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## **Retaliation Claims: Law and Recent Developments**

by

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## Retaliation Claims

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

### A. Definition.

Section 704 of Title VII protects employees from retaliation for opposing discriminatory or harassing practices or for participating in an inquiry into discriminatory or harassing practices. The “opposition” clause makes it unlawful to discriminate against a person who “has opposed any practice made an unlawful employment practice by this subchapter,” and the “participation” clause similarly makes it unlawful to discriminate against a person who “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a) (emphasis added).

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

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

Most states have state anti-retaliation statutes, many of which are modeled on Title VII, and which may cover employees who are not covered by Title VII (such as those who work for employers with fewer than 15 employees). Discussion of these statutes is also beyond the scope of this chapter, but two recent, high-profile cases from the Supreme Court of California illustrate the broad scope of some state statutes. In Miller, which involved discrimination, harassment, and retaliation claims brought by several female employees at a state prison, who alleged that the warden engaged in sexual favoritism by promoting a co-worker who was also his mistress, the Court held it was not necessary for plaintiffs to “elaborate to their employer on the legal theory underlying the complaints they are making,” when all they had to do to state their retaliation claim was to show that they made a complaint “of sexual favoritism in the workplace,” and suffered consequences as a result. Miller v. Dep’t of Corrections, 36 Cal. 4th 446, 115 P.3d 77, 30 Cal. Rptr. 3d 797, 821 (2005); see also B. Egelko, “State High Court Rules on Sex with the Boss; ‘Casting Couch’ Way to the Top can be Deemed Harassment,” San Francisco Chronicle, July 19, 2005 at B-1. More recently, in Yanowitz, which involved a sales manager for a cosmetics company who alleged that her employer took adverse actions against her after she repeatedly refused to comply with a supervisor’s demands that she fire a dark-skinned female sales associate and replace her with “somebody hot,” or “one who looks just like that,” referring to a young, blond customer, the Court held that the plaintiff had set forth sufficient facts to survive summary judgment. Yanowitz v. L’Oreal USA, Inc., No. S115154, 2005 WL 1903591 (Cal. Aug. 11, 2005). The Court further held that refusal to follow a supervisor’s discriminatory directive can constitute protected activity under the state anti-retaliation statute, even if the employee does not tell the supervisor why she has so refused. The Court further held that the plaintiff could use the continuing violation doctrine to show the totality of circumstances relating to the retaliatory actions. Id.; see also B. Egelko, “Woman’s Suit Against L’Oreal to go to Trial; Court Rules Alleged Retaliatory Actions a Civil Rights Matter,” San Francisco Chronicle, Aug. 12, 2005, at B-4; M. Dolan, “Court Widens Protections for Workers Sensing Bias,” L.A. Times, Aug. 12, 2005.

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

Retaliation claims are an increasingly important component of litigation and EEOC charges. In fiscal year 1992, 15.3% of all charges filed with the EEOC included a retaliation claim; this increased to 28.6% of all charges in fiscal year 2004. See EEOC, “Charge Statistics FY 1992 Through FY 2004” (Jan. 27, 2005) <<http://www.eeoc.gov/stats/charges.html>>.

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

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

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

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

The Tenth Circuit addressed the question of “whether a plaintiff may maintain a retaliation claim based on a subjective good-faith belief that the challenged conduct violated Title VII.” Crumpacker v. Kansas Dep’t of Human Resources, 338 F.3d 1163, 1171 (10th Cir. 2003). The Tenth Circuit noted that several prior circuit cases had allowed such claims, but the Supreme Court’s intervening decision in Clark County Sch. Dist. v. Breeden 532 U.S. 268 (2001) (*per curiam*), had rejected that approach, to the extent that it was based on a plaintiff’s unreasonable belief. “The Supreme Court, however, recently rejected by implication any interpretation of Title VII that would permit plaintiffs to maintain retaliation claims based on an unreasonable good-faith belief that the underlying conduct violated Title VII.” Crumpacker, 338 F.3d at 1171 (citing Clark County, 532 U.S. at 269). Thus, “the Supreme Court’s decision in Clark supercedes and overrules this court’s prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an *unreasonable* good-faith belief that the

underlying conduct violated Title VII.” Id. However, a reasonable good-faith belief remains protected under the anti-retaliation statute. “By permitting plaintiffs to maintain retaliation claims based on a reasonable good-faith belief that the underlying conduct violated Title VII, employees are able to report what they reasonably believe is discriminatory conduct without fear of reprisal. Strong policy supports allowing plaintiffs to maintain such claims.” Id. at 1172.

Title VII discrimination and harassment claims can be based on a “mixed motive” element allowing the plaintiff to recover when she “demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). However, the federal appellate courts have consistently held that this statutory “mixed motive” element is not available for Title VII retaliation claims, since the statute does not include retaliation for engaging in protected conduct in its listing of five categories of protected status. See Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001); Matima v. Celli, 228 F.3d 68, 81 (2d Cir. 2000); Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 552 n.7 (4th Cir. 1999); McNutt v. Board of Trustees of the Univ. of Ill., 141 F.3d 706, 707-09 (7th Cir. 1998); Woodson v. Scott Paper Co., 109 F.3d 913, 932-36 (3d Cir. 1997); Tanca v. Nordberg, 98 F.3d 680, 682-85 (1st Cir. 1996). The Fifth and D.C. Circuits have refrained from deciding this question. Rubinstein v. Administrators of the Tulane Educ. Fund, 218 F.3d 392, 403 (5th Cir. 2000); Borgo v. Goldin, 204 F.3d 252, 255 n.6 (D.C. Cir. 2000); see also Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005) (citing Borgo).

Against this backdrop, the impact of the Supreme Court’s decision in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), remains unclear. In Desert Palace, the Court held that direct evidence of unlawful motivation is not required to proceed under a mixed-motive theory. Id. at 101. The Court based its decision largely on the language of § 2000e-2(m), which would suggest that its holding applied only to the discrimination claims within the section’s orbit. Yet at least one court has held that because of Desert Palace the mixed-motive scheme of § 2000e-2(m) applies to retaliation claims, as well. See Warren v. Terex Corp., 328 F. Supp. 2d 641, 646 (N.D. Miss. 2004). But see Funai v. Brownlee, 369 F. Supp. 2d 1222, 1228 (D. Haw. 2004) (holding that Desert Palace does not apply to retaliation claims and applying Price Waterhouse defense).

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

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

discriminatory motive. See id. at 244-45 (Brennan, J.). If the defendant fails to persuade the trier of fact by a preponderance of the evidence that it would have taken the action even absent the discriminatory motive, the plaintiff will prevail. See id. at 276 (O'Connor, J., concurring).

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

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

#### B. Elements of the Claim: Direct Evidence Framework.

If the employee has direct evidence of retaliation, then the McDonnell Douglas burden shifting framework does not apply. As the Seventh Circuit concisely explained, summary judgment should be denied if the employee has direct evidence of retaliation, unless the employer can show, by un rebutted evidence, that it would have made the same adverse employment action against the plaintiff:

The plaintiff in a retaliation case should have two (and only two) distinct routes to obtaining/preventing summary judgment. One, the more straightforward, the one that is unrelated to McDonnell Douglas, is to present direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that he engaged in protected activity (filing a charge of discrimination) and as a result suffered the adverse employment action of which he complains. If the evidence is uncontradicted, the plaintiff is entitled to summary judgment. If it is contradicted, the case must be tried unless the defendant presents un rebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had no retaliatory motive; in that event the defendant is entitled to summary judgment because he has shown that the plaintiff wasn't harmed by retaliation.

Stone v. City of Indianapolis Public Utilities Div., 281 F.3d 640, 644 (7th Cir. 2004). Only if the plaintiff does not have direct evidence of retaliation should the court apply the McDonnell Douglas burden shifting framework, as discussed in the next section.

