

# WHEN YOUR EMPLOYER THINKS YOU ACTED DISLOYALLY: THE GUARANTEES AND UNCERTAINTIES OF RETALIATION LAW

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April 1, 2003

“Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out.”

– Francis Bacon

## INTRODUCTION

Extensive statutory and case law prohibits various forms of employer retaliation against employees who engage in legally proper, necessary, or desirable activities. The law on retaliation is not unified, however; as discussed in Part I, it is spread among many federal and state statutes typically organized by subject matter – e.g., retaliation against opposition to discrimination, retaliation against government employee whistleblowing, etc. Many basic principles of retaliation law are well-established, as the survey of federal law in Part I elaborates. Numerous issues in retaliation law remain unresolved, however, with different courts openly disagreeing on the limits of employee protections, as Part II discusses.

## I. RETALIATION PROTECTIONS UNDER FEDERAL LAW<sup>1</sup>

A variety of federal statutes<sup>2</sup> prohibit employers from retaliating against employees who exercise legal rights,<sup>3</sup> assist in efforts to enforce protected rights or otherwise oppose rights

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<sup>1</sup> This article is adapted from W. Outten & S. Moss, “When Your Employer Thinks You Acted Disloyally: The Guarantees and Uncertainties of Retaliation Law” (May 14, 2001) (on file with authors).

<sup>2</sup> It should be noted that many state laws provide additional retaliation and whistleblowing protections beyond the federal minimums. See, e.g., N.Y.C. Admin. Code. § 8-101 (providing broader mixed-motive protection by requiring that the forbidden animus play no role in the adverse action); New Jersey Stat. Ann. § 34:19-3 (whistleblower statute protecting any employee who has an objectively reasonable belief that an employer’s activity is illegal, fraudulent, or harmful to the public health, safety or welfare, and that there is a substantial likelihood that the activity is incompatible with a constitutional, statutory, or regulatory provision, code of ethics, or other recognized source of public policy); Haw. Rev. Stat. Ann. §§ 378-61 *et seq.* (prohibiting discharge of employee who discloses a suspected violation of any law or rule to a public body).

<sup>3</sup> Most notably, the anti-retaliation provisions in the federal anti-discrimination statutes, e.g., Americans with

violations,<sup>4</sup> appropriately disclose employer misconduct,<sup>5</sup> or undertake legal obligations.<sup>6</sup>

### **A. Retaliation Under Employment Discrimination Statutes**

Title VII,<sup>7</sup> the ADA,<sup>8</sup> and the ADEA<sup>9</sup> prohibit retaliation by employers, employment agencies, and labor organizations against employees, applicants, union members, and other individuals who (1) opposed an unlawful employment practice or (2) made a charge or testified, assisted, or participated in an investigation, proceeding, or hearing under the statute. These two tracks for protection are referred to as the “opposition” and “participation” clauses.<sup>10</sup> They are read liberally to protect persons who file administrative charges of discrimination or otherwise aid EEOC enforcement functions.<sup>11</sup>

The ADA declares it unlawful to coerce, intimidate, or interfere with any individual in his or her exercise or enjoyment of any right protected under the ADA or to retaliate against an individual who has exercised any protected right or has aided or encouraged another individual in the exercise of any such right.<sup>12</sup> The ADA also establishes whistleblower protection for

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Disabilities Act (ADA), 42 U.S.C. § 12203; Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623; Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3; Vocational Rehabilitation Act, 29 U.S.C. §§ 793, 794, as well as those in other federal statutes, e.g., Employee Polygraph Protection Act, 29 U.S.C. § 2002; Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140; Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 215(a), 216(b); Family Medical Leave Act (FMLA), 29 U.S.C. § 2614(a); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 948(a); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855; National Labor Relations Act (NLRA), 29 U.S.C. § 158; Occupational Safety and Health Act (OSHA), 29 U.S.C. § 660(c); Railroad Employers Act, 45 U.S.C. § 60. See generally infra Parts I(A),(B).

<sup>4</sup> Under most anti-retaliation statutes, a retaliation claim can be based on injury to a nondiscrimination advocate even if the advocate is outside the protected group and the discrimination does not target him or her directly. See, e.g., Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982) (holding Title VII violated if a black male was fired because he opposed supervisor efforts to discriminate by race and sex against white females). See generally infra Part I(A)(2).

<sup>5</sup> E.g., Whistleblower Protection Act/Civil Service Reform Act, 5 U.S.C. §§ 2302(b)(8), (b)(9); 42 U.S.C. § 1983 (allowing claims by public employees of retaliation based on protected First Amendment activity); the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (protecting employees of publicly traded companies from retaliation for whistleblowing). See generally infra Parts I(C), (D).

<sup>6</sup> E.g., Jury Duty Act, 28 U.S.C. § 1875.

<sup>7</sup> 42 U.S.C. § 2000e-3.

<sup>8</sup> 42 U.S.C. § 12203.

<sup>9</sup> 29 U.S.C. § 623.

<sup>10</sup> See generally infra Part I(A)(2).

<sup>11</sup> See Johnston v. Harris County Food Dist., 869 F.2d 1565 (5th Cir. 1989) (upholding finding that employer impermissibly retaliated against employee who testified in another employee's EEOC proceeding against employer).

<sup>12</sup> 42 U.S.C. § 12203(b); 29 C.F.R. § 1630.12(b).

employees of companies or other organizations that have other ADA compliance obligations because the ADA retaliation and interference prohibitions protect rights under all ADA provisions – not only employment, but also public accommodations and services.<sup>13</sup>

## 1. Basic Structure and Burdens of Proof

Courts analyze Title VII retaliation claims much as they do Title VII discrimination claims. Absent direct evidence of retaliation,<sup>14</sup>

[a] claim for retaliation under Title VII invokes a variant of the familiar McDonnell Douglas burden-shifting framework requiring the plaintiff to show: that he engaged in statutorily protected activity; suffered some adverse action by his employer; and that there exists a causal link between the protected expression and the adverse action. Once this is shown, the employer has the burden of producing a valid, non-retaliatory reason for the action. To prevail, the plaintiff must then rebut the employer's proffered reason by proving that it is mere pretext for discrimination.<sup>15</sup>

Like in discrimination cases, the “burden of establishing a prima facie case in a retaliation action is not onerous, but one easily met.”<sup>16</sup> Courts traditionally apply the same basic Title VII analysis to retaliation cases under various statutes, including the ADEA,<sup>17</sup> the ADA,<sup>18</sup> the FMLA,<sup>19</sup> and ERISA.<sup>20</sup>

## 2. Opposing Discrimination and Participating in Proceedings

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<sup>13</sup> 42 U.S.C. § 12203(c) (proscribing retaliation as to entirety of chapter 126, “Equal Opportunity for Individuals with Disabilities,” not just as to employment subchapter).

<sup>14</sup> For “mixed-motive” standards applicable to direct evidence, and often to circumstantial evidence, cases, see generally infra Part II(D).

<sup>15</sup> Sanchez v. Henderson, 188 F.3d 740, 745-46 (7th Cir. 1999) (citation omitted), cert. denied, 120 S.Ct. 1201 (2000).

<sup>16</sup> Nguyen v. City of Cleveland, 229 F.3d 559 (6<sup>th</sup> Cir. 2000); accord Cones v. Shalala, 199 F.3d 512, 516 (D.C. Cir. 2000) (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and Int’l Bhd. Of Teamsters v. United States, 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)), respectively) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

<sup>17</sup> See Farley v. Nationwide Ins. Co., 197 F.3d 1322, 1333 (11th Cir. 1999).

<sup>18</sup> See Farley, 197 F.3d 1322; Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir. 1999); Morgan v. Hilti, Inc., 108 F.3d 1319, 1325 (10th Cir. 1997).

<sup>19</sup> See Morgan, 108 F.3d 1319; Dodgens v. Kent Mfg. Co., 955 F. Supp. 560, 565-66 (D.S.C. 1997).

<sup>20</sup> See Gitlitz v. Compagnie Nationale Air France, 129 F.3d 554, 558 (11<sup>th</sup> Cir. 1997); May v. Shuttle, Inc., 129 F.3d 165, 169 (D.C. Cir. 1997) (absent direct evidence, plaintiff must show “(1) prohibited employer conduct[] (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled”) (citing Berger v. Edgewater Steel Co., 911 F.2d 911, 922 (3d Cir. 1990)).

Much of the retaliation case law focuses on the scope of “protected activity” under either the opposition or participation clauses. Broadly speaking, participation clause protection is narrower (covering fewer activities) but deeper (more categorically protected), while opposition clause protection is broader but shallower. Therefore, many cases focus on (a) whether the activity is “participation” entitled to the deeper protections of that clause, or (b) whether the activity is, though “opposition” to discrimination, sufficiently reasonable to merit protection.

**a. “Participation” Protection: Scope of Coverage**

Filing an EEOC charge or an employment discrimination lawsuit are the most basic forms of participation in administrative or judicial proceedings that merit “participation” clause protection, but much other activity is covered as well. Protected activity includes testimony, by deposition<sup>21</sup> or affidavit,<sup>22</sup> as well as refusal to testify,<sup>23</sup> because “[w]hether an employee agrees or refuses to cooperate, his participation in the pending Title VII investigation and proceeding has begun.”<sup>24</sup> A complaint of discrimination, to be protected, need not be a formal filing with the EEOC, but can be an informal letter to the EEOC<sup>25</sup> or an explicit threat to file a formal charge.<sup>26</sup> A charge filed with a local discrimination agency analogous to the EEOC may be protected participation.<sup>27</sup>

Subsequent employment or litigation developments tend not to affect whether prior participation activity is protected. Former employees are entitled to the same protection as current employees, the Supreme Court has ruled.<sup>28</sup> And retaliation remains forbidden even if the employer prevails in its defense of the underlying charge.<sup>29</sup>

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<sup>21</sup> See Glover v. South Carolina Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999), cert. dismissed, 120 S.Ct. 1005 (2000).

<sup>22</sup> See McKenzie v. Illinois Dep’t of Transp., 92 F.3d 473 (7th Cir. 1996) (finding protected activity where employee disobeyed employer instructions not to provide affidavit testimony supporting plaintiff).

<sup>23</sup> See Smith v. Columbus Metro. Hous. Auth., 443 F. Supp. 61 (S.D. Ohio 1977) (finding protected activity where plaintiff refused to provide employer an affidavit concerning another employee’s case).

<sup>24</sup> Smith, 443 F. Supp. at 64.

<sup>25</sup> See Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

<sup>26</sup> Compare Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149 (9th Cir. 1982) (explicit threat amounted to participation) with Brower v. Runyon, 178 F.3d 1002 (8th Cir. 1999) (contacting EEO officer with questions about selection process and then threatening a “civil suit” was not “participation” because employee had not stated discrimination concerns).

<sup>27</sup> See, e.g., Kellner v. Gen. Refractories Co., 631 F. Supp. 939 (N.D. Ind. 1986).

<sup>28</sup> Robinson v. Shell Oil Co., 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

<sup>29</sup> See Dawkins v. Nabisco, Inc., 549 F.2d 396 (5th Cir. 1977).

