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Retaliation Claims under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts

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Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts

Melissa A. Essary
*Terence D. Friedman**

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I. INTRODUCTION

Consider the following scenarios:

(1) *Mary Clark, a supervisor at a large company, considers herself an active proponent of equal promotion opportunities for women. When she begins to suspect that her own employer discriminates against women, she contemplates filing a complaint with the Equal Employment Opportunity Commission (EEOC) but decides to gather some evidence first. Clark then surreptitiously records a number of conversations with company executives, hoping to catch them in a tacit admission of guilt. After this fails, she rifles through the files of the executives, looking for something incriminating. When the company executives discover Clark's activities, they accuse her of "corporate disloyalty" and "snooping." Clark, well apprised of her civil rights, responds that she was not being disloyal; rather, she was engaging in "protected activity" under Title VII. As a result, Clark warns, if the company attempts to reprimand her in any manner, she will sue for unlawful retaliation under Title VII.*

(2) *An Hispanic husband and wife, John and Susan Lopez, work in different departments at the same company. Mrs. Lopez recently overheard her supervisor make derogatory comments about Hispanics. She protests to the company's complaint resolution board about these comments. Within a week of lodging her complaint, her work space is abruptly moved; her cubicle, formerly located near a sunny window on the second floor, is relocated to a dark, dismal basement. Moreover, Mrs. Lopez' supervisor begins to send her daily memoranda criticizing her for the most petty of mistakes.*

Throughout this time, Mr. Lopez generally has supported his wife's complaint but has done nothing overt to aid her. Nevertheless, his supervisor informs him that if his wife does not retract her claim, there will be "consequences" for the couple. Mrs. Lopez does not retract her claim, and Mr. Lopez soon is fired from his job. They both then complain to the EEOC, which issues them permission to sue in federal district court for retaliation under Title VII. They do so, whereupon the company moves for summary judgment on both claims, bringing to the district court's attention that under the law in their circuit: (a) regardless of its motives, the company has done nothing to Mrs. Lopez that rises to the level of retaliation under Title VII; and (b) the husband has no standing to sue under the retaliation clause.

The anti-retaliation provisions of Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) arm employees who have denounced alleged workplace discrimination with a cause of action above and beyond the protection that the three statutes afford against any actual discrimination; an employer still may be liable for "retaliatory acts" even after an employee's underlying discrimination claim has failed. However, as with the substantive issue of what may constitute discrimination under the

respective statutes, federal district court and appellate court decisions vary wildly regarding what sort of employee and employer actions may implicate the protection of the anti-retaliation provisions. For instance, in each of the preceding scenarios, the result to the dilemma posed may differ significantly according to the federal circuit in which the employee or employer is lucky, or unlucky, enough to sue or be sued.

In the recent decision of *Robinson v. Shell Oil Co.*, the United States Supreme Court resolved one of the hitherto more controverted issues surrounding Title VII's anti-retaliation provision when it held that an employer may be liable for post-employment retaliation.¹ However, the *Robinson* decision bridges only one of the numerous rifts dividing the United States circuit courts in regard to the three anti-retaliation provisions. These disagreements among the courts range from minor differences, such as the evidence necessary to give rise to an inference of causation in a prima facie case of retaliation, to major differences, such as who has standing to sue for retaliation and what sort of action by an employer constitutes retaliation against an employee who has protested alleged discrimination.

Despite these broad divisions over one of the more fundamental employment protections in our nation's civil rights laws, and despite employees' ever-increasing reliance on retaliation claims as a means of recovery,² there is a scarcity of published material analyzing the case law on the anti-retaliation provisions. As a result, this Article offers both a comprehensive treatment of the major decisions interpreting the anti-retaliation provisions and a critical evaluation of the conflicts between the courts regarding the protection which the provisions afford employees. Part II addresses the nature of the three anti-retaliation provisions and sets out the elements of the prima facie case that a plaintiff must allege. Part III deals specifically with what courts have held may constitute "protected activity," which is the first element of a prima facie retaliation case.

Part IV concerns the second element of a prima facie retaliation case—the requirement that an employer have carried out an "adverse employment action" against the plaintiff—about which there is a clear split in the nation's circuit courts. Part V of the Article treats the question of the causal link between protected activity and adverse action. Part VI then lists the damages available for successful retaliation claimants. Finally, Part VII weighs the competing

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1. *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 849 (1996).

2. Barbara O'Connell, *Retaliation Claims on the Rise*, 97 L. WKLY. U.S.A. 204, BE (1997).

interests at stake in the courts' recent, conflicting decisions regarding the anti-retaliation provisions.

II. THE ANTI-RETALIATION CLAUSE

Sections 2000e-3(a) of Title VII, 623(d) of the ADEA, and 12203 of the ADA make it unlawful for an employer to retaliate against an employee because she has participated in any investigation or proceeding under the Acts or because she has opposed the employer's discriminatory practices.³ As with other anti-retaliation provisions,⁴ Congress included these sections in their respective Acts in order to enable employees to engage in statutorily protected activities without fear of retaliation by their employers.⁵ All three provisions contain similar

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1994) [hereinafter Title VII], provides in pertinent part that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Age Discrimination Employment Act [hereinafter ADEA] anti-retaliation provision, 29 U.S.C. § 623(d) (1994), is almost identical to Title VII's anti-retaliation provision.

The Americans with Disabilities Act [hereinafter ADA], 42 U.S.C. § 12203(a)-(b) (1994), provides:

No *person* shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. (emphasis added).

The ADA further provides that it is unlawful to:

coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

Section 1981 of 42 U.S.C., which prohibits intentional racial discrimination, contains no anti-retaliation clause; as a result, it is unclear whether the statute bars retaliation. See Suzanne E. Riley, Comment, *Employees' Retaliation Claims Under 42 U.S.C. § 1981: Ramifications of the Civil Rights Act of 1991*, 79 MARQ. L. REV. 479 (1996).

4. Other statutes with anti-retaliation provisions include: the National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1994), the Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1994), the Occupational Safety and Health Act of 1970 [hereinafter OSHA], 29 U.S.C. § 660(c)(1) (1994), and the Employment Retirement Income Security Act of 1974, § 510, 29 U.S.C. § 1140 (1994).

5. EEOC v. Ohio Edison Co., 7 F.3d 541, 544 (6th Cir. 1993) (citing Mitchell v.

language, and courts regularly rely on Title VII decisions in interpreting ADEA retaliation cases, and vice-versa.⁶ In the few cases decided under the recently enacted ADA, courts have relied on decisions interpreting the anti-retaliation provisions of both Title VII and the ADEA.⁷

A. Procedure

A retaliation complainant first must file a charge of retaliation with the EEOC.⁸ If the EEOC does not conduct an investigation, the employee may, after a statutory period has expired, seek from the agency the issuance of a right-to-sue letter.⁹ After receiving permission to sue, a plaintiff then has ninety days in which to file suit against a private employer and thirty days in which to sue the federal government as an employer.¹⁰ A plaintiff who already has received permission from the EEOC to sue on a complaint of discrimination need not file a second complaint with the agency for her retaliation claim; this is because retaliation claims are deemed "reasonably related" to an original EEOC charge and, therefore, can be heard despite a plaintiff's failure to raise the claim in a separate complaint.¹¹

Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)).

6. See, e.g., *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 n.9 (1st Cir. 1996) ("The analytical framework for ADEA discrimination and retaliation cases was patterned after the framework for Title VII cases, and our precedents are largely interchangeable.").

7. See, e.g., *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997).

8. 42 U.S.C. § 2000e-5(e) (1994).

9. 42 U.S.C. § 2000e-5(e) (1994).

10. 42 U.S.C. §§ 2000e-5(f)(1), 16(c) (1994). For a detailed description of Title VII's filing procedure, see George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV., 824, 862-88 (1972).

11. *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992). *But see Keegan v. Dalton*, 899 F. Supp. 1503, 1510-11 (E.D. Va. 1995). In *Keegan*, the plaintiff failed to exhaust her administrative remedies because, after filing her EEOC complaint, she was twice given the opportunity to amend her complaint to specifically include a claim for retaliation and she twice failed to do so. *Id.*

In a related matter, courts have also held that a plaintiff whose underlying discrimination claim is pending before the EEOC may still seek purely equitable relief in the form of an injunction against retaliatory acts in federal district court. See, e.g., *Wagner v. Taylor*, 836 F.2d 566, 567 (D.C. Cir. 1987); *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 881 (2d Cir. 1981); *Drew v. Liberty Mut. Ins. Co.*, 480 F.2d 69, 73 (5th Cir. 1973), *cert. denied*, 417 U.S. 935 (1974).

B. *Prima Facie Case*

To establish a *prima facie* claim of retaliation, a plaintiff must show: (1) she engaged in protected activity; (2) her employer took adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse action.¹² A plaintiff in a retaliation case may establish these *prima facie* elements by either offering direct evidence of retaliation or by using the burden-shifting approach established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.¹³ In those cases in which there is direct evidence and/or mixed motives of retaliation, courts have selectively applied the Supreme Court's holding in *Price Waterhouse v. Hopkins*, as modified by the Civil Rights Act of 1991.¹⁴ However, these cases are few and far between.¹⁵ The overwhelming majority of courts rely on *McDonnell Douglas* in analyzing retaliation claims.

Under the *McDonnell Douglas* scheme as applied to retaliation cases, if a plaintiff proves her *prima facie* case (a burden which has variously been called "not onerous"¹⁶ and "easily met"¹⁷), the defendant is not entitled to summary judgment and is "force[d]" to proceed with its case by articulating a legitimate, nondiscriminatory reason for its adverse employment action.¹⁸ Additionally, some circuit courts have held that, in limited circumstances, an employer may concede that its actions meet the elements of retaliation under *McDonnell Douglas* while asserting direct evidence of lack of retaliatory intent.¹⁹ An employer may not, however, argue that an employee has waived a retaliation claim through a specific release or otherwise, since waiver of the right to file an EEOC charge is considered to be against public policy.²⁰

12. *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994). Some circuits have employed a slightly modified *prima facie* case which adds a fourth element requiring that an employer have knowledge of the employee's protected activity. *See, e.g., Harrison v. Metropolitan Gov't of Nashville*, 80 F.3d 1107, 1118 (6th Cir. 1996). Those courts using only three elements subsume the fourth element of knowledge into the third element of causation. *See, e.g., Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).

13. *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 477 (7th Cir. 1995) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

14. Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 412 (1997).