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

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

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

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

**District of Columbia Circuit.** The plaintiff “must show that (1) she engaged in statutorily protected activity; (2) her employer took an adverse personnel action against her; and (3) a causal connection exists between the two.” Carney v. American Univ., 151 F.3d 1090, 1095 (D.C. Cir. 1998); see also Broderick v. Donaldson, 338 F. Supp. 2d 30, 38 (D.D.C. 2004).

**First Circuit.** The plaintiff “must demonstrate that (1) he engaged in protected conduct under Title VII; (2) he suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity.” Hernández-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998); see also Higgins v. TJX Cos., Inc., 331 F. Supp. 2d 3, 6 (D. Me. 2004).

**Second Circuit.** The plaintiff “must show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action.” Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998); see also Olle v. Columbia Univ., 332 F. Supp. 2d 599, 619 (S.D.N.Y. 2004).

**Third Circuit.** The plaintiff “must show that: (1) he or she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action.” Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001).

**Fourth Circuit.** The plaintiff must prove “that (1) plaintiff engaged in a protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) a causal connection existed between the protected activity and the adverse action.” Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998); see also Anderson v. G.D.C. Inc., 281 F.3d 452, 458 (4th Cir. 2002); Schamann v. O’Keefe, 314 F. Supp. 2d 515, 528 (D. Md. 2004).

**Fifth Circuit.** The plaintiff “must show that: (1) he engaged in an activity protected by Title VII; (2) he was subjected to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action.” Davis v. Dallas Area Rapid Transit, 383 F.3d 309, 319 (5th Cir. 2004).

**Sixth Circuit.** This circuit requires four elements, with the additional element (defendant’s knowledge) interposed between the first and second elements of the traditional three-element test. The plaintiff “must show that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action.” Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999); accord Allen v. Michigan Dep’t of Corrections, 165 F.3d 405, 412 (6th Cir. 1999); see also Bukta v. J.C. Penny Co., Inc., 359 F. Supp. 2d 649, 671 (N.D. Ohio 2004). Since the discussion in this chapter is based on the three-element test, practitioners in the Sixth Circuit should refer to these two cases, and the earlier cases cited therein, for guidance on interpreting the unique aspects of the Sixth Circuit’s retaliation test.

**Seventh Circuit.** The Seventh Circuit reformulated its framework for retaliation cases based on indirect evidence by requiring a “similarly situated” analysis, which requires the plaintiff to show that after engaging in protected conduct, “only he, and not any similarly situated employee who did not file a charge [or other protected conduct], was subjected to an adverse employment action even though he was performing his job in a satisfactory manner.” Stone, 281 F.3d at 644. The court explained that “If the defendant presents no evidence in response, the plaintiff is entitled to summary judgment. If the defendant presents un rebutted evidence of a noninvidious reason for the adverse action, he is entitled to summary judgment. Otherwise there must be a trial.” Id.



**Eighth Circuit.** The plaintiff “must show that (1) she engaged in statutorily protected conduct; (2) suffered an adverse employment action; and (3) there is a causal connection between her protected conduct and the adverse employment action.” Zhuang v. Datacard Corp., 414 F.3d 849, 856 (8th Cir. 2005).

**Ninth Circuit.** The plaintiff “must show that: (1) he or she engaged in a protected activity; (2) suffered an adverse employment action; and (3) there was a causal link between the two.” Pardi v. Kaiser Found. Hospitals, 389 F.3d 840, 849 (9th Cir. 2004).

**Tenth Circuit.** The plaintiff “must show: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action.” Duncan v. Manager, Dep’t of Safety, 397 F.3d 1300, 1314 (10th Cir. 2005); see also Medlock v. Ortho Biotech Inc., 164 F.3d 545, 549-550 (10th Cir. 1999) (using direct evidence method instead of burden-shifting framework).

**Eleventh Circuit.** The plaintiff “must show that (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action.” Stavropoulos v. Firestone, 361 F.3d 610, 616 (11th Cir. 2004).

#### D. Protected Activity.

The EEOC has provided four generic examples of opposition activity, all of which must be read, pursuant to the statute, as involving unlawful discrimination: (1) “threatening to file a charge or other formal complaint alleging discrimination;” (2) “complaining to anyone about alleged discrimination against oneself or others;” (3) “refusing to obey an order because of a reasonable belief that it is discriminatory;” and (4) “requesting reasonable accommodation or religious accommodation.” See EEOC Compliance Manual, Section 8, at 4-6. The fourth provision does not apply to racial or sexual harassment plaintiffs, although some may also have a claim related to their religion or disability.

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

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

(1) Plaintiff “complained to [] management about what she believed constituted discriminatory practices” and was fired “after she failed to appear for the [in-house] deposition concerning [another plaintiff’s] employment at Cort Furniture.” Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996).

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

(3) Plaintiff filed two EEOC charges alleging discrimination. Berman v. Orkin Exterminating Co., 160 F.3d 697, 702 (11th Cir. 1998).

(4) Plaintiff’s letter to outside investigators “purports to complain of racism, sexism, and retaliation.” Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 373 (5th Cir. 1998).

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

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

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

(8) Plaintiff complained to supervisors and to corporate headquarters about racial harassment. Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1103 (10th Cir. 1998).

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

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

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

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

Here, we recognize that, at least where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee's participation is participation "in any manner" in the EEOC investigation. Accordingly, by participating in her employer's investigation conducted in response to an EEOC notice of charge of discrimination, Clover engaged in statutorily protected conduct under the participation clause.

Clover, 176 F.3d at 1353.

An important issue is whether an employee who files an EEOC charge that alleges discrimination or harassment but does not allege retaliation, can later file a lawsuit that includes a retaliation claim, where that claim is based on retaliation for having filed an EEOC charge. Although defendants usually attempt to dismiss such retaliation claims on the grounds that the plaintiff failed to exhaust her administrative remedies, prior to 2002 the courts increasingly recognized that it would be futile to require an employee to file a new EEOC charge when that retaliation arises from the protected activity of filing the first EEOC charge. In 2001, the First Circuit joined the majority of the federal appellate courts in holding that retaliation claims can be brought in court, even if the plaintiff only included a discrimination or harassment claim in her EEOC charge. Clockedile v. New Hampshire Dep't of Corrections, 245 F.3d 1, 4 & n.3 (1st Cir. 2001) (collecting cases from Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits). The First Circuit concluded that "retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency -- e.g., the retaliation is for filing the agency complaint itself." Clockedile, 245 F.3d at 6. The Sixth Circuit also has allowed retaliation claims if based on events that occurred after the filing of the EEOC charge. See Weigel v. Baptist Hosp. of East Tenn., 302 F.3d 367, 380 (6th Cir. 2002).

That line of cases may be threatened by the Supreme Court's decision in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), which eliminated the continuing violation theory by holding that Title VII precludes recovery for discrete acts of discrimination or retaliation occurring beyond the limitations period. Some courts have applied Morgan to discrete acts of retaliation occurring *after* a charge has been filed, thus requiring plaintiffs to make the retaliatory actions the subject of an amended or new charge. See Martinez v. Potter, 347 F.3d 1208, 1210-11 (10th Cir. 2003); Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 149 (D.D.C. 2005) ("[I]t makes sense to apply Morgan to bar subsequent discrete acts that a plaintiff fails to exhaust in the administrative process."); Bowie v. Ashcroft, 283 F. Supp. 2d 25, 34 (D.D.C. 2003). The Sixth Circuit, in an unpublished opinion, declined to extend Morgan to subsequent actions. See Delisle v. Brimfield Township Police Dep't, 94 Fed. Appx. 247, 253-54 (6th Cir. 2004).

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

The district courts are split as to whether resisting a supervisor’s sexual advances constitutes protected activity, although a majority of the courts that have ruled on this issue “have held that an employee’s refusal to submit to sexual advances constitutes protected activity.” *Little v. National Broadcasting Co.*, 210 F. Supp. 2d 330, 385-86 (S.D.N.Y. 2002) (collecting cases). The Second, Third and Seventh Circuit have all noted the existence of this issue but did not rule upon it. Id. at 385 (collecting cases). In *Little*, the district court held that “rejecting sexual advances from an employer does constitute protected activity,” on the grounds that “sexual harassment by an employer or supervisor is an unlawful practice, and an employee’s refusal is a means of opposing such unlawful conduct.” Id. at 386.

