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**PREPARING FOR THE GREATER EVIL:  
AN EMPLOYEE'S CLAIM OF RETALIATION**

**February 25, 2000  
Fontana, Wisconsin**

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# **PREPARING FOR THE GREATER EVIL: AN EMPLOYEE'S CLAIM OF RETALIATION**

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## **I. WHAT IS RETALIATION?**

- A. Most discrimination and other employment statutes generally prohibit an employer from “retaliating” against an employee for opposing unlawful employment practices or for “participating in protected activity.”
- B. Statutes that prohibit retaliation include, for example:
  - 1. Wisconsin Fair Employment Act
  - 2. Title VII of the Civil Rights Act
  - 3. Age Discrimination in Employment Act
  - 4. Americans with Disabilities Act
  - 5. Wisconsin and Federal Family and Medical Leave Acts
  - 6. Equal Pay Act
  - 7. Fair Labor Standards Act
  - 8. National Labor Relations Act
  - 9. Occupational Safety and Health Act
  - 10. Vietnam Veterans’ Readjustment Assistance Act
- C. The essential elements of a retaliation claim generally are:
  - 1. The employee engages in statutorily protected activity;
  - 2. An adverse employment action occurs; and
  - 3. There is a causal connection between the statutorily protected activity and the adverse employment action.
- D. See also the EEOC’s Compliance Manual on Retaliation, released May 20, 1998, available at: <http://www.eeoc.gov/docs/retal.txt>.

- E. For a discussion of when retaliation may also constitute a violation of the free speech rights of the First Amendment to the U.S. Constitution, see Section II.C below.

## II. WHAT IS STATUTORILY PROTECTED ACTIVITY?

### A. Employee's Participation in an Investigation, Proceeding, or Hearing

1. Courts liberally interpret "participation." "Participation" has been interpreted to include, for example:
  - a. Filing a charge of discrimination.
  - b. Expressing an intent to file a charge of discrimination.
  - c. Helping another to file a charge of discrimination.
    - (1) The EEOC views this to include being close to someone who complains of discrimination, such as is a complainant's spouse. Compliance Manual, section 8, p. 10.
    - (2) *But see, Paul v. Fox Point Sportswear* (LIRC, July 18, 1995). The Wisconsin Labor and Industry Review Commission rejected this retaliation case based on the fact that the Complainant merely had "a relationship" with the person who had filed the original discrimination complaint.
2. Participation is protected *even when*:
  - a. The employee's assertion of discrimination is without merit, frivolous, patently ridiculous, or even malicious.
    - (1) *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) ("We in no way imply that an employer is preempted by [Title VII] from vindicating his reputation through resort to a civil action for malicious defamation").
    - (2) *See also, e.g., Marten Transport v. DILHR*, 176 Wis. 2d 1012 (Wis. 1993). The court explained that when an employee files a complaint that is devoid of merit, the employer must resolve the dispute with the employee within the context of the employment relationship, "even if the bogus claim causes great and irreparable damage to the company's reputation."
    - (3) *See also, e.g., Sullivan v. National R.R. Passenger Corp.*, 79 FEP Cases 956 (8th Cir. 1999). The employer argued that because it based its defense on the fact that the one alleged incident of harassment never occurred, and the jury ruled against

the employee, the retaliation claim must also be dismissed as a matter of law. The employer reasoned that the jury must have believed there was no harassment, and therefore the plaintiff could not have had a good faith belief that discrimination occurred. The 11th Circuit found this argument “totally meritless,” concluding that the jury merely found that the elements of a harassment claim had not been met.

- b. The employee is no longer employed by the employer.

The U.S. Supreme Court held in 1997 that a former employee may maintain a cause of action under the participation clause against a former employer for acts of retaliation that occurred after the employment ended. The Court based its reasoning in part on the fact that Title VII affords protection to employees who file claims of unlawful discharge. *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997).

- c. The employee testifies to the employee’s own wrongdoing.