15. *See, e.g., Vepriusky v. Flour Daniel, Inc.*, 87 F.3d 881, 893 (7th Cir. 1996).

16. *Jackson v. RKO Bottlers, Inc.*, 743 F.2d 370, 377 (6th Cir. 1984).

17. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987).

18. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997).

19. *See infra* Section V.B.

20. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987). In contrast, it is uncertain whether making a settlement offer contingent on a party's withdrawal of her discrimination complaint may, in some circumstances, constitute retaliation. *Pendleton v. New York Dept. of Correctional Servs.*, 615 F. Supp. 522, 526 (S.D.N.Y.

Once the defendant has met its burden, the plaintiff then must show that the defendant's nondiscriminatory reason is merely pretextual; she does this by proffering what is essentially a second showing of causation, though one with a higher threshold of proof than the causation shown as part of the prima facie case.²¹ This second showing requires evidence that the adverse action would not have occurred but for the plaintiff's protected activity.²² If a plaintiff produces this second required showing of causation, she may survive a motion for summary judgment or be entitled, after a trial on the merits, to have her claim submitted to a jury.

III. PROTECTED ACTIVITY

An employee can satisfy the first prima facie element of a retaliation case, a showing of "protected activity," by alleging in her complaint that she has (1) "made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing" under Title VII, the ADEA, or the ADA (the "participation clause"); or (2) "*opposed*" an employment practice made illegal under any one of the three statutes (the "opposition clause").²³ These two clauses generate numerous and distinct legal issues. By far, the most litigated of the two clauses is the opposition clause; however, the participation clause also has been more disputed than its plain language might suggest.

A. Participation

1. EEOC Claims

Courts generally apply a liberal standard when determining whether an employee has participated in a protected activity. Naturally, the filing of an administrative complaint with the EEOC is a protected activity under the participation clause.²⁴ Likewise, following a complaint with a suit and deciding to appeal from a district court's decision of that suit are "protected activit[ies]."²⁵ Furthermore, where there is evidence that an employer has retaliated in mere anticipation of an employee filing an EEOC claim, an employee has been held

1985), *aff'd*, 788 F.2d 6 (2d Cir. 1985). See also *infra* Section V.

21. *Avery*, 104 F3d. at 861.

22. *Dwyer v. Smith*, 867 F.2d 184, 191 (4th Cir. 1989).

23. 42 U.S.C. § 2000e-3(a) (1994) (emphasis added).

24. 42 U.S.C. § 2000e-3(a) (1994). Participation in state law statutory proceedings is also considered participation, as is participation in an action of the U.S. Department of Labor and Office of Federal Contract Compliance Programs. *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275, 279 (6th Cir. 1978); *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66, 71 (S.D.N.Y. 1975).

25. *Johnson v. Injured Workers' Ins. Fund*, No. HAR 92-1702, 1992 WL 281027, at *3 (D. Md. Oct. 5, 1992).

to “participate” in a complaint even before complaining of the harassment.²⁶ Moreover, the participation clause has been extended to protect employees who have reported employers to the EEOC on behalf of fellow employees and employees who inform their co-employees of the co-employees’ right to bring an EEOC action.²⁷ Plaintiffs can participate in a complaint by refusing to sign an affidavit on an employer’s behalf during an employment discrimination investigation.²⁸ Also, once an employee has participated in an EEOC action against her employer, she may be protected against retaliation by her union although the employee’s initial complaint was unrelated to her union.²⁹ Finally, the anti-retaliation provisions protect mere applicants for employment when those applicants have engaged in protected activities against a former employer.³⁰

The merits of a plaintiff’s EEOC charge are not relevant to gaining protection from retaliation under the participation clause.³¹ Consequently, in order to establish a prima facie case of retaliation, a plaintiff need not establish that the allegedly discriminatory conduct she participated against actually was unlawful.³² Importantly, even false and malicious claims brought in an EEOC complaint have been protected as “participation,” as have false claims made

26. *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993); *Croushorn v. Board of Trustees*, 518 F. Supp. 9, 24 (M.D. Tenn. 1980). Similarly, in EEOC Commission rulings, the EEOC has held that an employee’s threat to file an EEOC complaint may be a protected activity. *Westfall v. Postmaster General*, 01922687, 3737/E7 (1993); *Sellard v. Postmaster General*, 01882492, 2008/E2 (1988). However, where an employee does not intend to file a complaint but is only resentful regarding an employment factor unrelated to discrimination, a threat to file a complaint may not be protected. *See Dziak v. United States Postal Serv.*, 01842494, 1463/D3 (1986).

27. *Fielder v. Southco Inc.*, 699 F. Supp. 577, 578 (W.D. Va. 1988); *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66 (S.D.N.Y. 1977).

28. *Smith v. Columbus Metro. Hous. Auth.*, 443 F. Supp. 61, 65 (S.D. Ohio 1977). *But see Merkel v. Scovill, Inc.*, 787 F.2d 174, 180 (6th Cir. 1986) (plaintiff not victim of retaliation where he refused to aid his employer in employer’s own independent investigation of an age discrimination claim).

29. *See, e.g., Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991) (where plaintiff filed EEOC claim against employer, plaintiff’s union could be sued for retaliation when it “acquiesce[d] in a company policy that abridges the statutory rights of the plaintiff”).

30. *Barela v. United Nuclear Corp.*, 317 F. Supp. 1217, 1219 (D.N.M. 1970) (employer commits retaliation where it fails to continue processing an application after discovering that the applicant had filed discrimination charges).

31. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1969).

32. *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 866 (3d Cir. 1990).

during an EEOC investigation.³³ One early Fifth Circuit decision emphasized:

There can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.³⁴

Thus, given the importance of one's ability to "participate" in a discrimination complaint, courts generally make the clause's protections almost inviolate, fearing that to do otherwise would chill complaints of discrimination.

2. Employee Engaging in Her Own Investigation as Participation

For those cases in which employees engage in their own investigations of discrimination before filing a formal complaint with the EEOC, courts must weigh the competing interests of an employee in protecting her statutory rights against those of an employer in maintaining a disciplined workplace. Another consideration is the plain language of the participation clause, which provides that an employee is protected so long as she is "participating in any manner in litigation" under the three acts;³⁵ this is a seemingly broad grant of protection which some courts have read literally.

For example, in *Grant v. Hazelett Strip-Casting Co.*, an employee, in an attempt to ensnare his employer, prepared a memorandum suggesting that the employer was biased against the elderly.³⁶ Later, the plaintiff was fired for refusing to destroy the memorandum.³⁷ In reinstating the jury's finding of retaliation, the Second Circuit reasoned that the plaintiff could be viewed as

33. *Pettway v. American Cast Iron Pipe*, 411 F.2d 998, 1007 (5th Cir. 1969). *But see Vasconcelos v. Meese*, 907 F.2d 111, 112 (9th Cir. 1990) (false claims made in an internal investigation prior to an EEOC investigation and unrelated to discrimination charges are not protected). *See also Barnes v. Small*, 840 F.2d 972, 975 (D.C. Cir. 1988). The Ninth Circuit, however, has limited the participation clause to the extent that a plaintiff must reasonably perceive the alleged discrimination she participates against under a statute to be the sort of discrimination which that statute actually forbids. For instance, when an employee protested handicap discrimination by participating in a Title VII action, the Ninth Circuit ruled that the employee could not reasonably perceive Title VII to forbid discrimination based on physical disabilities. *Silver v. KCA, Inc.*, 586 F.2d 138, 142 (9th Cir. 1978). Of course, the Americans with Disabilities Act would now apply in such a situation.

34. *Pettway*, 411 F.2d at 1004-05.

35. 42 U.S.C. § 2000e-3(a) (1994) (emphasis added).

36. *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989).

37. *Id.*

attempting to gather evidence for a lawsuit under the ADEA and therefore “was participating *in any manner* in litigation under ADEA.”³⁸

Similarly, in *Heller v. Champion International Corp.*, the plaintiff surreptitiously recorded exchanges with his employers, attempting to gather evidence for an ADEA claim.³⁹ The appellate court conceded that the plaintiff’s conduct was a kind of “disloyalty” but “not necessarily the kind of disloyalty that under these circumstances would warrant dismissal as a matter of law.”⁴⁰ The court then held that, as in *Grant*, the plaintiff in *Heller* “was participating in any manner in an investigation, proceeding, or litigation” under the ADEA.⁴¹

In contrast, in *O’Day v. McDonnell Douglas Helicopter Co.*, a plaintiff claimed that stealing sensitive personnel documents was protected activity because he intended to preserve them as evidence for a future ADEA lawsuit against his employer.⁴² In evaluating the plaintiff’s claim, the Ninth Circuit specifically balanced “the purpose of the [ADEA] to protect persons engaging *reasonably* in activities opposing . . . discrimination, against Congress’ equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.”⁴³ Regarding the “control” of an employee, the appellate court wrote that employers had an interest in “maintaining a harmonious and efficient operation.”⁴⁴

The Ninth Circuit then applied its balancing test to the facts in *O’Day*, concluding that the plaintiff’s conduct was a “serious breach of trust” and that to hold otherwise would be to “provide employees an incentive to rifle through confidential files looking for evidence that might come in handy in later litigation.”⁴⁵ Such an incentive, the court wrote, would afford employees “a license to flaunt company rules or an invitation to dishonest behavior.”⁴⁶ As a result, the plaintiff was not engaged in protected activity and could be legally discharged.⁴⁷

The question of whether an employee’s conduct constitutes a *prima facie* showing of protected activity under the participation clause also is closely linked to issues of (1) illegal acts committed pursuant to the opposition clause, and (2) protected yet disruptive conduct that may provide an employer with a legitimate

38. *Id.* (emphasis added).

39. *Heller v. Champion Int’l Corp.*, 891 F.2d 432, 436 (2d Cir. 1989).

40. *Id.*

41. *Id.*

42. *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 762 (9th Cir. 1996).

43. *Wrighten v. Metropolitan Hosps., Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984) (emphasis added).

44. *Id.* (citing *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978)).

45. *Id.*

46. *Id.* at 762-63.

47. *Id.*

reason for adverse action.⁴⁸ In cases where an employee commits illegal acts in supposed “opposition” to an employment practice, courts have held that such activity receives no statutory protection.⁴⁹ In cases where what would otherwise be protected “participation” or “opposition” renders a workplace disorderly, courts have held that employers have a nondiscriminatory reason for adverse actions.⁵⁰

The boundaries between these three issues, however, are poorly defined and ripe for litigation; conduct that a plaintiff’s attorney characterizes as *participation* “in any manner” in a discrimination claim also may be attacked by an astute defense attorney as illegal *opposition*, or turned by the defense attorney into an articulable reason for legitimate discipline.

