to be protected regardless of the validity or reasonableness of the underlying alleged statutory violation.

For example, in Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 79 FEP Cases 276 (4th Cir. 1999), the court ruled that Title VII's "participation clause" protects even "unreasonable testimony" given during a Title VII proceeding. See *id.* at 414. Specifically, the defendant alleged that plaintiff had utilized poor judgement when she "freely offered not only facts directly related to [the discrimination suit], but also [accused her successor] of mismanagement, destruction of office documents, wasting funds, inappropriate behavior, dishonesty, and discrimination." *Id.* at 412. The court found that "all testimony in a Title VII proceeding is protected against punitive employer action" regardless of its reasonableness, to ensure "not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses." *Id.* at 414. But see Douglas v. Dyn McDermott Petroleum Operations Co., 163 F.3d 223 (5th Cir. 1998) (finding as a matter of law that human resource counsel plaintiff's act of disclosing confidential information to government investigators regarding another employee's discrimination claim was unreasonable and did not constitute protected activity under Title VII because his conduct breached his employer's attorney-client privilege).

In Clover v. Total System Services Inc., 176 F.3d 1346, 1352, 79 FEP Cases 1500 (11th Cir. 1999) the employer argued that Clover's conduct did not constitute protected activity because she simply participated in an internal investigation of another employee's EEOC charge, and that such was not participation in an investigation intended to be covered by Title VII. The court disagreed. Applying a broad definition of "participat[ion] in any manner" under Title VII, the court found that an internal investigation of an employee's EEOC charge is, in effect, an extension of the EEOC investigation itself since the agency often relies on information gleaned from the employer's own internal investigation. See *id.* at 1353. But see Brower v. Runyon, 178 F.3d 1002, 80 FEP Cases 560 (8th Cir. 1999) (holding plaintiff's visits to employer's EEO counselor and HR manager did not constitute participation where neither conversation involved any complaints of discrimination or implications of unfair treatment).

B. Adverse Employment Action

Once it has been determined that a protected party engaged in a protected activity, the plaintiff must identify an adverse employment action. Such actions may take several forms; for example, job loss, wage reduction, reassignment, or transfer.

A number of federal courts have interpreted this issue strictly, finding that retaliation must take the form of an "ultimate employment action." See, e.g. Watts v. Kroger Co., 170 F.3d 505, 81 FEP Cases 6 (5th Cir. 1999) (holding employment actions are not adverse where level of pay, benefits and responsibility are unaffected); Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 80 FEP Cases 239 (8th Cir. 1999) (finding no adverse action despite plaintiff's claims that employer failed to address the hostile

work environment created by co-workers where plaintiff's transfer caused her no diminution in title, salary or benefits). But see Fielder v. UAL Corp. d/b/a United Airlines, 218 F.3d 973, 83 FEP Cases 493 (9th Cir. 2000) (finding adverse action where employee was ostracized by co-workers who refused to answer plaintiff's necessary technical questions; told that she was "neurotic and sick" and "not welcome here;" and publicly accused of fabricating her sexual harassment charges).

Importantly, the *EEOC Guidance* reflects the EEOC's disagreement with this standard, which it characterizes as "unduly restrictive." See 405 FEP Manual at 7589-90. The *EEOC Guidance* advocates the broader interpretation adopted by other courts, stating that the statutory protections against retaliation prohibit "any adverse treatment that is based on a retaliatory motive and that is reasonably likely to deter the charging party or others from engaging in protected activity." *Id.* The Third Circuit exercised this broader standard in Durham Life Ins. Co. v. Evans, 166 F.3d 139, 158, 78 FEP Cases 1434 (3d Cir. 1999). In that case, the court found the employer to have retaliated against Evans by failing to conduct a "full exit audit" of the employee's accounts before the employee left the company. This failure resulted in an investigation of Evans by the state insurance department and caused Evans to suffer significant adverse effects on her ability to continue insurance work. See *id.* at 160. The court emphasized that "[p]ost-employment actions by an employer can constitute discrimination under Title VII if they hurt a plaintiff's employment prospects." See *id.* at 157.