## b. “Opposition” Protection: Reasonableness of Belief & Conduct

Protected “opposition” to discrimination can include a variety of practices having little or nothing to do with actual administrative or judicial proceedings, such as public protests and letters to officials with no responsibility for acting on discrimination charges.<sup>30</sup> The basic limitation is the requirement of reasonable conduct and good-faith belief that the opposed conduct was discriminatory.<sup>31</sup>

The good-faith belief standard allows for the incorrect belief that the opposed conduct was illegally discriminatory; the opposition remains protected so long as the employee reasonably and in good faith believed that unlawful discrimination was occurring.<sup>32</sup> Protection will be denied only if the employee’s professed belief that discrimination occurred is so far from the mark that “[n]o reasonable person could have believed that the [conduct] ... violated Title VII’s standard.”<sup>33</sup>

The reasonable conduct standard is generally lenient, covering such tactics as “making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.”<sup>34</sup> Courts allow various tactics that may hurt the employer, including boycotting and picketing the employer’s stores.<sup>35</sup> Also covered are refusals to participate in discriminatory practices, such as when an officer makes a hiring decision that violates the employer’s discriminatory preference<sup>36</sup> or gives an employee advice calling into question the legality of the employer’s policies.<sup>37</sup>

In Hochstadt v. Worcester Foundation,<sup>38</sup> a seminal case on the limits of protected opposition, the employer’s particularly strong interest in a harmonious environment for cooperative laboratory research justified discharging the plaintiff as “disloyal.” The plaintiff not only complained constantly, but also, by circulating negative rumors, disclosing confidential

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<sup>30</sup> See Equal Employment Opportunity Comm’n v. Crown Zellerbach Corp., 720 F.2d 1008 (9th Cir. 1983).

<sup>31</sup> See Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir. 1999).

<sup>32</sup> See, e.g., Bigge v. Albertsons Inc., 894 F.2d 1497 (11th Cir. 1990).

<sup>33</sup> Clark County Sch. Dist. v. Breeden, 121 S. Ct. 1508 (Apr. 23, 2001). For further discussion of the outer limits of the good-faith reasonable belief standard, see infra Part II(C).

<sup>34</sup> Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990).

<sup>35</sup> See Payne v. McLemore’s Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981).

<sup>36</sup> See Equal Employment Opportunity Comm’n v. St. Anne’s Hosp., 664 F.2d 128 (7th Cir. 1981) (protecting plaintiff fired for hiring black employee).

<sup>37</sup> See Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980) (protecting personnel clerk who responded to employee inquiry as to pregnancy-related benefits by opining that employer could not lawfully deny such benefits).

<sup>38</sup> 545 F.2d 222 (1st Cir. 1976).

employee information, and other tactics, damaged employee relationships and interfered with research in ways that would have justified terminating any employee even in the absence of discrimination accusations.<sup>39</sup> Illegal tactics, such as an employee “stall-in” that violates state law on obstructing traffic, also do not qualify as protected activities.<sup>40</sup>

It is permissible for the plaintiff’s accusations to have a negative effect on the employer, however; otherwise, virtually all protected activity would be deemed disloyal. The test is whether plaintiffs go so far as to subvert the workplace and their own performance. Equal Employment Opportunity Commission v. Crown Zellerbach Corp.,<sup>41</sup> a seminal case on the limits of Hochstadt, held that the opposition clause protected plaintiffs who complained of discrimination not only to the EEOC, but also in a wide-ranging array of complaints, protests, and pressure tactics. These protected activities included letters to the employer’s corporate parent requesting meetings, letters to local officials demanding investigation, picketing of the Mayor’s office, an administrative complaint with the Office of Federal Contract Compliance, and a letter to a school district discouraging it from giving the employer an award for providing underprivileged students career guidance because of the employer’s “bigoted position of racism.”<sup>42</sup> In general, as long as employees opposing discrimination play by the basic rules of the workplace and continue to perform on the job, their conduct is unlikely to be deemed so unreasonable as to lose opposition clause protection.

## **B. Retaliation Under Other Employment Statutes**

### **1. ERISA**

Like Title VII, ERISA<sup>43</sup> offers retaliation protections to encourage individuals with knowledge of potential ERISA violations to share information in order to help prevent or redress those violations.<sup>44</sup> Under ERISA, it is unlawful to discharge, fine, suspend, expel, discipline, or discriminate against plan participants or beneficiaries for exercising or attempting to exercise their rights under ERISA or ERISA plans or for planning to testify or otherwise taking part in any ERISA-related inquiries or proceedings.<sup>45</sup> Because a plaintiff must prove only forbidden efforts to interfere, not actual interference, with ERISA rights, his or her receipt of ERISA

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<sup>39</sup> 545 F.2d 222 (1st Cir. 1976). See also Rollins v. Florida Dep’t of Law Enforcement, 868 F.2d 397 (11th Cir. 1989) (holding against plaintiff who filed overwhelming number of complaints, bypassed complaint chain of command, and damaged morale with unsupported accusations).

<sup>40</sup> See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

<sup>41</sup> 720 F.2d 1008 (9th Cir. 1983).

<sup>42</sup> 720 F.2d 1008.

<sup>43</sup> 29 U.S.C. §§ 1001 et seq.

<sup>44</sup> See generally Klein v. Banknorth Group, Inc., 977 F. Supp. 302 (D. Vt. 1997).

<sup>45</sup> 29 U.S.C. § 1140.

benefits does not preclude an ERISA retaliation claim.<sup>46</sup> ERISA retaliation claims generally follow the same basic analysis as Title VII retaliation claims.<sup>47</sup>

## 2. FMLA

The FMLA entitles eligible employees to take up to twelve weeks of unpaid leave in a twelve-month period because of the birth of a child, an illness in the family, or a serious health condition that makes the employee unable to perform the functions of his or her job.<sup>48</sup>

Following such a leave, the employee is entitled to reinstatement to his or her former position or an equivalent one.<sup>49</sup> The FMLA prohibits employers from interfering with, restraining, or denying the exercise of any right provided by the statute, and it provides a cause of action for retaliation.<sup>50</sup> FMLA retaliation claims generally follow the same basic analysis as Title VII retaliation claims.<sup>51</sup>

### C. Retaliation Under the First Amendment

Public employees enjoy protections that private employees do not against the threat of employer retaliation motivated by their expressive activities.<sup>52</sup> A public employer cannot retaliate against a public employee's speech on matters of public concern. This rule "falls within a larger category of Supreme Court cases known as the unconstitutional conditions doctrine, whereby government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit."<sup>53</sup> In a Section 1983 action by a public employee alleging First Amendment retaliation, the plaintiff must establish that he or she engaged in protected activity and suffered an adverse employment action, as well as that there was a causal connection between the two.<sup>54</sup>

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<sup>46</sup> See Roush v. Weastec, Inc., 96 F.3d 840, 844 (6<sup>th</sup> Cir. 1996); Kowalski v. L & F Prods., 82 F.3d 1283, 1287 (3d Cir. 1996).

<sup>47</sup> See generally supra Part I(A)(1).

<sup>48</sup> 29 U.S.C. § 2612(a).

<sup>49</sup> 29 U.S.C. § 2614(a).

<sup>50</sup> 29 U.S.C. § 2615(a).

<sup>51</sup> See generally supra Part I(A)(1).

<sup>52</sup> Although most of the cases discuss "speech," the retaliation protections apply even if the protected activity is another form of First Amendment activity such as "political association" or "intimate association," Sowards v. Loudon County, 203 F.3d 426 (6<sup>th</sup> Cir. 2000) (finding protected activity in plaintiff's support for her husband's election challenge to plaintiff's supervisor, the county sheriff).

<sup>53</sup> Anderson v. Davila, 125 F.3d 148, 161 n.12 (3d Cir. 1997) (quoting Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996)) (internal quotations omitted).

<sup>54</sup> See Sharp v. City of Houston, 164 F.3d 923 (5<sup>th</sup> Cir. 1999).

## 1. Proof of a Policy, Custom or Practice

The plaintiff must show that the execution of a policy, custom, or practice of the governmental employer caused the adverse action, because respondeat superior does not apply absent such a basis for imposing liability on the governmental body for individual officers' actions as employers.<sup>55</sup> Despite the lack of a strong respondeat superior doctrine, a government employer is liable for retaliation by a sufficiently high "policymaker" who exercises authority over the relevant operations of the government employer.<sup>56</sup> Absent action by a policy maker, however, the proof of a policy, custom, or practice may be a step removed from the overt acts of retaliation; proof of failure to discipline and adequately train those who committed the retaliation may suffice to prove the government employer culpable for and aware of the retaliation.<sup>57</sup>

## 2. "Protected Activity" Balancing Test

Under Pickering v. Board of Education,<sup>58</sup> a balancing test determines whether a public employee's speech is "protected activity." The balance is between the employee's interest as a citizen in commenting on matters of public concern and the employer's interest in promoting the efficiency of the public services it performs through its employees.<sup>59</sup>

### a. The Employee's Interest: Public Concern and Public Duty

A strong employee speech interest is most classically recognized when the speech addresses public policy issues, even when the public employer is the governmental body being criticized, as in Pickering, in which a teacher faced dismissal for speaking out on a tax increase proposed by the school district that employed her.<sup>60</sup> In contrast, even though all of a public employer's actions in some sense are matters of public concern, criticism and disruption of internal personnel matters are far less protected, with employees who speak out and stoke dissent the most likely to be at risk.<sup>61</sup> Speaking out against corruption or mismanagement by one's superiors may be protected, especially if the manner of the speech yields limited disruption of the

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<sup>55</sup> See Morris v. Lindau, 196 F.3d 102 (2d Cir. 1999) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

<sup>56</sup> See Jeffes v. Barnes, 208 F.3d 49 (2d Cir. 2000) (finding county sheriff a policymaker with respect to jail operations and "the management of his jail staff with respect to the existence or enforcement of a code of silence" underlying the retaliation against an employee who broke that code of silence).

<sup>57</sup> See Blair v. City of Pomona, 223 F.3d 1074 (9th Cir. 2000).

<sup>58</sup> 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

<sup>59</sup> See Dangler v. New York City Off Track Betting Corp., 193 F.3d 130, 139 (2d Cir. 1999) (citing Pickering, 391 U.S. at 568, 88 S.Ct. 1731).

<sup>60</sup> 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

<sup>61</sup> See Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (holding that assistant district attorney speaking out against transfer policy and alleged political pressures on staff was not protected against termination).



employer's interest on the other side of the ledger,<sup>62</sup> but not if the dispute focuses on the employee's personal situation rather than on broader public concerns.<sup>63</sup>

Public duty may be a source of protection independent of public concern. At least one court has held that a public employee's jury testimony is constitutionally protected against retaliation "without the need to show that the testimony relates to a matter of public concern."<sup>64</sup> As an alternative holding, that court elaborated a broad definition of "public concern" that encompassed the jury testimony at issue, because "speech relevant to the issues in a judicial proceeding always involves a matter of public concern or it would not be in Court, and the lawfulness of the hiring practices of a municipality is also a matter of public concern."<sup>65</sup> This concept of "public concern" seems to parallel that of the "participation" clause of Title VII,<sup>66</sup> though covering a wider range of underlying disputes – i.e., the testimony need not be about claims covered by Title VII.

### **b. The Employer's Interest: Disruption and Performance**

Analysis of the employer's interest considers several factors, such as "the extent of the disruption caused by the employee's speech on workplace discipline, harmony among co-workers, working relationships, and the employee's job performance,' as well as the responsibilities of the employee within the agency and whether the speech is made publicly or privately."<sup>67</sup> The employer need not show "an actual disruption," only "a likely interference with its operations," to justify the adverse action.<sup>68</sup> Thus, even though all criticisms of the public employer or individual superiors are in a sense disruptive of various legitimate employer interests, complaints made discreetly, and through proper channels, are the most likely to avoid a

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<sup>62</sup> See, e.g., Dangler, 193 F.3d 130; Ingram v. Johnson, 187 F.3d 877 (8th Cir. 1999); Lundgren v. Curiale, 836 F. Supp. 165 (S.D.N.Y. 1993) (denying defendant summary judgment in state insurance department employee's claim that he was fired for complaining of department practices).