*See, e.g., Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997). An alleged harasser who provided deposition testimony was fired and was told it was because his testimony was the company president was personally embarrassed over the case and because the alleged harasser’s testimony was the “most damning” to the employer’s case. The alleged harasser then brought suit claiming that his testimony should have been protected participation, and that he was wrongfully terminated. The 11th Circuit agreed, explaining that even where an employee witness’s testimony is both involuntary and harmful to the employer, Title VII’s broad antiretaliation protection still applies. The court recognized that while an employee may be disciplined for harassment, the employee may not be disciplined for “damning” testimony.

- 3. An employee is probably not protected for *refusing* to participate in a protected proceeding.

*See, e.g., Merkel v. Scovill, Inc.*, 787 F.2d 174 (6th Cir.), *cert. denied*, 479 U.S. 990 (1986). An employee who claimed to have been fired for refusing to aid the employer in its investigation of an age discrimination claim was found not to be the victim of retaliation under the Age Discrimination in Employment Act.

## B. Employee’s *Opposition* to Unlawful Employment Practices

- 1. Opposition must be “reasonable.” Courts liberally interpret reasonableness, however. Reasonable opposition has been interpreted to include, for example:

- a. Requesting a meeting with a supervisor to discuss an employment practice. *See, e.g., Lindsay v. Mississippi Research & Dev. Ctr.*, 652 F.2d 488 (5th Cir. 1981).
- b. Complaining to an employer about a discriminatory practice.

But, in order for a claim of retaliation to be established, the employee's complaint must related to one of the laws prohibiting retaliation. E.g., to support a claim of retaliation under the Wisconsin Fair Employment Act, the employer understand the employee's complaint to be about "discrimination," and not, for example, about a violation of the collective bargaining agreement. Anti-retaliation provisions are not intended to be catch-all protection for "all manner of employee protests." *Norton v. City of Kenosha* (LIRC, March 16, 1994).

- c. Asking an employer whether a protected status played a role in an employment decision.
- d. Contacting an attorney.

2. *Mistaken* opposition may be protected.

Courts have generally stated that an employee is protected when the employee has a *good faith* and *reasonable* belief that the practice they opposed violated the applicable law.

3. *Disloyal* opposition may be protected.

*See, e.g., Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253 (4th Cir. 1998). A secretary found an unsigned disciplinary warning to and resignation notice from another employee on the desk of her supervisor. She photocopied both documents and sent them to a former employee who had earlier filed an internal complaint about the resigning employee. When the former employee filed suit and revealed through discovery where she had obtained the documents, the employer terminated the secretary. The Fourth Circuit found that the secretary's actions were unreasonable and unprotected opposition.

4. If an employee's opposition interferes with job performance, a court will balance the goal of the law protecting the employee against the employer's need to maintain an efficient work environment. Beware: some courts will go far to give the employee the benefit of the doubt! For example:

- a. Where an employee addressed a letter to the employer's major customer protesting the employer's policy on affirmative action, which threatened to disrupt the relationship between the employer and the customer, the court found that the employee's action did not disrupt the workplace and had no effect on job performance. *EEOC v. Crown-Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983.)

b. On the other hand: where an employee complained about her colleagues in a manner that damaged work relationships, told employees that the employer was going to lose federal grant money, challenged a supervisor to take sides in an ongoing dispute, and improperly disclosed confidential information, the employee's actions were found to be unduly disruptive and unprotected. *Hochstadt v. Worcester Fnd. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).

5. An employee's deliberate *unlawful* conduct is likely unprotected.

*See, e.g., Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972) (plaintiff's staging an unlawful traffic "stall-in" was unprotected activity); *See also the EEOC Compliance Manual*, section 8, p. 7.

6. Opposition must be about alleged discriminatory conduct under one of the laws prohibiting retaliation.

*See, e.g., Artis v. Francis Howell North Band Booster Ass'n*, 161 F.3d 1178 (8th Cir. 1998). A marching band teacher alleged he was fired because he complained about perceived disparate treatment of black students. The Eighth Circuit held that opposing an employer's actions (even race-based actions) outside the ambit of an employment practice is unprotected by Title VII.