Even courts that adopt the broader definition have consistently held that the alleged retaliatory conduct must still "materially affect the terms, conditions and privileges of employment." See Munday v. Waste Mgmt. of N. America, Inc., 126 F.3d 239, 243, 74 FEP Cases 1478 (4th Cir. 1997) (finding action did not materially affect terms and conditions of employment where employer instructed co-workers to shun plaintiff, spy on her and report her activities to management); LaCroix v. Sears, Robuck and Co., 240 F.3d 688, 85 FEP Cases 191 (8th Cir. 2001) (finding supervisor's refusal to speak to plaintiff and failure to inform her of mandatory meetings did not constitute adverse action even where her lack of attendance at such meetings resulted in a poor performance, absent a showing that such review was used to detrimentally alter the terms and conditions of her employment).

In several recent cases, the courts have found that the employer's unreasonable failure to address co-worker or third party harassment of the plaintiff constituted an adverse action. See e.g. Richardson v. New York State Dept. of Corr. Service., 180 F.3d 426, 80 FEP Cases 110 (2d Cir. 1999) (finding employer's unreasonable failure to stop co-worker harassment constituted an adverse action where the harassment caused the employee to suffer a materially adverse change in the terms and conditions of her employment); Strouss v. Michigan Dept. of Corr., 250 F.3d 336, 85 FEP Cases 1250 (6th Cir. 2001) (finding sufficient fact questions as to whether the plaintiff's lateral transfer to another correctional facility constituted an adverse action where she was subjected to constant threats of violence by the inmates in the new facility).

In White v. New Hampshire Dept. of Corr., 221 F.3d 254, 83 FEP Cases 851 (1st Cir. 2000), the court upheld the jury's verdict for the former corrections officer who alleged that she was retaliated against for her complaints of sexual harassment. Importantly, the court held that there was sufficient evidence to support the jury's finding that the plaintiff suffered adverse actions. The plaintiff had presented evidence

that following her complaints of sexual harassment she was subjected to continued harassment by co-workers; she was transferred out of her unit without her consent and not reassigned; she was left to find another assignment on her own; and was ultimately constructively discharged. 221 F.3d at 262.

C. Causal Connection

The final element of a retaliation claim requires the plaintiff to prove that the identified adverse employment action was causally connected to his/her statutorily-protected activity. See Dowe v. Total Action, 145 F.3d 653, 657-58, 77 FEP Cases 151 (4th Cir. 1998).

Importantly, several of the circuit courts differ in their view of causation in retaliation cases. For example, on the strict end of the spectrum the Seventh Circuit has stated that a plaintiff must demonstrate that the employer would not have taken the adverse action "but for" the plaintiff's protected activity. See Adusumilli v. City of Chicago, 164 F.3d 353, 363, 78 FEP Cases 1669 (7th Cir. 1998). By contrast, the Eleventh Circuit has stated that to prove a causal connection "a plaintiff must show that the decision-makers were aware of the protected conduct, and that the activity and the adverse action were not wholly unrelated." Gupta v. Florida Bd. of Regents, 212 F.3d 571, 587, 84 FEP Cases 1408 (11th Cir. 2000). While the Sixth Circuit attempts to strike middle ground by holding that "although no one factor is dispositive," evidence of differential treatment or that the adverse action was taken "shortly after the plaintiff's exercise of his protected rights" is relevant to causation. Nguyen v. City of Cleveland, 229 F.3d 559, 563, 84 FEP Cases 242 (6th Cir. 2000).

The link between the adverse action and the prohibited rationale may be proven either through direct or circumstantial evidence. However, conclusory statements or allegations of the connection are insufficient. See Allen v. Michigan Dept. of Corrections, 165 F.3d 405, 413, 78 FEP Cases 1578 (6th Cir. 1999) (holding that plaintiff's statement that "he was not promoted to sergeant while non-black employees were promoted to sergeant" was insufficient to establish causation where plaintiff failed to present any evidence supporting his statement).