B. Opposition

The variety of conduct that plaintiffs have attempted to characterize as opposition to their employers’ allegedly unlawful practices is seemingly endless. Ultimately, though, the challenges that plaintiffs face in alleging protected activity under the opposition clause tend to settle into three distinct groups, namely problems arising with regard to: (1) direct protests to an employer, (2) allegedly discriminatory practices not imputable to the employer, and (3) allegedly discriminatory practices not related to employment.

1. Protesting Directly to the Employer

First, as with the participation clause, an employee invoking protection against retaliation need not show that the underlying employer conduct was actually discriminatory. Rather, a plaintiff’s allegations need only show that the plaintiff had a good faith, reasonable belief that the conduct she opposed was an unlawful employment practice.⁵¹ The opposition clause differs markedly from the participation clause in that its good faith requirement means that an employee may not oppose a practice maliciously or make a claim with knowledge of its falsehood, as an employee may do under the participation clause. In a recent Fifth Circuit decision, the plaintiff complained to college officials about an offensive joke concerning condoms made by her supervisor in her presence.⁵²

48. See *infra* Sections III.B.1, V.B.1.

49. See *infra* Section III.B.1.

50. See *infra* Section III.B.1.

51. *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981). See also *Hicks v. St. Mary’s Honor Ctr.*, 90 F.3d 285, 291 (8th Cir. 1996) (analyzing error in district court’s decision that although the defendant/employer discharged the employee/plaintiff in retaliation for filing an EEOC complaint, the defendant was not liable because its decision was not racially motivated).

52. *Long v. Eastfield College*, 88 F.3d 300, 307-09 (5th Cir. 1996).

She alleged that this single incident created a hostile work environment.⁵³ The Fifth Circuit held that, while the incident itself did not constitute a claim for hostile work environment, the plaintiff could state a claim for retaliatory discharge for “protesting” what she “reasonable believed” to be illegal conduct under Title VII.⁵⁴

Conversely, of course, an employer may rebut an employee’s allegedly “reasonable belief” by proving the unreasonableness of the belief. For example, in another recent case, a husband and wife both were employees of Wal-Mart.⁵⁵ When the wife complained to Wal-Mart about its administrative opposition to her husband’s workers’ compensation claim and Wal-Mart’s failure to call or send flowers to her ill husband, a district court ruled that the wife could not *reasonably* believe that the ADA prohibited such employer conduct.⁵⁶ Hence, the wife had not engaged in protected activity under the opposition clause and could not sue for retaliatory discharge.⁵⁷

Courts have accepted informal protests of discriminatory employment practices as protected activity.⁵⁸ Among such informal manners of opposition are oral complaints to management, invoking an internal grievance procedure,⁵⁹ writing critical letters to customers, protesting against employment discrimination by an entire industry or by society in general, telling co-workers of an intent to file a discrimination charge, and expressing support of co-workers who have filed formal charges.⁶⁰

However, an employee’s complaint to her employer must be precise in terms of the employee’s grievance and its alleged discriminatory nature. For example, when an employee’s letter to his employer’s human resources department complained only about “unfair treatment in general” and expressed mere “dissatisfaction that someone else was awarded” a position, the employee

53. *Id.* at 309.

54. *Id.* at 305, 309.

55. *Deghand v. Wal-Mart Stores, Inc.*, 926 F. Supp. 1002 (D. Kan. 1996).

56. *Id.* at 1015-16 (“Flowers and personal phone calls are simple courtesies which no one would reasonably believe are a matter of federal right.”).

57. *Id.*

58. *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990).

59. *See, e.g., Hearn v. R.R. Donnelley & Sons Co.*, 460 F. Supp. 546, 548 (N.D. Ill. 1978). *See also infra* Section III.B.2 regarding the adequacy of internal grievance procedures and the consequences of the lack of an internal grievance procedure.

60. *Id.* *See also Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 176 (3d Cir. 1997) (“protected conduct” existed where in-house counsel advised two superiors of the civil rights implications of a lack of female representation in upper management and an imminent firing of an African-American senior vice president); *Sanborn v. Hunt Real Estate Corp.*, 65 Fair Empl. Prac. Cas. (BNA) 1305, 1307 (W.D.N.Y. Jul. 29, 1994) (“arguably” protected activity existed so as to avoid summary judgment where plaintiff alleged that she had observed alleged harassment and reported it to her supervisor, after which her supervisor told her not to disclose what she had seen).

had not “explicitly or implicitly allege[d]” an ADEA complaint, and, therefore, writing the letter was not a protected activity.⁶¹ In contrast, an employee’s letter to his congressman was sufficiently precise to be “opposition” although it was inartfully drawn and complained only vaguely about harassment of black employees at the defendant’s bus garage.⁶²

Additionally, when an employee’s opposition to an alleged employment practice becomes disruptive and/or ultimately unlawful, it is not statutorily protected, regardless of the employee’s motives. For instance, where employees have engaged in illegal “stall-ins,” blocking access roads to a plant, or have launched an illegal work stoppage to protest alleged racial discrimination in employment, courts have held that, while such conduct is clearly in opposition to an employment practice, it is not the sort of opposition that is protected.⁶³

Again, however, this is an area that is ripe for litigation. While defendants have established certain types of opposition as disruptive or even unlawful, plaintiffs have successfully characterized similar employee conduct, such as conning an employer into signing incriminating memoranda, as “participation in any manner.”⁶⁴

2. Opposing a Practice Not Imputable to an Employer

Employees often oppose practices that are not the sort of practices made illegal by Title VII. Often, these incidents occur when an employee opposes an act of discrimination by a co-worker or even a supervisor who does not herself meet the statutory definition of an employer. In evaluating whether such plaintiffs have met their prima facie burden, courts’ analyses are widely varied; some appellate courts have held that plaintiffs in these situations fail to allege protected activity, whereas other courts appear to analyze such cases in terms of a lack of causal relation to the employer.⁶⁵

61. *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701 (3d Cir. 1995). *See also* *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (disk-jockey’s opposition to a radio station’s English-only policy was not opposition to a discriminatory employment practice but only opposition based on his own personal concern about success).

62. *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 896 (3d Cir. 1993).

63. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 344 (8th Cir. 1972), *vacated on other grounds*, 411 U.S. 792 (1973); *King v. Illinois Bell Tel. Co.*, 476 F. Supp. 495, 499 (N.D. Ill. 1978). *See also* *Hazel v. United States Postmaster Gen.*, 7 F.3d 1, 4 (1st Cir. 1993) (holding that refusal to work on account of alleged discrimination is not protected opposition).

64. *See supra* note 37.

65. Although the language of the ADA, unlike Title VII or the ADEA, holds any “person” liable for retaliation, as opposed to any “employer,” courts have read this to mean only employer, as previously defined under Title VII and ADEA decisions; subsequently, plaintiffs under the ADA may not sue co-employees as “persons” who brought retaliatory actions against them. *Cable v. Department of Dev. Servs. of*

An illustrative example of a court addressing this issue as one of protected activity is the Eleventh Circuit's recent decision in *Little v. United Technologies*.⁶⁶ In *Little*, the plaintiff complained to his employer about a racially derogatory remark one of his co-workers made at a team meeting, a complaint for which the plaintiff claimed he was retaliated against by constant surveillance, scrutiny, and criticism.⁶⁷ Applying common law agency principles, the appellate court held that the plaintiff's opposition to his co-employee's remark was protected activity only if the remark could be attributed to the employer by the employer's having known of the comment and having failed to take prompt remedial action.⁶⁸

In a case with facts similar to those in *Little*, the Ninth Circuit held that a plaintiff who was fired after confronting a co-employee to protest a racially offensive remark the co-employee had made to the plaintiff's trainee should have directed her opposition at "an unlawful employment practice of an employer, not an act of discrimination of a private individual."⁶⁹

If, however, a plaintiff has not been provided a "reasonable avenue for complaint"⁷⁰ to express her opposition to a co-employee's discriminatory conduct, that conduct then may be imputed to her employer. Thus, the employee may be able to establish the existence of a protected activity. In such cases, courts examine not only whether the employer offered a grievance procedure, but whether the grievance procedure was adequate, given the gravity of the plaintiff's complaint. For instance, in *Reed v. A.W. Lawrence & Co.*, a plaintiff alleged that she was fired for complaining about a co-employee's sexually vulgar comment. In that case, the Second Circuit upheld a jury finding that the employer's avenue of complaint about her co-employee was not reasonable.⁷¹ Among the evidence supporting the jury's finding was a lack of adequate time

California, 973 F. Supp. 937 (C.D. Cal. 1997); *Burke v. Virginia*, 938 F. Supp. 320, 324 (E.D. Va. 1996).

66. *Little v. United Techs.*, 103 F.3d 956 (11th Cir. 1997).

67. *Id.* at 959.

68. *Id.* The court's application of agency principles in this area is in keeping with courts' general application of master-servant law to the substantive question of whether a supervisor's discrimination can constitute an underlying, unlawful employment action. See David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 101 (1995).

69. *Silver v. KCA, Inc.*, 586 F.2d 138, 141-42 (9th Cir. 1978) ("Even a continuing course of racial harassment by a co-employee cannot be imputed to the employer unless the latter both knows of it and fails to take remedial action."). *But see EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983) (when an employee protests the actions of her supervisor such opposition is protected activity).

70. *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992).

71. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1180-81 (2d Cir. 1996).

for investigation of the claim by the employer, the rapid closing of the investigation by the employer's investigator, and the fact that the plaintiff did not know she would be interviewed about the incident before arriving at an interview with the investigator.⁷²

However, as the Eleventh Circuit recognized in *Little*, even when a plaintiff has failed to impute a co-worker's conduct to her employer, she may still recover for discrimination by alleging that she reasonably believed the co-employee's conduct to be a Title VII violation by the employer itself.⁷³ For instance, in *Trent v. Valley Electric Ass'n*, the Ninth Circuit reversed summary judgment against a plaintiff who had protested to her employer regarding the comments of an outside contractor-consultant at a seminar.⁷⁴ Without deciding whether such a protest was protected activity in and of itself, the Ninth Circuit ruled that the plaintiff only had to raise a fact question regarding whether she had a "reasonable belief that it was unlawful under Title VII for her to be subjected to a series of offensive remarks at a seminar her employer required her to attend."⁷⁵ However, although a plaintiff may survive the lesser standard of summary judgment in this manner, at trial a mere "reasonable belief" that certain conduct constitutes an unlawful employment practice may be unlikely to withstand a motion for directed verdict.

