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Retaliation in the Workplace

by

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Workplace retaliation claims -- in which the plaintiff alleges that she was retaliated against for having exercised her rights under the anti-discrimination statutes -- are an increasingly important component of employment discrimination litigation. Retaliation claims are comparable to, but distinct from, discrimination and harassment claims under federal and state statutes.

1. Definition.

Section 704 of Title VII protects employees from retaliation for opposing discriminatory or harassing practices or for participating in an inquiry into discriminatory or harassing practices. The “opposition” clause makes it unlawful to discriminate against a person who “has opposed any practice made an unlawful employment practice by this subchapter,” and the “participation” clause similarly makes it unlawful to discriminate against a person 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) (emphasis added).

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The references to “this subchapter” means that this statute protects only those who have opposed or participated in any matter under Title VII; equivalent statutory protections are available under the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act (“ADEA”) and the Equal Pay Act (“EPA”) but not other anti-discrimination statutes, including Section 1981. Nonetheless, several federal courts have allowed plaintiffs to allege retaliation under Section 1981. *See, e.g., Carney v. American Univ.*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998) (collecting cases); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998) (same). The Section 1981 plaintiff must allege retaliation “in response to the claimant’s assertion of rights that were protected by § 1981.” *Hawkins*, 163 F.3d at 693.

Public employees may also be able to invoke the First Amendment, through a Section 1983 claim, 42 U.S.C. § 1983, to protect their workplace speech or conduct from retaliatory actions. Whistleblower statutes, state or federal, may provide yet another remedy for public or private employees.² Discussion of these topics is beyond the scope of this chapter, except for the Sarbanes-Oxley Act of 2002, which is discussed in Part I, *infra*, but practitioners should determine their availability for any given plaintiff.

Retaliation claims are an increasingly important component of litigation and EEOC charges. In fiscal year 1992, 15.3% of all charges filed with the EEOC included a retaliation claim; this increased to 27.0% of all charges in fiscal year 2001. *See* EEOC, “Charge Statistics FY 1992 Through FY 2002” (Feb. 6, 2003) <<http://www.eeoc.gov/stats/charges.html>>.

In 1998, the EEOC issued a revised version of its Compliance Manual section on “Retaliation” which provides a useful overview of the EEOC’s guidelines and analytical framework for investigating retaliation claims. *See* EEOC Compliance Manual, Section 8, Retaliation (May 20, 1998) <<http://www.eeoc.gov/docs/retal.html>>. This Manual acknowledges, in several areas, that the EEOC disagrees with the current case law, or that the EEOC has adopted a position not taken by a majority of the courts. Thus, this Manual does not consistently state the current law, but is in part a statement of what the EEOC believes the law should be.

² *See generally* E.S. Callahan & T.M. Dworkin, “The State of Whistleblower Protection,” 38 *Am. Bus. L.J.* 99 (2000) (collecting state statutes and case law); S.M. Kohn, *Concepts and Procedures in Whistleblower Law* (2001) (collecting federal statutes and case law); R.G. Vaughn, “State Whistleblower Statutes and the Future of Whistleblower Protection,” 51 *Admin. L. Rev.* 581 (1999).

The courts have recognized that a plaintiff can succeed on her retaliation claim, even if the underlying discrimination or harassment is found not to be actionable, so long as the plaintiff had a reasonable belief that she was engaged in protected conduct, or that the employer was engaged in illegal conduct:

An employee does not need to demonstrate that the action he protests is actually a violation of Title VII, instead he need only to have a good faith belief that his behavior is protected conduct. Moreover, in order to prevail on a retaliation claim, a plaintiff need not prove the merits of the underlying discrimination complaint. A verdict, therefore, can contain both a finding against a plaintiff on his Title VII claim, but for a plaintiff on his Title VII retaliation claim.

Bianchi v. Philadelphia, 183 F. Supp. 2d 726, 739 (E.D. Pa. 2002) (internal citations omitted); see also Evans v. Port Auth. of N.Y. & N.J., 192 F. Supp. 2d 247, 278 (S.D.N.Y. 2002) (“If anything, the evidence supporting a finding of retaliation is stronger than the evidence supporting a finding of discrimination because the jury need not take the logical step from plaintiff’s [protected conduct] to his race.”).

Title VII discrimination and harassment claims can be based on a “mixed motive” element allowing the plaintiff to recover when she “demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). However, the federal appellate courts have consistently held that this statutory “mixed motive” element is **not** available for Title VII retaliation claims, since the statute does not include retaliation for engaging in protected conduct in its listing of five categories of protected status. See Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001); Matima v. Celli, 228 F.3d 68, 81 (2d Cir. 2000); Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 552 n.7 (4th Cir. 1999); McNutt v. Board of Trustees of the Univ. of Ill., 141 F.3d 706, 707-09 (7th Cir. 1998); Woodson v. Scott Paper Co., 109 F.3d 913, 932-36 (3d Cir. 1997); Tanca v. Nordberg, 98 F.3d 680, 682-85 (1st Cir. 1996). The Fifth and D.C. Circuits have refrained from deciding this question. Rubinstein v. Administrators of the Tulane Educ. Fund, 218 F.3d 392, 403 (5th Cir. 2001); Borgo v. Goldin, 204 F.3d 252, 255 n.6 (D.C. Cir. 2000).

Thus, for retaliation claims, the employer continues to have a mixed motive defense under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The D.C. Circuit explained the consequences of this defense:

Where, on the other hand, the plaintiff argues that the [retaliatory] action resulted from mixed motives, a slightly different model operates. A plaintiff asserting mixed motives must persuade the trier of fact by a preponderance of the evidence that unlawful retaliation constituted a substantial factor in the defendant's action. Price Waterhouse, 490 U.S. at 276 (O'Connor, J., concurring); id. at 259 (White, J., concurring). When the plaintiff successfully shows that an unlawful motive was a substantial factor in the employer's action, the defendant may seek to prove in response that it would have taken the contested action even absent the discriminatory motive. See id. at 244-45 (Brennan, J.). If the defendant fails to persuade the trier of fact by a preponderance of the evidence that it would have taken the action even absent the discriminatory motive, the plaintiff will prevail. See id. at 276 (O'Connor, J., concurring).

This burden on a defendant in a mixed-motives case has been characterized both as an affirmative defense, id. at 246 (Brennan, J.) and as a shifting burden of persuasion, id. at 274 (O'Connor, J., concurring). The question of characterization is "semantic," and need not be definitively resolved. See id. at 259 (White, J., concurring). What is noteworthy, however, is that under Price Waterhouse a defendant who is guilty of acting pursuant to an unlawful motive may nonetheless escape liability by proving that it would have made the same decision in the absence of the unlawful motivation. In short, the ultimate burden of persuasion as to the facts constituting the defense properly falls on the defendant in a mixed-motives case, because the plaintiff has proven that unlawful motivation constituted a substantial factor in the defendant's action.

Thomas v. National Football League Players Ass'n, 131 F.3d 198, 202-03 (D.C. Cir. 1997); see also Rose v. New York City Bd. of Educ., 257 F.3d 156, 161-62 (2d Cir. 2001); Kubicko, 181 F.3d at 552-53 & n.8 (collecting cases).

2. Elements of the Claim: Burden-Shifting Framework.

Retaliation claims are typically brought under the McDonnell Douglas burden shifting framework; thus, there are three components to the case. First, the plaintiff must prove her prima facie retaliation claim. Second, the burden then shifts to the defendant to provide a “legitimate, nondiscriminatory reason” for the action(s) taken. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Third, if the defendant has satisfied its burden of production, then the plaintiff must be “afforded a fair opportunity” to show that the defendant’s proffered reason is pretextual. Id. at 804.

The Supreme Court subsequently clarified the level of proof required at each stage and the consequences for a party’s failure to satisfy its burden, while maintaining the tripartite framework. See St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 509-19 (1993); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981). Under Hicks, if the plaintiff makes a prima facie case, then defendant’s burden is not discharged unless the defendant “introduces evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action.” Hicks, 509 U.S. at 509 (emphasis in original). If the defendant meets its burden, then the trier of fact proceeds to the ultimate question -- instead of going through the third McDonnell Douglas step -- and then decides whether to reject defendant’s proffered reasons. Id. at 511. If the trier of fact rejects these reasons, then the ultimate burden of persuasion remains with the plaintiff. Id. Alternatively, if the defendant fails to rebut plaintiff’s prima facie case, then “the court must award judgment to the plaintiff as a matter of law.” Id. at 509.