C. When does participation or opposition become protected speech under the First Amendment to the United States Constitution?

1. Early decisions tended to regard the filing of a claim of discrimination under Title VII to be a matter of private, rather than public, concern and thus unprotected under the First Amendment.

*See, e.g., Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987), *rev'g* 628 F.Supp. 1478 (W.D. Wis. 1986) (School district affirmative action officer who complained internally regarding sexual harassment by the Director of Human Relations intended her complaint to be purely confidential. The court stated, "because such speech stands unprotected from public scrutiny when uttered in the pursuit of purely private interests, we decline to enter the fray surrounding personnel decisions taken by public employers.").

2. More recent decisions have questioned this rationale, however, because discrimination and harassment claims tend to be widely publicized and often involve allegations of widespread practices.

*See, e.g., Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997) (Report of sexual harassment by a high level supervisor was a matter of public concern; the complainant's personal employment-based motive was not dispositive).

### III. WHAT IS AN ADVERSE EMPLOYMENT ACTION?

A. Adverse employment action generally includes:

1. Refusal to hire;
2. Failure to promote;
3. Failure to rehire;
4. Refusal to award a deserved pay raise;
5. Suspension;
6. Fine;
7. Discharge;
8. Constructive discharge; and
9. Unfavorable letters of recommendation.

B. What about less definite employment actions?

The Seventh Circuit holds that, although the prohibition on retaliation extends beyond acts of retaliation such as termination and demotion, the act must be “materially adverse” or serious and tangible enough to alter the terms and conditions of employment. *See, e.g., Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996). Otherwise, minor and even trivial employment actions that “an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.” *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

1. Icy co-worker treatment?

- a. Where there is no evidence that the employer ordered other employees to shun the plaintiff, and where there is no indication that the shunning resulted in material harm to the plaintiff, the shunning does not amount to an adverse employment action. *Parkins v. Civil Constructors of Illinois*, 163 F.3d 127 (7th Cir. 1998).
- b. The Wisconsin Labor and Industry Review Commission has held that a complainant must be able to prove that the alleged retaliatory act “impinged” upon the Complainant’s work. “This is an especially important point of proof where the alleged retaliatory treatment (in this case, the employer’s refusal to say “good morning” to the Complainant) is more subtle than, for example, a disciplinary demotion, loss of normal work assignments, extension of probationary period, or denial or customary letter of recommendation.” *Alexander v. Aldridge, Inc.* (LIRC, October 21, 1991).

2. Change in title?

- a. The Seventh Circuit found that a change in the title from “Assistant Vice-President” and “Manager” at one branch of a bank to “Loan Officer” at another branch did not in itself constitute retaliation. *Crady v. Liberty National Bank & Trust Co. of Indiana*, 993 F.2d 132 (7th Cir. 1996).

b. The Seventh Circuit also found that a principal who was offered the choice between retirement and a transfer to a position of co-principal did not suffer an adverse employment action, despite her “humiliation,” because “public perceptions were not a term or condition of her employment.” *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989).

3. Lateral transfer?

a. The Seventh Circuit found that a lateral transfer, where the employee’s existing title would be changed and the employee would report to a former subordinate, may have caused a “bruised ego,” but did not constitute an adverse employment action. *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994).

4. Oral reprimands? Negative performance evaluation?

a. According to the Seventh Circuit, negative performance evaluations, standing alone, cannot constitute an adverse employment action. “If we interpreted these simple personnel actions as materially adverse, we would be sending a message to employers that even the slightest nudge or admonition (however well-intentioned) given to the employee can be the subject of a federal lawsuit...” *Sweeney v. West*, 149 F.3d 550 (7th Cir. 1998).

b. Also according to the Seventh Circuit, a poor performance evaluation by itself, even if undeserved, does not constitute an adverse action under Title VII when the employee’s salary and other terms of employment remained unaffected and when the employee was never threatened with or put on probation. *Smart v. Ball State University*, 89 F.3d 437 (7th Cir. 1996).