Although courts approach opposition to a co-employee's practice from different angles, their decisions appear to rest on the same principle—an employee must allege a sufficient nexus between the conduct of a third party, whether an independent contractor, a co-employee, or a supervisor, and her employer in order to engage in protected activity against that third party. Ultimately, this basic tenet of principal-agency law underlies the reasoning in cases viewing the question of co-employee conduct as one of sufficient employer knowledge, failure to provide a plaintiff with an adequate grievance procedure, or even causation.⁷⁶

3. Opposing a Practice Not Related to Employment

Because a plaintiff must oppose an unlawful *employment* practice, an employee's otherwise protected activity must be in opposition to her employer's employment activities, as opposed to other activities an employer may carry out with regard to the public at large. For instance, in a case where an employee complained that he was retaliated against for opposing a school district's efforts to comply with a desegregation directive, the Eighth Circuit found that the employee's complaint did not relate at all to the "terms and conditions" of

72. *Id.* at 1181 n.14.

73. *Id.*

74. *Trent v. Valley Elec. Ass'n, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994).

75. *Id.* at 526.

76. *See infra* note 157.

anyone's employment but rather dealt with "concerns about the school's responsibility to the student body."⁷⁷ Similarly, where an employee's general advocacy of women's rights includes rights that could "extend to and include additional ideas relating to abortion, marriage, and the family," a court has refused to find that the employee was necessarily advocating particular employment rights so as to be "opposing" an employment practice.⁷⁸

C. Mutual Workplace Scenarios: Retaliation for Someone Else's Protected Conduct

Aside from the issue of how much retaliation an employer may permissibly carry out against an employee before it counts as an "adverse employment action,"⁷⁹ there is no more uncertain area of the case law on retaliation than that of retaliation against employees who work in the same workplace as spouses, relatives, or other closely related third parties who have themselves engaged in protected conduct. Those courts addressing this issue have taken opposite views: either the discrimination statutes, in general circumstances, bar retaliation actions by persons uninvolved in a third party's protected conduct or, because of the purpose of the acts, third-party actions are permissible across the board.

The most-cited case in this area is *De Medina v. Reinhardt*, in which a plaintiff who had been discharged sued her employer under Title VII for retaliation based on her husband's anti-discrimination activities.⁸⁰ The district court in *De Medina* first conceded that, because the anti-retaliation provision provides only that it is unlawful to retaliate against an individual when "*he* has opposed" an unlawful employment practice or when "*he* has made a charge, testified, assisted, or participated in any manner in an investigation[.]. . . . Congress did not expressly consider the possibility of third-party reprisals."⁸¹ Nonetheless, the district court concluded: (1) "tolerance of third party reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII," and (2) a contrary decision would produce "absurd results" since the spouse who actually had engaged in protected activity would have no standing to seek relief based on the adverse action taken against his spouse.⁸²

77. *Evans v. Kansas City, Missouri Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996).

78. *EEOC v. Del Rio Nat'l Bank*, 12 Fair Empl. Prac. Cas. (BNA) 1668, 1670 n.2 (W.D. Tex. Mar. 25, 1975).

79. *See infra* Section IV.

80. *De Medina v. Reinhardt*, 444 F. Supp. 573, 574 (D.D.C. 1978), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C. Cir. 1982).

81. *Id.* at 580 (citing 42 U.S.C. § 2000e-3).

82. *Id.* at 580-81.

Other district courts have arrived at the same conclusion as the court in *De Medina* with regard to husbands threatened and discharged because of their wives' protected activities and with regard to retaliation against other close familial relatives.⁸³

Additionally, the Sixth Circuit has held that Title VII protects an employee against retaliation for sending a co-worker to protest allegedly discriminatory policies.⁸⁴ Although in *EEOC v. Ohio Edison Co.* the Sixth Circuit explicitly rejected the plaintiff's argument that "Title VII prohibits employers from discriminating against any and all third parties in retaliation for a co-employee's protected activity," the court also reversed the district court's decision that "third parties who have not actually engaged in protected activities themselves, can never sue" for retaliation.⁸⁵ Citing both *De Medina* and the rule of statutory construction that Title VII should not be read so as to frustrate its purpose, the court in *Ohio Edison* expressly interpreted the phrase "he [the employee] has opposed any practice" to mean "he or his representative has opposed any practice" because it was "consistent with the objective of the Act which is to prohibit retaliation against protected activity."⁸⁶

In marked contrast to the foregoing decisions stands the Fifth Circuit's decision in *Holt v. JTM Industries*, in which the court reversed a jury verdict awarding a discharged plaintiff retaliation damages after his wife had participated in clearly protected activities.⁸⁷ In its holding, the Fifth Circuit emphasized that the plaintiff-husband had not alleged that he participated in any manner in his wife's activities and, as a result, to uphold the jury award would be to confer "automatic standing" on the plaintiff.⁸⁸ The Fifth Circuit then

83. See *Wu v. Thomas*, 863 F.2d 1543, 1547-48 (11th Cir. 1989) (holding that husband's claim that he was retaliated against after his wife filed an EEOC claim against the university where they both worked was properly before court), *cert. denied*, 511 U.S. 1033 (1994); *Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934, 941 (N.D. Ga. 1994) ("In a case of an alleged retaliation for participation in a protected activity by a close relative who is a co-employee, the first element of the prima facie case is modified to require the plaintiff to show that the relative was engaged in statutorily protected expression."); *Mandia v. Arco Chem. Co.*, 618 F. Supp. 1248, 1253 (W.D. Pa. 1985) (court impliedly accepts the possibility of third-party retaliation in holding that plaintiff bore the burden of proof on whether he was terminated because of his wife's EEOC charge); *United States v. City of Socorro*, 25 Fair Empl. Prac. Cas. (BNA) 815 (D.N.M. Jan. 9, 1976) (Title VII violated when husband was threatened because his wife was engaging in protected activities); *Kornbluh v. Stearns & Foster Co.*, 73 F.R.D. 307 (S.D. Ohio 1976) (plaintiff entitled to trial on issue of retaliatory discharge because of his wife's lawful engagement in picketing employer).

84. *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir. 1993).

85. *Id.* at 544.

86. *Id.* at 545.

87. *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1821 (1997).

88. *Id.*

weighed the equitable considerations of allowing reprisals against third parties against the anti-retaliation provision's literal language, graciously allowing that to permit the husband's judgment to stand "might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities."⁸⁹ However, the court concluded that such a rule would contradict the plain language of the statute.

By emphasizing the fact that the plaintiff had not participated whatsoever in his wife's protected conduct, and that the court's decision was, therefore, simply a rejection of "automatic standing," the Fifth Circuit in *Holt* was able to avoid the clearly distasteful holding that employers could retaliate with unfettered abandon against third parties for their relatives' protected conduct. Likewise, by anchoring its decision in *Ohio Edison* on the fact that the person who actually engaged in the protected activity did so as the plaintiff's express "representative," the Sixth Circuit also was able to avoid the arguably liberal holding that any and all third parties could invoke the anti-retaliation provision based on a closely related employee's protected activity.⁹⁰

Taken together, *Holt* and *Edison* are more restrictive than *De Medina* and its progeny in that *Holt* and *Edison* require that an employee somehow involve herself in a third party's protected conduct before claiming the opposition as her own, while those courts employing *De Medina* concentrate on an employer's retaliatory animus, without overly concerning themselves with the plaintiff's statutory standing. Regardless of the arguably more equitable outcome under *De Medina*, the plain language of the statutes is clearly on the side of a more restrictive reading in this area, as opposed, for instance, to the more restrictive readings of the meaning of "adverse action" in the following Part of this Article.⁹¹

IV. ADVERSE ACTION

Once a plaintiff establishes that she has engaged in protected activity, courts must then determine whether the employer's conduct constitutes "retaliation." Importantly, both Title VII and the ADEA contain no language regarding the type of employer conduct that will trigger a retaliation claim. The anti-retaliation provisions speak only in terms of "discrimination" in that it is "an

89. *Id.* The *Holt* court distinguished its holding from that of *De Medina* by writing that it was unclear in *De Medina* whether the plaintiff had participated in any manner in her husband's activities, whereas in the case before it, the plaintiff had simply not participated in his wife's activities and could not be granted "automatic standing." *Id.*

90. *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993). Indeed the Sixth Circuit even recognized the slippery slope inherent in such a holding when it warned against such a broad reading of Title VII that "any time that an adverse employment action is taken by an employer against an employee at the same time a second employee is engaging in protected activity, the first employee could allege retaliation." *Id.* at 546.

91. See *infra* Section IV.

unlawful employment practice for an employer to *discriminate* against any of his employees or applicants⁹² because of their participation or opposition activities. Hence, the plain language of these two Acts, unlike the language of the ADA,⁹³ gives little guidance as to what constitutes prohibited retaliation.

A. Retaliatory Conduct

Courts generally agree that employment decisions involving hiring, granting leave, discharge, promotion, and compensation suffice as discrimination.⁹⁴ But aside from these more obvious acts of retaliation, courts differ markedly in their treatment of less obvious retaliatory employer conduct, so much so that a clear split has arisen among the circuits on the issue. As a result, whether legally actionable retaliation has occurred in a given case will depend largely on the jurisdiction in which the litigants find themselves.⁹⁵

92. 42 U.S.C. § 2000e-3 (1994) (emphasis added).

93. The ADA's anti-retaliation clause contains participation and opposition clauses like those found in Title VII and the ADEA, but it also includes a separate section: It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

42 U.S.C. § 12203(b) (1994).

Thus, not only is the employer prohibited from "discriminating," it may not "coerce, intimidate, threaten, or interfere" with one who has engaged in protected activity. 42 U.S.C. § 12203(b) (1994). Arguably, this language broadens the scope of prohibited employer actions. Certainly, those Title VII decisions mandating that an "ultimate employment action" exist before finding actionable retaliation should not provide precedent for a narrow interpretation of the ADA's anti-retaliation clause.