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

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

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

Nor does the clause protect employees who assist their employer during a Title VII investigation, when the employee alleges that he is subsequently retaliated against by his

supervisors for having taken the employer's side against the employee. Twisdale v. Snow, 325 F.3d 950, 952 (7th Cir. 2003) (Title VII's retaliation provision is "for the protection of the discriminated against, and not their opponents."). In Twisdale, the plaintiff's supervisors were upset that the plaintiff had not sided with the employee who complained of discrimination.

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

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

The Fifth Circuit has recognized an important limitation by holding that the protected activity must itself constitute lawful conduct; "any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protections." Douglas, 144 F.3d at 376 (plaintiff, an attorney, violated Louisiana State Bar Rules of Professional Conduct by her unauthorized disclosure of confidential information about her employer to third party). But see Willy v. Administrative Review Board, 423 F.3d 483, 500 (5th Cir. 2005) (rejecting as a matter of federal common law that the "attorney-client privilege is a *per se* bar to retaliation claims under federal whistleblower statutes").

The state courts are split as to whether in-house counsel can reveal client confidences to her attorney in order to prove a wrongful discharge or other discrimination claim. Courts from Connecticut, Montana, Utah, and Tennessee have recently held that attorneys can reveal client confidences in such circumstances, contrary to an older decision from Illinois. Compare Meadows v. KinderCare Learning Centers, Inc., No. Civ. 03-1647-HU, 2004 WL 2203299, at \*2-\*4 (D. Or. Sept. 29, 2004) (in-house counsel could bring state wrongful discharge claims based on refusal to implement discriminatory employment practices, but did not state Title VII retaliation claims) and Spratley v. State Farm Mut. Auto. Ins. Co. 78 P.3d 603, 610 (Utah 2003)

(in-house counsel “may, consistent with their duties under the Rules of Professional Conduct, disclose matters relating to their representation of State Farm in a suit against State Farm, so long as those disclosures are reasonably necessary to that claim.”) and O’Brien v. Stolt-Nielsen Transp. Group, Ltd., 838 A.2d 1076, 1080-82 (Conn. Super. Ct. 2003) (collecting cases) and Crews v. Buckman Laboratories Int’l, Inc., 78 S.W.3d 852 (Tenn. 2002) (allowing plaintiff to bring wrongful discharge claim based on her refusal to violate her ethical obligations) and Burkhart v. Semitool, Inc., 300 Mont. 480, 5 P.3d 1031 (Mont. 2000) (plaintiff can reveal confidential attorney-client information to establish her employment discrimination claim) with Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d. 104 (Ill. 1991) (in-house counsel cannot bring action for retaliatory discharge).

A recent Maryland decision explained the contrary approach of the Illinois courts as turning on the fact that in Maryland (and some other states), Rule 1.6, Md. Rules Prof. Conduct, allows an attorney to reveal confidential information “to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” Hoffman v. Baltimore Police Dep’t, 379 F. Supp. 2d 778, 782 (D. Md. 2005). In Hoffman, the court also found that the employer had waived the attorney-client privilege as to numerous documents that the employer had submitted to the EEOC as part of its response to the employee’s charge of discrimination. Id. at 784-85.

An intermediate appellate court in Florida held that an in-house counsel’s attorney in a whistleblower suit could not be disqualified on the basis that the client made reasonably necessary disclosures to her attorney to help prove her claims. Alexander v. Tandem Staffing Solutions, Inc., 881 So.2d 607, 21 IER Cases 1148 (Fla. Dist. Ct. App. 2004), reh’g den., Sept. 22, 2004; accord Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 310-11, 106 Cal. Rptr. 2d 906, 920 (Cal. Ct. App. 2001).

The American Bar Association has explored this issue and concluded that in some circumstances, in-house counsel can bring a wrongful discharge claim. See American Bar Ass’n, Formal Ethics Opinion 01-424, “A Former In-House Lawyer may Pursue a Wrongful Discharge Claim Against her Former Employer and Client as long as Client Information Properly Is Protected” (Sept. 22, 2001) (collecting cases); see generally B. Marshall, “In Search of Clarity: When Should In-House Counsel Have the Right to Sue For Retaliatory Discharge?,” 14 Geo. J. Legal Ethics 871 (2001) (same).<sup>3</sup> Thus, practitioners who are faced with this situation will need to ascertain the applicable case law and state ethical rules and opinions, bearing in mind that not all states have addressed this issue. See also R. Adams & D.S. Katz, “Lawyers Who ‘Tell’ Risk All,” Nat’l L.J., Mar. 29, 2004, at 22; J. Gibeaut, “Telling Secrets: When In-

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

House Lawyers Sue Their Employers, They Find Themselves in the Middle of the Debate on Client Confidentiality,” ABA J., Nov. 2004, at 38-44, 73; M. Lyons & P.F. Butcher, “Too Many Loyalties,” Legal Times, Apr. 19, 2004, at 49; S. Reisinger, “Every Lawyer’s Nightmare,” Legal Times, Oct. 20, 2003, at 25.

E. Adverse Employment Action.

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

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

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

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

There is a significant split in the circuits as to what constitutes adverse employment action for retaliation claims under Title VII. The Fifth and Seventh Circuits recognize only adverse actions rising to the level of an ultimate decision. Johnson v. Cambridge Indus., Inc., 325 F.3d 892, 902 (7th Cir. 2003); Krause v. City of La Crosse, 246 F.3d 995, 1000-01 (7th Cir. 2001); Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997) (“To hold otherwise would be to expand the definition of “adverse employment action” to include events such as disciplinary filings, supervisor’s reprimands, and even poor performance by the employee -- anything which *might* jeopardize employment in the future. Such expansion is unwarranted.”); see also McGuire v. City of Springfield, Ill., 280 F.3d 794, 797 (7th Cir. 2002) (“An employer’s action can be called ‘retaliation’ only if it makes the employee worse off on account of the protected activity.”). The Seventh Circuit recently emphasized that “an adverse employment action is one that significantly alters the terms and conditions of the employee’s job,” thereby excluding actions such as lateral transfers, reprimands, and harder working assignments. Griffin v. Potter, 356 F.3d 824, 829 (7th Cir. 2004) (collecting cases). However, “transfers that quantitatively affect benefits or wages or that significantly reduce an employee’s career prospects may constitute adverse action.” Firestine v. Parkview Health Syst., Inc., 338 F.3d 229, 235 (7th Cir. 2004); Malone v. Norfolk Southern R.R., No. 1:03-CV-942-SEB-JPG, 2004 WL 3250125, \*6-\*7 (S.D. Ind. Dec. 15, 2004) (implying that a *permanent* reassignment to a different job, with no change in pay or benefits, but that was objectively viewed as inferior to the plaintiff’s previous position, could be interpreted as an adverse employment action). The Fifth Circuit has potentially retreated from its Mattern holding by recognizing, in one decision, that the Supreme Court’s definition of “tangible employment actions” in Burlington and Faragher, cast doubt on the Fifth Circuit’s “ultimate employment decision” standard. Compare Fierros v.

Texas Dep't of Health, 274 F.3d 187, 192-93 (5th Cir. 2001) (noting Supreme Court standard with Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528, 531 (5th Cir. 2003) (applying ultimate employment standard); see also Hockman v. Westward Communications, LLC, 407 F.3d 317, 331 (5th Cir. 2004) (citing Mattern).