1. Direct Evidence

Direct evidence of a causal connection between an adverse employment action and a retaliatory motive may take several forms. These include a written or oral statement - such as an office memo or a phone conversation - made by the decision-maker to the affected party or to the enforcing party that the basis for the decision was retaliation for engagement in protected activities. It is unusual for an employee to be able to present such "smoking gun" evidence, but, where such evidence is available, retaliation is substantially more easily established.

In Walker v. Glickman, 241 F.3d 884, 888, 85 FEP Cases 186 (7th Cir. 2001) the court restated its definition of direct evidence:

Direct evidence is evidence which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption. If the evidence consists of isolated statements, those statements should be causally related to the & decision making process, for direct evidence relate[s] to the

motivation of the decision-maker responsible for the contested decision.

See *id.* citing Miller v. Borden, Inc., 168 F.3d 308, 312 (7th Cir. 1999)(internal citations omitted).

In Rubenstein v. Administrators of the Tulane Education Fund, 218 F.3d 392, 402 84 FEP Cases 1059 (5th Cir. 2000) cert. denied, ____ U.S. ____, 121 S.Ct. 1393, 69 USLW 3419 (U.S. Mar. 19, 2001), the plaintiff established sufficient direct evidence of the causal link by presenting deposition testimony from the reviewing professor admitting that he denied Rubenstein a raise because he had filed his national origin discrimination suit. Despite the employer's attempts to distance itself from the reviewing professor's testimony, the court stated that viewing the testimony in the context of the entire record, it "could be no more direct on the issue of retaliation." *Id.*

By contrast, in Walker, the court reviewed the plaintiff's "direct" evidence and concluded that it did not establish a retaliatory animus. 241 F.3d at 889. Specifically, in support of his claim that he was unlawfully denied four positions with the National Resources Conservation Service, Walker presented three instances of direct evidence: (1) a letter from the hiring director (Dean) stating that Walker's complaint letter made him want to investigate his work history; (2) Dean's testimony that he wanted to hire a team leader or "cheerleader;" and (3) a conflict between Dean's testimony that he spoke with HR regarding Walker's dedication to the agency and the human resource manager's testimony that no such conversation occurred. *Id.* at 888. Analyzing the evidence in the light most favorable to the plaintiff, the court found that the evidence failed to demonstrate a retaliatory animus because the employer provided credible alternative explanations for its refusal to hire Walker. See *id.* at 889 - 890.

2. Inference of Retaliation

Where no direct evidence is available, a plaintiff may establish a causal connection through circumstantial evidence, i.e. the plaintiff must create an inference that the employer's adverse action had a retaliatory motive. See King, 166 F.3d at 891-94 citing McDonnell Douglas, 411 U.S. at 802-05.

The creation of an inference of retaliation can be quite simple. The *EEOC Guidance* recommends presenting evidence that "the adverse action occurred . . . after the protected activity, and "the person who undertook the adverse action was aware of the plaintiff's protected activity before taking the action." *EEOC Guidance*, 405 FEP Manual 7581 (BNA); Bass v. Board of County Commiss., Orange County, Fl., 242 F.3d 996, 1015, 85 FEP Cases 202 (11th Cir. 2001).

For example, a short time span between the employee's protected action and the employer's employment action can provide sufficient evidence to infer causation. See Bassett v. City of Minneapolis, 211 F.3d 1097, 1105-1106, 83 FEP Cases 1097 (8th Cir. 2000)(finding temporal proximity of two weeks between filing of plaintiff's charge of discrimination and the negative reviews and reprimands given to her supported an inference of retaliation); Bass, 242 F.3d at 1015-1016 (holding that plaintiff established a sufficient causal connection where he suffered adverse actions within weeks of filing his EEOC

charge). But see Strouss, 250 F.3d at 340 (holding that temporal proximity alone is insufficient to support an inference of retaliation where an employer presents evidence that it was open to complaints of discrimination).