No reported case, however, appears to contrast the language of the various anti-retaliation provisions; in fact, no ADA decision appears to actually analyze the distinctive ADA language apart from the language of Title VII and the ADEA. However, without discussing the ADA's actual language, one district court opinion has recognized that harassment may constitute retaliation under the ADA. *See Muller v. Costello*, No. 94-CV-842, 1996 U.S. Dist. LEXIS 5239, at *20 (N.D.N.Y., Apr. 16, 1996). The EEOC regulations implementing the ADA's anti-retaliation provision merely restate the statutory language and, hence, provide no interpretative guidance either. 29 C.F.R. §§ 1630.2 (a), (b) (1995).

As a result, proponents of the narrow construction of the anti-retaliation clauses in Title VII and the ADEA could argue that the omission of the additional language in those acts supports their restrictive interpretations of what constitutes retaliation under those two statutes. However, for an opposing view, *see infra* Section V of this Article.

94. *See, e.g., Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980); *Whatley v. Metropolitan Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir. 1980).

95. *See Nelson v. University of Maine Sys.*, 923 F. Supp. 275, 281 (D. Me. 1996) ("Divergent authority, nationwide, obscures the parameters of adverse employment

Some courts have adopted an extremely narrow view of actionable retaliation, holding that the retaliation must involve a “material” or “ultimate” employment decision.⁹⁶ In these jurisdictions, conduct which falls short of such characterization renders the plaintiff’s prima facie case legally inadequate, and as a result, wide open to a summary judgment motion by the defendant. A second set of courts requires that the adverse conduct be related to the employment and have more than a trivial or insignificant effect on the employment relationship.⁹⁷ Yet a third set of courts emphasizes that retaliation can come in “many shapes and sizes”; these courts allow for a wide range of actions constituting retaliation, at least for the purposes of surviving the employer’s motion for summary judgment.⁹⁸

1. The Narrow View: Ultimate Employment Decision

Courts that narrowly construe the anti-retaliation clause appear to be concerned that a broad interpretation of the clause may hinder the ability of employers to manage their employees,⁹⁹ a concern that is not without merit. An employee who has engaged in protected activity should not be able to wield her protected status as a hammer against any and all adverse events that might affect her at the workplace.¹⁰⁰ In jurisdictions with liberal readings of “adverse action,” it is undoubtable that many employers feel hamstrung to take any legitimate action against such an employee for fear of triggering a retaliation charge; in these more liberal circuits, employers may very well feel that a “protected” employee is truly “untouchable.” In seeming response to these employer concerns, several courts have developed a simple, predictable, bright-line rule—adverse actions must be “ultimate employment decisions,” such as hiring and firing, in order to withstand summary judgment.

action.”).

96. See, e.g., *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), cert. denied, 118 S. Ct. 336 (1997).

97. See, e.g., *Nelson v. Upsala College*, 51 F.3d 383, 388 (3d Cir. 1995).

98. See, e.g., *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996).

99. See, e.g., *Nelson v. Univ. of Maine Sys.*, 923 F. Supp. 275, 281 (D. Me. 1996) (“This Court is weary of defining an adverse employment action in a manner which discourages open communication, critical or otherwise, between employers or supervisors and their employees as to the employee’s employment performance.”). Despite its concerns, however, the *Nelson* court recognized that “within reasonable limits, in order to arrive at a determination as to adverse employment action, a case by case review is necessary.” *Id.* at 282.

100. *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (“Not everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.”).

For example, in *Mattern v. Eastman Kodak Co.*,¹⁰¹ the Fifth Circuit reversed a jury verdict finding that an employer had retaliated against the plaintiff in return for her filing of a sexual harassment claim.¹⁰² At trial, the employee in *Mattern* alleged that: (1) her fellow employees had been notably hostile toward her; (2) her tools had been stolen at her worksite; (3) her supervisors made an unprecedented visit to her home to check on the validity of her illness after she called in sick; and (4) she missed a chance for a pay increase and was placed on “final warning.”¹⁰³ Despite affirmative jury findings on these incidents, the Fifth Circuit held that, as a matter of law, such actions by the employer did not violate the retaliation clause because they did not constitute an “ultimate employment action.”

Instead of concentrating on what legally constituted “discrimination” in return for protected activity under Title VII, the court in *Mattern*, like most other courts, focused solely on whether an “adverse employment action” existed. In underlining its “ultimate employment decision” rule, the court emphasized that Title VII was not designed to either “address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions” or “an interlocutory or mediate decision which can lead to an ultimate decision.”¹⁰⁴ Defending its holding, the *Mattern* court reasoned: “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.”¹⁰⁵

The Fifth Circuit in *Mattern*, and numerous district courts employing the strict ultimate employment decision standard,¹⁰⁶ have relied expressly on the

101. 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997).

102. *Id.*

103. *Id.* at 707-08.

104. *Id.*

105. *Id.* at 708 (emphasis in original).

106. *Williams v. Encompass*, No. 96-8574, 1997 U.S. Dist. LEXIS 3041, at *4 (E.D.N.C. June 20, 1997) (threat of firing and refusal to give plaintiff tools necessary to do job are not adverse employment actions); *Sharp v. City of Houston*, 960 F. Supp. 1164, 1172 (S.D. Tex. 1997) (shunning by colleagues, exclusion from morning roll call, tampering with saddle, inassistance after auto accident, and holding banquet to honor alleged sexual harassers, are not adverse employment actions); *Keegan v. Dalton*, 899 F. Supp. 1503, 1511 (E.D. Va. 1995) (supervisors attempts to erect “minor hindrances” to accomplishment of plaintiff’s tasks are not adverse employment actions); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 829, 836 (D. Md. 1994) (warning placed in plaintiff’s file, and requirement that plaintiff perform strenuous physical activities not adverse actions), *aff’d*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); *Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 377 (D. Md. 1994) (“not speaking to [employee] and giving her less favorable assignments in the ‘dirtier’ part of the basement” are adverse employment actions).

Fourth Circuit's decision in *Page v. Bolger*¹⁰⁷ as the genesis of their holdings. However, these courts' exclusive reliance on *Page* is misplaced, most fundamentally so because *Page* simply did not concern an anti-retaliation clause. Rather, *Page* addressed a plaintiff's attempt to rewrite the prima facie case requirements in a failure-to-promote case brought under 42 U.S.C.A. § 2000e-16(a), a particular section of Title VII which deals only with discrimination in federal employment and which itself requires that there be a "personnel action," not merely "discrimination."¹⁰⁸

In *Page*, an African-American male alleged that the racial composition of a review panel that recommended individuals for promotion qualified as discrimination in a personnel action under Section 2000e-16(a). The Fourth Circuit disagreed, reasoning that the plaintiff had to assert a claim regarding the panel's actual decision rather than challenge the composition of the panel itself.¹⁰⁹ The court held that steps in the process toward a final decision are merely mediate decisions that do not provide a basis for liability. Thus, there was no personnel action at issue in *Page* to trigger the coverage of the statute.¹¹⁰ In determining the scope of "personnel action," the court looked to other "comparable provisions of Title VII, most notably . . . 42 U.S.C. § 2000e-2(a) (1)," the basic anti-discrimination provision of Title VII.¹¹¹

Both Title VII provisions cited in *Page* are "substantive" discrimination sections, not anti-retaliation sections; the latter being so far removed from the concerns of actual substantive discrimination that they protect plaintiffs even when the underlying discrimination claims are unsuccessful.¹¹² Moreover, even if the statutory term at issue in *Page* actually *did* concern retaliation, the language in the anti-retaliation provisions is arguably broader with regard to employer conduct in that it prohibits any discrimination as opposed to merely personnel actions. Nonetheless, *Page* constantly is cited by courts employing a conservative adverse action standard. Despite these courts' flawed reliance on *Page* as precedent and their failure to engage in statutory construction, courts continue to employ the *Page* language as a mechanistic, determinative standard, especially in the wake of *Mattern's* affirmative reliance on *Page*. For instance, in one recent district court case, a plaintiff alleged that her employer retaliated against her by threatening to discharge her, intimidating her, interfering with her management tasks, and ultimately reassigning her from her original office to

107. 645 F.2d 227 (4th Cir.), cert. denied, 454 U.S. 892 (1981).

108. *Id.* at 232. For a detailed criticism of *Mattern's* reliance on *Page*, see *Deavenport v. MCI Telecommunications Corp.*, No. 96-13-002, 1997 U.S. Dist. LEXIS, 12342, at *11-19 (D. Colo. Aug. 13, 1997).

109. *Page*, 645 F.2d at 233.

110. *Id.*

111. *Id.*

112. See *supra* note 33.

another office for ninety days of training.¹¹³ Citing *Mattern*, the district court stated that the employer's threats of removal were "not adverse employment actions because of their lack of consequence."¹¹⁴

Other examples of non-actionable employer conduct under the ultimate employment decision standard include: (1) a plaintiff being followed by supervisor while off the job;¹¹⁵ (2) an employer threatening to discharge a protected employee and refusing to give the employee the tools necessary to complete her job; (3) an employer excluding an employee from the morning roll call, tampering with the employee's saddle, and holding a banquet to honor the alleged sexual harassers of the employee; and (4) a supervisor's refusal to speak to an employee, coupled with giving the employee the least favorable assignments in the "'dirtier' part of the basement."¹¹⁶

2. The Middle-of-the-Road Approach: Requiring Adverse Impact on Plaintiff's Employment Relationship

In a second category of cases involving adverse action, courts predicate the existence of adverse action on conduct that is detrimental to the plaintiff's employment opportunities, either at a current or future job.¹¹⁷ For example, in *Nelson v. Upsala College*, the Third Circuit stated that although "the connection with employment need not necessarily be direct, it does not further the purpose of Title VII to apply Section 704 to conduct unrelated to an employment relationship."¹¹⁸ The court further wrote that "cases dealing with unlawful retaliation under Title VII typically involve circumstances in which the defendant's conduct has impaired or might impair the plaintiff in employment situations."¹¹⁹

In *Nelson*, the plaintiff's former employer barred the plaintiff from coming onto the employer's campus. The court held that such action "had no impact on any employment relationship that [plaintiff] had, or might have in the future."¹²⁰ On the other hand, the court gave several examples of conduct which would affect a plaintiff's employment opportunities, including: (1) deletion of positive

113. *Seely v. Runyon*, No. 2:95-CV-279W, 1997 U.S. Dist. LEXIS 7836 (D. Utah May 28, 1997).

114. *Id.* at *12. In particular, the court held that the ninety-day training reassignment did not constitute adverse employment action in that, as in other cases involving lateral transfers, it was nothing more than a "mere inconvenience or an alteration of job responsibilities." *Id.* at *15 (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

115. *Watts v. Kroger Co.*, 955 F. Supp. 674 n.25 (N.D. Miss. 1997).