The courts have consistently recognized three elements to plaintiff’s prima facie retaliation claim: “(1) opposition to discrimination or participation in covered proceedings; (2) adverse action; (3) causal connection between the protected activity and the adverse action.” See EEOC Compliance Manual, Section 8, at 3. The exact wording used by the various circuits differs somewhat, and the courts are split regarding the requisite level of adverse action. The Sixth Circuit requires four elements, although its additional element (defendant’s knowledge) is inherent in the “causal connection” element of the traditional three-element test. The following cases represent recent statements of the circuit courts for retaliation under Title VII.

District of Columbia Circuit. The plaintiff “must show that (1) she engaged in statutorily protected activity; (2) her employer took an adverse personnel action against her; and (3) a causal connection exists between the two.” Carney, 151 F.3d at 1095; see also Richard v. Bell Atl. Corp., 165 F. Supp. 2d 1, 6 (D.D.C. 2001).

First Circuit. The plaintiff “must demonstrate that (1) he engaged in protected conduct under Title VII; (2) he suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity.” Hernández-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998); see also Russell v. Enterprise Rent-A-Car Co. of R.I., 160 F. Supp. 2d 239, 264 (D.R.I. 2001).

Second Circuit. The plaintiff “must show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action.” Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998); see also Hill v. Children’s Village, 196 F. Supp. 2d 389, 400 (S.D.N.Y. 2002).

Third Circuit. The plaintiff “must show: (1) that she engaged in a protected activity; (2) that she was discharged subsequent to or contemporaneously with such activity; and (3) that a causal link exists between the protected activity and the discharge.” Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996).

Fourth Circuit. The plaintiff must prove “that (1) plaintiff engaged in a protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) a causal connection existed between the protected activity and the adverse action.” Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998); see also Anderson v. G.D.C. Inc., 281 F.3d 452, 458 (4th Cir. 2002).

Fifth Circuit. The plaintiff must prove that “(1) the employee engaged in activity protected by Title VII, (2) the employer took adverse employment action against the employee, and (3) a causal connection exists between that protected activity and the adverse employment action.” Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 372 (5th Cir. 1998).

Sixth Circuit. This circuit requires four elements, with the additional element (defendant’s knowledge) interposed between the first and second elements of the traditional three-element test. The plaintiff “must show that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action.” Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999); accord Allen v. Michigan Dep’t of Corrections, 165 F.3d 405, 412 (6th Cir. 1999). Since the discussion in this chapter is based on the three-element test, practitioners in the Sixth Circuit

should refer to these two cases, and the earlier cases cited therein, for guidance on interpreting the unique aspects of the Sixth Circuit's retaliation test.

Seventh Circuit. The plaintiff “must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the adverse action.” Adusumilli v. City of Chicago, 164 F.3d 353, 362 (7th Cir. 1998).

Eighth Circuit. The plaintiff must “introduce probative evidence that (a) she engaged in protected activity, (b) [defendant] took adverse employment action against her, and (c) a causal connection existed between the adverse employment action and the protected activity.” Flannery v. Trans World Airlines, Inc., 160 F.3d 425, 428 (8th Cir. 1998).

Ninth Circuit. The plaintiff “must show (1) that she was engaging in a protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between the protected activity and the adverse employment decision.” Tarin v. County of Los Angeles, 123 F.3d 1259, 1264 (9th Cir. 1997).

Tenth Circuit. The plaintiff “must show that (1) she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) she suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and (3) there is a causal connection between the protected activity and the adverse employment action.” Penry v. Federal Home Loan Bank of Topeka, 155 F.3d 1257, 1263-64 (10th Cir. 1998); see also Medlock v. Ortho Biotech Inc., 164 F.3d 545, 549-550 (10th Cir. 1999) (using direct evidence method instead of burden-shifting framework); Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1103 (10th Cir. 1998).

Eleventh Circuit. The plaintiff must show “that (1) the plaintiff engaged in a statutorily protected activity; (2) the employer took an adverse employment action against him; and (3) there is a causal connection between the protected activity and the adverse action.” Berman v. Orkin Exterminating Co., 160 F.3d 697, 701 (11th Cir. 1998).

3. Protected Activity.

The EEOC has provided four generic examples of opposition activity, all of which must be read, pursuant to the statute, as involving unlawful discrimination: (1) “threatening to file a charge or other formal complaint alleging discrimination;” (2) “complaining to anyone about alleged discrimination against oneself or others;” (3) “refusing to obey an order because of a reasonable belief that it is discriminatory;” and (4) “requesting reasonable accommodation or religious accommodation.” See EEOC Compliance Manual, Section 8, at 4-7. The fourth provision does not apply to racial or sexual harassment plaintiffs, although some may also have a claim related to their religion or disability.

Participation activity essentially tracks the statutory definition, *i.e.*, having “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].” 42 U.S.C. § 2000e-3(a).

The aforementioned retaliation cases and others provide the following non-exhaustive examples of what the courts have considered to be protected activity:

(1) Plaintiff “complained to [] management about what she believed constituted discriminatory practices” and was fired “after she failed to appear for the [in-house] deposition concerning [another plaintiff’s] employment at Cort Furniture.” Aman, 85 F.3d at 1085.

(2) Plaintiff filed “various grievances against [defendant]” with the EEOC and the Michigan Civil Rights Commission. Allen, 165 F.3d at 412.

(3) Plaintiff filed two EEOC charges alleging discrimination. Berman, 160 F.3d at 702.

(4) Plaintiff’s letter to outside investigators “purports to complain of racism, sexism, and retaliation.” Douglas, 144 F.3d at 373.

(5) Plaintiff filed a complaint with the New York Department of Human Rights. Quinn, 159 F.3d at 769.

(6) Plaintiff was terminated one month after his deposition in his Title VII case; defendants’ termination letter stated that their decision was “a result of issues raised in your deposition.” Medlock, 164 F.3d at 550.

(7) Plaintiff informed defendant by letter that she intended “to file suit” regarding her discrimination claims. Carney, 151 F.3d at 1095; see also Jones v. Washington Metro. Area Transit Auth., 205 F.3d 428, 433 (D.C. Cir. 2000) (supervisor retaliated against plaintiff “for protected activity, namely the 1985 letter . . . complaining of Department discrimination”); Ferguson v. Small, 225 F. Supp. 2d. 31, 38 (D.D.C. 2002) (“Accordingly, the Court finds that the [plaintiff’s attorney’s] letter to defendant’s General Counsel constituted protected activity.”).

(8) Plaintiff complained to supervisors and to corporate headquarters about racial harassment. Roberts, 149 F.3d at 1102.

(9) Plaintiff provided information to the employer during its internal investigation of another employee’s sexual harassment charge. Clover v. Total Sys. Servs., Inc., 175 F.3d 1346, 1353 (11th Cir. 1999).

(10) Plaintiff conducted investigation of sexual harassment claim against the head of his employee’s union, who then retaliated by denying him a promotion. McMenemy v. Rochester, N.Y., 241 F.3d 279, 284-85 (2d Cir. 2001).

(11) Plaintiff actively participated in an internal diversity program “aimed at promoting the hiring of people of color and fostering relationships with minority firms,” after which his supervisors increasingly criticized his work, downgraded his evaluations, and transferred him to another project. Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1214, 1220-21 (10th Cir. 2002).

Although defendants may argue that participation in an employer’s internal investigation pursuant to an EEOC charge should not be treated as protected activity, the Eleventh Circuit rejected that argument:

Here, we recognize 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. Accordingly, by participating in her employer’s investigation conducted in response to an EEOC notice of charge of discrimination, Clover engaged in statutorily protected conduct under the participation clause.

Clover, 176 F.3d at 1353.

An important issue is whether an employee who files an EEOC charge that alleges discrimination or harassment but does not allege retaliation, can later file a lawsuit that includes a retaliation claim, where that claim is based on retaliation for having filed an EEOC charge. Although defendants usually attempt to dismiss such retaliation claims on the grounds that the plaintiff failed to exhaust her administrative remedies, the courts have increasingly recognized that it would be futile to require an employee to file a new EEOC charge when that retaliation arises from the protected activity of filing the first EEOC charge.