<sup>63</sup> See, e.g., Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d 814 (5th Cir. 2000) (finding that school principal's speech was not of "public concern" where she had criticized the Board of Trustees for not renewing her contract and for its response to fund mismanagement concerns, because the speech about the alleged mismanagement focused merely on whether the Board adequately defended the principal); Schlesinger v. New York City Transit Authority, No. 00 Civ. 4759, 2001 WL 62868 (S.D.N.Y. Jan. 24, 2001) ("Even though plaintiff's complaints of his heavy workload also addressed the workload of his co-workers, such speech does not constitute a matter of public concern because it related primarily 'to plaintiff's personal circumstance and was motivated purely by self-interest'").

<sup>64</sup> Benedict v. Town of Newburgh, 95 F. Supp. 2d 136, 143 (S.D.N.Y. 2000) (denying motion to dismiss), later op., 125 F. Supp. 2d 675, 678 (denying motion for summary judgment) (quoting id.).

<sup>65</sup> Benedict, 125 F. Supp. 2d at 678; see also Benedict, 95 F. Supp. 2d at 142 (collecting cases from other circuits and reasoning that, "If employers were free to retaliate against employees who provide truthful, but damaging, testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs, or could lie to the tribunal and protect their job security").

<sup>66</sup> See generally supra Part I(A)(2)(a).

<sup>67</sup> Dangler, 193 F.3d at 139 (quoting McEvoy v. Spencer, 124 F.3d 92, 98 (2d Cir. 1997)).

<sup>68</sup> Dangler, 193 F.3d at 140.

finding of “likely interference.”<sup>69</sup>

### 3. Retaliation Against Discrimination Complainants

A public employee who filed a Title VII (or similar statutory) discrimination charge and then suffered retaliation may have not only a statutory retaliation claim, but also a constitutional retaliation claim, because the plaintiff’s

filing of his EEOC complaint and his employment discrimination suit ... constituted protected activity under the First Amendment. The Supreme Court has consistently held that an individual’s constitutional right of access to court is protected by the First Amendment’s clause granting the right to petition the government for grievances. ‘The right of access to the courts is indeed but one aspect of the right of petition.’ Numerous claims ... – both in this Circuit and in others – have involved fact patterns in which the government took retaliatory action in response to an individual’s filing of a lawsuit.<sup>70</sup>

If a causal connection sufficient for the statutory retaliation claim is present, then the other basic elements of the constitutional inquiry likely are as well, because the protected activity is clear and is unlikely to be so disruptive as to fail the Pickering balancing test unless it was so disruptive as to fail the Hochstadt Title VII reasonableness inquiry. The difficult part is likely to be proving a “policy, custom, or practice” sufficient to support a finding that the governmental body is liable under 42 U.S.C. § 1983.

#### D. Whistleblower Protection Statutes and Statutory Provisions

Many federal statutes, including some lesser-known ones, entitle successful whistleblower claimants to reinstatement, back pay, injunctive relief, and compensatory damages.<sup>71</sup> Some also provide for exemplary or punitive damages<sup>72</sup> and recovery of reasonable attorney fees and costs.<sup>73</sup> Many statutes refer to the administrative procedures promulgated by the United States Department of Labor (DOL) for whistleblower claims.<sup>74</sup> Those procedures

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<sup>69</sup> Dangler, 193 F.3d at 140 (holding that First Amendment claim was stated by third-ranked employee at New York City Off-Track Betting (OTB) who reported official corruption by his superiors to OTB Inspector General and to City’s Department of Investigation).

<sup>70</sup> Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997) (quoting California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 612, 30 L.Ed.2d 642 (1972)).

<sup>71</sup> E.g., Energy Reorganization Act, 42 U.S.C. § 5851(d).

<sup>72</sup> E.g., Clean Air Act, 42 U.S.C. § 7622(d); Energy Reorganization Act, 42 U.S.C. § 5851(d); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(4); and Toxic Substances Control Act, 15 U.S.C. § 2622(d). See, e.g., Reich v. Cambridgeport Air Servs., 26 F.3d 1187 (1st Cir. 1994) (upholding administrative award of punitive damages under OSHA). As to the availability of punitive damages under the Fair Labor Standards Act, see infra Part II(H).

<sup>73</sup> E.g., Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(4); Toxic Substances Control Act, 15 U.S.C. § 2622(d).

<sup>74</sup> 29 C.F.R. §§ 18-24.

require that administrative complaints be filed within 30 days of the retaliation<sup>75</sup> and provide the full panoply of discovery tools regularly available in civil litigation.<sup>76</sup> Certain federal statutes prohibit employer retaliation against whistleblowers but provide no private right of action.<sup>77</sup>

Plaintiffs have achieved marked success with whistleblower claims. Plaintiffs' probability of recovery in whistleblower claims (both state and federal) is 68%, compared to 58% for claims of retaliation for the filing of sexual harassment complaints, 57% for claims of retaliation for the filing of discrimination complaints, and 45% for claims of retaliation for the filing of workers' compensation claims.<sup>78</sup> The median award for whistleblower claims is \$200,000.<sup>79</sup>

## 1. Public Employees: Whistleblower Protection Act

In 1989, Congress enacted the Whistleblower Protection Act (WPA), an amendment to the Civil Service Reform Act (CSRA), to protect federal employees who attempt to alert the public to illegal or dangerous actions.<sup>80</sup> The WPA forbids the federal government from taking or threatening adverse action against a federal employee because the employee disclosed information that he or she reasonably believed showed a violation of law, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.<sup>81</sup> To state a WPA whistleblower claim, a federal employee must show a protected disclosure, knowledge of the disclosure by the retaliating official, and concrete causation of the retaliation by the protected whistleblowing activity.<sup>82</sup> In mixed-motive WPA whistleblower cases, as in discrimination cases, where protected whistleblowing activities coincide with legitimate reasons for adverse action, the employer must prove that it would have undertaken the action even absent the protected activity.<sup>83</sup>

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<sup>75</sup> 29 C.F.R. § 24.3(b).

<sup>76</sup> 29 C.F.R. §§ 18.13 – 18.24.

<sup>77</sup> E.g., Occupational Safety & Health Act, 29 U.S.C. § 660(c) (exclusively administrative procedures); Department of Defense Authorization Act, § 10 U.S.C. § 2409 (same for federal defense contracts).

<sup>78</sup> Jury Verdict Research, Employment Practice Liability: Jury Award Trends and Statistics, 2001 Edition (analyzing recovery for the years 1994-2000).

<sup>79</sup> Id.

<sup>80</sup> Whistleblower Protection Act/Civil Service Reform Act, 5 U.S.C. §§ 2302(b)(8), (b)(9).

<sup>81</sup> 5 U.S.C. §§ 2302(b)(8), (b)(9).

<sup>82</sup> See Caddell v. Dep't of Justice, 96 F.3d 1367 (Fed. Cir. 1996).

<sup>83</sup> See Pogue v. Dep't of Labor, 940 F.2d 1287 (9th Cir. 1991) (federal employer failed to prove adverse actions would have occurred absent protected activity where it was unable to separate plaintiff's negative performance from his whistleblowing); cf. Am. Nuclear Resources, Inc. v. Dep't of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998) (citing Pogue for mixed-motive analysis of whistleblower protections under Energy Reorganization Act).

The WPA covers the entire federal government, even sensitive agencies.<sup>84</sup> The WPA requires employees to exhaust administrative remedies through the Merit Systems Protection Board (MSPB), which the CSRA originally created. An employee unsatisfied with the MSPB outcome of a whistleblower claim may seek judicial review.<sup>85</sup>

## 2. Private Employees: Whistleblowing on Workplace Rules Violations

The private sector is also subject to federal whistleblower protection, mainly through various federal statutes that address public health and safety<sup>86</sup> or otherwise regulate employment or business practices.<sup>87</sup> Generally, private sector whistleblowers asserting claims against their employers under federal law are subject to similar elements of proof as Title VII claimants; they must demonstrate that they (1) had a good faith belief that a serious violation of laws, rules, or regulations had occurred, (2) were not directly culpable in the wrongdoing, (3) reported the wrongdoing, at the very least, to their immediate supervisor, and (4) were adversely affected in their employment because they blew the whistle. For example, the Federal Deposit Insurance Act<sup>88</sup> contains a whistleblower provision that does not require evidence of specific violations of an applicable law or regulation; all that is required is proof that the employee reported a possible violation.<sup>89</sup>

The newest federal statute protecting private sector whistleblowers is the Sarbanes-Oxley

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<sup>84</sup> The Department of Justice has procedures for Federal Bureau of Investigation employees to disclose information under the WPA. *See, e.g.*, 28 C.F.R. §§ 27.1 *et seq.*; 63 Fed. Reg. 62937. *Cf. Coupar v. Dep't of Labor*, 105 F.3d 1263 (9th Cir. 1997) (prisoners are not federal employees with whistleblower protection under environmental statute).

<sup>85</sup> *See Grisham v. United States*, 103 F.3d 24 (5th Cir. 1997).

<sup>86</sup> *E.g.*, Asbestos School Hazard Detection & Control Act, 20 U.S.C. § 3608; Aviation Investment and Reform Act, 49 U.S.C. § 42121; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; Clean Air Act, 42 U.S.C. §§ 7401, 7622; Energy Reorganization Act a/k/a Atomic Energy Act, 42 U.S.C. § 5851; Federal Mine Safety & Health Act, 30 U.S.C. §§ 815, 820(b); Federal Railroad Safety Act, 45 U.S.C. §§ 441(a), (b)(1); Federal Water Pollution Control Act, 33 U.S.C. § 1367; International Safe Container Act, 46 U.S.C. § 1506; Occupational Safety & Health Act, 29 U.S.C. § 660(c); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Solid Waste Disposal Act, 42 U.S.C. § 6971; Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201, 1293; Surface Transportation Assistance Act, 49 U.S.C. § 2305; Toxic Substances Control Act, 15 U.S.C. § 2622.

<sup>87</sup> *E.g.*, Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(d); Conspiracy to Obstruct Justice Act, 42 U.S.C. § 1985(2); Consumer Credit Protection Act, 15 U.S.C. § 1674(a); Department of Defense Authorization Act, 10 U.S.C. § 2409; Federal Deposit Insurance Act, 12 U.S.C. § 1831(j); Federal Property and Administrative Services Act, 41 U.S.C. § 251; Jury Duty Act, 28 U.S.C. § 1875; Major Fraud Act, 18 U.S.C. § 1031(g); Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 2021(b), 2024(c).

<sup>88</sup> 12 U.S.C. § 1831(j).

<sup>89</sup> Thus, a bank employee whose memorandum outlined what he believed were improper or illegal bank actions “provided information” as to “possible violations of any law or regulation” under the whistleblower statute. *Haley v. Fiechter*, 953 F. Supp. 1085 (E.D. Mo. 1997), *aff'd*, 138 F.3d 1245 (8th Cir. 1998).

Act,<sup>90</sup> enacted on July 30, 2002, in response to the scandals involving Enron and other major U.S. corporations. The Act provides:

**(a) Whistleblower protection for employees of publicly traded companies.--**

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The language of § 1514A(1) appears to create an ambiguity as to the protection afforded a private employee who blows the whistle absent a pending investigation. On the one hand, the statute states that the Act protects employees who “provide information, cause information to be provided, or otherwise assist in an investigation,”<sup>91</sup> suggesting that an employee is protected only if she is providing information to assist in an investigation. On the other hand, the end of the same paragraph provides protection “when the information or assistance is provided to or the investigation is conducted by...,” suggesting that the provision of information need not be related to an investigation. The legislative history of the Act supports the latter interpretation. Both the House and Senate Conference Reports state that the Act is intended to protect employees like Sherron Watkins, who blew the whistle on Enron when there was no pending investigation; in fact, it was her disclosures that prompted the ensuing federal investigations.<sup>92</sup>

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<sup>90</sup> 18 U.S.C. § 1514A (“Sarbanes-Oxley”) or (“the Act”).