In contrast, the First, Fourth, Sixth, Ninth and Eleventh Circuits allow some adverse actions falling short of ultimate employment decisions. See White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 801-02 (6th Cir. 2004) (en banc) (“We now join the majority of other circuits in rejecting the ‘ultimate employment decision standard.’”); Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) (“But ‘ultimate employment decision’ is not the standard in this circuit.”); Johnson v. DiMario, 14 F. Supp. 2d 107, 110 (D.D.C. 1998) (collecting cases); see also Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (same). The Eleventh Circuit recently explained that an adverse employment action “must either be an ultimate employment decision or else must ‘meet some threshold level of substantiality.’” Stavropoulos v. Firestone, 361 F.3d 610, 616-17 (11th Cir. 2004).

The Sixth Circuit, although rejecting the “ultimate employment decision” standard, also declined to adopt the EEOC Guideline’s proposal that adverse employment action encompass “any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity.” White, 364 F.3d at 798 (quoting EEOC Compliance Manual, Section 8, “Retaliation,” ¶ 8008 (1998)). The en banc court explained that this would allow retaliation claims “based upon trivial employment actions,” id. at 799, and adhered to prior circuit decisions that the plaintiff “must show that she suffered ‘a materially adverse change in the terms of her employment.’” Id. at 797.

The Tenth Circuit, in a case which recognized retaliation when a former employer brought a malicious prosecution action against an employee, would not require an ultimate employment action. Berry v. Stevinson Chevrolet, 74 F. 3d 980, 986-87 (10th Cir. 1996). In Dick v. Phone Directories Co., Inc., 397 F.3d 1256 (10th Cir. 2005), the Court stated that it “liberally interpret[s] the second prong of the prima facie case and take[s] a case-by-case approach, examining the ‘unique factors relevant to the situation at hand’” (citing Hillig v. Rumsfeld, 381 F.3d 1028, 1033 (10th Cir. 2004)).

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

Also indicative of the sometime slight real world difference between the two standards is the fact that while the Eighth Circuit has ostensibly adopted the “ultimate employment decision” standard, it has consistently applied a broader standard. See e.g., Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (ultimate employment decision includes “tangible change in duties or working conditions that constituted a material employment disadvantage”); Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997) (ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, “papering” of an employee’s file with



negative reports and reprimands even though employee was “not discharged, demoted, or suspended”).

Von Gunten, 243 F.3d at 864.

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

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

The courts have found that some personnel actions do not rise to the level of adverse employment actions. A warning letter placed in a plaintiff’s personnel file did not constitute an adverse employment action, because the plaintiff suffered no change in her working conditions or other adverse action. Hill, 196 F. Supp. 2d at 400. But see Turner v. Gonzales, 421 F.3d 688, 696 (8th Cir. 2005) (reversing summary judgment on retaliation claim and holding that a performance downgrade that resulted in a lost automatic salary increase constituted an adverse action). A plaintiff who alleged that he was isolated from his managers and co-workers was unable to prove that this resulted in an adverse employment action. Yerry v. Pizza Hut of S.E. Kansas, 186 F. Supp. 2d 178, 186 (N.D.N.Y. 2002). These cases could have come out differently if the alleged actions had resulted in the plaintiff being less able to earn a future promotion because of the warning letter or being isolated from others in his office. But see Taylor v. Virginia Dep’t of Corrections, 177 F. Supp. 2d 497, 505 (E.D. Va. 2001) (“Furthermore, although it is logical, as asserted by the Plaintiff, that his chances for advancement (including salary) may have been diminished by being transferred to a smaller facility, such a potential is too speculative to be considered and is therefore nothing more than an unsupported conclusory allegation that must be discarded.”). Recently, one court has held that actions not “directly employment-related” might constitute adverse action. See Gore v. Trustees of Deerfield Academy, 385 F. Supp. 2d 65, 72 (D. Mass. 2005) (denying summary judgment on

claim that plaintiff's daughter was denied admission into school because of mother's complaints).

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

The federal appellate courts have recognized that harassment, or a hostile work environment, can constitute retaliation under Title VII, where the plaintiff alleges that the harassment arose because she engaged in protected activity. The courts that have so found are those that do not require that the adverse employment action be an "ultimate" employment decision. See Noviello v. City of Boston, 398 F.3d 76, 89 (1st Cir. 2005) ("We . . . hold explicitly that a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action for purposes of 42 U.S.C. 2000e-3(a). This means that workplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action."); Medina v. Income Support Div., 413 F. 3d 1131, 1135 (10th Cir. 2005); Von Gunten v. Maryland, 243 F.3d 858, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1244-45 (9th Cir. 2000); Richardson v. New York State Dep't of Corr. Serv., 180 F.3d 426, 440 (2d Cir.1999); Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998); Gunnel v. Utah Valley State College, 152 F.3d 1253, 1264 (10th Cir. 1998); see also Singletary v. District of Columbia, 225 F. Supp. 2d 43, 62 (D.D.C. 2002); Bryant v. Brownlee, 265 F. Supp. 2d 52, 66-67 (D.D.C. 2003) (collecting cases). Even so, the retaliatory harassment must be severe or pervasive, as for a hostile work environment claim, in order to support a retaliation claim. Bryant, 225 F. Supp. 2d at 67-68 (collecting cases). The Supreme Court has set forth various analytical factors in this regard:

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

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

In contrast, the courts that require an ultimate employment decision to support a Title VII retaliation claim presumably would not recognize harassment for such a retaliation claim.

F. Causal Connection.

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

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

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

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

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

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

In Breeden, the Supreme Court held that 20 months was too long a gap between protected conduct and adverse employment action to prove temporal proximity, which is consistent with prior holdings of the lower courts, and the subsequent case law has similarly recognized that temporal gaps of 10 to 24 months cannot support temporal proximity. See, e.g., Shanklin v. Fitzgerald, 397 F.3d 596, 604 (8th Cir. 2005) (10 months); Vasquez v. County of Los Angeles, 349 F.3d 634, 646 (9th Cir. 2003) (13 months); Bishop v. Bell Atl. Corp., 299 F.3d 53, 60 (1st Cir. 2002) (12-30 months); Bernales v. County of Cook, 37 Fed. Appx. 792, 797-98 (7th Cir. 2002) (22 months); Scurto v. Commonwealth Edison Co., 37 Fed. Appx. 213, 216-17 (7th Cir. 2002) (10 months); Warren, 24 Fed. Appx. at 266 (11 months); Taylor v. Procter & Gamble Dover Wipes, 184 F. Supp. 2d 402, 417 (D. Del. 2002) (one to two years); Adams v. Calvert County Public Sch., 201 F. Supp. 2d 516, 520 (D. Md. 2002) (24 months); Hill v. Taconic Developmental Disabilities Servs. Office, 181 F. Supp. 2d 303, 322 (S.D.N.Y. 2002) (1.5 years); Figueroa v. City of New York, 198 F. Supp. 2d 555, 570 (S.D.N.Y. 2002) (“Due to the passage of time [over a year] between the filing and these actions, there is no basis for inferring a causal connection.”); see also Delk v. Arvinmeritor, Inc., 179 F. Supp. 2d 615, 624 (W.D.N.C. 2002) (4 months probably too long), aff'd 40 Fed. Appx. 775 (4th Cir. 2002) (per curiam).

In contrast, where the employee made repeated complaints during the same year as the adverse action, then temporal proximity existed to support causation. See Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 563 (6th Cir. 2004) (holding that plaintiff could establish prima facie causation element based on three-month gap between complaint and retaliatory action); Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25-26 (1st Cir. 2004) (finding one month sufficient to establish prima facie temporal connection); Winarto v. Toshiba Am. Electronics Components, Inc., 274 F.3d 1276, 1287 & n.10 (9th Cir. 2001) (“Winarto’s several complaints . . . closely preceded the [adverse] evaluation.”); see also Turner v. Housing Auth. of Jefferson County, 188 F. Supp. 2d 1066, 1079 (S.D. Ill. 2002) (“The fact that the plaintiff was fired two weeks after his complaints to management is a short enough time to establish the necessary causal link.”); Elries v. Denny’s, Inc., 179 F. Supp. 2d 590, 599 (D. Md. 2002) (“[P]laintiff shows retaliatory conduct that began shortly after filing a complaint, thus showing prima facie causation, even though actual termination came much later.”); Little v. National Broadcasting Co., 210 F. Supp. 2d 330, 386 (S.D.N.Y. 2002) (“Muro engaged in protected activity when he filed a complaint with the NBC Ombudsperson in June 1998. His assignment two months later to undesirable shifts . . . raises a genuine issue of fact as to whether Muro’s protected activity was followed so closely by discriminatory treatment as to establish causation by temporal proximity.”).