In 2001, the First Circuit joined the majority of the federal appellate courts in holding that retaliation claims can be brought in court, even if the plaintiff only included a discrimination or harassment claim in her EEOC charge. Clockedile v. New Hampshire Dep't of Corrections, 245 F.3d 1, 4 & n.3 (1st Cir. 2001) (collecting cases from Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits; noting that the Sixth Circuit's position is unclear, and that the D.C. Circuit "is silent"). In 2002, the Sixth Circuit allowed retaliation claims if based on events that occurred after the filing of the EEOC charge. See Weigel v. Baptist Hosp. of East Tenn., 302 F.3d 367, 380 (6th Cir. 2002). District courts in the D.C. Circuit have similarly allowed such retaliation claims that are related to the filing of the EEOC charge. Bonds v. Heyman, 950 F. Supp. 1202 (D.D.C. 1997); Webb v. District of Columbia, 864 F. Supp. 175, 184 (D.D.C. 1994); see generally Loe v. Heckler, 768 F.2d 409, 420 (D.C. Cir. 1985) (R.B. Ginsburg, J.) ("So long as the employer 1) was on notice that its actions allegedly violated Title VII, and 2) has been afforded an adequate opportunity to pursue a mutually satisfactory resolution with the employee, no purpose would be served by demanding a stream of further administrative pleadings denoted 'charge' or 'complaint.'"). Hence, the First Circuit concluded 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., the retaliation is for filing the agency complaint itself." Clockedile, 245 F.3d at 6.

However, if the retaliation is based on conduct prior to the EEOC charge, then the EEOC charge must include a retaliation claim. See, e.g., Strouss v. Michigan Dep't of Corrections, 250 F.3d 336, 342 (6th Cir. 2001) ("Since those pre-1997 claims of retaliation could have been included in her 1997 EEOC charge, Strouss' failure to do so deprives this court of subject matter jurisdiction over those claims.").

The district courts are split as to whether resisting a supervisor's sexual advances constitutes protected activity, although a majority of the courts that have ruled on this issue "have held that an employee's refusal to submit to sexual advances constitutes protected activity." Little v. National Broadcasting Co., 210 F. Supp. 2d 330, 385-86 (S.D.N.Y. 2002)

(collecting cases). The Second, Third and Seventh Circuit have all noted the existence of this issue but did not rule upon it. Id. at 385 (collecting cases). In Little, the district court held that “rejecting sexual advances from an employer does constitute protected activity,” on the grounds that “sexual harassment by an employer or supervisor is an unlawful practice, and an employee’s refusal is a means of opposing such unlawful conduct.” Id. at 386.

In Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (per curiam), the Supreme Court held that there was no evidence of causation when the employer had already initiated adverse employment action, but had not fully implemented it at the time of the protected conduct. The lower federal courts have recognized this defense to retaliation claims. See, e.g., Warren v. Ohio Dep’t of Public Safety, 24 Fed. Appx. 259, 266 (6th Cir. 2001); Bates v. Variable Annuity Life Ins. Co., 200 F. Supp. 2d 1375, 1383 (N.D. Ga. 2002); Ianetta v. Putnam Investments, Inc., 183 F. Supp. 2d 415, 426-27 (D. Mass. 2002); McFadden v. State Univ. of N.Y., College at Brockport, 195 F. Supp. 2d 436, 455 (W.D.N.Y. 2002); Kaplan v. City of Arlington, 184 F. Supp. 2d 553, 564 (N.D. Tex. 2002).

As one district court concluded, “an employee who knows that some adverse action is in the works cannot manufacture a claim for retaliation, based solely on the anticipated adverse action itself, merely by complaining of discrimination before the action is finally taken.” McFadden, 195 F. Supp. 2d at 455.

Protected opposition to unlawful discrimination may come in the form of protests, including informal expressions of one’s view through an established grievance procedure, employer-wide meetings, etc. But the clause does not protect insubordinate or non-productive behavior. Matima v. Celli, 228 F.3d 68, 78-79 (2d Cir. 2000) (“The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination But not all forms of protest are protected For instance, Title VII does not constitute a license for employees to engage in physical violence in order to protest discrimination.”). Thus, federal appellate courts have held “that disruptive or unreasonable protests against discrimination are not protected activity under Title VII and therefore cannot support a retaliation claim.” Id. at 79 (collecting cases).

Nor does the clause protect employees who assist their employer during a Title VII investigation, when the employee alleges that he is subsequently retaliated against by his supervisors for having taken the employer’s side against the employee. Twisdale v. Snow, 325 F.3d 950, 952 (7th Cir. 2003) (Title VII’s retaliation provision is “for the protection of the

discriminated against, and not their opponents.”). In Twisdale, the plaintiff’s supervisors were upset that the plaintiff had not sided with the employee who complained of discrimination.

In contrast, the harasser may be protected under the participation clause, if the harassed employee is able to elicit deposition or trial testimony from the harasser that corroborates her claims, and the employer then retaliates against the harasser solely because of his testimony which increased the employer’s liability. Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997). This latter scenario may be less problematic for the employer, since the employer can still fire the accused harasser for his conduct, independent of the harasser’s testimony. Id. at 1191 (“Dillard could have fired Merritt after he gave his deposition testimony, as well, so long as it did not fire him because he ‘testified, assisted, or participated in any manner’ in a Title VII investigation or proceeding.”). Further, the employer may be able to invoke the mixed-motives defense, which would preclude the fired harasser from obtaining monetary damages (other than attorney’s fees) or reinstatement. 42 U.S.C. § 2000e-5(g)(2)(B).

Although the plaintiff may have satisfied the first element for her retaliation claim, the court may then find that she had not satisfied the second and/or third elements. It is not necessary that the employee actually prove that the harassment or discrimination complained about was unlawful: “She need only demonstrate that she had a *good faith, reasonable belief* that the underlying challenged actions of the employer violated the law.” Quinn, 159 F.3d at 769 (internal quotation marks omitted); accord Turner v. National R.R. Passenger Corp., 181 F. Supp. 2d 122, 134 (N.D.N.Y. 2002). Thus, if a plaintiff complains that the employer failed to give her a promotion and pay increase, but does not attribute that failure to gender or other status-based discrimination, then the plaintiff was not engaged in protected activity. Hunt v. Nebraska Public Power Dist., 282 F.3d 1021, 1028-29 (8th Cir. 2002).

The Fifth Circuit has recognized an important limitation by holding that the protected activity must itself constitute lawful conduct; “any betrayal of a client’s confidences that breaches the ethical duties of the attorney places that conduct outside Title VII’s protections.” Douglas, 144 F.3d at 376 (plaintiff, an attorney, violated Louisiana State Bar Rules of Professional Conduct by her unauthorized disclosure of confidential information about her employer to third party).

The courts are split as to whether in-house counsel can reveal client confidences to her attorney in order to prove a wrongful discharge or other discrimination claim. Compare Crews v. Buckman Laboratories Int’l, Inc., 78 S.W.3d 852 (Tenn. 2002) (allowing plaintiff to bring wrongful discharge claim based on her refusal to violate her ethical obligations) and Burkhart v.

Semitool, Inc., 300 Mont. 480, 5 P.3d 1031 (Mont. 2000) (plaintiff can reveal confidential attorney-client information to establish her employment discrimination claim) with Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d. 104 (Ill. 1991) (in-house counsel cannot bring action for retaliatory discharge).

The American Bar Association has explored this issue and concluded that in some circumstances, in-house counsel can bring a wrongful discharge claim. See American Bar Ass'n, Formal Ethics Opinion 01-424, "A Former In-House Lawyer may Pursue a Wrongful Discharge Claim Against her Former Employer and Client as long as Client Information Properly is Protected" (Sept. 22, 2001) (collecting cases); see generally B. Marshall, "In Search of Clarity: When Should In-House Counsel Have the Right to Sue For Retaliatory Discharge?," 14 Geo. J. Legal Ethics 871 (2001) (same).³ Thus, practitioners who are faced with this situation will need to ascertain the applicable case law and state ethical rules and opinions, bearing in mind that only a minority of the states have addressed this issue.

4. Adverse Employment Action.

The second element of plaintiff's prima facie retaliation case is that she has experienced an adverse employment action. The EEOC has proposed a broad universe of adverse actions:

The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of adverse actions include threats, reprimands, negative evaluations, harassment, or other adverse treatment.

Suspending or limiting access to an internal grievance procedure also constitutes an "adverse action."

³ The California legislature passed a government attorney whistleblower bill that "would authorize an attorney who learns of improper governmental activity, as defined, in the course of representing a governmental organization to urge reconsideration of the matter and to refer it to a higher authority in the organization." Assembly Bill 363 (Aug. 28, 2002). However, Governor Gray Davis vetoed this bill on the grounds that it would have interfered with the need for candor and confidentiality in the attorney-client relationship. See "California Governor Unexpectedly Vetoes Government Attorney Whistleblower Bill," 71 U.S.L.W. 2243 (Oct. 15, 2002).