5. Loss of office space? Loss of secretarial help? Workplace restrictions?

The Seventh Circuit has held that an employee’s work restrictions, including limited break times, required check-in with a supervisor before leaving, denial of secretarial use, and a restriction of employee’s conversations with others to business matters, do not constitute an adverse employment action. The court reasoned that the alleged actions are mere inconveniences, not “material” actions. *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996).

C. What about actions only *distantly* related to employment or not related to employment at all?

1. Under the Wisconsin Fair Employment Act, an adverse action can be prohibited “even though its relationship to an employment opportunity is only indirect.” For example, filing a lawsuit based on defamation or malicious prosecution may be retaliatory! Similarly, pursuing criminal charges against a complainant for making threatening phone calls to an employer could be re-

taliation! The Labor and Industry Review Commission reasoned that these examples all had “some effect” on future employment opportunities. However, contacting the City Recreation Department to report that the Complainant was not a resident of the City in whose softball league she was participating was too unrelated to employment, past, present, or future, to be retaliatory. *Pufahl v. Niebuhr* (LIRC, Aug. 16, 1991), *aff’d sub nom. Pufahl v. LIRC* (Dane Co. Cir. Ct., June 16, 1992). *See also, Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996).

2. The Seventh Circuit, however, has recently clarified that retaliatory activity in the pre-termination context need not be job related. That is, a plaintiff’s allegation that the employer called the police and falsely reported that he was armed and threatening the plant was sufficient to sustain the adverse action element of a retaliation claim. *Aviles v. Cornell Forge Company*, 80 FEP Cases 209 (7th Cir. 1999).

#### **IV. HOW DOES AN EMPLOYER DISPROVE THE CAUSAL CONNECTION?**

A. Timing will be an issue.

1. *See, e.g., Johnson v. Zema Systems Corporation*, 170 F.3d 734 (7th Cir. 1999). A three year gap between an employee’s complaint of race discrimination and his termination precludes the plaintiff from proving his the causal connection, and consequently, his prima facie case.
2. *See also, e.g., Salvato v. Illinois Dep’t of Human Rights*, 78 FEP Cases 249 (7th Cir. 1998). The six month gap between the employer’s lay-off of two age-protected employees and its rehire for one of the positions “dooms” the argument that there was a causal connection.

B. The fact that the employer started the course of discipline (or other treatment) prior to notice of a discrimination claim will be a valuable defense.

1. *See, e.g., Adusumilli v. City of Chicago*, 164 F.3d 353 1669 (7th Cir. 1998). A female police department employee who was placed in a “behavior alert” program two months after she complained about the behavior of a male employee, and who was terminated eight months after her complaint, was unable to show a causal connection. She was unable to show the causal connection because the city had documented serious and persistent performance problems long before her complaint. “Given this history, no jury could rationally conclude that the City would not have fired [the plaintiff] but for her complaint...”
2. *See also, e.g., Debs v. Northeastern Illinois University*, 153 F.3d 390 (7th Cir. 1998). A university’s initiation of demotion proceedings against an age-protected employee after he filed an EEOC Charge did not support a retaliation claim, because they were part of disciplinary actions that began long before the EEOC filing.

- C. Employer lack of knowledge of opposition is helpful.
- D. The biggest danger of the retaliation claim: the causal connection is often a question for the jury.

**V. PRACTICAL STRATEGIES**

- A. Develop a stand-alone anti-retaliation policy. Train employees on the policy and document that training has occurred.
- B. When an employee engages in protected activity (e.g., complains of harassment), tell the employee retaliation is prohibited, give the employee a copy of the anti-retaliation policy, and request the employee to report any retaliatory activity. Monitor the situation by following up with the complaining employee. Document all actions.
- C. Develop ways to track consistency of treatment. Don't start documenting problems only after the employee becomes litigious about discrimination! Despite the threat of retaliation, treat an employee who has complained of discrimination consistently with past treatment that that employee and others.
- D. If an employee complains of retaliation, take the complaint *even more seriously* than a complaint of harassment, *particularly* when you have reason to believe the employee is not credible. Make sure the investigator is unimplicated by the claim of retaliation. Do not delay in responding.

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