However, where there is a delay between the protected activity and the adverse action(s), there may be no inference of retaliation. See Oest v. Illinois Dept. of Corr., 240 F.3d 605, 616, 85 FEP Cases 586 (7th Cir. 2001) citing Davidson v. Midelfort Clinic Ltd., 133 F.3d 499, 511 (7th Cir. 1998). In Oest, the Seventh Circuit applied the temporal proximity element strictly, holding that the eight months between plaintiff's EEOC charge and the first act of discipline against amounted to a delay that was "& too attenuated to support a jury verdict of retaliation." 240 F.3d at 616. Despite Oest's claim that the eight-month lapse was necessary for her supervisors to "build a case against her," the court found that the intervening events were unrelated to the decision to terminate her. Id. at 617. See also Maniccia v. Brown, 171 F.3d 1364, 1369-1370, 80 FEP Cases 901 (11th Cir. 1999) (holding no inference of retaliatory motive where employee was reassigned 15 months after sexual harassment complaint and was terminated 21 months after filing such grievance).

In addition to temporal proximity, a causal link between the protected activity and adverse action may be established by presenting evidence that the plaintiff was treated differently than his/her counterparts after the protected activity or that the employer gave inconsistent reasons for its adverse action. See e.g. Moore, 171 F.3d at 1079 (finding evidence of management's efforts to isolate plaintiff from his co-workers and give him unwarranted disciplinary write-ups for "trivial matters" which began after he filed his EEOC complaint established the necessary causal connection); Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281, 82 FEP Cases 464 (3d Cir. 2000) (holding that district court's requirement of proof of "intervening antagonism" was too restrictive and allowing plaintiff to prove causal connection by demonstrating inconsistencies in the employer's articulated reasons for her termination).

Once the plaintiff has presented sufficient evidence to establish an inference of retaliation, the employer has an opportunity to rebut the inference by presenting a legitimate, non-retaliatory reason for the employment action. See EEOC v. Board of Governors of State Colleges and Universities, 957 F.2d 424, 427, 58 FEP Cases 292 (7th Cir. 1992). This is achieved by demonstrating that the employer "took the adverse action for some reason unrelated to the employee's participation in protected activity." Id. at 427. See e.g. Velasco v. Illinois Dept. of Human Services, 246 F.3d 1010, 1017, 85 FEP Cases 1176 (7th Cir. 2001) (holding that defendant's assertion that plaintiff was terminated because she failed to timely respond and supply medical attention during a life-threatening Code Blue emergency was a sufficient legitimate, nondiscriminatory reason to satisfy defendant's burden of production).

In Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1007, 84 FEP Cases 835 (7th Cir. 2000), the plaintiff had documented and admitted problems with absenteeism prior to her complaints of sexual harassment against her supervisor. When plaintiff's absenteeism continued and worsened in the months following her sexual harassment complaint, her employer gave her a written warning and eventually laid her off. The court found that the employer's discipline of Paluck after her protected activity was based on legitimate, non-

discriminatory reasons and that her filing of a complaint "does not prevent her employer from issuing written charges against her when her conduct warranted discipline." Id. at 1011. The court further noted that discrimination complaints do not "immunize" employees from disciplinary action and that "[e]mployers retain, as they always have, the right to discipline or terminate employees for any legitimate nondiscriminatory reason." Id. citing Glover v. South Carolina Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999).

D. Pretext

When a defendant succeeds in asserting a legitimate, non-retaliatory reason for an adverse action, the plaintiff may only prevail if he/she is able to demonstrate that the rationale presented by the employer is a pretext for retaliation. Parkins, 163 F.3d at 1039.

In 2000, the Supreme Court decided Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), an age discrimination case in which the Court clarified the standard for proving pretext and put to rest the so-called "pretext plus" standard that was being applied in several circuit courts of appeals. Importantly, the Court ruled that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 120 S.Ct. at 2109.

Based on the recent caselaw, it does not appear that the lower federal courts have eagerly embraced the Reeves analysis of pretext in Title VII retaliation cases. However, as the Seventh Circuit recently explained, there is more than one way for a plaintiff to show that the employer's asserted reason(s) for its conduct were a pretext for discrimination. See Velasco, 246 F.3d at 1017. Specifically, to demonstrate pretext, the plaintiff must demonstrate that the employer's articulated reason for the adverse action either: (1) has no basis in fact; (2) did not actually motivate the decision; or (3) was insufficient to motivate the decision. See id. citing Collier v. Budd Co., 66 F.3d 886, 892 (7th Cir. 1995).