EEOC Compliance Manual, Section 8, at 11. However, the EEOC's definition is more expansive than recognized by several of the circuit courts.

There is a significant split in the circuits as to what constitutes adverse employment action for retaliation claims under Title VII. The Fifth and Seventh Circuits recognize only adverse actions rising to the level of an ultimate decision. Krause v. City of La Crosse, 246 F.3d 995, 1000-01 (7th Cir. 2001); Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997) (“To hold otherwise would be to expand the definition of “adverse employment action” to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee -- anything which *might* jeopardize employment in the future. Such expansion is unwarranted.”); see also McGuire v. City of Springfield, Ill., 280 F.3d 794, 797 (7th Cir. 2002) (“An employer's action can be called ‘retaliation’ only if it makes the employee worse off on account of the protected activity.”).

In contrast, the First, Fourth, Ninth and Eleventh Circuits allow some adverse actions falling short of ultimate employment decisions. See Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2002) (But ‘ultimate employment decision’ is not the standard in this circuit.”); Johnson v. DiMario, 14 F. Supp. 2d 107, 110, 77 FEP Cases 1398, 1400 (D.D.C. 1998) (collecting cases); see also Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (same).

The Third Circuit probably requires an ultimate employment action, based on its phrasing of the second and third elements as: “(2) that she was discharged subsequent to or contemporaneously with such activity; and (3) that a causal link exists between the protected activity and the discharge.” Aman, 85 F.3d at 1085 (emphasis added).

The Tenth Circuit, in a case which recognized retaliation when a former employer brought a malicious prosecution action against an employee, would not require an ultimate employment action. Berry v. Stevinson Chevrolet, 74 F. 3d 980, 986-87 (10th Cir. 1996).

Although the Eighth Circuit claims to follow the “ultimate employment decision” standard, its opinions reveal a much broader standard, as the Fourth Circuit recently noted:

Also indicative of the sometime slight real world difference between the two standards is the fact that while the Eighth Circuit has ostensibly adopted the “ultimate employment decision” standard, it has consistently applied a broader standard. See e.g., Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (ultimate employment decision includes “tangible change in duties or

working conditions that constituted a material employment disadvantage”); Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997) (ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, “papering” of an employee’s file with negative reports and reprimands even though employee was “not discharged, demoted, or suspended”).

Von Gunten, 243 F.3d at 864.

For example, a warning letter placed in a plaintiff’s personnel file did not constitute an adverse employment action, because the plaintiff suffered no change in her working conditions or other adverse action. Hill, 196 F. Supp. 2d at 400. A plaintiff who alleged that he was isolated from his managers and co-workers was unable to prove that this resulted in an adverse employment action. Yerry v. Pizza Hut of S.E. Kansas, 186 F. Supp. 2d 178, 186 (N.D.N.Y. 2002). These cases could have come out differently if the alleged actions had resulted in the plaintiff being less able to earn a future promotion because of the warning letter or being isolated from others in his office. But see Taylor v. Virginia Dep’t of Corrections, 177 F. Supp. 2d 497, 505 (E.D. Va. 2001) (“Furthermore, although it is logical, as asserted by the Plaintiff, that his chances for advancement (including salary) may have been diminished by being transferred to a smaller facility, such a potential is too speculative to be considered and is therefore nothing more than an unsupported conclusory allegation that must be discarded.”).

The District of Columbia Circuit “has expressly refused to decide this issue on two occasions,” Johnson, 14 F. Supp. 2d at 111 (citing cases), but its decision under the ADEA, which has an identical retaliation statute, held that adverse actions were not limited to ultimate personnel decisions, *i.e.*, “discharge, transfer, or demotion.” Id. (quoting Passer v. American Chem. Soc’y, 935 F.2d 322, 331 (D.C. Cir. 1991)). For that reason, the district court in Johnson “concludes that our court of appeals would agree with the First, Ninth, and Eleventh Circuits that Title VII’s protection extends to non-ultimate adverse personnel actions.” Id. A job transfer can constitute an adverse action, if it is accompanied by a loss in compensation, diminished chances for promotion, or other “objectively tangible harm.” Richard, 165 F. Supp. 2d at 12. As the Eleventh Circuit recognized, allowing “employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees’ willingness to file charges of discrimination.” Wideman, 141 F.3d at 1456.

The EEOC has criticized those courts which have limited retaliation to ultimate employment actions as being “unduly restrictive” given that the statutes “prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.” See EEOC Compliance Manual, Section 8, at 13-14 (collecting cases).

Practitioners will need to determine the precise contours of what constitutes adverse actions in their circuits, especially those not itemized in the previous paragraph; this issue is ripe for review by the Supreme Court. Although the Court in 1997 noted that a plaintiff claimed to have received “a negative reference in retaliation for his having filed the EEOC charge,” it did not decide whether the negative job reference, by itself, sufficed to constitute an adverse employment action since the only issue before it was whether a former employee could invoke the Title VII retaliation statute. Robinson v. Shell Oil Co., 519 U.S. 337, 339, 346 (1997) (holding “that former employees are included within § 704(a)’s coverage”).

The federal appellate courts have increasingly recognized that harassment, or a hostile work environment, can constitute retaliation under Title VII, where the plaintiff alleges that the harassment arose because she engaged in protected activity. The courts that have so found are those that do not require that the adverse employment action be an “ultimate” employment decision. See Marrero v. Goya of P.R., Inc., 304 F.3d 7, 26 (1st Cir. 2002) (employer “liable for retaliation if it tolerates severe or pervasive harassment motivated by the plaintiff’s protected conduct”); Von Gunten v. Maryland, 243 F.3d 858, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1244-45 (9th Cir. 2000); Richardson v. New York State Dep’t of Corr. Serv., 180 F.3d 426, 440 (2d Cir.1999); Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998); Gunnel v. Utah Valley State College, 152 F.3d 1253, 1264 (10th Cir. 1998); see also Singletary v. District of Columbia, 225 F. Supp. 2d 43, 62 (D.D.C. 2002); Bryant v. Brownlee, __ F. Supp. 2d __, 2003 WL 21287605, at *10 (D.D.C. 2003) (collecting cases). Even so, the retaliatory harassment must be severe or pervasive, as for a hostile work environment claim, in order to support a retaliation claim. Bryant, 2003 WL 21287605, at *11 (collecting cases). The Supreme Court has set forth various analytical factors in this regard:

whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). The Court further recognized that “no single factor is required” to find a hostile work environment. Id. Thus, practitioners who are litigating a retaliatory harassment claim should consider whether the alleged conduct rises to the level recognized by Harris and its progeny.

In contrast, the aforementioned circuits (Fifth and Seventh) that require an ultimate employment decision to support a Title VII retaliation claim presumably would not recognize harassment as supporting such a retaliation claim.

5. Causal Connection.

The final element is that there must be a causal connection, or nexus, between the protected activity and the adverse action.

In Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (per curiam), the Supreme Court reversed the Ninth Circuit and upheld summary judgment for the employer, concluding that the employer either did not know that the plaintiff had filed an EEOC charge or knew about the filing of the charge 20 months earlier before the proposed adverse employment action, thereby defeating the causation element.

In 1994, Ms. Breeden, a School District employee, met with her supervisor and another male employee to review the psychological evaluation reports of four job applicants. The report of one applicants disclosed that the applicant had once commented to a co-worker, “I hear making love to you is like making love to the Grand Canyon.” The supervisor read the statement aloud, and, looking at Breeden, said, “I don’t know what that means.” The male employee said, “Well, I’ll tell you later,” upon which both men laughed. Ms. Breeden complained about the comment to the employee who made it, to her supervisor, and to two Assistant Superintendents. Id. at 269-70.

In August 1995, Ms. Breeden filed a charge of discrimination with the EEOC. In April 1997, several months after receiving the right-to-sue letter, Ms. Breeden filed a Title VII retaliation lawsuit in which she alleged that she was punished for these complaints, including being transferred to a different position. Id. at 269, 271-72. The Ninth Circuit held that Ms. Breeden’s opposition was protected “if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment.” Id. at 270.

In a per curiam opinion issued without hearing oral argument, the Supreme Court reversed, concluding that no reasonable person could have believed that the single incident violated Title VII's standard. The comment and chuckling by Breeden's co-worker cannot remotely be considered "extremely serious" as our cases require. Id. at 271. Secondly, Breeden was unable to show a causal connection between her protected activities and her transfer as the employer was "contemplating" the transfer before Breeden filed suit. Id. at 272. "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not definitively determined, is no evidence whatever of causality." Id. Further, the Court held that even if the employer did know about the employee's filing of an EEOC charge, it knew 20 months prior to the adverse action, thereby negating an inference of causality. Id. at 273. The Court rejected the employee's claim that the EEOC's issuance of a right-to-sue letter could support temporal causation, since the employee took no part in that action. Id.