The First Circuit rejected the employer’s claim that an eleven month temporal gap between the employee’s filing of a complaint and his demotion, since “temporal proximity is but one method of proving retaliation.” Che v. Massachusetts Bay Transp. Auth., 342 F.3d 31, 38

(1st Cir. 2003). There was “ample evidence of disparate and discriminatory treatment from which a jury could find a causal connection between Che's demotion and his earlier lawsuits,” id., particularly disparate disciplinary actions and racist remarks. For example:

. . . after Johnson disciplined Che for the argument, Che fainted and his union representative asked Johnson to call for help. In response, Johnson said "I think the chink is faking it." There was evidence at trial that Johnson and another MBTA supervisor referred to Che as a "chink" on other occasions. In sum, this evidence of discriminatory and disparate treatment is sufficient to meet "the relatively low threshold showing necessary to establish a prima facie case."

Id. at 39. The First Circuit found that the employer's proffered non-discriminatory reasons were pretextual in light of the strong evidence of disparate treatment. Id. at 40. (“In light of the evidence described above, we agree with the district court that there was sufficient evidence from which a jury could find that the MBTA's stated reason for Che's demotion was pretextual.”). The First Circuit also found that the plaintiff suffered a retaliatory hostile work environment. Id.

The Seventh Circuit reversed the district court's determination that a three month gap between plaintiff's complaint and her termination was insufficient to state a retaliation claim, since temporal proximity was only one aspect of causation. Sitar v. Indiana Dep't of Transp., 344 F.3d 720, 728 (7th Cir. 2003). Critically, “Here, a trier of fact could find that the causal relationship existed from much more. Baker was visibly upset upon receiving Price's findings and recommendations against him. He decided almost immediately, at the same meeting, that he would terminate Sitar.” Id. Thus, the deposition testimony of the supervisor was sufficient to prove causation: “Sitar's complaint, legitimized by Price's findings, cast a shadow over Baker's performance, and he was embarrassed when he learned about Price's report in the presence of his supervisors. A reasonable jury could find that Baker punished Sitar for complaining about his misconduct, and not because her performance was allegedly unsatisfactory. Therefore, we find that Sitar has established a *prima facie* case of retaliation under the direct method.” Id. at 729. Moreover, even under the indirect method, it is not necessary for the plaintiff to prove causation. Id. (“Lack of causation should not have been the district court's sole basis for granting summary judgment. In *Stone*, we held that for a plaintiff proceeding under the indirect method, causation would no longer be a part of her *prima facie* burden.”) (citing Stone v. City of Indianapolis Pub. Util. Div., 281 F.3d 640 (7th Cir.2002)).

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

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

Id.

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

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

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

1280 (“Such heightened scrutiny and differential treatment indicates that [supervisor] was acting out of a retaliatory mind set and intended to create a difficult work environment for plaintiff.”).

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

Reasons that are intertwined with an employee’s conduct during the resulting investigation of her complaint may also be suspect. See Gilooly v. Missouri Dep’t of Health & Senior Services, 421 F.3d 734 (8th Cir. 2005) (reversing summary judgment on retaliation claim in which plaintiff was terminated for a “lack of credibility” during the investigation of his complaints and holding that “questions related to the very substance of the investigation are ‘not sufficiently independent’ and therefore within the scope of the protected activity”)

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

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

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

both knowledge of the protected activity and temporal proximity. Carney, 151 F.3d at 1095 (citing Mitchell v. Baldrige, 759 F.2d 80, 86 (D.C. Cir. 1985)).

The Seventh Circuit concluded that where the plaintiff in a sexual harassment and retaliation case was herself terminated because she engaged in “highly inappropriate” workplace conduct towards male employees, that the plaintiff could not maintain a retaliation claim based on having reported harassment by another co-worker. Hall v. Bodine Elec. Co., 276 F.3d 345, 359 (7th Cir. 2002) (“[A]n employee’s complaint of harassment does not immunize her from being subsequently disciplined or terminated for inappropriate workplace behavior.”). Here, the plaintiff admitted that she had engaged in sexual bantering, but claimed that it did not rise to the level of Title VII harassment. The Seventh Circuit rejected this argument, concluding that “Bodine was still permitted to terminate her. In fact, the company’s failure to do so would have most likely constituted a Title VII violation (i.e., sex discrimination against Lopez), as well as subjecting the company to future liability if another complaint of harassment was filed against Hall.” Id. at 359.

#### G. Retaliatory Lawsuits Against Employees.

##### 1. Declaratory Judgment Lawsuits By Employers.

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

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

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



Ms. Lauricia filed her EEOC charge of discrimination in early 2000; MicroStrategy “received her complaint on March 13,” called Ms. Lauricia to a meeting on March 14 after which “she was placed on administrative leave.” *Id.* Three days later, MicroStrategy filed its reverse lawsuit in federal court against both Ms. Lauricia and her attorney, Claude Convisser. In its complaint, MicroStrategy averred that information about its employee compensation, including stock options, constituted trade secrets as well as privileged attorney-client information; thus, MicroStrategy alleged that the use of this information by Ms. Lauricia and her attorney (through her EEOC charge and, presumably, any future litigation) constituted theft of trade secrets and misuse of confidential attorney-client information. Complaint for Declaratory Relief, ¶¶ 42-50. MicroStrategy also alleged that Ms. Lauricia had breached her fiduciary duty to her employer through using this information, *id.*, ¶¶ 51-56, and further requested a declaratory judgment that MicroStrategy had not violated the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), in its proposed termination of Ms. Lauricia. *Id.* at ¶¶ 37-41.

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

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

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

Meanwhile, Ms. Lauricia filed a Title VII, ADEA and FLSA federal lawsuit that also sought declaratory relief. See MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 247-48 (4th Cir. 2001) (discussing history of case). MicroStrategy sought to compel arbitration, and the district court denied its motion on the grounds that “by virtue of its ‘remarkably aggressive’ course of

litigation against Lauricia, MicroStrategy had waived its right to insist on arbitration.” *Id.* at 248 (quoting *Lauricia v. MicroStrategy, Inc.*, 114 F. Supp. 2d 489, 492 (E.D. Va. 2000)). The Fourth Circuit reversed, and dismissed Ms. Lauricia’s complaint, on the grounds that there was a valid arbitration agreement, and MicroStrategy’s litigation activities were not so burdensome as to constitute a waiver. *Id.* at 254.

## 2. “SLAPP” Statutes.

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

California’s SLAPP statute, Cal. Code Civ. Proc. § 425.16, is probably the most frequently litigated statute. The California Supreme Court, in three decisions issued in August 2002, clarified the scope of this statute. In all three decisions, the Court held that the defendant (*e.g.*, employee or community activist group) does not have to show that the action was brought with the intent to chill the defendant’s exercise of the constitutional rights of free speech or to petition the government for redress of grievances in order to obtain dismissal of the action under the California SLAPP statute. Instead, the defendant only has to show that the targeted cause of action arose from the protected activity. *See* *City of Cotati v. Cashman*, 29 Cal. 4th 69, 52 P.3d 695, 124 Cal. Rptr. 2d 519 (2002); *Equilon Enter’s, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 52 P.3d 685, 124 Cal. Rptr. 2d 507 (2002); *Navellier v. Sletten*, 29 Cal. 4th 82, 52 P.3d 703, 124 Cal. Rptr. 2d 530 (2002). Thus, these three decisions will enhance the SLAPP defendant’s (*i.e.*, employee’s) ability to prevail on a motion to dismiss the SLAPP suit. If the defendant is the *employer*, the employer benefits rather than the employee by the lower evidentiary standard.