In cases where the employer's asserted reason for its adverse action against the plaintiff is the plaintiff's misconduct, it is often difficult for the plaintiff to prove pretext. However, if the plaintiff can show that employees outside the protected class, who were involved in misconduct of comparable seriousness, were not subjected to similar adverse employment action(s), then he/she may be able to prove pretext. See Johnson v. West, 218 F.3d 725, 733, 83 FEP Cases 602 (7th Cir. 2000). In Johnson, the plaintiff, a nurse at the VA hospital, had been subjected to repeated instances of sexual touching at the hands of her supervisor, Williams. After filing her internal complaint of sexual harassment against Williams, he again touched her in a sexual manner, and in response, she slapped him. Soon after this, Johnson was terminated for violating the VA department's policies by assaulting her supervisor. Id. The district court rejected Johnson's retaliation claim because it accepted the VA's justification for its termination of Johnson as a legitimate nondiscriminatory reason. Id. at 732. However, the Seventh Circuit found sufficient evidence of pretext to reverse and remand the case for trial. Importantly, when it compared that VA's treatment of Johnson and Williams, it found that while they had both committed assault (Williams committed several assaults on Johnson), both were not similarly treated since Williams

was not even disciplined for his conduct. *Id.* at 733.

E. Mixed Motive Cases

When direct or circumstantial evidence establishes that retaliation was a factor in an adverse employment action, but where retaliation is not the sole basis for the decision, liability depends upon the standard a court enforces regarding mixed motive situations. Some courts have held that Section 107(a) of Title VII establishes employer liability for any adverse employment action in which retaliation is a motive for the decision, regardless of whether it was a dispositive factor. See Fields v. New York State Office of Mental Retardation and Developmental Disabilities, 115 F.3d 116, 123-25, 73 FEP Cases 1736 (2d Cir. 1997). Previously, based on the holding of Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 49 FEP Cases 954 (1989), liability was only imposed when retaliation was determined to be a "but for" motivating factor in the employment decision without which the adverse action would not have occurred. However, in Fields, the Second Circuit firmly stated that Section 107(a) "modifies Price Waterhouse to make sure that a successful affirmative defense only limits the plaintiff's relief, rather than avoiding the defendant's liability." *Id.*, 115 F.3d at 123-25 citing Fuller v. Phipps, 67 F.3d 1137, 1142, 69 FEP Cases 111 (4th Cir. 1995).

However, the *EEOC Guidance* warns that "[s]ome courts have ruled that Section 107(a) [of Title VII] does not apply to retaliation claims" and have applied the more stringent standard of Price Waterhouse. See Speedy v. Rexnord Corp., 234 F.3d 397, 401, 85 FEP Cases 397 (7th Cir. 2001)(holding that Price Waterhouse rather than Section 107(a) controls in retaliation involving mixed motives). Based upon this standard, as long as an employer can prove that an adverse employment action would have occurred for reasons other than retaliation, the employer can escape liability even where the plaintiff has proven through direct or circumstantial evidence that retaliation was one of the motives. See *id.* at 402.

By contrast, in Rubenstein, 218 F.3d 392 (5th Cir. 2000) cert. denied, ___ U.S. ___, 121 S.Ct. 1393 (Mar. 19, 2001), the Fifth Circuit upheld the jury verdict in plaintiff's favor on his retaliation claim where the jury was given a mixed-motive instruction. In this case, Rubenstein alleged that the university denied him a 3.5 percent raise after he filed claims of national origin and religious discrimination. The jury was instructed on the mixed-motive analysis after the defense put forth evidence of a non-retaliatory motive for denying Rubenstein's raise, i.e. "poor university citizenship," low teaching evaluation scores and an insufficient mentoring record. The jury concluded that, although Rubenstein's discrimination claims were a motivating factor in the denial of his raise and the university had legitimate non-discriminatory reasons for its decision, the university would not have made the same decision but for its retaliatory motive. *Id.* at 403. The Fifth Circuit refused to squarely address whether the mixed-motive analysis applies in retaliation cases because it did not feel that the issue was "clearly presented" in this case, but concluded that there was sufficient evidence to sustain the jury's verdict. *Id.* Since the Supreme Court has declined to review this decision, we continue to wait for clarification on whether the mixed-motive analysis should be applied to retaliation cases.