<sup>91</sup> Emphasis added.

<sup>92</sup> 148 Cong. Rec. H5462, at H5473 (July 25, 2002) (statement of Rep. Jackson-Lee); 148 Cong. Rec. S7350, at S7358 (statement of Senator Leahy).

Indeed, it is unlikely that Congress intended to protect employees who assist ongoing investigations but not employees who alert the government to violations that should be investigated.

The Sarbanes-Oxley Act provides a private right of action against retaliation for the disclosure of information only if it is related to suspected fraud or violations of Securities and Exchange Commission rules.<sup>93</sup> The Act does not provide a private right of action to employees who disclose any other kind of information, or those who disclose information of any kind to the media. This limited whistleblower protection seems intended to minimize the disruption to financial markets that the publication of major corporate accounting scandals (like those involving Enron, WorldCom, and Global Crossing) can cause.

Employees must file complaints of retaliation for whistleblowing under Sarbanes-Oxley with the Secretary of Labor.<sup>94</sup> They may not bring suit in a federal district court unless the Secretary fails to issue a final decision on their complaints within 180 days of filing.<sup>95</sup> Both complaints to the Secretary and federal lawsuits under Sarbanes-Oxley are governed by the rules originally enacted to protect airline employees from retaliation for whistleblowing, which call for a burden-shifting analysis familiar from the context of Title VII litigation.<sup>96</sup> The Secretary must dismiss a complaint without investigating it if: (a) the employee fails to make a prima facie showing that the employer's adverse action was motivated at least in part by the employee's whistleblowing activity, or (b) the employer rebuts the employee's prima facie showing with clear and convincing evidence that it would have taken the same action regardless of the whistleblowing.<sup>97</sup> If the employee makes a prima facie showing that the employer does not rebut with clear and convincing evidence, the Secretary must conduct an investigation and issue her findings within 60 days of receiving the complaint.<sup>98</sup> The losing party then has 30 days to object to the Secretary's findings and request a hearing on the record.<sup>99</sup> Within 120 days of a hearing on the record, the Secretary must issue her final order, from which the losing party has

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<sup>93</sup> An employer who retaliates against an employee for disclosing violations of other federal laws or rules is not liable for civil damages, but may be subject to criminal penalties. The Sarbanes-Oxley Act provides that "[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. §1513(e). While the civil protections against retaliation encompass information disclosed to federal regulatory agencies, members of Congress, or the employee's supervisor, criminal penalties for retaliation are available only if the employee disclosed information to a law enforcement officer.

<sup>94</sup> 18 U.S.C. § 1514A(b)(1)(A).

<sup>95</sup> 18 U.S.C. § 1514A(b)(1)(B).

<sup>96</sup> 49 U.S.C. § 42121.

<sup>97</sup> 49 U.S.C. § 42121(b)(2)(B)(i).

<sup>98</sup> 49 U.S.C. § 42121(b)(2)(A).

<sup>99</sup> 49 U.S.C. § 42121(b)(2)(A).

60 days to appeal to the federal court of appeals.<sup>100</sup>

The statute of limitations for complaints of retaliation under Sarbanes-Oxley is extremely short: 90 days from the date of the violation.<sup>101</sup> Employees who do not learn of their employers' retaliatory conduct until more than 90 days after it occurred are barred from seeking relief, and even employees who learn of the retaliation immediately may be hard-pressed to meet the deadline. In contrast, employees complaining of retaliation under Title VII have 300 days to decide whether to pursue their claims, retain counsel if they wish to, and prepare their EEOC charges.

Sarbanes-Oxley entitles a prevailing employee to "all relief necessary to make the employee whole," including reinstatement, back pay with interest, and compensation for "special damages" such as "litigation costs, expert witness fees, and reasonable attorney fees."<sup>102</sup>

### **3. False Claims Act (FCA)**

#### **a. Basic FCA Qui Tam Principles**

Potent federal whistleblowing protection exists for individuals who can assert a Federal False Claims Act (FCA) qui tam claim,<sup>103</sup> under which individuals may bring civil actions for violations of the statute in the "person and for the United States Government."<sup>104</sup> Since the action is brought in the name of the federal government, the government may either allow the original plaintiff – the "qui tam relator" – to proceed with the suit on his or her own<sup>105</sup> or intervene and prosecute the action.<sup>106</sup> If the government decides to proceed with the action, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the [statutory] limitations."<sup>107</sup> If the government pursues the action with the qui tam relator, then the relator shall receive "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person

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<sup>100</sup> 49 U.S.C. §§ 42121(b)(3) and (b)(4).

<sup>101</sup> 18 U.S.C. § 1514A(b)(2)(D). Airline employees who disclose safety violations face the same statute of limitations for filing complaints of retaliation. 49 U.S.C. § 42121(b)(1).

<sup>102</sup> 18 U.S.C. § 1514A(c).

<sup>103</sup> 31 U.S.C. § 3730.

<sup>104</sup> 31 U.S.C. § 3730(b)(1).

<sup>105</sup> 31 U.S.C. § 3730(b)(4)(B).

<sup>106</sup> 31 U.S.C. § 3730(b)(2). "The action may be [voluntarily] dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. § 3730 (b)(1). The rule applies when the government declines to prosecute, but does not limit courts' inherent power to dismiss as a matter of law. See Minotti v. Lensink, 895 F.2d 100 (2d Cir. 1990).

<sup>107</sup> 31 U.S.C. § 3730(c)(1).

substantially contributed to the prosecution of the action.”<sup>108</sup> If the government does not proceed with the action, “the person bringing the action or settling the claim shall receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than 25 percent and not more than 30 percent.”<sup>109</sup>

While its most apparent application is in the area of government contracts, the FCA does not require direct privity of contract between the federal government and the defrauder.<sup>110</sup> It covers all manner of fraudulent claims submitted to the federal government, from those under large federal programs such as Medicaid and Medicare<sup>111</sup> to those under special government contracts.<sup>112</sup> A critical limit on qui tam claims is the “original source” rule. Before the 1986 amendments, the FCA required a qui tam relator’s information to be “new” – *i.e.*, not previously disclosed to the government.<sup>113</sup> The amended FCA requires only that the fraud not have been publicly disclosed, defined to mean by media or government investigation.<sup>114</sup> Even upon public disclosure, a qui tam relator still has standing to sue if he or she is an “original source” of the information uncovering the fraud – *i.e.*, has “direct and independent knowledge” of the fraud.<sup>115</sup>

### **b. FCA Retaliation Protection**

Under the FCA, an employee subjected to an adverse employment action in retaliation for disclosing an employer's false or fraudulent federal claims can sue the employer.<sup>116</sup>

Any employee who is discharged, demoted, suspended, threatened, harassed, or in

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<sup>108</sup> 31 U.S.C. § 3730(d)(1).

<sup>109</sup> 31 U.S.C. § 3730(d)(2).

<sup>110</sup> See United States v. Bornstein, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d. 514 (1976). Moreover, corporate officers or senior managers who knowingly participate in fraud are personally liable, see, e.g., Smith v. United States, 287 F.2d 299 (5th Cir. 1961), and corporations are vicariously liable for the fraud of agents who acted with apparent authority even if the corporations received no benefit, see, e.g., United States v. O’Connell, 890 F.2d 563, 567-69 (1st Cir. 1989).

<sup>111</sup> See, e.g., Peterson v. Weinberger, 508 F.2d 45 (5th Cir. 1975) (Medicaid); Hopkins v. Actions, Inc., 985 F. Supp. 706 (S.D. Tex. 1997) (Medicare).

<sup>112</sup> See, e.g., United States ex rel. Fallon v. Accudyne Corp., 921 F. Supp. 611 (W.D. Wis. 1995) (military hardware contract).

<sup>113</sup> See generally Hughes Aircraft v. U.S. ex rel. Schumer, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (explaining 1986 amendments).

<sup>114</sup> 31 U.S.C. § 3730(e)(4)(A).

<sup>115</sup> 31 U.S.C. § 3730(e)(4)(A).

<sup>116</sup> 31 U.S.C. § 3730. See, e.g., Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994) (“The purpose of the False Claims Act is to discourage fraud against the government, and the whistleblower provision is intended to encourage those with knowledge of fraud to come forward”); Hopkins v. Actions, Inc., 985 F. Supp. 706 (S.D. Tex. 1997).



any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.<sup>117</sup>

Thus, the FCA provides whistleblower protection and relief to employees who report their employers to the federal government for “knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government ... , a false or fraudulent claim for payment or approval.”<sup>118</sup> Under the FCA, the word “employer” does not include those who are not in an actual employment relationship with the whistleblower. Because the relief available under the statute likely consists of reinstatement or back wages, the FCA has been interpreted as requiring an employment relationship between plaintiff and defendant.<sup>119</sup>

A plaintiff claiming retaliation “must show that she was engaged in a protected activity and that her employer knew about it.”<sup>120</sup> Courts construe “protected activity” broadly:

The statute provides examples of the types of activity that are protected, including investigation, initiation of a suit, and testimony, but these examples are not exclusive and the legislative history indicates that “[p]rotected activity should . . . be interpreted broadly.” ... [B]ringing the alleged fraud to the attention of her supervisors and showing them a newspaper article describing a qui tam action in Florida involving similar allegations of fraud, are protected activities.<sup>121</sup>

Available remedies include reinstatement, triple back pay, and compensation for special damages, including litigation costs and reasonable attorneys' fees.<sup>122</sup>

#### **4. Racketeer Influenced and Corrupt Organizations Act (RICO)**

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides civil remedies

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<sup>117</sup> 31 U.S.C. § 3730(h).

<sup>118</sup> 31 U.S.C. § 3729(a)(1). The terms “knowing” or “knowingly” refer to one who has actual knowledge of information or who acts in deliberate ignorance or reckless disregard of the truth or falsity of information. 31 U.S.C. § 3729(b)(1), (b)(2). While proof of specific intent is not required, 31 U.S.C. § 3729(b)(3), pleading fraud with particularity under Fed. R. Civ. P 9(b) is required, see United States ex rel. McCoy v. California Med. Review, 723 F. Supp. 1363 (N.D. Cal. 1989).

<sup>119</sup> See, e.g., Mruz v. Caring, Inc., 991 F. Supp. 701 (D.N.J. 1998).

<sup>120</sup> See U.S. ex rel. McKenzie v. Bellsouth Telecommunications, Inc., 123 F.3d 935, 944 (6th Cir. 1997).

<sup>121</sup> 123 F.3d at 944 (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 35 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5300).

<sup>122</sup> 31 U.S.C. § 3730(h).

that would seem applicable to whistleblowers: “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fees.”<sup>123</sup> In its efforts to rein in the RICO statute, however, the Supreme Court has all but precluded a RICO whistleblower cause of action.

In Sedima, S.P.R.L. v. Imrex Co.,<sup>124</sup> despite stating that “RICO is to be read broadly,”<sup>125</sup> the Supreme Court declined to broaden RICO standing requirements to cover whistleblowers. A violation of § 1962(c), which Sedima analyzed, “requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”<sup>126</sup> The Court framed the causation requirement – injury caused by violation of § 1962 – as one of standing: “[u]nder section 1964(c) ‘a plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.’”<sup>127</sup> Thus, “[w]histleblowers do not have standing to sue under RICO for the injury caused by the loss of their job”<sup>128</sup> because “[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured.”<sup>129</sup>

Following Sedima, several federal courts attempted to preserve a RICO whistleblower cause of action via § 1962(d), the “RICO conspiracy” section, which makes it “unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c).” In Shearin v. E.F. Hutton Group, Inc.,<sup>130</sup> the Third Circuit reasoned that Sedima

did not apply its civil RICO standing analysis to conspiracy in violation of section 1962(d). Rather, it addressed only violations under section 1962(a), (b), and (c). In addition, nothing in Sedima forecloses the possibility that harm arising from criminal acts in furtherance of the conspiracy, yet distinct from the predicate acts recognized in section 1961(1), might yet confer standing so long as the plaintiff has alleged a violation of section 1962(d).<sup>131</sup>

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<sup>123</sup> 18 U.S.C. § 1964(c).