For example, one panel of the California Court of Appeals, in *Kibler*, rejected a SLAPP retaliation claim brought by a hospital physician after he was suspended allegedly for criticizing the hospital’s management. The Court upheld the hospital’s motion to dismiss the SLAPP suit, reasoning that the physician employee’s lawsuit “constituted an effort to chill defendants’ exercise of free speech as related to an official proceeding authorized by law,” the “official proceeding” referred to being the legally-mandated peer review process. *Kibler v. Northern Inyo County Local Hospital*, 24 Cal. Rptr. 3d 220, 222 (2005). However, another panel in the same judicial district, in a SLAPP lawsuit also involving a physician, reached the opposite result, holding that the hospital’s peer review process did not constitute an “official proceeding.” *O’Meara v. Palomar-Pomerado Health Sys.*, 125 Cal. App. 4th 1324, 23 Cal. Rptr. 3d 406 (2005). Evidently as a result of this split, on April 27, 2005, the California Supreme Court

granted review of these two cases to decide whether employment actions arising out of a hospital peer review process subject to a motion to strike under the SLAPP statute because the review is an official proceeding or implicates a public issue or issue of public interest.

Once the court concludes the action arises from protected activity, it must then determine whether the plaintiff has “demonstrated a probability of prevailing on the claim.” Equilon, 29 Cal. 4th at 67. To prevail on the defendant’s motion to strike, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 74 P.3d 737, 3 Cal. Rptr. 3d 636 (2003) (declining to create exemption from anti-SLAPP motions for malicious prosecution claims); see also Gallant v. City of Carson, 128 Cal. App. 4th 705, 27 Cal. Rptr. 3d 318 (2005) (denying employer’s motion to strike an employee’s lawsuit against the employer for wrongful termination and defamation because the employer waived evidentiary objections that would otherwise have prevented the employee from proving that the defamatory statements were false).

### **3. Retaliatory Lawsuits and Counterclaims.**

After an employee files a lawsuit against his or her current or former employer, which alleges discriminatory or retaliatory conduct, the employer may then, as part of its answer, file counterclaims against the employee. Or, an employer may file a lawsuit against the employee while the employee’s charge is still pending with the EEOC. Typical claims against the employee might include breach of contract (arising from an employment contract or a severance agreement), theft of trade secrets, violation of a non-compete agreement, or breach of fiduciary duty. Can the plaintiff then bring a retaliation claim which alleges that the counterclaim is itself retaliatory? The majority of courts that have addressed this issue have held that a plaintiff can base her retaliation claim on an allegedly bad faith counterclaim or lawsuit brought against her.

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

Numerous district courts have held that the filing of a lawsuit or a counterclaim motivated by retaliation against an employee can serve as a basis for a retaliation claim under Title VII. See, e.g., Harper v. Realmark Corp., No. 4:04-CV00040-DFH-WGH, 2004 WL 1795392, at \*4 (S.D. Ind. July 29, 2004) (denying motion to dismiss a claim based on retaliatory counterclaim). Rosania v. Taco Bell, 303 F. Supp. 2d 878, 887-88 (N.D. Ohio 2004) (reviewing Title VII case law in FMLA retaliation context); Hernandez v. Data Sys. Int’l, Inc., 266 F. Supp. 2d 1285, 1306 (D. Kan. 2003) (“[R]etaliatory civil litigation can constitute an adverse

employment action for purposes of a retaliation claim.”); Gliatta v. Tectum, Inc., 211 F. Supp. 2d 992, 1009 (S.D. Ohio 2002) (“This Court concludes that the adverse action requirement for a retaliation claim encompasses an allegedly bad faith counterclaim brought by the employer against its former employee”); Ward v. Wal-Mart Stores, Inc., 140 F. Supp. 2d 1220, 1230-31 (D.N.M. 2001) (holding that employer’s filing of appeal of former employee’s claim for unemployment benefits less than a month after he engaged in protected activity “raises the inference of a retaliatory motive sufficient to establish a causal connection” for a Title VII retaliation claim); Outback Steakhouse, 75 F. Supp. 2d at 1231; Jones v. Ryder Services Corp., No. 95 C 4763, 1997 WL 158329, at \*5 (N.D. Ill. Mar. 31, 1997) (denying summary judgment to employer where employer withdrew plaintiff’s workers’ compensation settlement offer in retaliation for filing EEOC charges); Cozzi v. Pepsi-Cola General Bottlers, Inc., No. 96 C 7228, 1997 WL 312048, at \*3, 74 FEP Cases (BNA) 321, 323 (N.D. Ill. June 6, 1997) (holding that filing of retaliatory lawsuit constituted “adverse employment action” under Title VII, but dismissing suit on other grounds); Shafer v. Dallas County Hosp. Dist., No. CA 3-96-CV-1580-R, 1997 WL 667933, at \*4, 76 FEP Cases (BNA) 1555, 1560 (N.D. Tex. Oct. 21, 1997) (“It is well established that filing a retaliatory lawsuit may be actionable under Title VII.”); Harmar v. United Airlines, Inc., No. 95 C 7665, 1996 WL 199734, at \*1 (N.D. Ill. Apr. 23, 1996); Urquiola v. Linen Supermarket, Inc., No. 94-14-CIV-ORL-19, 1995 WL 266582, at \*1 (M.D. Fla. Mar. 23, 1995); EEOC v. Levi Strauss & Co., 515 F. Supp. 640, 643-44 (N.D. Ill. 1981); EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775, 778 (W.D. Va. 1980).<sup>4</sup>

However, the Fifth Circuit rejected this approach, in a case where the former employer brought a counterclaim for theft (of building materials) against a terminated employee. Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528 (5th Cir. 2003) (*per curiam*). The Fifth Circuit held that it was reversible error to allow the jury to determine whether this counterclaim was retaliatory, since under Fifth Circuit precedent, only an ultimate employment action can constitute retaliation. *Id.* at 531-32. Here, since the plaintiff was already terminated at the time of the counterclaim, there was no additional ultimate employment action that could be taken by

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

the former employer. *Id.* at 533 (“A counterclaim filed after the employee has already been discharged in no way resembles the ultimate employment decisions described in [42 U.S.C.] Section 2000e-2(a)(1).”). The Fifth Circuit did note that two district courts in the Fourth Circuit have allowed lawsuits or counterclaims to be treated as retaliatory employment actions. *Id.* at 532 (citing Beckham v. Grand Affair of N.C. Inc., 671 F. Supp. 415, 419 (W.D.N.C. 1987); EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775 (W.D. Va. 1980)).

It seems likely that the Fifth Circuit’s narrow holding would not be followed in the courts that have held that adverse employment actions that do not rise to the level of “ultimate” actions can be retaliatory.

### 3. Management Lawsuits Against Unions.

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

The Supreme Court reversed, finding that only if the lawsuit was objectively baseless could it be deemed as retaliatory under the labor statutes. Other retaliatory lawsuits, so long as they are not objectively baseless, can continue to be brought without fear of enforcement action by the NLRB. *Id.* at 536-37. The rationale is that the First Amendment right to petition allows some “breathing space” in seeking judicial relief. *Id.* at 531.<sup>5</sup>

Although this case arose in the context of NLRB enforcement, since it relied upon Supreme Court precedent regarding retaliatory lawsuits in other contexts, some courts may extend its principles to declaratory judgment and SLAPP lawsuits in the employment context. For example, the Supreme Judicial Court of Massachusetts held, in an age discrimination and retaliation case, that the employer’s declaratory judgment complaint was not retaliatory, where the employer only sought a declaratory judgment that the release which the employee signed

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

upon her termination precluded the employee from bringing her statutory claims. Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 704-07, 774 N.E.2d 1085, 1092-94 (2002).