IV. Current Issues

A. Protected Parties

In recent years, the Supreme Court and the lower federal courts have issued opinions that have extended anti-retaliation protections beyond the parameters of a current employment relationship to cover former employees and even third parties who have been affected by the employer's retaliatory conduct.

In 1997, the Supreme Court resolved a split in the federal courts over the issue of whether a former employee could sue for retaliation. In Robinson, the Court held that former employees have the same rights as current employees to sue on the grounds that prospective, current or previous employers retaliated against them for engaging in protected activities. 117 S.Ct. at 849. Plaintiff Robinson applied for a job with another employer while his race discrimination charge was pending at the EEOC, and his former employer gave a negative reference that Robinson claimed was in retaliation for filing an EEOC charge. See *id.* at 845. The Court agreed with the EEOC that former employees should be able to sue for retaliation because to prevent them from doing so would:

undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to [the] EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.

Id. at 848.

Title VII not only provides protection for employees who personally engage in protected activities but many courts hold that it also protects job applicants and individuals who are so closely related to or associated with the actor that adverse employment actions imposed upon the plaintiff would discourage the actor from engaging in protected activities. This protection also extends to individuals who are not part of a protected group yet are the victims of employer retaliation based upon their relationships with members of protected groups. See Kubicko v. Ogden Logistics Services, 181 F.3d 544, 79 FEP Cases 1591 (4th Cir. 1999) (alleging retaliation by employer for plaintiff's opposition to his supervisor's sexual harassment of plaintiff's co-worker and for plaintiff's participation in a related protected activity) see also EEOC v. Ohio Edison Co., 7 F.3d 541, 63 FEP Cases 65 (6th Cir. 1993). The plaintiff only has to allege that retaliatory actions were taken against him/her, not that he/she was personally the victim of discriminatory treatment. See *id.* at 543 citing DeMedina v. Reinhardt, 444 F.Supp. 573, 20 FEP Cases 280 (D.C. 1978) (holding that in "several cases, courts have found that if an employer retaliated against a close relative of the person engaging in protected activity, the relative may bring a claim under 42 U.S.C. § 2000e-3(a), even though the relative was not the person engaging in the protected activity").

In Ohio Edison, the court recognized plaintiff, Johnnie Whitfield's, retaliation claim based upon the actions of a co-worker. See 7 F.3d at 542. Prior to his suit, Whitfield had been terminated by his employer and then offered reinstatement. See *id.* His employer allegedly withdrew the offer in retaliation against complaints made on Whitfield's behalf by a former co-worker stating that the employer had discriminated against Whitfield in violation of Title VII based upon race. See *id.* While the co-worker's complaints were protected under Title VII's opposition clause, Whitfield, on the other hand, had not personally complained of discrimination. See *id.*

While the Ohio Edison court recognized that the explicit language of Title VII did not

address situations in which retaliation was directed at someone other than the person engaged in protected activity, it nevertheless found that the statute provided protection in such situations. See *id.* at 544-45. The Sixth Circuit cited the Supreme Court holding of NLRB v. Scribner, 405 U.S. 117, 92 S.Ct. 798 (1972) in which the Court stated that "the language of a statute should not be read strictly, but should 'be read more broadly' if such a reading was also consistent with the 'purpose and objective' of the prohibition made illegal by the statute." Ohio Edison, 7 F.3d at 545. Based on this reasoning, the Ohio Edison court determined that Whitfield was protected under Title VII regarding the rescinding of his reinstatement offer. See *id.* at 546-47.