<sup>124</sup> 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

<sup>125</sup> 473 U.S. at 497.

<sup>126</sup> 473 U.S. at 496-97.

<sup>127</sup> 473 U.S. at 496.

<sup>128</sup> Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1215 (5th Cir. 1988). Accord Pujol v. Shearson/American Express, Inc., 829 F.2d 1201 (1st Cir. 1987); Morast v. Lance, 807 F.2d 926 (11th Cir. 1987); McCampbell v. KPMG Peat Marwick, No. 3:96-CV-3136-H, 1997 WL 311521 (N.D. Tex. May 30, 1997).

<sup>129</sup> 473 U.S. at 496-97.

<sup>130</sup> 885 F.2d 1162 (3d Cir. 1989).

<sup>131</sup> 885 F.2d at 1169.

Shearin drew little support from other circuits, however. The Second Circuit explicitly criticized Shearin and took a narrower approach to § 1962(d) in Hecht v. Commerce House, Inc.,<sup>132</sup> holding that the purpose of RICO is “to target RICO activities and not other conduct. Therefore, we hold that standing may be founded only upon injury from overt predicate acts that are also section 1961 predicate acts, and not upon any and all overt acts furthering a RICO conspiracy.”<sup>133</sup>

The Supreme Court has settled the RICO conspiracy debate by siding with Hecht and abrogating Shearin. In Beck v. Prupis,<sup>134</sup> the Court rejected the RICO conspiracy claim of an employee dismissed in retaliation for opposing RICO violations, holding that “a cause of action ... for a violation of § 1962(d) is not available to a person injured by an overt act in furtherance of a RICO conspiracy unless the overt act is an act of racketeering.”<sup>135</sup> In sum, a RICO whistleblower is unprotected unless the retaliatory injury can be characterized as the direct result of an underlying RICO violation, not just as a RICO violator’s attempt to protect or cover up a RICO violation.

## II. UNRESOLVED ISSUES IN RETALIATION LAW

### A. Restrictive “Adverse Employment Action” Requirements

#### 1. Application of Restrictive Standard in Fifth and Eighth Circuits

There is a circuit split as to what sort of “adverse action” suffices for a retaliation claim. The Fifth Circuit takes the restrictive position that plaintiffs can claim retaliation only as to “ultimate employment decisions ... such as hiring, granting leave, discharging, promoting, or compensating.”<sup>136</sup> The logic of this position stems from language in the Title VII retaliation subsection, 42 U.S.C. § 2000e-3, stating only that employers may not “discriminate” against those undertaking protected activity. This, the Fifth Circuit reasons, is a more limited proscription than the non-retaliation Title VII rule prohibiting “‘limitation’ of employees which deprive or ‘would tend to deprive’ the employee of ‘opportunities’ or ‘adversely affect his status.’”<sup>137</sup> Thus, documented reprimands, threats of termination, and negative performance reviews did not support a retaliation claim in the Fifth Circuit, because while they “may have increased the chance that [plaintiff] would suffer an adverse employment action, ... neither were they ultimate employment decisions nor did they rise above having a mere tangential effect on a possible future ultimate

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<sup>132</sup> 897 F.2d 21 (2d Cir. 1990)

<sup>133</sup> 897 F.2d at 25. Accord Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987) (finding no RICO violation in retaliation against whistleblower by defendant that took various steps to violate customs laws and to cover up illegal acts because, even assuming that termination is an injury to “business or property” under section 1964(c), the injury resulted not from the offenses within the RICO scheme (mail and wire fraud, obstruction of justice and criminal investigations, and interference with commerce), but from his termination for reporting the scheme to his superiors).

<sup>134</sup> 529 U.S. 494, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000).

<sup>135</sup> 529 U.S. at 499.

<sup>136</sup> Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995)).

<sup>137</sup> 104 F.3d at 709.

employment decision.”<sup>138</sup> Neither did a denial of a request for a lateral transfer closer to the plaintiff’s home qualify.<sup>139</sup> The denial of a pay increase, however, does qualify as an “ultimate employment decision” in the Fifth Circuit because it is a compensation decision.<sup>140</sup>

The Eighth Circuit also has ratcheted up the required adverse action showing for retaliation plaintiffs.<sup>141</sup> In Spears v. Missouri Dep’t of Corr. & Human Resources, for example, an Eighth Circuit panel held that “[a] transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action,” citing a prior precedent holding that “a transfer that required the plaintiff to move from one city to another was not actionable because the transfer did not entail a change in his salary, benefits, or any other aspect of his employment.”<sup>142</sup> Notably, several Eighth Circuit judges have recorded their disagreement with the heightened adverse action requirement. Citing Spears, in LePique v. Hove, another Eighth Circuit panel held that failing to grant a transfer not entailing a change in pay or rank is insufficiently “adverse” to support a retaliation claim.<sup>143</sup> But the LePique panel complied with Spears only with clearly expressed reluctance:

We have no wish to minimize the personal impact that transfers or refusals to transfer can have on an individual employee. This Court, however, has squarely held that a decision to transfer an employee to another city, a transfer that the employee did not want, is not an adverse employment action of sufficient consequence to justify an action under Title VII, assuming, as is the case here, that the job to which the employee is being transferred is of equal pay and rank and with no material change in working conditions.... This panel is bound by Spears and the authorities it cites. We have no power to change the law of the Circuit as enunciated by another panel.<sup>144</sup>

Judge Heaney, concurring in LePique, used even stronger language, citing the Spears opinion but arguing that

the rule set forth in the [Spears] opinion is, in my view, simply wrong. An

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<sup>138</sup> 104 F.3d at 707.

<sup>139</sup> See Burger v. Cent. Apartment Mgmt., Inc., 168 F.3d 875 (5th Cir. 1999).

<sup>140</sup> Fierros v. Texas Dep’t of Health, 274 F.3d 187, 194 (5<sup>th</sup> Cir. 2001).

<sup>141</sup> See, e.g., Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (“appellant failed to establish how such consequences effectuated a material change in the terms or conditions of her employment. While the action complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII”) (citing Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994)).

<sup>142</sup> 210 F.3d 850, 853-53 (8th Cir. 2000) (citing Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997)).

<sup>143</sup> 217 F.3d 1012 (8th Cir. 2000).

<sup>144</sup> 217 F.3d at 1014.

employer's retaliatory refusal to transfer an employee is an adverse employment action, regardless whether the position sought involves the same duties, pay and benefits. After all, where a person lives and works often is more important than the salary or benefits he/she receives, and refusing the transfer results in more than 'mere inconvenience.' Accordingly, when an employee seeks a transfer, is the most qualified applicant, and is refused the transfer in retaliation for her civil rights claim against the employer, he/she suffers an adverse employment action. However, I recognize that I am bound by our circuit's precedent, and thus I concur.<sup>145</sup>

Some district court judges in the Eighth Circuit seem to be resisting the Circuit's restrictive standard by distinguishing away relevant precedents.<sup>146</sup>

## 2. Rejection of Restrictive Standard Outside of Fifth and Eighth Circuits

A majority of circuits, however, disagree with the Fifth Circuit's position. Numerous circuits have explicitly held that a retaliation plaintiff need not show an ultimate employment decision, but instead must make the same basic showing of a "material adverse action" that applies to any Title VII claim.<sup>147</sup> Also undercutting the Fifth Circuit position are numerous precedents in other circuits establishing a broader range of retaliatory adverse actions, such as that, in retaliation cases, "the prohibition against discrimination is not limited to 'pecuniary emoluments,' but includes discriminatorily-motivated diminution of duties."<sup>148</sup>

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<sup>145</sup> 217 F.3d at 1014 (Heaney, J., concurring).

<sup>146</sup> Woods v. Schutte Lumber Co., 90 FEP 1432, 2003 WL 136187 (W.D.Mo., Jan. 10, 2003) (holding that assigning plaintiff a higher proportion of strenuous or undesirable tasks than his white colleagues was an adverse employment action); McGregory v. Crest/Hughes Technologies, 149 F. Supp. 2d 1079 (S.D.Iowa 2001) (holding that a demotion from a supervisory to a non-supervisory position with no accompanying reduction in pay was an adverse employment action).

<sup>147</sup> See, e.g., Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001) ("ultimate employment decision' is not the standard in this circuit.... [W]e have expressly rejected distinctions, like those drawn by the Mattern court, between § 2000e-2 and § 2000e-3" – Title VII's discrimination and retaliation provisions, respectively); Cones v. Shalala, 199 F.3d 512 (D.C. Cir. 2000) (applying D.C. Circuit's ADEA standard, that retaliation claims are "not limited 'only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion,'" to Title VII context (quoting Passer v. Am. Chem. Soc., 935 F.2d 322, 331 (D.C. Cir. 1991); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998) (establishing that Eleventh Circuit sided with First, Ninth, and Tenth Circuits against Fifth and Eighth Circuits: "We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions"); Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) (holding that a retaliatory negative reference violates Title VII even if it causes no damage, because effect of retaliation goes only to damages, not to liability); Price v. Delaware Dep't of Corrections, 40 F. Supp. 2d 544 (D. Del. 1999) ("The Third Circuit's view is less restrictive than that of some other circuits, which hold that retaliation must involve a material or ultimate employment decision"); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001) (quoting Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999)) (holding that examples of adverse employment actions include "negative evaluation letters [and] express accusations of lying").

<sup>148</sup> Preda v. Nissho Iwai Am. Corp., 128 F.3d 789, 791 (2d Cir. 1997) (reversing defense grant of summary judgment in retaliation claim where alleged adverse actions were exclusion from meetings and reduction of job duties, such as to largely clerical tasks, because such allegations "raised a material question of fact about whether

Further undermining the Fifth Circuit’s position is general judicial acceptance of “retaliatory harassment” claims.<sup>149</sup> A strict limitation of retaliation claims to “ultimate employment decisions” presumably would disallow any claim of retaliatory harassment, which does not qualify as an “ultimate employment decision ... such as hiring, granting leave, discharging, promoting, or compensating.”<sup>150</sup> Similarly broadening the range of covered retaliatory conduct are the cases recognizing a claim when an employer undertakes a retaliatory legal action against an employee.<sup>151</sup>

Finally, whatever the inter-circuit dispute about the Fifth Circuit’s standard for a Title VII retaliation claim, it appears clear that this strict standard could not apply to a First Amendment retaliation claim. In such a claim, the retaliation need only be “sufficient ‘to deter a person of ordinary firmness’ from exercising his First Amendment rights.”<sup>152</sup> Consequently, based on a fairly extensive body of precedent, the Third Circuit has found it sufficient that employees suffered a “campaign of retaliatory harassment culminating in retaliatory rankings ... even if plaintiffs cannot

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the terms of his employment were adversely affected in retaliation for protected activity”) (citing de la Cruz v. New York City Human Resources Admin. Dep’t of Soc. Serv., 82 F.3d 16, 21 (2d Cir. 1996), and Rodriguez v. Board of Educ., 620 F.2d 362, 366 (2d Cir. 1980)); see also Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (“the filing of [criminal] charges can constitute the requisite adverse action ... [and] malicious prosecution can constitute adverse employment action”); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1996) (“In addition to discharges, other adverse actions are covered by § 2000e-3(a),” including “employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees”) (citing 3 Arthur Larson & Lex K. Larson, Employment Discrimination § 87.20, at 17-101 to 17-107 (1994)); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (“Transfers of job duties and undeserved performance ratings ... constitute ‘adverse employment decisions’ cognizable under this section” as retaliation). But see Chu v. City of New York, No. 99 Civ. 11523 (DLC), 2000 WL 1879851 (S.D.N.Y. Dec. 27, 2000) (granting judgment as a matter of law to defendant upon finding no “adverse employment action” in allegedly retaliatory transfer of an employee out of an “elite” police unit, because plaintiff failed to show material alteration of duties or decreased promotional opportunities; the Court applied the same “adverse employment action” standard of discrimination cases to the retaliation context); Aiello v. Reno, No. C 97-3686 TEH, 2000 WL 635442 (N.D. Cal. May 16, 2000) (finding insufficient evidence of adverse action in a lowered performance evaluation, followed by a transfer, without evidence of “tangible impact” on terms and conditions of employment).