#### H. The False Complaint.

Is an employee who falsely accuses a supervisor or co-worker of discriminatory or harassing conduct protected from retaliation? The Tenth Circuit upheld a district court's determination that the employee's falsified complaint was a legitimate, non-discriminatory reason for terminating the employment of the employee, so that the termination was not retaliatory. Renner-Wallace v. Cessna Aircraft Co., 95 Fed. Appx. 967 (10th Cir. 2004). Here, the two plaintiffs filed sexual harassment claims with the EEOC, alleging that their foreman had harassed them. The company's internal investigation failed to identify sufficient evidence to support their claim, but instead led to information showing that the plaintiffs "may have fabricated the sexual harassment allegation," based on interviews with at least four witnesses. The company then terminated the two employees based on "breach of trust in falsifying reports of sexual harassment." Id. at 968. The Tenth Circuit affirmed the grant of summary judgment to the employer. Id. at 970; see generally "Alleged Fabricators of Harassment Story Who Were Fired Lose Claims Against Cessna," BNA Daily Labor Report, Mar. 25, 2003, at A-1 (discussing district court decision). Employees who bring claims determined to be false may also risk criminal sanctions. In 2004, the Fourth Circuit upheld the conviction of an employee for bringing false sexual harassment claims against her supervisor. United States v. Smith, 105 Fed. Appx. 506, 507 (4th Cir.) (per curiam), cert. denied, 125 S. Ct. 677 (2004). The case was remanded for recalculating the defendant's sentence, resulting in an amended sentence of 21 months, followed by two years' supervised release. United States v. Smith, No. CR-02-313, Amended Judgment (D.S.C. Sept. 17, 2004) (Docket No. 93).

#### I. The "NO FEAR Act" and Federal Employees.

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

Specifically, the U.S. General Accounting Office (GAO) testified that the Judgment Fund "discourages accountability by being a disincentive to agencies to resolve matters promptly in the administrative processes; by not pursuing resolution, an agency could shift the cost of resolution from its budget to the Judgment Fund and escape the scrutiny that would accompany a request for a supplemental appropriation." S. Rep. No. 107-143, at 3.

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

The NO FEAR Act also requires individual agencies, as well as the EEOC, to post annual statistics on their websites, setting forth the numbers of complaints filed, pending, and resolved; the amount paid out on such claims; the number of employees disciplined for discrimination, retaliation, or harassment; and an examination of any trends in those statistics, including a causal analysis, the practical knowledge obtained through this experience, and any actions taken or planned to improve the complaint resolution process in each agency. Pub. L. No. 107-174, §§ 203, 301, 302. This information must also be submitted by each agency to Congress and the Attorney General. *Id.* at § 203. The EEOC promulgated its “Interim Final Rule” in January 2004, with regulations governing these posting and reporting requirements, codified at 29 C.F.R. § 1614.701 to § 1601.706. *See* 69 Fed. Reg. 3,483–3,492 (Jan. 26, 2004).

#### J. Sarbanes-Oxley Whistleblower Provisions.

Undoubtedly the most widely discussed federal whistleblower statute is the enacted provision of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002) that protects certain corporate whistleblowers who report financial or securities-related wrongdoing.<sup>6</sup> As of October 21, 2005, 609 complaints had been filed with the Department of Labor (277 of those coming in FY2005, an increase of 93 over FY2004). Based on the complaints that have been processed, the Department of Labor reports that 380 were dismissed, 79 were withdrawn, and 78 were determined to have merit (resulting in 61 settlements).

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

The investigation prong protects those who provide, or cause to be provided, information, or otherwise participate in an investigation regarding any conduct that the employee reasonably

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<sup>6</sup> *See, e.g.*, E. Kaplan & T. Hannapel, “Hear the Whistle Blow: Companies Should Welcome, Not Vilify, Newly Protected Inside Informants,” *Legal Times*, Oct. 7, 2002, at 32; A. Berger, “Taking the Stand: Cops or Confidants? The Role of Lawyers After Sarbanes-Oxley,” *Washington Lawyer*, Mar. 2003, at 34; P. Plitch, “Blowing the Whistle; Sarbanes-Oxley Requires that Companies Treat Internal Complaints – and Complainers – Seriously,” *Wall St. J.*, June 21, 2004, at R-6.

believes constitutes a violation of specified federal securities and fraud law. The information or assistance must have been provided to, or the investigation must be conducted by, (1) a federal regulatory or law enforcement agency; (2) a member of Congress or any committee of Congress; (3) a person with supervisory authority over the employee; or (4) a person working for the employer who has the authority to investigate, discover, or terminate the misconduct.

The proceedings prong protects those who file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed, or about to be filed, relating to an alleged violation of federal securities and fraud laws. The Department of Labor has historically interpreted “proceedings” broadly to encompass internal reports to management, and potentially employee leaks to the media, on the grounds that such contacts were a “preliminary step” towards causing a proceeding to be filed or initiated.

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

The employee must file a complaint with OSHA within 90 days after the alleged violation. There is no written form required, but the complaint must be in writing, and should include a full statement of the allegations, with relevant dates. OSHA will then conduct an investigation if it determines that the employee has stated a prima facie case that his protected conduct was a contributing factor in an unfavorable employment action, and the employer has failed to rebut the claim by clear and convincing evidence. Otherwise, OSHA will dismiss the complaint. Either party can appeal an adverse decision to the Department of Labor’s Office of Administrative Law Judges, which then conducts an administrative hearing preceded by discovery. The ALJ’s decision can be appealed by the unsuccessful party to the Department of Labor’s Administrative Review Board, with further appeal to the U.S. Circuit Court of Appeals for the circuit in which the employee resided or the violation allegedly occurred. This statutory enforcement scheme is comparable to those of other federal whistleblower statutes administered by the U.S. Department of Labor, with one significant exception: a party can remove the claim to federal court if the Department of Labor does not resolve the claim within 180 days.<sup>7</sup>

Among early decisions of the Administrative Law Judges (ALJ) of the Department of Labor were rulings that Sarbanes-Oxley did not apply retrospectively, see Gilmore v. Parametric Tech. Corp., ALJ No. 2003-SOX-1 (ALJ Feb. 6, 2003), and that the alleged protected activity

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



occurred prior to its effective date, see Kunkler v. Global Futures & Forex, Ltd., ALJ No. 2003-SOX-12 (ALJ Apr. 24, 2003); see generally “ALJ Rejects Retroactive Application of New Corporate Whistleblower Protections,” BNA Daily Labor Report, Mar. 10, 2003, at A-1. More recently, ALJ decisions have dismissed claims where the complainant has failed to name the public parent of a non-public subsidiary. See Dawkins v. Shell Chem., LP, ALJ No. 2005-SOX-41 at 4 (ALJ May 16, 2005); see also Minkina v. Affiliated Physician’s Group, ALJ No. 2005-SOX-00019 at 5-6 (ALJ Feb. 22, 2005) (discussing the Act’s definition of “covered entity”).

Additionally, ALJ decisions have considered the scope of protected activity under the statute. In Marshall v. Northrup Gruman Synoptics, 2005-SOX-0008 (ALJ June 22, 2005), the Administrative Law Judge granted summary judgment against a complainant who had complained about violations of internal ethics policies and financial accounting methods. The judge interpreted the statute to mean that “an element of intentional deceit that would impact shareholders or investors is implicit” in a claim. Id. at 4. Thus, since the complainant had failed to raise an issues of fraud (but only violations of internal policies), he had not engaged in protected activity under the statute. Id. at 4-5. In Getman v. Southwest Securities, Inc., ARB Case No. 04-059 (ARB July 29, 2005), the Administrative Review Board reversed a finding that the Respondent had retaliated against the complainant. The ARB held that an equity research analyst had not engaged in protected activity by refusing to change a recommendation on a stock. Id. at 9. Rather, because she never complained that she had been pressured to change her recommendation, she did not engage in “whistleblowing.” Id. The Department of Labor provides the latest ALJ decisions at <http://www.oalj.dol.gov/public/wblower/refrnc/sox2list.htm>.