The lower federal courts have applied Breeden's holdings to retaliation claims with respect to (1) the temporal gap between the protected activity and the adverse employment action and (2) protected activity that occurs after the employer has already decided to initiate adverse employment activity (discussed in Part C, supra).

In Breeden, the Supreme Court held that 20 months was too long a gap between protected conduct and adverse employment action to prove temporal proximity, which is consistent with prior holdings of the lower courts, and the subsequent case law has similarly recognized that temporal gaps of 10 to 24 months cannot support temporal proximity. See, e.g., Bishop v. Bell Atl. Corp., 299 F.3d 53, 60 (1st Cir. 2002) (12-30 months); Bernales v. County of Cook, 37 Fed. Appx. 792, 797-98 (7th Cir. 2002) (22 months); Scurto v. Commonwealth Edison Co., 37 Fed. Appx. 213, 216-17 (7th Cir. 2002) (10 months); Warren, 24 Fed. Appx. at 266 (11 months); Taylor v. Procter & Gamble Dover Wipes, 184 F. Supp. 2d 402, 417 (D. Del. 2002) (one to two years); Adams v. Calvert County Public Sch., 201 F. Supp. 2d 516, 520 (D. Md. 2002) (24 months); Hill v. Taconic Developmental Disabilities Servs. Office, 181 F. Supp. 2d 303, 322 (S.D.N.Y. 2002) (1.5 years); Figueroa v. City of New York, 198 F. Supp. 2d 555, 570 (S.D.N.Y. 2002) ("Due to the passage of time [over a year] between the filing and these actions, there is no basis for inferring a causal connection."); see also Delk v. Arvinmeritor, Inc., 179 F. Supp. 2d 615, 624 (W.D.N.C. 2002) (4 months probably too long), aff'd 40 Fed. Appx. 775 (4th Cir. 2002) (per curiam).

In contrast, where the employee made repeated complaints during the same year as the adverse action, then temporal proximity existed to support causation. See Winarto v. Toshiba

Am. Electronics Components, Inc., 274 F.3d 1276, 1287 & n.10 (9th Cir. 2001) (“Winarto’s several complaints . . . closely preceded the [adverse] evaluation.”); see also Turner v. Housing Auth. of Jefferson County, 188 F. Supp. 2d 1066, 1079 (S.D. Ill. 2002) (“The fact that the plaintiff was fired two weeks after his complaints to management is a short enough time to establish the necessary causal link.”); Elries v. Denny’s, Inc., 179 F. Supp. 2d 590, 599 (D. Md. 2002) (“plaintiff shows retaliatory conduct that began shortly after filing a complaint, thus showing prima facie causation, even though actual termination came much later”); Little v. National Broadcasting Co., 210 F. Supp. 2d 330, 386 (S.D.N.Y. 2002) (“Muro engaged in protected activity when he filed a complaint with the NBC Ombudsperson in June 1998. His assignment two months later to undesirable shifts . . . raises a genuine issue of fact as to whether Muro’s protected activity was followed so closely by discriminatory treatment as to establish causation by temporal proximity.”).

The Ninth Circuit emphasized that since Breeden was an appeal from a grant of summary judgment, its standard is not directly applicable to a post-trial motion, in which the court must decide whether the plaintiff’s “evidence allowed the jury to draw a reasonable inference of retaliatory motive.” Winarto, 274 F.3d at 1287 n.10 (“Breeden does not control this case.”). In such circumstances, the Ninth Circuit emphasized that the timing of events and the supervisor’s known animus could support the jury’s verdict for the plaintiff on her retaliation claim:

[Plaintiff’s] several complaints, any one of which or combination of which could have triggered [the supervisor’s] low evaluation of [plaintiff], closely preceded the evaluation. The evidence of timing of the events in this case and the evidence of [the supervisor’s] hostility toward [plaintiff] could support a jury’s reasonable inference that [the supervisor] had a retaliatory motive.

Id.

Thus, a factor that courts look at in determining the presence of retaliatory motive are negative or hostile remarks made, or actions taken, by the supervisor upon learning of the employee’s protected conduct. These remarks and actions, even if anecdotal, can constitute direct evidence of retaliation. See, e.g., Azzaro v. County of Allegheny, 110 F.3d 968, 974 (3d Cir. 1997) (“a reasonable juror could infer that Braun knew Azzaro was for some reason on a ‘hit list,’ and that he sought to aid the efforts to ‘get’ Azzaro by including her discharge as part of his reorganization plan.”); Lee v. New Mexico State Univ. Bd. of Regents, 102 F. Supp. 2d 1265, 1277, 1280 (D.N.M. 2000) (plaintiff “was subject to heightened scrutiny and surveillance” and

her “colleagues were also asked to monitor her actions” in order to provide “negative feedback regarding plaintiff”).

Another factor is whether the decision-maker was the “cat’s paw” — *i.e.* an apparently neutral person whose actions were impermissibly influenced by those who had a retaliatory motive. For example, the Fifth Circuit, in a Title VII gender retaliation case, stated that the alleged innocence of final decisionmaker cannot insulate the company from liability, “when the person conducting the final review serves as the ‘cat’s paw’ of those who were acting from retaliatory motives, [then] the causal link between the protected activity and adverse employment action remains intact.” Gee v. Principi, 289 F.3d 342, 346 (5th Cir. 2002) (reversible error to grant summary judgment where decisionmaker was improperly influenced by others).

Courts also look to whether an employer has punished the plaintiff more seriously than other employees for the same alleged infractions. *See, e.g., Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 820 (8th Cir. 1998) (plaintiff “presented evidence that management at Riceland confronted her about filing her charge and that other employees who had not filed charges of discrimination were not investigated as closely or punished as severely as she was”); Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir. 1996) (plaintiff was “written up” after filing retaliation complaint); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1525 (11th Cir. 1991) (“pronounced increase in negative reviews and the careful scrutiny of Weaver’s performance, coupled with testimony suggesting that management personnel were acutely aware of Weaver’s EEOC charge, is sufficient to establish a causal link for Weaver’s prima facie case of retaliatory discharge”); Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (“The causal connection between the protected activity and the adverse employment action can be established indirectly with circumstantial evidence, for example, . . . through evidence of disparate treatment of employees who engaged in similar conduct . . .”); Lee, 102 F. Supp. 2d at 1280 (“Such heightened scrutiny and differential treatment indicates that [supervisor] was acting out of a retaliatory mind set and intended to create a difficult work environment for plaintiff.”).

Jury findings of retaliation are commonly affirmed based on evidence that the employer’s stated reason was incorrect, particularly so where the stated reason is potentially mendacious. *See, e.g. King v. Preferred Technical Group*, 166 F.3d 887, 894 (7th Cir. 1999) (stated reason that plaintiff was fired for failure to produce missing doctor’s slips belied by evidence that the reason was false and potentially mendacious); Baty v. Willamette Industries, Inc., 172 F.3d 1232, 1243 (10th Cir. 1999) (stated reason that employer could not pay plaintiff’s salary belied by evidence that plant made more money than in prior year and other employees received bonuses).

The failure of the employer to follow established protocols or procedures can also constitute evidence of retaliatory motive. McClam v. Norfolk Police Dep't, 877 F. Supp. 277, 283 (E.D. Va. 1995) (“The most telling evidence of pretext here is proof that the articulated reason for refusing to transfer McClam based on his disciplinary record was not consistently applied in the past” to other employees); see generally NLRB v. Transportation Mgmt. Corp., 462 U.S. 393, 404 (1983) (“the employer departed from its usual practice in dealing with rules infractions”).

Direct evidence of causation is not necessary since the plaintiff may use circumstantial evidence to demonstrate causation. See, e.g., Aman, 85 F.3d at 1086 (five items of circumstantial evidence sufficient to prove causation); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993) (“defendant’s awareness of the protected statement, however, may be established by circumstantial evidence”); Russell, 160 F. Supp. 2d at 264 (“Thus, where direct evidence of causation is missing temporal proximity may provide the necessary nexus to meet the third element of the plaintiff’s case.”). However, “conclusory statements” alone are insufficient to prove causation. Tarin, 123 F.3d at 1265.