<sup>149</sup> See, e.g., Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001) (holding that “retaliatory harassment can also comprise adverse employment action” supporting a Title VII retaliation claim); Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000) (applying Title VII harassment doctrine, including affirmative defenses under Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and Burlington Industries v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), both sexual harassment cases, to claim of harassment motivated by retaliatory animus); Richardson v. New York State Dep’t of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999) (“unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action”); Gunnell v. Utah Valley State College, 152 F.3d 1253, 1264 (10th Cir. 1998) (“co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute ‘adverse employment action’ for purposes of a retaliation claim”); Yaba v. Roosevelt, 961 F. Supp. 611, 620-21 (S.D.N.Y. 1997) (holding that “harsher treatment, threats, and harassment” stated claim for retaliatory harassment under Title VII).

<sup>150</sup> Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995)).

<sup>151</sup> See infra Part II(B).

<sup>152</sup> Suppan v. Dadonna, 203 F.3d 228 (3d Cir. 2000) (quoting Bart v. Telford, 677 F.2d 622 (7th Cir. 1982)).

prove a causal connection between the rankings and the failure to promote.”<sup>153</sup>

## **B. Retaliatory Employer Claims and Counterclaims Against Employees**

“It is well established that filing a retaliatory lawsuit may be actionable under Title VII.”<sup>154</sup> This kind of forbidden retaliation includes a range of legal actions, including employer counterclaims,<sup>155</sup> independent lawsuits by the employer against the discrimination claimant,<sup>156</sup> and any other employer actions to extend its dispute with the discrimination claimant to other legal proceedings.<sup>157</sup> The difficulty comes in the characterization of the counterclaim or lawsuit. Is it an impermissible act of retaliation, a permissible legal claim that would have been cognizable even absent any protected employee activity, or a permissible affirmative defense to the employee’s charges and claims?<sup>158</sup>

A particularly difficult question arises in a pre-emptive declaratory judgment lawsuit by an employer – e.g., in an arbitral forum – against an employee who plans a discrimination lawsuit – e.g., in federal court. Such pre-emptive action may well be retaliatory because,

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<sup>153</sup> Suppan, 203 F.3d at 234-35 (3d Cir. 2000) The Court’s use of the term “harassment” did not imply the sort of “hostile work environment” inquiry applicable to a Title VII claim. Such an inquiry would have required plaintiff to prove that the harassing conduct was “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), an inquiry Suppan did not undertake.

<sup>154</sup> Shafer v. Dallas County Hosp. Dist., No. CA 3-96-CV-1580-R, 1997 WL 667933, at \*4 (N.D. Tex. Oct. 21, 1997).

<sup>155</sup> See, e.g., Equal Employment Opportunity Comm’n v. Outback Steakhouse of Florida, Inc., 75 F. Supp. 2d 756 (N.D. Ohio 1999) (“a counterclaim that is not employment-related nevertheless constitutes retaliation”); Shafer, 1997 WL 667933 (defamation counterclaim); Yankelevitz v. Cornell Univ., 71 FEP 1662, No. 95 Civ. 4593 (PKL), 1996 WL 447749 (S.D.N.Y. 1996) (employer’s counterclaim, seeking an accounting of plaintiff’s income, after plaintiff filed discrimination action).

<sup>156</sup> See, e.g., Cozzi v. Pepsi-Cola Gen. Bottlers, Inc., No. 96 C 7228, 1997 WL 312048 (N.D. Ill. June 6, 1997) (state court fraud action that employer filed against plaintiff after her EEOC charge but before her federal action); Urquiola v. Linen Supermarket, Inc., No. 94-14-CIV-ORL-19, 1995 WL 266582 (M.D. Fla. Mar. 23, 1995) (state court action for defamation and intentional infliction of emotional distress following plaintiff’s EEOC discrimination charge); Equal Employment Opportunity Comm’n v. Virginia Carolina Veneer Corp., 495 F. Supp. 775 (W.D. Va. 1980) (state court defamation action that employer filed after plaintiff’s EEOC charge).

<sup>157</sup> See, e.g., Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (“the filing of [criminal] charges can constitute the requisite adverse action ... [and] malicious prosecution can constitute adverse employment action”); Jones v. Ryder Servs. Corp., No. 95 C 4763, 1997 WL 158329 (N.D. Ill. Mar. 31, 1997) (employer’s withdrawal of workers’ compensation settlement offer once plaintiff filed EEOC discrimination charge); Atkinson v. Oliver T. Carr Co., Civ. A. No. 85-1950, 1986 WL 6997 (D.D.C. Apr. 22, 1986) (employer, after plaintiff filed EEOC charge, threatened to complain to police that plaintiff made threatening phone calls to employer).

<sup>158</sup> See, e.g., Harmar v. United Airlines, Inc., No. 95 C 7665, 1996 WL 199734 (N.D. Ill. Apr. 23, 1996) (noting that “the filing of lawsuits, not in good faith and instead motivated by retaliation, can be a basis for a retaliation claim under Title VII,” but dismissing plaintiff’s retaliation claim because employer asserted only affirmative defenses, not its own claims, and therefore neither caused plaintiff to incur separate expenses nor chilled his protected activity).

according to various circuit precedents, depriving an employee of one of two available forums for the redress of her federal law grievances is an adverse action triggering retaliation provisions under Title VII and analogous federal law anti-retaliation provisions.<sup>159</sup>

### C. Reasonable Yet Incorrect Belief That Discrimination Occurred

“Opposition” clause protection extends to employees who were incorrect in their belief that discrimination had occurred only if they reasonably and in good faith believed that discrimination had occurred. Under that rule, the question is how incorrect an employee’s belief can be and remain protected. In Clark County Sch. Dist. v. Breeden, a female employee claimed retaliation protection when she complained that a supervisor and co-worker laughed at one arguably sexually offensive joke that a job applicant made about another woman.<sup>160</sup> Applying the Ninth Circuit’s elaboration of the “reasonable belief” standard, the Court, per curiam, held that “[n]o reasonable person could have believed that the single incident recounted above violated Title VII’s standard.”<sup>161</sup>

For years, however, federal courts have been extending opposition clause protection to cases in which the “discrimination” being opposed consisted of racially or sexually offensive comments too infrequent to constitute the unlawful employment practice of racial or sexual harassment. A key distinction between Breeden and two such holdings – the Ninth Circuit’s Trent v. Valley Elec. Ass’n (a series of sexually offensive remarks at a seminar)<sup>162</sup> and the Seventh Circuit’s Alexander v. Gerhardt Enters., Inc. (a single racial slur)<sup>163</sup> – may be that in Trent and Alexander, the comments were offensive enough that, if they recurred sufficiently often, they almost certainly would have constituted unlawful harassment. In Breeden, in contrast, the comment probably was not so offensive that its recurrence would have amounted to unlawful harassment; the employee “conceded that it did not bother or upset her” to hear the job applicant’s joke read by her supervisor.<sup>164</sup>

The distinction Breeden and the existing case law may illustrate is one between comments that are insufficiently offensive to amount to harassment (Breeden) and comments that are offensive enough to amount to harassment if they were to continue unabated. Protecting opposition to truly offensive comments is important even if they have not been repeated often enough to support a harassment claim; the alternative is a nonsensical rule that employees must

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<sup>159</sup> See Johnson v. Palma, 931 F.2d 203 (2d Cir. 1991) (Title VII complainant retaliation protections); EEOC v. Bd. of Governors of State Colleges & Univs., 957 F.2d 424 (7th Cir. 1992) (ADEA complainant retaliation protections); Connecticut Light & Power Co., 85 F.3d 89 (2d Cir. 1996) (Energy Reorganization Act of 1974 whistleblower retaliation protections).

<sup>160</sup> 532 U.S. 268, 121 S. Ct. 1508, 149 L.Ed.2d 509 (Apr. 23, 2001).

<sup>161</sup> 532 U.S. at 271.

<sup>162</sup> 41 F.3d 524 (9th Cir. 1994).

<sup>163</sup> 40 F.3d 187 (7th Cir. 1994).

<sup>164</sup> 532 U.S. at 271.



allow offensive comments to continue unabated before attempting any opposition. The point of Breeden may be that protecting opposition to marginally offensive comments may not be as important, because the law need not encourage early opposition to middling offensiveness. Though this interpretation of Breeden makes logical sense and comports with the existing case law, there remains a fuzziness to the exact limits of protection for opposition conduct based on an incorrect belief that discrimination occurred.

## D. Variety of Mixed-Motive Standards

### 1. Basic Title VII Mixed-Motive Analysis

When plaintiffs present direct evidence of discrimination, courts apply the Price Waterhouse v. Hopkins<sup>165</sup> “mixed-motive” analysis, not the McDonnell Douglas pretext analysis. If the evidence proves that discrimination or retaliation was one cause of the adverse action, then the burden shifts to the defendant to prove that it would have taken the same action even absent the discriminatory or retaliatory motive. Under the original Price Waterhouse formulation, the plaintiff’s direct evidence must prove that the forbidden animus was a “but for” cause of the adverse action, and the defendant can avoid liability by proving that it would have taken the same action absent that animus.

The Civil Rights Act of 1991 liberalized mixed-motive analysis in three ways. First, to merit mixed-motive analysis, the plaintiff must show only that the forbidden animus was a “motivating factor,” not necessarily a “but for” factor. Second, that showing renders the plaintiff a prevailing party, so the defendant’s showing that it “would have taken the same action in the absence of the impermissible motivating factor” serves not to avoid liability, but only to limit plaintiff’s remedies (e.g., no front pay for a job the plaintiff would not have received anyway).<sup>166</sup> Third, because the amended statutory text does not limit mixed-motive analysis to direct evidence cases, some courts have held that mixed-motive analysis applies regardless of whether the proof is “direct” or “circumstantial” – i.e., a plaintiff must show only that the forbidden animus was a motivating factor.<sup>167</sup>

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<sup>165</sup> 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 168 (1989).

<sup>166</sup> 42 U.S.C. § 2000e-5(g)(2)(B).