116. *See supra* note 105.

117. *Nelson v. Upsala College*, 51 F.3d 383, 388 (3d Cir. 1995).

118. *Id.* at 387.

119. *Id.*

120. *Id.* at 389.

references from plaintiff's personnel file after an EEOC charge was filed; (2) giving a negative reference for a former employee who had filed an EEOC charge; (3) discontinuance of severance benefits after an EEOC charge was filed; and (4) refusing to issue a letter of recommendation and making untrue remarks about plaintiff to a prospective employer.¹²¹

Nonetheless, the court in *Nelson* appeared to acknowledge the shortcomings under Title VII of its employment relationship standard when it wrote:

[I]f an employer physically assaults a former employee or burns down her house in retaliation for the employee having brought a Title VII charge, relief might not be available under section 704. However, in such cases the former employee could assert a state-law damage claim.¹²²

Thus, courts utilizing the employment relationship standard first focus on whether there is a sufficient nexus between an employer's action and the plaintiff's employment opportunities, either current or future. The courts' analyses then turn to the severity of the employer's conduct, for just as in the "ultimate employment decision" cases, an employer's conduct may not be sufficiently "adverse" to constitute actionable retaliation.

For example, the Second Circuit recently held that to bar a terminated employee from using an office and phone to conduct a job hunt presented only a minor, ministerial stumbling block toward securing future employment, and, thus, did not constitute adverse employment action.¹²³ Likewise, the Third Circuit held that "unsubstantiated oral reprimands" and "unnecessary derogatory comments" did not rise to the level of the adverse action required for a retaliation claim.¹²⁴ Additionally, in a recent Eighth Circuit decision, the court held that requiring an employee to move to a different city did not rise to the level of an adverse employment action since the move entailed no change in position, title, or salary.¹²⁵ The Eighth Circuit reiterated that "not everything that makes an employee unhappy is actionable adverse action."¹²⁶

121. *Id.* (citing *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1054 (2d Cir. 1978)). Although the court in *Nelson* did not reference any retaliatory conduct in the context of an ongoing employment relationship, the nature of the actions the court considered to be post-employment adverse actions are easily analogous to the context of present, ongoing employment. *Id.*

122. *Nelson*, 51 F.3d at 388.

123. *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465-66 (2d Cir. 1997).

124. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3d Cir. 1997).

125. *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997).

126. *Id.*

3. The Broad View: A Case-by-Case Analysis

In contrast to the foregoing approaches to the meaning of “adverse employment action,” other courts addressing the issue of retaliation have identified a broader range of acts as adverse, based on the scope of the actions’ consequences. For instance, in *Collins v. Illinois*, the Seventh Circuit held that an employer retaliated against an employee when it transferred the employee to a lateral position where: (1) her supervisors were unsure of her new responsibilities; (2) she was largely relegated to reference work rather than consulting work; and (3) she had lost her office and telephone.¹²⁷ The move did not involve any reduction in pay or benefits, which would almost certainly have been determinative under the ultimate employment decision standard, but the Seventh Circuit nonetheless held that the transfer was retaliatory.¹²⁸ Other examples of retaliatory conduct which would have fallen short of the ultimate employment decision standard but which nonetheless have been successful in other, more liberal jurisdictions include: reduction in duties,¹²⁹ isolation at the workplace,¹³⁰ cancellation of a major public symposium in an employee’s honor,¹³¹ and efforts to scuttle a former employee’s search for a job.¹³²

Addressing the perceived need for a broad definition of “adverse action,” the District of Columbia Circuit Court has written, “The statute itself proscribes ‘discriminat[ion]’ against those who invoke the Act’s protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion.”¹³³

Finally, in a case in which the plaintiff alleged that the retaliation against her took the form of co-worker harassment that her employer ignored, the Seventh Circuit, in perhaps the most assertive declaration in support of a broad

127. 830 F.2d 692, 702-04 (7th Cir. 1987).

128. However, the Seventh Circuit cautioned in a later case that a bruised ego or personal humiliation is insufficient to establish a “materially adverse employment action” where the transfer involved a change only in the reporting relationship of plaintiff to his supervisor. See *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994).

129. *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994). The *Welsh* Court noted that, while “not every unpleasant matter short of [discharge, demotion, or failure to promote] creates a cause of action, . . . many things, such as constant rudeness, conspicuous discriminatory acts, etc., could have an adverse effect upon employment. Within reasonable limits, in order to arrive at a determination, a case by case review is necessary.” *Id.* See also *Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994) (dramatic downward shift in skill level required to perform job responsibilities can constitute adverse action).

130. *Dortz v. City of New York*, 904 F. Supp. 127, 156 (S.D.N.Y. 1995).

131. *Passer v. American Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991).

132. *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164-65 (10th Cir. 1977).

133. *Passer*, 935 F.2d at 331.

interpretation of “adverse action,” wrote that the employer “[sat] on its hands in the face of the campaign of co-worker harassment” and that:¹³⁴

[t]here is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action, as we have often held . . . adverse actions can take many shapes and sizes No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment; actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services (like secretarial help or a desktop computer), or cutting off challenging assignments The law deliberately does not take a “laundry list” approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.¹³⁵

B. Analogy to Title VII’s Substantive Anti-Discrimination Provision

Courts employing more restrictive readings of retaliation have turned to the substantive anti-discrimination provision in Title VII in defense of their position, although the wording of that section is far more detailed than that of the anti-retaliation clause.¹³⁶ Under Title VII it is illegal for the employer to:

(1) . . . fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual’s race, color sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee¹³⁷

The numerous verbs in this section of the statute contrast with the perhaps intentionally vague language of the anti-retaliation clauses, which merely state, without limitation, that it is “an unlawful employment action” to “discriminate.”¹³⁸ Thus, the anti-retaliation provision, which is not limited to a

134. Knox v. Indiana, 93 F.3d 1327, 1335 (7th Cir. 1996).

135. *Id.* at 1334.

136. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (“Courts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee’s compensation, terms, conditions or privileges or employment into the doctrinal requirement that the alleged retaliation constitute ‘adverse employment action.’”).

137. 42 U.S.C. §§2000e-2(a)(1), (2) (1994) (emphasis added).

138. 42 U.S.C. §2000e-3 (1994) (Title VII); 29 U.S.C. § 623(d) (1994) (ADEA).

specific definition, as is the substantive discrimination provision, may be construed more broadly than the substantive anti-discrimination provisions. However, the Fifth Circuit's ultimate employment decision standard appears to contradict even the plain language of the substantive anti-discrimination clause. Under the statute, discrimination in the "terms and conditions" of employment is as actionable as the easily identifiable actions of hiring and firing.¹³⁹

For example, hostile work environment harassment claims affect the terms and conditions of employment and are actionable.¹⁴⁰ A work environment may be discriminatory by being merely "discriminatorily hostile" or "abusive." The U.S. Supreme Court has made it clear that Title VII is violated when a workplace is permeated with discriminatory intimidation, ridicule, and insult that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."¹⁴¹ Thus, in substantive discrimination cases, neither economic harm nor psychological injury are necessary;¹⁴² generally, the standard for imposition of employer liability for a hostile work environment is a "knew or should have known" standard, under which an employer is liable if it failed to implement prompt and appropriate corrective action.¹⁴³

Similarly, in many retaliation cases, the conduct at issue may involve harassment by co-workers who resent the protected activity of the plaintiff. Often, the employer may be aware of this conduct. Corresponding to the definition of discrimination in some circuits, such co-employee harassment may qualify as "adverse employment action."¹⁴⁴ For instance, the Seventh Circuit noted in *Knox v. Indiana* that "there is nothing to indicate that the principle of

139. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment."). Importantly, the *Harris* court recognized that determining whether conduct constituted actionable harassment was "not, and by its nature cannot be, a mathematically precise test." *Id.* at 22. Determining whether employer conduct constitutes actionable retaliation may pose analytically similar problems for the Supreme Court if it ever considers the matter.

140. *Id.* at 21-22.

141. *Id.*

142. *Id.* at 21.

143. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 621 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). However, even this substantive area reflects uncertainty, as the Supreme Court will decide when an employer is liable for hostile work environment sexual harassment committed by a supervisor as opposed to co-workers. *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 438 (1997).

144. Of course, not all hostile work environment cases are sufficiently severe or abusive to be actionable. Likewise, one could argue that not all retaliatory conduct is sufficiently severe to be actionable. However, such an argument in no way mandates the use of a constricted "ultimate employment decision" definition of actionable retaliation.

employer responsibility does not extend equally to other Title VII claims, such as a claim of unlawful retaliation."¹⁴⁵

Nonetheless, courts imposing a narrow reading on the anti-retaliation clause are quick to characterize such harassment as "predictable tension that arises in an office."¹⁴⁶ For example, in *Swain v. Roadway Express, Inc.*, a plaintiff alleged that co-workers retaliated against her by driving their cars extremely close to her as if to run the plaintiff over, ostracizing her, and allegedly assaulting her.¹⁴⁷ After citing the *Page* ultimate employment decision standard, the court held that "these alleged actions, while serious and quite possibly illegal do not constitute adverse employment actions as a matter of law."¹⁴⁸

Aside from their misplaced reliance on *Page v. Bolger*, courts accepting the ultimate employment decision standard essentially adopt mutually contradictory positions in treating retaliation claims. On one hand, these courts' limited definition of adverse action renders a retaliation claim far more limited than an underlying discrimination claim. On the other hand, all courts, including "ultimate employment decision" courts, recognize that a retaliation claim may exist even when no actual discrimination has occurred, implying that retaliation claims, by their very nature, have broader objectives than discrimination claims.

V. CAUSATION

Because there are two independent showings of causation under the *McDonnell Douglas* scheme,¹⁴⁹ there are two-times as many pitfalls for the unwary employee in asserting the third prima facie element of a retaliation case.¹⁵⁰ In the employee's initial complaint, before the employer has proffered a legitimate, non-discriminatory reason for the adverse action, the employee has a minimal burden; courts have variously held that a plaintiff need only allege evidence "sufficient to raise the inference that her protected activity was the likely reason for the adverse action" and that a plaintiff "merely . . . establish that the protected activity and the adverse action were *not wholly unrelated*."¹⁵¹ Even

145. *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996). The EEOC agrees that retaliatory harassment, whether perpetrated by supervisors or co-workers, is actionable. See EEOC Compliance Manual, § 614.7(c) (Jan. 1988), available in LEXIS, Employment Library, Eeoman File.

146. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 836 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

147. *Swain v. Roadway Express, Inc.*, No. HAR 96-279, 1996 WL 281564 (D. Md. May 13, 1996).

148. *Id.* at *5.

149. See *supra* Section II.A.

150. The "causation must be proved in its own right" and its "existence cannot be bootstrapped from the existence of the other two elements." *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990).

151. *Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir.

the Fifth Circuit, while refusing to adopt the “wholly unrelated” test for this initial causation showing, has conceded that a plaintiff still need not prove that her protected activity was the “sole factor” motivating an adverse action.¹⁵²

A. Causal Inferences

In evaluating this first causal showing of retaliation, courts regularly allow for mere allegations of close temporal proximity between a plaintiff’s protected conduct and the alleged adverse action to give rise to an inference of causation.¹⁵³ Time periods of one day, one week, two weeks, and even up to fifteen months have been held sufficient to infer causation and thereby put the defendant to his burden to respond.¹⁵⁴ In computing the time between protected conduct and adverse action, a court should not concentrate solely on the first instance of protected action since a later re-urging of a complaint may shorten the temporal period.¹⁵⁵ However, regardless of close temporal proximity, no causal link may exist if the employee does not allege that her employer was aware of her protected activity.¹⁵⁶ And, where time periods of one year, and even

1990); *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).

152. *Long v. Eastfield College*, 88 F.3d 300, 304 n.4 (5th Cir. 1996).

153. Regarding the initial showing of causality under a Title VII or ADEA claim, the plaintiff need only show “actions taken by [his] employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [retaliatory] criterion illegal under [Title VII].” *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978). A showing that the parties’ actions are sequential, with alleged retaliatory adverse actions following protected activities, may establish a prima facie element of causality. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1141 n.13 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

154. *Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922, 939 (7th Cir. 1996). The *Johnson* Court allowed for a causal inference, arising from the plaintiff’s allegations of his employer having denied him higher vacation pay and use of a company vehicle, because the denials occurred two weeks after the plaintiff filed his EEOC complaint. *Id.* (citing *Holland v. Jefferson Nat’l Life Ins. Co.*, 883 F.2d 1307, 1315 (7th Cir. 1989) (finding that a one week period between a complaint and an adverse employment decision was sufficient to create a factual issue on the question of causation)). See also *Harrison v. Metropolitan Gov’t of Nashville*, 80 F.3d 1107, 1118 (6th Cir. 1996); *Johnson v. Sullivan*, 945 F.2d 976, 980 (7th Cir. 1991).

155. *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997). In *Kachmar*, the Third Circuit ruled that an employee’s initial consultations with his superiors were not the only protected activity the employee engaged in; rather, the district court failed to take into account later legal “counsel[ing]” of the employee’s superiors regarding the implications of the same disparate treatment of which the employee had initially complained. *Id.*

156. *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994).

up to ten years have passed between protected activity and adverse action, courts have held, not surprisingly, that there may be no inference of causation based solely on such extended periods.¹⁵⁷

When there is a lack of temporal proximity between the protected activity and the adverse action sufficient to raise an inference of causality, the Third Circuit has held that a "pattern of antagonism" following the protected conduct also can give rise to the inference.¹⁵⁸ Moreover, these two manners, temporal proximity and a pattern of antagonism, are still "not the exclusive ways to show causation, as the proffered evidence, looked at as a whole, may suffice to raise the inference."¹⁵⁹ In examining the whole of the plaintiff's complaint, the court should make a "more generalized inquiry" into whether the protected activity was the "likely reason" for the plaintiff's dismissal.¹⁶⁰ Nonetheless, where the

157. *Chavez v. City of Arvada*, 88 F.3d 861, 866 (10th Cir. 1996). The *Chavez* court held that the ten-year period between the protected activity and the adverse employment action did not permit an inference of causation in retaliation case unless there were sufficient evidence tying the adverse employment action to the past protected activity. One ambiguous, disputed statement in the interim was not such "sufficient evidence." *Id.*

158. *Kachmar*, 109 F.3d at 177 (citing *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 895 (3d Cir. 1993)). Nonetheless, the Tenth Circuit appears to have ruled that no causal inference is possible at all if there is no temporal proximity between the protected conduct and the adverse employment action. *Candelaria v. EG & G Energy Measurements, Inc.*, 33 F.3d 1259, 1261-62 (10th Cir. 1994); *Burrus v. United Tel. Co., Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982). However, in each of these cases, a significant amount of time had passed between the protected conduct and the adverse action. *Candelaria*, 33 F.3d at 1259; *Burrus*, 683 F.2d at 343. Therefore, it is questionable whether the Tenth Circuit would reach the same outcome as it did in *Burrus* and *Candelaria*, if it were faced with a case in which there was only a reasonable amount of time coupled with, for instance, an ongoing pattern of antagonism.

159. *Kachmar*, 109 F.3d at 177. Another consideration "in the whole" of the plaintiff's complaint is an employer's inconsistency in following its normal procedures with regard to the plaintiff and a series of facially neutral incidents that, when taken as a whole, were too coincidental to be explained as normal procedure. *Gemmell v. Meese*, 655 F. Supp. 577, 583 (E.D. Pa. 1986); *Sims v. MME Paulette Dry Cleaners*, 580 F. Supp. 593, 598 (S.D.N.Y. 1984).

160. *Kachmar*, 109 F.3d at 179. In a 1996 opinion, however, the Fifth Circuit demonstrated to what extreme lengths a court could go in agonizing over the question of causation. In *Long v. Eastfield College*, two employees brought suit for retaliatory discharge after their respective supervisors, both of whom harbored allegedly retaliatory motives, recommended that the plaintiffs be terminated. 88 F.3d 300, 305-06 (5th Cir. 1996). The court first distinguished between: (1) adverse employment actions carried out by an "ordinary employee," which were generally not causally related to the plaintiffs' employer; and (2) adverse employment actions carried out by a "supervisory employee" with the "authority to make the decisions to discipline, hire, and fire subordinate employees," which were causally related to the plaintiffs' employer. *Id.* at 305-07.

only evidence of a causal connection between protected conduct and adverse action was that it was “the only plausible reason,” the Eighth Circuit has ruled that there is “not, without more, sufficient [evidence] to support [a] retaliation claim.”¹⁶¹ And, where an employee willfully resigns after filing only a single complaint and the employer goes so far as to ask the employee to withdraw his resignation, there is no inference of causation.¹⁶²

B. Rebutting Causation—Legitimate Reasons and Lack of Intent

1. Legitimate Reasons

As applied to the anti-retaliation provisions, the *McDonnell Douglas* scheme requires that an employer rebut an employee’s first showing of causation with a legitimate reason for the adverse employment action, a burden which the Eleventh Circuit has called “exceedingly light.”¹⁶³ Often, employers satisfy this burden by simply alleging poor business and economic prospects as a legitimate reason for discharge.¹⁶⁴ Employers also may claim dissatisfaction with the employee’s performance and buttress this claim with some sort of documentation. Examples of such documentation may be poor job performance reviews, student evaluations of a teacher, and budgets showing a lack of need for an employee’s employment position in the future.¹⁶⁵

In the first category—adverse action by an ordinary employee—the appellate court purported to include co-employees whose allegedly discriminatory actions could not be imputed to the employer. *Id.* at 306. In treating this issue, however, the court thoroughly muddled the distinct issues of: (1) co-employee discrimination that a plaintiff opposes but which is not imputable to an employer; and (2) any eventual, adverse action that the employer takes against the plaintiff in return for her opposition to her co-employee’s conduct.

To complicate matters further, the two supervisors in *Long* did not make the ultimate decision on adverse action against the plaintiffs, though they did recommend that the employees be discharged. *Id.* This, in turn, sent the court spiraling downward into a belabored study of whether the two supervisors’ superior conducted his own investigation, in which case there was no *prima facie* showing of a causal relation, or whether the superior merely “rubber stamped” the recommendations of the plaintiffs’ two supervisors, in which case the plaintiffs had met the *prima facie* element of causation. *Id.* Ultimately, the court concluded that there was a *prima facie* showing of causation. *Id.*

161. *Evans v. Pugh*, 902 F.2d 689, 693 (8th Cir. 1990).

162. *Frost v. Chromalloy Aerospace Tech. Corp.*, 697 F. Supp. 82, 87 (D. Conn. 1988).

163. *Meeks v. Computer Assocs. Int’l*, 15 F.3d 1013, 1021 (11th Cir. 1994) (citing *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1495 (11th Cir. 1989)).

164. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996).

165. *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 477 (7th Cir. 1995); *West v. Fred Wright Constr. Co.*, 756 F.2d 31, 33 (6th Cir. 1985). Of course, oral

Nonetheless, when negative job performance reviews occur during the pendency of an employee's underlying discrimination suit, such documentation may not be sufficient to overcome the employee's inference of causation.¹⁶⁶ And, in the event that documentation generated after an employee engages in protected action may establish a legitimate reason for adverse action, the employee may nonetheless rebut the employer's explanation with proof that such documentation was pretextual.¹⁶⁷

Employers also have argued that the manner in which an employee engages in her protected conduct may itself provide the employer with a legitimate reason for adverse action. In response to an employer's claim that it legitimately discharged an employee because the employee engaged in "disloyalty" by informing one of the employer's customers that the employer was racist, the Ninth Circuit has held that disloyalty alone did not provide a nondiscriminatory reason for adverse action.¹⁶⁸ However, an employer may instead assert that its adverse action was legitimate because it was taken in response to an employee's "serious breach of trust," a standard which the Ninth Circuit itself enunciated in a participation clause case.¹⁶⁹

Finally, an employer may assert that even an employee's seemingly protected actions under the participation clause or the opposition clause have become so unreasonable as to significantly disrupt the workplace or directly hinder the employee's job performance.¹⁷⁰ For example, when an employee fails to complete her work because she has spent up to a third of her work time gathering information to support her EEOC claim, an employer may have a nondiscriminatory reason for adverse action despite the employee's participation in her claim.¹⁷¹ Likewise, when an employee opposes alleged discrimination by

testimony regarding employer dissatisfaction may also suffice. For example, even when a company official admits having been upset by an employee's filing of a complaint, his testimony that he did not believe the employee had the necessary experience to warrant a promotion was not pretextual. *Dominguez v. Nelson*, 43 Fair Empl. Prac. Cas. (BNA) 74, 76 (S.D. Tex. Sept. 25, 1986).