Causation is not susceptible to simple rules or line-drawing; the Seventh Circuit has stated the plaintiff “must demonstrate that the [defendant] would not have taken the adverse action ‘but for’ the protected expression.” Adusumilli, 164 F.3d at 363 (citations and internal quotation marks omitted). The Eleventh Circuit has taken a slightly more lenient reading by holding that causation “is satisfied if the evidence shows that the protected activity and the adverse action are not totally unrelated.” Berman, 160 F.3d at 701 (collecting cases). The Sixth Circuit has recognized that “no one factor is dispositive” but evidence of differential treatment “or that the adverse action was taken shortly after the plaintiff’s exercise of protected rights is relevant to causation.” Allen, 165 F.3d at 413. The District of Columbia Circuit has required both knowledge of the protected activity and temporal proximity. Carney, 151 F.3d at 1095 (citing Mitchell v. Baldrige, 759 F.2d 80, 86 (D.C. Cir. 1985)).

The Seventh Circuit concluded that where the plaintiff in a sexual harassment and retaliation case was herself terminated because she engaged in “highly inappropriate” workplace conduct towards male employees, that the plaintiff could not maintain a retaliation claim based on having reported harassment by another co-worker. Hall v. Bodine Elec. Co., 276 F.3d 345, 359 (7th Cir. 2002) (“an employee’s complaint of harassment does not immunize her from being subsequently disciplined or terminated for inappropriate workplace behavior”). Here, the plaintiff admitted that she had engaged in sexual bantering, but claimed that it did not rise to the

level of Title VII harassment. The Seventh Circuit rejected this argument, concluding that “Bodine was still permitted to terminate her. In fact, the company’s failure to do so would have most likely constituted a Title VII violation (i.e., sex discrimination against Lopez), as well as subjecting the company to future liability if another complaint of harassment was filed against Hall.” Id. at 359.

6. Retaliatory Lawsuits Against Employees.

1. Declaratory Judgment Lawsuits By Employers.

Recently, some employers have used the Declaratory Judgment Act, 28 U.S.C. § 2201, in an attempt to obtain a court ruling that they have not discriminated against employees who have complained of discriminatory or harassing conduct or have filed charges with the EEOC. See, e.g., L. Bernabei, “Reverse Litigation (SLAPP) Lawsuits and Employment Discrimination Law: Impermissible Retaliation Against Employees,” 2 J. Empl. Discr. L. 269 (2000); D.S. Hilzenrath, “MicroStrategy hit by Bias Complaint; Discrimination, Overtime Abuse Alleged,” Wash. Post, May 6, 2000, at E1; J. Richardson, “MicroStrategy’s Strategy: Sue or Be Sued,” Legal Times, May 1, 2000, at 20; S. Siwolop, “Recourse or Retribution? Employers are Taking on Disgruntled Workers in Court,” N.Y. Times, June 7, 2000, at C1.

However, the courts may view such preemptive actions as constituting retaliation against employees for having raised concerns or filing charges, particularly where the employer’s lawsuit was filed before the completion of the EEOC investigation, or under circumstances where the employee is unaware of its filing.

For example, MicroStrategy was a “reverse” or “SLAPP” [Strategic Lawsuit Against Public Participation] lawsuit filed by an employer against a female employee and her attorney regarding their use of information about stock options in her pending EEOC charge of discrimination and her future Title VII litigation. MicroStrategy, Inc. v. Convisser, Civ. A. No. 00-453-A, 2000 WL 554264 (E.D. Va. May 2, 2000). Ms. Lauricia, the Vice President for Corporate Development Operations at MicroStrategy, an Internet start-up company in northern Virginia that has recently gone public, alleged that while she was only granted 7,500 stock options, “another [male] vice president, hired four months before her, was granted 125,000 stock options.” See Richardson, supra.

Ms. Lauricia filed her EEOC charge of discrimination in early 2000; MicroStrategy “received her complaint on March 13,” called Ms. Lauricia to a meeting on March 14 after which “she was placed on administrative leave.” Id. Three days later, MicroStrategy filed its reverse lawsuit in federal court against both Ms. Lauricia and her attorney, Claude Convisser. In its complaint, MicroStrategy averred that information about its employee compensation, including stock options, constituted trade secrets as well as privileged attorney-client information; thus, MicroStrategy alleged that the use of this information by Ms. Lauricia and her attorney (through her EEOC charge and, presumably, any future litigation) constituted theft of trade secrets and

misuse of confidential attorney-client information. Complaint for Declaratory Relief, ¶¶ 42-50. MicroStrategy also alleged that Ms. Lauricia had breached her fiduciary duty to her employer through using this information, *id.*, ¶¶ 51-56, and further requested a declaratory judgment that MicroStrategy had not violated the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), in its proposed termination of Ms. Lauricia. *Id.* at ¶¶ 37-41.

The district court dismissed MicroStrategy’s lawsuit — which was filed before MicroStrategy had responded to the EEOC charge, let alone before Ms. Lauricia had even exhausted her administrative remedies through the EEOC — on the grounds that judicial intervention at this stage in an employer’s suit against an employee was unwarranted:

There is good reason why federal courts have not accepted jurisdiction in employment disputes under the Declaratory Judgment Act as plaintiff would have us do. In effect, MicroStrategy is asking this court to place an imprimatur upon a proposed employment action. If we were to accept this role, a federal court would become a super-personnel advisor to wary employers. Moreover, by exercising jurisdiction over this complaint we would encourage pre-emptive strikes by employers against dissatisfied employees, potentially undercutting Congress’s very clear direction that such disputes be addressed through the administrative process. To take a step in this direction would be a step towards the involvement of federal courts in the workplace of unprecedented magnitude. We decline to impose such a role on the federal judiciary.

MicroStrategy, 2000 WL 554264, at * 4, 2000 U.S. Dist. LEXIS 6094, at *14 (internal citation omitted). MicroStrategy filed an unsuccessful emergency appeal with the Fourth Circuit; undeterred, it promptly filed a parallel lawsuit in the Alexandria Circuit Court, “seeking the return of numerous documents the company claims are confidential,” Richardson, *supra*, and the parties were subjected to a gag order, with the documents in the custody of the court. See MicroStrategy, Inc. v. Lauricia, 82 FEP Cases 1568 (Va. Cir. Ct. 2000).

Meanwhile, Ms. Lauricia filed a Title VII, ADEA and FLSA federal lawsuit that also sought declaratory relief. See MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 247-48 (4th Cir. 2001) (discussing history of case). MicroStrategy sought to compel arbitration, and the district court denied its motion on the grounds that “by virtue of its ‘remarkably aggressive’ course of litigation against Lauricia, MicroStrategy had waived its right to insist on arbitration.” *Id.* at 248 (quoting Lauricia v. MicroStrategy, Inc., 114 F. Supp. 2d 489, 492 (E.D. Va. 2000)). The Fourth Circuit reversed, and dismissed Ms. Lauricia’s complaint, on the grounds that there was a valid

arbitration agreement, and MicroStrategy's litigation activities were not so burdensome as to constitute a waiver. Id. at 254.

2. "SLAPP" Statutes.

At least thirteen states have "SLAPP" statutes, which "allow the defendant in a SLAPP lawsuit to file a counterclaim or an expedited motion to dismiss, or to institute a separate proceeding against the plaintiff (the so-called SLAPP-back lawsuit) on the grounds that the SLAPP lawsuit constitutes illegal retaliation for having engaged in protected conduct." See L. Bernabei, 2 J. Empl. Discr. L., supra, at 270 & n.6 (California, Delaware, Georgia, Indiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, Tennessee, and Washington). In 2001, several additional states enacted comparable statutes, although legislative compromises may limit their effectiveness. See "Business Opposes Anti-SLAPP Laws," Nat'l L.J., Dec. 10, 2001, at A17 (discussing statutes enacted in Oregon, New Mexico and Utah, and statutes vetoed or withdrawn in Arkansas, Colorado and Texas).

California's SLAPP statute, Cal. Code Civ. Proc. § 425.16, is probably the most frequently litigated statute. The California Supreme Court, in three decisions issued in August 2002, recently clarified the scope of this statute. In all three decisions, the Court held that the defendant (e.g., employee or community activist group) does not have to show that the action was brought with the intent to chill the defendant's exercise of the constitutional rights of free speech or to petition the government for redress of grievances in order to obtain dismissal of the action under the California SLAPP statute. Instead, the defendant only has to show that the targeted cause of action arose from the protected activity. See City of Cotati v. Cashman, 29 Cal. 4th 69, 52 P.3d 695, 124 Cal. Rptr. 2d 519 (2002); Equilon Enter's, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 52 P.3d 6685, 124 Cal. Rptr. 2d 507 (2002); Navellier v. Sletten, 29 Cal. 4th 82, 52 P.3d 703, 124 Cal. Rptr. 2d 530 (2002). Thus, these three decisions will enhance the SLAPP defendant's (i.e., employee's) ability to prevail on a motion to dismiss the SLAPP suit.