<sup>167</sup> Compare, e.g., Danzer v. Norden Sys., Inc., 151 F.3d 50, 54 (2d Cir. 1998) (reversing summary judgment for ADEA defendant because of “evidence from which a rational trier of fact could infer that age was a motivating factor in Danzer’s dismissal, either under the burden-shifting framework of McDonnell Douglas ... or the mixed-motive framework of Price Waterhouse”) with Watson v. Southeastern Pennsylvania Transp. Auth., 207 F.3d 207, 220 (3d Cir. 2000) (holding that 1991 Act “does not alter the distinction in standards of causation that apply to ‘pretext’ and ‘mixed-motive’ cases and, accordingly, that the ‘determinative’ factor jury instructions in this case were correct”), cert. denied, 121 S. Ct. 1086, 148 L. Ed. 2d 961 (2001). See generally Curley v. St. John’s Univ., 19 F. Supp. 2d 181, 188 (S.D.N.Y. 1998) (“[T]he 1991 Act has erased the key distinctions between parties’ burdens in ‘pretext’ and ‘mixed-motive’ analyses.... ‘Pretext’ and ‘mixed-motive’ thus are not two kinds of cases, but two kinds of liability findings based on two kinds of showings plaintiffs can attempt to make.... Only a mix of motives is plausible if defendant clearly has some nondiscriminatory motivation; only pretext is plausible ‘where, on the particular evidence, no reasonable trier could find that two motives could have simultaneously coexisted’”) (quoting Fields v. New York State Office of Mental Retardation & Dev. Disabilities, 115 F.3d 116, 122 n.2 (2d Cir. 1997)).

## 2. Application of 1991 Mixed-Motive Standards to Retaliation Claims

There is a circuit split as to whether the 1991 mixed-motive standards apply to retaliation claims. The amended statutory text establishing the “motivating factor” standard does not explicitly mention retaliation, but instead declares that “an unlawful employment practice is established when the complaining party 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.”<sup>168</sup> Retaliation is not listed among the types of forbidden animus to which the new “motivating factor” standard applies, which numerous courts have taken to mean that the old Price Waterhouse analysis (i.e., direct evidence, but-for causation, etc.) remains applicable.<sup>169</sup>

On the other hand, while retaliation is not explicitly listed in the “motivating factor” provision, retaliation standards always have derived from more general Title VII standards, and some courts have analyzed retaliation cases under the “motivating factor” standard that now applies to all other Title VII cases.<sup>170</sup> The issue remains unsettled due to the disagreement among the courts<sup>171</sup> as well as the refusal by other courts to address the issue.<sup>172</sup>

## 3. Mixed-Motive Standards in Other Types of Retaliation Claims

In retaliation claims other than under the Title VII framework, different mixed-motive standards may apply. In a public employee’s § 1983 First Amendment retaliation claim, for example, standards seem to track the pre-1991 Price Waterhouse standard but without any “direct evidence” requirement: the plaintiff must show that the protected speech was a

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<sup>168</sup> 42 U.S.C. § 2000e-2(m).

<sup>169</sup> For cases still applying the pre-1991 standard, see, e.g., Norbeck v. Basin Elec. Power Cooperative, 215 F.3d 848 (8th Cir. 2000); Lewis v. Young Men’s Christian Ass’n, 208 F.3d 1303 (11th Cir. 2000); Kubicko v. Ogden Logistics Servs., 181 F.3d 544 (4th Cir. 1999); McNutt v. Bd. of Trustees of Univ. of Illinois, 141 F.3d 706 (7th Cir. 1998); Woodson v. Scott Paper Co., 109 F.3d 913 (3d Cir. 1997); Tanka v. Nordberg, 98 F.3d 680 (1st Cir. 1996); Behne v. Microtouch Sys., Inc., 58 F. Supp. 2d 1096 (N.D. Cal. 1999); Riess v. Dalton, 845 F. Supp. 742 (S.D. Cal. 1993).

<sup>170</sup> For cases applying the revised 1991 standard, see, e.g., Llano v. N. Dakota State Univ., 951 F. Supp. 168 (D. N.D. 1997); Medlock v. Johnson & Johnson Cos., 73 FEP 1405, No. 94-2317-JWL, 1996 WL 707029 (D. Kan. Oct. 7, 1996); Heywood v. Samaritan Health Sys., 902 F. Supp. 1076 (D. Ariz. 1995); see also 2 Lex K. Larson, Employment Discrimination § 35.04[1] (2d ed. 1996) (analyzing retaliation provisions and 1991 mixed-motive provisions and concluding that the 1991 standard applies to retaliation claims).

<sup>171</sup> The Second Circuit appears to have conflicting recent precedents on the applicability of the 1991 mixed-motive standard to retaliation claims. Compare Gordon v. New York City Bd. of Educ., 232 F.3d 111, 117-18 (2d Cir. 2000) (applying 1991 standard) with Matima v. Celli, 228 F.3d 68, 81 (2d Cir. 2000) (applying pre-1991 standard).

<sup>172</sup> See, e.g., Borgo v. Goldin, 204 F.3d 251, 255 n.6 (D.C. Cir. 2000) (“Some circuits have held that retaliation claims are not covered by the Civil Rights Act of 1991 and are still governed by Price Waterhouse. . . . This circuit has not addressed that question. Because both parties agreed below that the Civil Rights Act of 1991 provided the appropriate framework for decision, and neither asks us to address the issue here, we have no need to resolve the question to decide this case”) (citations omitted).

substantial factor in the adverse action;<sup>173</sup> if the plaintiff so proves, the defendant can respond by proving that it would have undertaken the same adverse action even absent any retaliatory motivations.<sup>174</sup> In contrast, in an ERISA retaliation claim, the plaintiff need not show that the forbidden motive was the only reason for an adverse action, just that deprivation of benefits was one motivation and more than an incidental result of an adverse action such as a discharge.<sup>175</sup> Consequently, a retaliation plaintiff with multiple legal theories – e.g., Title VII and the First Amendment – may face the prospect of jurors applying bewilderingly subtle doctrinal differences to the same facts.

## **E. Opposing Discrimination Committed Outside the Plaintiff's Employment**

There are recent precedents on two variations on the same theme: is there protection for an employee's opposition to discrimination committed outside the plaintiff's employment relationship?

### **1. Opposition to the Plaintiff's Employer's Discrimination Against Non-Employees**

There may be a circuit split as to whether opposing discrimination against non-employees is protected activity under Title VII. The Second Circuit said no in Wimmer v. Suffolk County Police Department,<sup>176</sup> holding that the opposition clause did not protect a white police recruit who opposed police civil rights abuses against minority citizens. Those abuses were not "employment" practices forbidden by Title VII, the Second Circuit panel noted.<sup>177</sup> Although the permissibility of an action alleging "retaliation for opposing discrimination by co-employees against non-employees" was a question "of first impression in this Circuit," the panel nevertheless held that the plaintiff "could not have reasonably believed that he was opposing an employment practice."<sup>178</sup>

Wimmer appears to conflict with an earlier Ninth Circuit case, Moyo v. Gomez,<sup>179</sup> which held that the opposition clause protected a prison guard fired for, among other things, protesting prison discrimination against minority inmates. The Ninth Circuit found that the plaintiff's incorrect view that the discrimination violated Title VII was reasonable enough to pass the

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<sup>173</sup> See Ingram v. Johnson, 187 F.3d 877, 879 (8th Cir. 1999).

<sup>174</sup> See Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999) (citing Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)).

<sup>175</sup> See Seaman v. Arvida Realty Sales, 985 F.2d 543, 546 (11th Cir. 1993); Gandelman v. Aetna Ambulance Serv., Inc., 48 F. Supp. 2d 169, 172 (D. Conn. 1999).

<sup>176</sup> 176 F.3d 125 (2d Cir.), cert. denied, 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 310 (1999).

<sup>177</sup> 176 F.3d at 135-36.

<sup>178</sup> 176 F.3d at 135-36.

<sup>179</sup> 40 F.3d 982 (9th Cir. 1994).

“reasonable belief” test.

The reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an objective standard – one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims.<sup>180</sup>

The broader question thus is whether laypeople can hold a reasonable and good-faith belief that their rights as employees to oppose employer discrimination extend to discrimination against non-employees.<sup>181</sup>

## 2. Opposition to a Different Employer’s Discrimination Against Others

Wimmer does not appear to elaborate a generally stricter standard for what constitutes a reasonable and good-faith belief, however, as McMenemy v. City of Rochester,<sup>182</sup> a subsequent Second circuit precedent, clarified. McMenemy, dismissing defendant’s citations to Wimmer, extended retaliation protection to an employee who opposed discrimination by another employer and then suffered retaliation by his own employer. The other employer was not actually covered by Title VII, because it fell short of the statutory requirement of fifteen employees. The plaintiff nevertheless had a reasonable and good-faith belief that the other employer’s discrimination violated Title VII, so he was protected against his own employer’s retaliation.

### F. Opposition Activity Limitations for Particular Officer Positions

In Title VII “opposition” clause analyses, the usual leniency with aggressive complainant tactics may be more stringent for complainants whose jobs entail particular degrees of discretion and trust. In the seminal case of Pendleton v. Rumsfeld,<sup>183</sup> the District of Columbia Circuit allowed the terminations of army EEO officers for participating in a crowded and disruptive “press conference” that consisted of publicly reading worker grievances. Their EEO positions required the confidence of management that they could serve as even-handed worker-manager intermediaries; their disruptive public disclosures destroyed that confidence. The Pendleton principle has narrow application, however, in two ways.

First, the principle is limited in breadth to specific classes of employees. Not every high-ranking post is the sort of “position for which confidentiality or public contact is essential” that necessitates more limited rights to oppose illegal employer actions.<sup>184</sup> Rather, recent cases

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<sup>180</sup> 40 F.3d at 985.

<sup>181</sup> For a discussion of the good-faith belief standard, see generally supra Part I(A)(2)(b).

<sup>182</sup> 241 F.3d 279 (2d Cir. 2001).

<sup>183</sup> 628 F.2d 102 (D.C. Cir. 1980).

<sup>184</sup> See generally Dangler v. New York City Off Track Betting Corp., 193 F.3d 130, 139 (2d Cir. 1999) (holding that high officer did not have greater duty to be discreet or silent in opposing and reporting corruption by his superiors; “Although by 1994 Dangler was OTB's third-highest-ranking officer, serving as its operations manager with

illustrate that this principle is usually limited to the context of personnel officers and in-house counsel.<sup>185</sup> Each of these two classes of employees have responsibilities and access to sensitive information that arguably require an unusual duty of discretion even in opposing illegal discrimination: personnel officers must have the confidence of management, including in the handling of discrimination and wage complaints;<sup>186</sup> in-house counsel must have the confidence of management as confidential advisors to, and spokesmen for, the employer.<sup>187</sup>

Second, the principle is limited in depth to cases of actual, not just theoretical, disruption to the peculiar employer interest at stake. The Pickering First Amendment balancing test requires only “a likely interference with [employer] operations,” not “an actual disruption”<sup>188</sup>; in contrast, courts tend to require actual disruption before limiting the opposition clause rights of both personnel officers<sup>189</sup> and in-house counsel.<sup>190</sup>

Somewhat analogously, there is “a narrow exception to the First Amendment’s protection in cases where the public employee is a policymaker or confidential employee.”<sup>191</sup> The exception derives from a caveat to the basic First Amendment retaliation doctrine that “[g]overnment officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the

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numerous people reporting to him, it is not necessarily the case that a person who heads an organization's operations formulates the policies that direct the conduct of those operations or holds a position for which confidentiality or public contact is essential”).

<sup>185</sup> See, e.g., Douglas v. DynMcDermott Petro. Oper. Co., 144 F.3d 364 (5th Cir. 1998) (allowing discharge of in-house counsel); McKenzie v. Renberg’s, Inc., 94 F.3d 1478 (10th Cir. 1996) (allowing discharge of personnel director).

<sup>186</sup> See, e.g., McKenzie, 94 F.3d 1478 (personnel director’s report to management of wage and hour violations was not protected “opposition” to illegal employer actions, but instead was part of her job of alerting employer to possible legal violations and liabilities).

<sup>187</sup> See, e.g., Douglas, 144 F.3d 364 (in-house counsel gave government letter complaining of discrimination that discussed confidential attorney-client matters she handled for employer).

<sup>188</sup> Dangler, 193 F.3d at 140.