Similar protection has also been granted based on marital relationships, as in Murphy v. Cadillac Rubber & Plastics, Inc., 946 F.Supp. 1108, 1118, 76 FEP Cases 1295 (W.D.N.Y. 1996). In Murphy, the plaintiff's wife was the party that engaged in statutorily-protected activities, yet plaintiff was subjected to adverse retaliatory employment actions. See *id.* Plaintiff was able to bring a retaliation claim based on his wife's protected activities. See *id.*

Not all courts, however, grant statutory protection to individuals who suffer adverse employment actions in retaliation for the statutorily protected actions of their relatives. In Smith v. Riceland Foods, 151 F.3d 813, 819, 77 FEP Cases 1052 (8th Cir. 1998), the court agreed with the Fifth Circuit, holding that a person bringing a claim of retaliation must also personally have engaged in protected activity to qualify as a protected individual. See also Holt v. JTM Indus., Inc., 89 F.3d 1224, 1226-27, 71 FEP Cases 809 (5th Cir. 1996), cert. denied, 117 S.Ct. 1821, 73 FEP Cases 1504 (1997) (finding that the employer did not retaliate against plaintiff in violation of the ADEA by placing him on paid administrative leave after his wife's filing of an ADEA charge).

In Riceland, the employer was aware that plaintiff Smith was living as a married couple with a co-worker who had filed a charge of Title VII discrimination against their employer. 151 F.3d at 819. Despite this, Smith was denied Title VII protection because the employer lacked knowledge that Smith had assisted in preparing the underlying discrimination claim. See *id.* The court held that to provide Smith with protection as the "significant other" of a person who engaged in protected activity "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation." *Id.* citing Holt, 89 F.3d at 1226-27. The EEOC disagrees with this holding. See *EEOC Guidance*, 405 FEP Manual at 7587, n.27.

B. EEOC Charge Requirement

Generally, as a prerequisite to filing in federal court, Title VII requires an individual to file a charge with the EEOC within a specified period of time (180 or 300 days depending upon the jurisdiction) after the complained of discrimination. 42 U.S.C. §2000e-5(e)(1), and within 90 days of receiving a right-to-sue letter from the agency. 42 U.S.C. §2000e-5(f)(1). Even though some courts have characterized this requirement as "jurisdictional," this is basically an exhaustion requirement. See Clockedile v. New Hampshire Dep't of Corr., 245 F.3d 1, 3-4, 85 FEP Cases 570 (1st Cir. 2001).

However, in Clockedile, the First Circuit recently abandoned precedent and reinstated a jury's verdict on the plaintiff's retaliation claim where she had not filed a retaliation charge with the EEOC. 245 F.3d at 6. Rejecting the First Circuit's ruling in Johnson v.

General Electric, 840 F.2d 132 (1st Cir. 1988), the court ruled that "retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency e.g. retaliation is for filing the agency complaint itself." 245 F.3d at 6. But see Wallin v. Minnesota Dept. of Corr., 153 F.3d 681, 8 AD Cases 1012 (8th Cir. 1998)(refusing to consider plaintiff's retaliation claims where he failed to state the claims in his EEOC charge and where the alleged retaliation did not grow out of but occurred at the same time as the alleged discrimination).

The Clockedile decision brings the First Circuit into harmony with most of the federal circuits that have allowed plaintiffs to proceed with their retaliation claims even though they did not file retaliation charges. See e.g. Kirkland v. Buffalo Bd. of Ed., 622 F.2d 1066 (2d Cir. 1980)(per curiam); Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208 (3d Cir. 1984); Nealon v. Stone, 958 F.2d 584 (4th Cir. 1992); Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989); Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999); Brown v. Hartshorne Pub. Sch. Dist. No. 1, 864 F.2d 682 (10th Cir. 1988); Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988). However, the Sixth Circuit is unclear on the issue. Compare Ang v. Procter & Gamble Co., 932 F.2d 540 (6th Cir. 1991)(holding claims must be reasonably expected to have been within the scope of the EEOC investigation) with Duggins v. Steak 'N Shake, Inc., 195 F.3d 828 (6th Cir. 1999)(allowing the retaliation claim to proceed where no retaliation charge was filed). The D.C. Circuit has been silent on the issue.