One key provision is that the DOL must supply the details of the employee’s charge to the Securities & Exchange Commission (SEC), to allow that agency the opportunity to conduct its own investigation. See 29 C.F.R. § 1980.1034(a). This provision provides a powerful incentive for the employer to settle a claim before it is filed with the Department of Labor.

Federal district courts have had little opportunity to issue substantive decisions on Sarbanes-Oxley claims. One court denied the employer’s motion for summary judgment, since the two-week gap between the employee’s complaints and her termination were sufficient to show causation, *i.e.*, that her protected activity was a contributing factor for the employer’s termination, and there were factual issues relating to whether the employer would have terminated her anyway, thereby precluding summary judgment. Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365 (N.D. Ga. 2004). The court found that plaintiff’s allegations that her employer was overpaying invoices to a company owned by a friend of the president of her employer, was overpaying sales agents based on personal friendships, and that kickbacks were paid for the purchase of lumber, thereby “circumvent[ing] the company’s system of internal accounting controls ... in violation of Section 13 of the Exchange Act,” was sufficient to set forth a claim that she engaged in protected activity. Id. at 1376-77. Moreover, the burden on defendants in a Sarbanes-Oxley case is to show, by “clear and convincing evidence that they would have fired Plaintiff absent her participation in protected activity,” which is a higher standard than the ordinary preponderance of the evidence standard. Id. at 1380 (citing Stone & Webster Eng’g Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997)). A court has held that

the retaliatory removal of an employee's job responsibilities is sufficient to state a claim. Willis v. Vie Fin. Group, Inc., No. Civ.A. 04-435, 2004 WL 1774575, at \*6 (E.D. Pa. Aug. 6, 2004). There is already conflict over whether the Sarbanes-Oxley Act provides damages for reputational injury. Compare Hanna v. WCI Communities, Inc., 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) (holding that reputational injury is compensable), with Murray v. TXU Corp., No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444, at \*3 (N.D. Tex. June 7, 2005) (holding that reputational injury is not compensable). Another district court held that the Sarbanes-Oxley Act did not preempt an employee's mandatory arbitration provision, pursuant to the employment contract. Boss v. Salomon Smith Barney, Inc., 263 F. Supp. 2d 684 (S.D.N.Y. 2003).

On August 24, 2004, OSHA promulgated its final rules for handling these complaints, codified at 28 C.F.R. Part 1980. See 69 Fed. Reg. 52,113–52,117 (Aug. 24, 2004). OSHA has been criticized for its handling of whistleblower complaints under the fourteen whistleblower statutes that it handles, which may arise from the agency's limited resources. See E. Byerrum, "Protections for Job Safety Whistleblowers Among Weakest of Those Overseen by OSHA," 72 U.S.L.W. 2211 (Oct. 21, 2003); J. Scalia, "A Note of Caution; Whistleblower Provisions are Making Labor Judges Wrestle with Securities Law," Legal Times, Apr. 19, 2004, at 46.

On February 6, 2003, the Securities and Exchange Commission (SEC) published proposed final rules to implement the "reporting" requirements of Sarbanes-Oxley. See 68 Fed. Reg. 6296 (Feb. 6, 2003). These rules, codified at 17 C.F.R. Part 205, were to be effective August 5, 2003, absent further revision by the SEC. However, the SEC deferred action, pending further study, on the "noisy withdrawal" provisions, which would require an attorney to withdraw representation of a corporate client that engaged in financial or securities misconduct, and to notify federal authorities of the reasons for such withdrawing. See "Federal Lawmakers get Earful at Hearing on SEC Proposed 'Noisy Withdrawal' Rules," 72 U.S.L.W. 2461-62 (Feb. 10, 2004). As presently codified, attorneys who appear and practice before the SEC have a duty to report evidence of a material violation of the securities laws, and must report such evidence "up the ladder," to the chief legal officer and/or the chief executive officer. If the attorney believes that such reporting would be futile, or that the persons notified have not made an "appropriate response within a reasonable time," the attorney must report the evidence further up the ladder to the Board of Directors, or the board's audit committee, or another outside committee of the board. See 17 C.F.R. § 205.2 (2004). Alternatively, the attorney may report his or her concerns to the issuer's legal compliance committee, and need not pursue the concerns any further. Id.

The attorney may reveal, without the issuer's consent, the concerns to the SEC, including the disclosure of confidential information related to the attorney's representation of the issuer, to the extent that the attorney reasonably believes that such disclosure is necessary to prevent the issuer from committing a material violation that is likely to cause substantial financial injury to the issuer or investors; or to rectify the consequences of such a violation; or to prevent the issuer from committing perjury or any other fraud on the SEC.

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

On July 26, 2003, the Washington State Bar Association rejected the ABA’s approach and held that attorneys admitted to the bar of that state could not disclose client confidences and secrets under Sarbanes-Oxley, unless those disclosures were required to be made, as opposed to merely being authorized under the SEC regulations.<sup>8</sup> The WSBA held that discretionary disclosures would violate the attorney’s obligations under Rule 1.6, Rules of Professional Conduct (which authorizes, but does not require, revealing client confidences to prevent the client from committing a crime), since the SEC regulations encompass disclosures about civil violations that constitute non-criminal conduct.

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<sup>8</sup> See Washington State Bar Association, Interim Formal Ethics Opinion Re: The Effect of the SEC’s Sarbanes-Oxley Regulations on Washington Attorneys’ Obligations Under the RPCs (July 26, 2003), at: <<http://www.wsba.org/lawyers/groups/ethics2003/formalopinion.doc>>.

On August 13, 2003, the State Bar of California similarly concluded that such disclosures would violate the obligations of California attorneys under that state's ethics rules.<sup>9</sup> The California ethics rules, which are both statutory and judicial enactments in that state, expressly prohibit disclosure of client confidences.<sup>10</sup> The State Bar of California also concluded that the SEC lacked authority to pre-empt state ethics rules in this area, on the grounds that administrative agencies lack the power to make new laws, since their only authority is to propose and adopt regulations that implement Congressional intent as manifested by the statute.<sup>11</sup>

The Department of Labor's Administrative Review Board held in February 2004 that an in-house attorney could not disclose client confidences in order to prove his whistleblowing claims. Willy v. Coastal Corp., ARB No. 97-107, 98-060 (ARB Feb. 27, 2004). Although Willy did not involve Sarbanes-Oxley whistleblower claims, it arose under environmental whistleblower statutes that are also enforced by the Department of Labor, and which have similar statutory frameworks for proving the employee's claims. See also R. Adams & D.S. Katz, "Lawyers Who 'Tell' Risk All," Nat'l L.J., Mar. 29, 2004, at 22. In a significant decision, the Fifth Circuit reversed the ARB and, as a matter of federal common law, flatly rejected its conclusion that the "attorney-client privilege is a *per se* bar to retaliation claims under federal whistleblower statutes." Willy v. Administrative Review Board, 423 F.3d 483, 500 (5th Cir. 2005). The attorney-client privilege, the Court held, does not "mandate exclusion of all documents subject to the privilege." Id. Rather, the Willy court recommended more limited means of addressing confidentiality concerns, such as the use of protective orders and *in camera* proceedings. Id. at 498.

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<sup>9</sup> See Letter from State Bar of Calif. to Securities & Exchange Comm'n (Aug. 13, 2003), at: <[http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2003-10-08\\_SEC.pdf](http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2003-10-08_SEC.pdf)>; see generally "Attorneys Cautioned on Sarbanes-Oxley Disclosure," Calif. Bar J. (Oct. 2003).

<sup>10</sup> Cal. Bus. & Prof. Code, § 6068(e) (attorneys have duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"); Cal. R. Prof. Cond., Rule 3-600(B) ("If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)); Cal. R. Evid., Rule 954 ("the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer").

<sup>11</sup> See Letter from State Bar of Calif., supra, at 6-8.

## **CONCLUSION**

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