<sup>189</sup> Compare McKenzie v. Renberg’s, Inc., 94 F.3d 1478 (10th Cir. 1996) (rejecting retaliation claim of personnel director who reported wage and hour violations to management, because her report was not protected “opposition” to illegal employer actions but instead part of her job of alerting employer to possible legal violations and liabilities) with Equal Employment Opportunity Comm’n v. HBE Corp., 135 F.3d 543 (8th Cir. 1998) (upholding retaliation verdict for supervisor in personnel department; “Unlike the plaintiff in McKenzie who merely alerted management of potential violations of the law in order to avoid liability for the company, [plaintiff] refused to implement a discriminatory company policy. This placed him outside the normal managerial role which is to further company policy”).

<sup>190</sup> Compare Douglas v. DynMcDermott Petro. Operations Co., 144 F.3d 364 (5th Cir. 1998) (rejecting retaliation claim of in-house counsel who gave government letter complaining of discrimination that discussed confidential attorney-client matters she handled for employer) with Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173 (3d Cir. 1997) (allowing retaliation claim by in-house counsel despite possible disclosure of confidential information).

<sup>191</sup> DiRuzza v. County of Tehama, 206 F.3d 1304 (9th Cir. 2000).

job in question.”<sup>192</sup> This is a fact-specific determination because “[t]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>193</sup>

The muddiness of this “policymaker” doctrine stems partly from its fact-specificity and partly from efforts by conflicting cases to distinguish each other by noting minute factual differences. For example, while several circuits have found “deputy sheriffs” to be policymakers lacking First Amendment protection against retaliation, the Ninth Circuit distinguished those cases by noting “the different nature of the job performed by deputy sheriffs in these circuits and these states”<sup>194</sup> and that one of those cases had come under fire in its own circuit.<sup>195</sup> Just as a high title may not suffice for a “policymaker” holding, a low title may not protect against such a holding; one district court has found a state assemblyman’s “legislative aide” unprotected due to the nature of her political duties.<sup>196</sup>

## **G. Unresolved ADA Retaliation Issues**

The ADA retaliation provisions present several issues similar to the issue of whether the Civil Rights Act of 1991 mixed-motive provisions apply to Title VII retaliation claims. The issues are similar in that they share a common source: Congress’s penchant for placing antiretaliation provisions in different statutory sections than antidiscrimination provisions. This difference in placement leads to debatable discrepancies in statutory interpretation that, depending on the eye of the beholder, may reflect overinterpretation of textual minutiae or may reflect meaningful differences between the legal rules for discrimination and retaliation cases.

### **1. Unclear Basis for Accommodation Request Retaliation Claims**

The ADA’s retaliation provisions are codified at 42 U.S.C. § 12203. While § 12203(a) contains opposition and participation clauses that track those of Title VII, § 12203(b) prohibits efforts to “coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his having exercised or enjoyed, . . . any right granted or protected

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<sup>192</sup> O’Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 714, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996) (emphasis added).

<sup>193</sup> O’Hare Truck Serv., 518 U.S. at 718 (quoting Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980)).

<sup>194</sup> DiRuzza, 206 F.3d 1304 (reversing finding that deputy sheriff was a policymaker and remanding with cautionary note that “on the current state of the record, there is little to support a conclusion that DiRuzza is a policymaker”) (citing, as holdings that other deputy sheriffs were policymakers, Jenkins v. Medford, 119 F.3d 1156 (4th Cir. 1997) (en banc); Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991); Terry v. Cook, 866 F.2d 373 (11th Cir. 1989)).

<sup>195</sup> See Cutcliffe v. Cochran, 117 F.3d 1353, 1357 (11th Cir. 1997) (“we find Terry controlling, although we also believe that Terry should be revisited en banc because it may be viewed as inconsistent with Branti”).

<sup>196</sup> See Gordon v. Griffith, 88 F. Supp. 2d 38 (E.D.N.Y. 2000) (finding no First Amendment protection for legislative aide fired by her employer, a state assemblyman, after she spoke out publicly against police brutality).

by this subchapter.” From the face of this statutory language, it would appear that retaliation against an individual who requests accommodation would violate § 12203(b) as an attempt to “coerce, intimidate, threaten, or interfere” motivated by the individual’s efforts to exercise ADA rights. At least one court, however, has held that a claim of retaliation for requesting accommodation is a § 12203(a) claim,<sup>197</sup> while another court did not specify the statutory basis for such a claim.<sup>198</sup>

## 2. Possibility of Individual Liability

While most courts have found that individuals cannot be held liable under Title VII,<sup>199</sup> ADA retaliation language in § 12203(a) directing that “No person shall”<sup>200</sup> retaliate may open the door to individual liability for ADA retaliation claims. At least one district court has adopted this view, even though basic ADA discrimination claims allow for no individual liability.<sup>201</sup> Another district court in the same circuit noted that “courts disagree on this issue,”<sup>202</sup> and other district courts have rejected individual liability for ADA retaliation.<sup>203</sup>

## 3. Availability of Compensatory and Punitive Damages

A few courts have opined that compensatory and punitive damages are not available for ADA retaliation claims because the Civil Rights Act of 1991, which first made such damages

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<sup>197</sup> See Garza v. Abbott Laboratories, 940 F. Supp. 1227, 1244-45 (N.D. Ill. 1996) (denying defendant summary judgment because plaintiff “has produced evidence that she engaged in statutorily protected expression by requesting accommodation.... [T]he adverse actions that Garza alleges followed on the heels of her requests for accommodation”).

<sup>198</sup> See Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318 (11th Cir. 1998) (holding, in ADA plaintiff’s claim of retaliation after his reasonable accommodation request, that “it would be sufficient for him to show that he had a good faith, objectively reasonable belief that he was entitled to those accommodations under the ADA,” but finding no such reasonable belief).

<sup>199</sup> See, e.g., Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (holding that no individual liability is appropriate under Title VII). But see Iacampo v. Hasbro, Inc., 929 F. Supp. 562 (D.R.I. 1996) (holding that individual liability is appropriate under Title VII).

<sup>200</sup> Emphasis added.

<sup>201</sup> See Ostrach v. Regents of Univ. of California, 957 F. Supp. 196, 200-01 (E.D. Cal. 1997). Cf. Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (finding individual liability but addressing only under Title II (public services) rather than Title I (employment) of ADA).

<sup>202</sup> Harris v. Oregon Health Sciences Univ., No. CV-98-1-ST, 1999 WL 778584, at \*11 (D. Or. Sept. 22, 1999) (declining to rule on “whether Dr. Johnson may be liable as an individual for retaliation under the ADA [because] [t]he courts disagree on this issue”).

<sup>203</sup> See Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); Van Hulle v. Pacific Telesis Corp., 124 F. Supp. 2d 642 (N.D. Cal. 2000); Kautio v. Zurich Ins. Co., No. 97-2411-JWL, 1998 WL 164623 (D. Kan. Mar. 18, 1998); Stern v. California State Archives, 982 F. Supp. 690 (E.D. Cal. 1997); Cable v. Department of Dev. Servs., 973 F. Supp. 937 (C.D. Cal. 1997); McInerney v. Moyer Lumber & Hardware, Inc., 25 NDLR P 61, 2002 WL 31928450 (E.D.Pa. 2002); Santiago v. City of Vineland, 107 F. Supp. 2d 512 (D.N.J. 2000).

available to Title VII and ADA plaintiffs, does not explicitly list the ADA's retaliation section as one of those covered by the new damages provisions.<sup>204</sup>

## H. Punitive Damages for Retaliation under the Fair Labor Standards Act

While the statutory language on remedies for substantive FLSA claims (i.e., minimum wages and overtime pay) lists particular non-punitive remedies – primarily lost wages, liquidated damages, and legal fees – the later-added language on remedies for FLSA retaliation is more general. The language on retaliation remedies lists various specific remedies “without limitation” as well as “such legal or equitable relief as may be appropriate to effectuate the purposes” of the anti-retaliation section.

The difference between the restricted remedies for substantive FLSA claims and the broader remedies for FLSA retaliation claims has led to a split in authority as to whether punitive damages are available in FLSA retaliation claims. The Seventh Circuit had found room in the statutory language for a court to award punitive damages in Travis v. Gary Community Mental Health Center, Inc.,<sup>205</sup> but the Eleventh Circuit recently held otherwise in Snapp v. Unlimited Concepts, Inc.,<sup>206</sup> reasoning that the listing of only non-punitive remedies throughout the FLSA implied that punitive damages were inappropriate for FLSA-based lawsuits of any stripe.

## I. False Claims Act Liability for Local Governments

In Vermont Agency of Natural Resources v. United States ex rel. Stevens,<sup>207</sup> the Supreme Court held that states are not “persons” susceptible to FCA liability. It remains unsettled, however, whether local governments are “persons” under the FCA. In United States ex rel. Garibaldi v. Orleans Parish School Board,<sup>208</sup> the Fifth Circuit held that a school board was not a qualifying “person,” but it cited numerous conflicting decisions on the issue from outside the Fifth Circuit, illustrating that courts remain in conflict on this point.<sup>209</sup> The Supreme Court

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<sup>204</sup> Compare Boe v. AlliedSignal, Inc., 131 F. Supp. 2d 1197 (D. Kan. 2001) (finding that Civil Rights Act of 1991 does not authorize compensatory or punitive damages for ADA retaliation claim) and Brown v. City of Lee's Summit, No. 98-0438-CV-W-2, 9 A.D. Cas. 1337, 1999 WL 827768 (W.D. Mo. June 1, 1999) (holding same) with Ostrach v. Regents of Univ. of California, 957 F. Supp. 196, 200-01 (E.D. Cal. 1997) (finding that Civil Rights Act of 1991 does authorize compensatory or punitive damages for ADA retaliation claim). Cf. Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (allowing compensatory damages for ADA retaliation claim but addressing only under Title II (public services) rather than Title I (employment) of ADA); Rhoads v. F.D.I.C., 13 AD Cases 1405, 25 NDLR P 15, 2002 WL 31755427 (D. Md. November 7, 2002) (holding that compensatory damages are available for ADA retaliation claims, but punitive damages not available because defendant was a governmental agency).

<sup>205</sup> 921 F.2d 108 (7th Cir. 1990).

<sup>206</sup> 208 F.3d 928 (11th Cir. 2000); accord Bolick v. Brevard County Sheriff's Dep't, 937 F. Supp. 1560 (M.D. Fla. 1996) (explicitly disagreeing with Travis in holding punitive damages unavailable in FLSA claim); see also Singh v. Jutla & C.D.&R's Oil, Inc., 214 F. Supp. 2d 1056, 1060 n.2 (N.D. Cal. 2002) (noting split among circuits).

<sup>207</sup> 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).

<sup>208</sup> 244 F.3d 486 (5th Cir. 2001); cert. denied, 534 U.S. 1078, 122 S.Ct. 808, 151 L.Ed.2d 693 (2002).

<sup>209</sup> Compare United States ex rel. Chandler v. Cook County, Ill., 277 F.3d 969 (7th Cir. 2002), cert. granted, 122



recently granted certiorari in United States ex rel. Chandler v. Cook County, Ill., so the disagreement on this point should soon be resolved.

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S.Ct. 2657, 153 L.Ed.2d 833 (June 28, 2002) (Cook County, Illinois is a person under the FCA) and United States ex rel. Giles v. Sardie, No. CV-96-2000 LGB (Rcx) (C.D. Cal. Aug. 1, 2000) (City of Los Angeles, California is a person) with United States ex rel. Graber v. City of New York, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (City of New York, New York is not a person) and United States ex rel. Dunleavy v. County of Delaware, No. Civ. A. 94-7000, 2000 WL 1522854 (E.D. Pa. Oct. 12, 2000) (Delaware County, Pennsylvania is not a person).