C. Punitive Damages

Compensatory damages have been awarded under both Title VII and the ADA since the Civil Rights Act of 1991 became effective, subject to a statutory cap. While punitive damages have also been available since that time, plaintiffs were not automatically entitled to punitive damages, even where compensatory damages had been awarded due to a circuit split regarding what evidence was needed to demonstrate the "malice or reckless indifference" necessary for awarding of punitive damages. See McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 508, 70 FEP Cases 1037 (1st Cir. 1996).

However, in Kolstad v. American Dental Ass'n, 527 U.S. 526, 119 S.Ct. 2118 (1999), the Supreme Court resolved the circuit split and articulated the requirements plaintiffs must prove to obtain an award of punitive damages. Specifically, plaintiffs must prove that the alleged discriminatory conduct was committed with "malice or reckless indifference to the [plaintiff's] federal rights." 119 S.Ct. at 2129. The plaintiff must show that the complained of conduct was committed by a person acting in his/her "managerial capacity" and while he/she was "acting in the scope of employment." Id. at 2127. Importantly, the Court stated that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decision of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" Id. at 2129.

Courts who have addressed the issue since Kolstad have concluded that, although the implementation of written anti-discrimination policies is relevant to evaluating the employer's good faith efforts at Title VII compliance, it is not sufficient in and of itself to insulate the employer from punitive damages. See e.g. Romano v. U-Haul Int'l., 233 F.3d 655, 669, 81 FEP Cases 639 (1st Cir. 2000)(holding that the written nondiscrimination policy was insufficient to insulate the employer from punitive damages where the employer failed to demonstrate that it attempted to implement

the policy through management training and active enforcement of the policy); Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210, 83 FEP Cases 1645 (10th Cir. 2000)(stating "even if an employer-defendant adduces evidence showing it maintains on paper a strong non-discrimination policy and makes good faith efforts to educate its employees about that policy and Title VII, a plaintiff may still recover punitive damages if she demonstrated the employer failed to adequately address Title VII violations of which it is aware.")

Though Kolstad is a Title VII gender discrimination case, it has provided clear guidance as to the type of evidence required in order to permit a punitive damage instruction in Title VII and ADA retaliation cases. See e.g. Foster v. Time Warner Entertainment Co., No. 00-2734, 2001 WL 548561 (8th Cir. May 24, 2001)(upholding a jury award of \$136,000 for punitive damages in an ADA retaliation claim where the jury was given instructions under the Kolstad standard); Rubenstein, 218 F.3d at 405-408 (applying the Kolstad standard and upholding a jury award of \$75,000 for punitive damages in a Title VII retaliation case).

Additionally, in Bruso v. United Airlines, Inc., 239 F.3d 848, 84 FEP Cases 1780 (7th Cir. 2001), the Seventh Circuit remanded the plaintiff's Title VII retaliatory demotion case for a new trial on damages finding that there was sufficient evidence for the jury to consider punitive damages under Kolstad. At trial, the jury awarded Bruso \$10,000 in lost wages and direct expenses and no compensatory damages, however, they were prevented from considering his punitive damages request because the court found that United had not been recklessly indifferent to Bruso's complaints of retaliatory harassment. 239 F.3d at 855-856. On appeal, the Seventh Circuit, applying the standard announced in Kolstad, found that Bruso had presented sufficient evidence that United was recklessly indifferent to his federal rights. Specifically, Bruso showed that the "major players" in the decision to demote him were familiar with Title VII's anti-discrimination principles and United's "zero-tolerance" anti-discrimination policies and that they acted within the scope of their employment. *Id.* at 860. Finally, Bruso presented sufficient evidence to allow a reasonable jury to conclude that United did not engage in good faith efforts to comply with Title VII when it disregarded its policies and training by refusing to remedy the co-worker harassment of which Bruso complained.

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