3. Retaliatory Lawsuits and Counterclaims.

After an employee files a lawsuit against his or her current or former employer, which alleges discriminatory or retaliatory conduct, the employer may then, as part of its answer, file counterclaims against the employee. Or, an employer may file a lawsuit against the employee while the employee's charge is still pending with the EEOC. Typical claims against the employee might include breach of contract (arising from an employment contract or a severance

agreement), theft of trade secrets, violation of a non-compete agreement, or breach of fiduciary duty. Can the plaintiff then bring a retaliation claim which alleges that the counterclaim is itself retaliatory? The majority of courts that have addressed this issue have held that a plaintiff can base her retaliation claim on an allegedly bad faith counterclaim or lawsuit brought against her.

The courts have recognized that “‘a lawsuit . . . may be used by an employer as a powerful instrument of coercion or retaliation’ and that such suits can create a ‘chilling effect’ on the pursuit of a discrimination claim.” EEOC v. Outback Steakhouse of Florida, Inc., 75 F. Supp. 2d 756, 758 (N.D. Ohio 1999) (quoting Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731, 740-41 (1983)). For example, the Tenth Circuit held that “the filing of charges against a former employee may constitute adverse action” under Title VII. Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996).

Numerous district courts have held that the filing of a lawsuit or a counterclaim motivated by retaliation against an employee can serve as a basis for a retaliation claim under Title VII. *See, e.g., Hernandez v. Data Sys. Int’l, Inc.*, No. 02-2193-JWL, ___ F. Supp. 2d ___, 2003 WL 21355928, at *16 (D. Kan. June 10, 2003) (“retaliatory civil litigation can constitute an adverse employment action for purposes of a retaliation claim”); Gliatta v. Tectum, Inc., 211 F. Supp. 2d 992, 1009 (S.D. Ohio 2002) (“this Court concludes that the adverse action requirement for a retaliation claim encompasses an allegedly bad faith counterclaim brought by the employer against its former employee”); Ward v. Wal-Mart Stores, Inc., 140 F. Supp. 2d 1220, 1230-31 (D.N.M. 2001) (holding that employer’s filing of appeal of former employee’s claim for unemployment benefits less than a month after he engaged in protected activity “raises the inference of a retaliatory motive sufficient to establish a causal connection” for a Title VII retaliation claim); Outback Steakhouse, 75 F. Supp. 2d at 1231; Jones v. Ryder Services Corp., No. 95 C 4763, 1997 WL 158329, at *5 (N.D. Ill. Mar. 31, 1997) (denying summary judgment to employer where employer withdrew plaintiff’s workers’ compensation settlement offer in retaliation for filing EEOC charges); Cozzi v. Pepsi-Cola General Bottlers, Inc., No. 96 C 7228, 1997 WL 312048, at *3, 74 FEP Cases (BNA) 321, 323 (N.D. Ill. June 6, 1997) (holding that filing of retaliatory lawsuit constituted “adverse employment action” under Title VII, but dismissing suit on other grounds); Shafer v. Dallas County Hosp. Dist., No. CA 3-96-CV-1580-R, 1997 WL 667933, at *4, 76 FEP Cases (BNA) 1555, 1560 (N.D. Tex. Oct. 21, 1997) (“It is well established that filing a retaliatory lawsuit may be actionable under Title VII.”); Harmar v. United Airlines, Inc., No. 95 C 7665, 1996 WL 199734, at *1 (N.D. Ill. Apr. 23, 1996); Urquiola v. Linen Supermarket, Inc., No. 94-14-CIV-ORL-19, 1995 WL 266582, at *1 (M.D. Fla. Mar.

23, 1995); EEOC v. Levi Strauss & Co., 515 F. Supp. 640, 643-44 (N.D. Ill. 1981); EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775, 778 (W.D. Va. 1980).⁴

However, the Fifth Circuit recently rejected this approach, in a case where the former employer brought a counterclaim for theft (of building materials) against a terminated employee. Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528 (5th Cir. 2003) (*per curiam*). The Fifth Circuit held that it was reversible error to allow the jury to determine whether this counterclaim was retaliatory, since under Fifth Circuit precedent, only an ultimate employment action can constitute retaliation. *Id.* at 531-32. Here, since the plaintiff was already terminated at the time of the counterclaim, there was no additional ultimate employment action that could be taken by the former employer. *Id.* at 533 (“A counterclaim filed after the employee has already been discharged in no way resembles the ultimate employment decisions described in [42 U.S.C.] Section 2000e-2(a)(1).”). The Fifth Circuit did note that two district courts in the Fourth Circuit

⁴ The courts have similarly recognized retaliation claims under other labor, employment, and civil rights statutes based on lawsuits or counterclaims against the plaintiff(s). *See, e.g., Bill Johnson’s Restaurants*, 461 U.S. at 743-44 (employer’s lawsuit against employees for assertion of labor rights constituted retaliation under the NLRA); Gill v. Rinker Materials Corp., 91 FEP Cases (BNA) 179, 182-83 (E.D. Tenn. 2003) (ADA and ADEA retaliation claims for filing bad faith counterclaim against employee); Zhu v. Countrywide Realty, Co., Inc., 165 F. Supp. 2d 1181, 1199 (D. Kan. 2001) (filing for “petition for a restraining order roughly three weeks after plaintiff filed her HUD complaint raises an inference of causation” under anti-retaliation provision of Fair Housing Act); Blistein v. St. Johns College, 860 F. Supp. 256, 268 (D. Md. 1994) (filing counterclaim against employee, including counterclaim for breach of contract, stated a claim for retaliation under the ADEA).

have allowed lawsuits or counterclaims to be treated as retaliatory employment actions. Id. at 532 (citing Beckham v. Grand Affair of N.C. Inc., 671 F. Supp. 415, 419 (W.D.N.C. 1987); EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775 (W.D. Va. 1980)).

It seems likely that the Fifth Circuit's narrow holding would only be followed in the Seventh Circuit, and not in the other circuits that have held that adverse employment actions that do not rise to the level of "ultimate" actions can be retaliatory.

4. Management Lawsuits Against Unions.

The U.S. Supreme Court, in the labor-management context, recently held that the NLRB could not prosecute an employer for having filed a suit against employees or a union, where that suit was filed with a retaliatory purpose, so long as that lawsuit was not objectively baseless. See BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002). In BE & K, the employer filed two lawsuits against several unions, alleging that their activities had delayed the employer's construction project, in violation of the Sherman Act and the secondary boycott provision of the Labor-Management Relations Act. Id. at 519-21. After these lawsuits were dismissed, the unions lodged complaints with the NLRB, which determined that the employer's lawsuits "had violated the NLRA because it was unsuccessful and retaliatory." Id. at 523. The Sixth Circuit affirmed, finding that "evidence of a simple retaliatory motive . . . sufficed to adjudge [BE & K] of committing an unfair labor practice." Id.

The Supreme Court reversed, finding that only if the lawsuit was objectively baseless could it be deemed as retaliatory under the labor statutes. Other retaliatory lawsuits, so long as they are not objectively baseless, can continue to be brought without fear of enforcement action by the NLRB. Id. at 536-37. The rationale is that the First Amendment right to petition allows some "breathing space" in seeking judicial relief. Id. at 531.⁵

Although this case arose in the context of NLRB enforcement, since it relied upon Supreme Court precedent regarding retaliatory lawsuits in other contexts, some courts may extend its principles to declaratory judgment and SLAPP lawsuits in the employment context. For example, the Supreme Judicial Court of Massachusetts held, in an age discrimination and

⁵ See generally NLRB Office of the General Counsel, Memorandum GC 02-09, "Case Handling Instructions for Cases Concerning Bill Johnson's Restaurants and BE & K Constr. Co." (Sept. 20, 2002) (available online at: <<http://www.nlr.gov/gcmemo/gc02-09.html>>).

retaliation case, that the employer's declaratory judgment complaint was not retaliatory, where the employer only sought a declaratory judgment that the release which the employee signed upon her termination precluded the employee from bringing her statutory claims. Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 704-07, 774 N.E.2d 1085, 1092-94 (2002).

7. The False Complaint.

Is an employee who falsely accuses a supervisor or co-worker of discriminatory or harassing conduct protected from retaliation? A district court recently held that a falsified complaint was a legitimate, non-discriminatory reason for terminating the employment of the employee, so that the termination was not a retaliatory act. Renner-Wallace v. Cessna Aircraft Co., No. 01-1135-JAR, 2003 WL 1342939 (D. Kan. Mar. 17, 2003). Here, the two plaintiffs fabricated accusations of sexual harassment against their supervisor, in an attempt to have him fired or removed. Critically, several witnesses overheard the plaintiffs talking about how to get rid of their supervisor. Id. at *8. Further, none of plaintiffs' own witnesses were able to corroborate the alleged harassment. Id. at *9. Thus, the court granted summary judgment to the employer on the discrimination and retaliation claims. Id. at *10; see generally "Alleged Fabricators of Harassment Story Who Were Fired Lose Claims Against Cessna," BNA Daily Labor Report, Mar. 25, 2003, at A-1. The plaintiffs then appealed to the Tenth Circuit. Renner-Wallace v. Cessna Aircraft Co., No. 03-3125 (10th Cir. docketed Apr. 22, 2003).

8. The "NO FEAR Act" and Federal Employees.

On May 15, 2002, the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002" ("NO FEAR Act"), Pub. L. No. 107-174, became law. The NO FEAR Act, which only applies to the federal sector, was passed by Congress after receiving testimony that agencies were neglecting their responsibilities under the anti-discrimination and whistleblower statutes, and that the agencies had little incentive to settle meritorious claims, particularly class actions, in a timely manner, since any monetary judgment against the agency would not come from the agency's own budget, but from the Judgment Fund of the U.S. Department of Justice. See "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001," S. Rept. No. 107-143 (Apr. 15, 2002); see generally S. Barr, "Making Agencies Pay the Price of Discrimination, Retaliation," Wash. Post, May 16, 2002, at B-2; "No Fear Coalition," website <<http://groups.msn.com/NoFearCoalition>>.

Specifically, the U.S. General Accounting Office (GAO) testified that the Judgment Fund "discourages accountability by being a disincentive to agencies to resolve matters promptly in

the administrative processes; by not pursuing resolution, an agency could shift the cost of resolution from its budget to the Judgment Fund and escape the scrutiny that would accompany a request for a supplemental appropriation.” S. Rep. No. 107-143, at 3.

The NO FEAR Act now requires that agencies reimburse the U.S. Treasury for any judgment or settlement under the federal sector anti-discrimination and whistleblower statutes. Pub. L. No. 107-174, § 201. It remains to be seen whether agencies will be more willing to settle meritorious claims, particularly class actions, instead of insisting on litigating them to the end.

The NO FEAR Act also requires individual agencies, as well as the EEOC, to post annual statistics on their websites, setting forth the numbers of complaints filed, pending, and resolved; the amount paid out on such claims; the number of employees disciplined for discrimination, retaliation, or harassment; and an examination of any trends in those statistics, including a causal analysis, the practical knowledge obtained through this experience, and any actions taken or planned to improve the complaint resolution process in each agency. Pub. L. No. 107-174, §§ 203, 301, 302. This information must also be submitted by each agency to Congress and the Attorney General. *Id.* at § 203. As of June 2003, the federal agencies are waiting for the EEOC and the Office of Personnel Management to promulgate regulations governing these posting and reporting requirements.

9. Sarbanes-Oxley Whistleblower Provisions.

Undoubtedly the most widely discussed federal whistleblower statute is the recently enacted provision of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002) that protects certain corporate whistleblowers who report financial or securities-related wrongdoing.⁶

This statute provides a new remedy to corporate employees of publicly traded companies, who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, alleged violations of securities statutes and regulations. See Pub. L. No. 107-204, § 806 (codified at 18 U.S.C. § 1514A). This statute

⁶ See, e.g., E. Kaplan & T. Hannapel, “Hear the Whistle Blow: Companies Should Welcome, Not Vilify, Newly Protected Inside Informants,” Legal Times, Oct. 7, 2002, at 32; A. Berger, “Taking the Stand: Cops or Confidants? The Role of Lawyers After Sarbanes-Oxley,” Washington Lawyer, Mar. 2003, at 34; C.D. Smith, “Holding the Accountant Accountable,” Trial, Apr. 2003, at 32.

prohibits such companies and their officers, employees and agents, from discharging, demoting, suspending, threatening, harassing, “or in any other matter discriminat[ing] against an employee because of any lawful act done by the employee” relating to such alleged violations. Id. Successful claimants can obtain make-whole relief, including reinstatement, along with back pay with interest, and compensation for special damages, including litigation costs, expert witness fees, and reasonable attorney’s fees. 18 U.S.C. § 1514A(c); see generally “Sarbanes-Oxley Act of 2002,” H. Rept. No. 107-610 (July 24, 2002).

On February 6, 2003, the Securities and Exchange Commission (SEC) published proposed final rules to implement the “reporting” requirements of Sarbanes-Oxley. See 68 Fed. Reg. 6296 (Feb. 6, 2003). These rules, to be codified at 17 C.F.R. Part 205, are effective August 5, 2003, absent further revision by the SEC. However, the SEC deferred action, pending further study, on the “noisy withdrawal” provisions, which would require an attorney to withdraw representation of a corporate client that engaged in financial or securities misconduct, and to notify federal authorities of the reasons for such withdrawing. The SEC published draft rules regarding the “noisy withdrawal” provision which were open for comment through April 7, 2003. See 68 Fed. Reg. 6324 (Feb. 6, 2003).

The statutory enforcement scheme is comparable to those of other federal whistleblower statutes administered by the U.S. Department of Labor, with one significant exception: a party can remove the claim to federal court if the Department of Labor does not resolve the claim within 180 days.⁷ As of June 16, 2003, only two substantive decisions have been issued; in both, the Administrative Law Judge (ALJ) dismissed the claims on the grounds that Sarbanes-Oxley did not apply retrospectively, and the alleged protected activity occurred prior to its effective date.⁸ As of early March 2003, the Occupational Safety and Health Administration (OSHA),

⁷ See 18 U.S.C. § 1514A(b)(1)(B) (Claimant may seek relief, “if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, [by] bringing an action at law or equity for de novo review in the appropriate district court.”).

⁸ See Gilmore v. Parametric Tech. Corp., Case No. 2003-SOX-1 (ALJ Feb. 6, 2003); Kunkler v. Global Futures & Forex, Ltd., Case No. 2003-SOX-12 (Apr. 24, 2003) (online at: <<http://www.oalj.dol.gov/public/wblower/refrnc/sox1list.htm>>); see generally “ALJ Rejects Retroactive Application of New Corporate Whistleblower Protections,” BNA Daily Labor Report, Mar. 10, 2003, at A-1.

U.S. Department of Labor, received more than fifty complaints under this statute, with ten pending before the ALJs.⁹

On May 28, 2003, OSHA promulgated its interim final rules for handling these complaints, codified at 28 C.F.R. Part 1980, effective that date, but open for comment until July 28, 2003. See OSHA, “Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002,” 68 Fed. Reg. 31860 (May 28, 2003); see generally “Sarbanes-Oxley Whistleblower Rule Issued; Input on Handling Retaliation Claims Sought,” 71 U.S.L.W. 2756 (June 3, 2003).

Meanwhile, the American Bar Association proposed modifying the Model Rules of Professional Conduct governing confidentiality of client communications in order to enable attorneys to inform regulatory agencies about potential corporate misconduct. See B. Masters, “Lawyers Back Easing Confidentiality Rules; Corporate Fraud is Targeted,” Wash. Post, Apr. 30, 2003, at E-2. It remains to be seen whether the ABA will adopt such revisions, or whether the state courts will accordingly amend their Rules of Professional Conduct.

CONCLUSION

Retaliation claims are an important aspect of employment litigation. Therefore, practitioners representing both employees and employers should work to mitigate and greatly reduce the incidence of retaliation in the workplace by ensuring that the entire workforce is properly informed as to (1) their rights to work in an atmosphere that is free of retaliation for engaging in conduct protected by the anti-discrimination statutes, and (2) their obligations to maintain such a workplace, including promptly investigating and remedying retaliation in the workplace. This preventive medicine will serve the socially desirable goals of the retaliation statutes and should reduce the need for litigation to resolve retaliation in the workplace.

⁹ See “Whistleblowers: Tight Time Limits, New OSHA Subject Area Create Challenges in Sarbanes-Oxley Claims,” BNA Daily Labor Report, Mar. 19, 2003, at C-1.