166. *Lewis v. AT&T Techs., Inc.*, 691 F. Supp. 915, 922 (D. Md. 1988). *But see* *Kolpas v. G.D. Searle & Co.*, 959 F. Supp. 525, 530 (N.D. Ill. 1997) (employee's failure to comply with company policy by providing a medical release to return to work after her debilitating injury was a legitimate reason for dismissal under the ADA's anti-retaliation provision).

167. *See supra* note 121.

168. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983).

169. *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 762 (9th Cir. 1996). This is, of course, in addition to characterizing the employee's conduct as simply not protected conduct, so that the plaintiff's *prima facie* case fails. *See supra* note 43.

170. *Crown*, 720 F.2d at 1014.

171. *Hernandez v. Alexander*, 607 F.2d 920, 923 (10th Cir. 1976). *See also* *Willis v. Conoco, Inc.*, 108 F.3d 282, 286 (11th Cir. 1997) (defendant had legitimate, nondiscriminatory reason under ADA to terminate plaintiff's employment when plaintiff who claimed disability refused to return to work after doctor proclaimed the plaintiff

complaining to her co-employees to such an extent as to significantly disrupt the co-employees' work, she may provide the employer with a legitimate, articulable reason for adverse action.¹⁷² Again, however, activity that an employer claims is disruptive may be characterized by a plaintiff as mere participation "in any manner" in a discrimination complaint.¹⁷³

2. Lack of Intent

There is no explicitly articulated affirmative defense available to an employer in a retaliation claim under Title VII, the ADEA, or the ADA. Moreover, some courts have refused to create a judicial defense based on an adverse action that an employer admits it took because of an employee's protected conduct but that the employer contends was not done with a retaliatory motive. For example, in *EEOC v. Board of Governors of State Colleges and Universities*,¹⁷⁴ an employer denied internal arbitration procedures to any employee who filed a concurrent action with the EEOC so as to avoid duplicative investigations. The Seventh Circuit wrote that "[n]othing in [the ADEA anti-retaliation provision] requires a showing of intent" because the anti-retaliation provision is "concerned with the effect of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates."¹⁷⁵

On the other hand, the Fifth Circuit has accepted an employer's defense to a Title VII claim when the employer lacked a retaliatory motive and supported its adverse action with a legitimate business concern. In *EEOC v. J.M. Huber Corp.*, in which an employer claimed that it withheld retirement benefits from an employee in order to ensure the tax-qualified status of the company's benefit plan under ERISA, the Fifth Circuit examined the employer's motive by focusing on whether the alleged retaliation had a disparate impact on only employees who engaged in protected activity.¹⁷⁶ The circuit court's finding that there was no such impact may have created what one commentator terms "an affirmative defense to a policy that on its face allegedly violated the retaliation provision of Title VII."¹⁷⁷ However, the *Huber* holding also may be seen as an

capable to return to work).

172. *Hochstadt v. Worcester Found.*, 545 F.2d 222, 229 (1st Cir. 1976). See also *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997) (under ADA, defendant had a legitimate reason for terminating disabled plaintiff who, in opposing alleged lack of necessary lunch breaks, circulated insulting petitions in her workplace and threatened to "disembowel" her "petty tyrant" employers).

173. *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989).

174. *EEOC v. Board of Governors of State Colleges & Univs.*, 957 F.2d 424, 427 (7th Cir.), cert. denied, 506 U.S. 906 (1992).

175. *Id.*

176. *EEOC v. J.M. Huber Corp.*, 942 F.2d 930, 931 (5th Cir. 1991).

177. *Edward C. Lyons, EEOC v. Board of Governors of State Colleges and*

instance of an employer negating application of the circumstantial *McDonnell Douglas* scheme when, in fact, the employer has direct evidence of its lack of intent.

C. *But For Causation—Pretext*

After an employer has responded to an employee's retaliation complaint with a legitimate explanation, the burden of production shifts back to the employee to rebut the employer's explanation with evidence showing that, but for her protected activity, her employer would not have carried out its adverse action.¹⁷⁸ Courts have termed the first showing of causation in a plaintiff's prima facie case as "much less stringent" than this second "rigorous" causation standard, which is "designed to ensure that the mere fact that an employee files a charge against his employer will not immunize him from legitimate discipline for an unsatisfactory performance."¹⁷⁹

A majority of courts has held that a mere showing that an employee's protected conduct is "in part" the reason for an adverse action, or a "substantial element" of the employer's decision, will not satisfy the second causal showing.¹⁸⁰ Moreover, a plaintiff must show an actual, impermissible motive on behalf of the employer; it may not be enough to prove merely that the employer's proffered legitimate reason is false.¹⁸¹ A showing of such impermissible motive must be made with "specific facts" as "[i]t is not enough for [a] plaintiff merely to cast doubt upon the employer's justification."¹⁸²

Universities: Collective-Bargaining Agreements and Age Discrimination in Employment Act Claims: What Counts as Retaliation Under ADEA Section 4(D), 20 J.C. & U.L. 241, 251 (1993).

178. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985); see also *Dwyer v. Smith* 867 F.2d 184, 191 (4th Cir. 1989).

179. *EEOC v. Avery Dennison Corp.*, 117 F.3d 1278 (6th Cir. 1997). See also *Long v. Eastfield College*, 88 F.3d 300, 304 n.4 (5th Cir. 1996) (citing *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116-17 (5th Cir. 1983)); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 668-69 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984).

180. *Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 708 (8th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir. 1992); *Dwyer v. Smith*, 867 F.2d 184, 191 (4th Cir. 1989); *Jack v. Texaco Research Ctr.*, 743 F.2d 1129, 1130 (5th Cir. 1984); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 243-44 (4th Cir. 1982).

181. *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994). The converse of this is that the defendant/employer need not establish that its proffered legitimate reasons were its actual motives. *West v. Fred Wright Const. Co.*, 756 F.2d 31, 33 (6th Cir. 1985) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). See generally *St. Mary's v. Hicks*, 509 U.S. 502, 510-11 (1993).

182. *Lawrence v. Northrop Corp.*, 980 F.2d 66, 69 (1st Cir. 1992).

However, the D.C. Circuit has attempted to downplay any perceived harshness of the second causal showing, writing that the standard

not at all precludes a finding of a Title VII violation when an employer acts from mixed motives. The mere presence of a legitimate purpose underlying the discharge will not sterilize unlawful retaliation, where the latter is in fact the dispositive cause. The but for standard simply compares the adversity faced by the plaintiff employee . . . with conditions imposed on similarly situated employees who did not engage in protected conduct.¹⁸³

Those evidentiary showings that fail to rebut an employer's legitimate reason for an adverse action will differ, of course, depending on the individual case. Among the more noteworthy holdings are: (1) an employer's "mere knowledge" of protected activity "is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee;"¹⁸⁴ (2) a supervisor's comment that "if [plaintiff] had not gone crying to . . . [her] friends . . . [she] would not be in the position . . . [she was] in," and other similar statements that the appellate court termed "susceptible of several interpretations, most of which are innocuous," were not enough to establish a factual issue on the issue of but for causation; and (3) a suit filed on the heels of an employee's protected conduct is not retaliation where the employer has a "factual and legally well founded" basis for the suit.¹⁸⁵

Employees have been most successful in establishing but for causation when they suffer unprecedented reprimands or poor work evaluations after engaging in protected activity. For instance, where a plaintiff's performance evaluations were excellent for nine years prior to the protected conduct and the plaintiff's supervisor became "increasingly abusive" after the protected activity, a jury finding of but for causation has been affirmed.¹⁸⁶ Likewise, evidence that an employer who discharged the plaintiff had never before discharged anyone for the same infraction and that work evaluations were downgraded after engaging in protected activity has created a question of fact on but for causation.¹⁸⁷

183. *Williams v. Boorstin*, 663 F.2d 109, 117 (D.C. Cir. 1980).

184. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989).

185. *EEOC v. R.J. Gallagher Co.*, 959 F. Supp. 405, 410 (S.D. Tex. 1997).

186. *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42-43 (5th Cir. 1994).

187. *Long v. Eastfield College*, 88 F.3d 300, 308 (5th Cir. 1996) (revising grant of summary judgment for employer); *Davis v. Fleming Co.*, 55 F.3d 1369, 1373 (8th Cir. 1995). In *Davis*, a question of fact existed regarding defendant's legitimate reasons where there had never been any prior complaints about plaintiff's work, and plaintiff had been recommended for possible promotion before engaging in his protected activity. *Davis*, 55 F.3d at 1373. Conversely, where there is evidence that the plaintiff was not treated atypically but, in fact, the defendant had a history of taking similar adverse action against discrimination complainants, an employee may also rebut an employer's legitimate reason. *Mead v. United States Fidelity & Guar. Co.*, 442 F. Supp. 114, 131-32

Nonetheless, the fact that an employer was dissatisfied with an employee's performance *prior* to the employee's protected conduct does not, in and of itself, bar a finding of but for causation.¹⁸⁸ Although an employer has given an employee unfavorable performance reviews before protected activity, a showing that the employer has engaged in other retaliatory conduct since the employee's protected activity, such as transferring the plaintiff to a new location with unreasonable working conditions and assigning the plaintiff an overload of work that is impossible to complete, may sustain a jury finding on the second issue of causation.¹⁸⁹

D. Court Review of Causation After Trial

As a result of the different standards of proof in the two causal showings of a retaliation case, the Sixth Circuit has held that, upon an employer's motion for judgment notwithstanding a jury's verdict for the employee, the trial court can review only the sufficiency of the evidence of but for causation, as opposed to the sufficiency of evidence to establish a *prima facie* causal inference.¹⁹⁰ Upon proper motion, the district court must address directly whether the plaintiff has established evidence of the "ultimate issue" in a retaliation case—but for causation.¹⁹¹ This holding is perhaps most significant in that, on appeal, the Sixth Circuit held that an appellate court also was limited to reviewing the ultimate, but for causation issue.¹⁹² In sum, then, after a jury trial or, assumably, a bench trial, the only appealable issue regarding causation would appear to be the ultimate question of but for causation.

VI. REMEDIES

Traditionally, damages under Title VII for violations of the substantive discrimination clauses or retaliation clause were limited to equitable relief, including back pay and attorney's fees.¹⁹³ The ADA was similarly limited, at

(D. Minn. 1977).

188. *See, e.g.,* *Dominic v. Consol. Edison Co.*, 822 F.2d 1249 (2d Cir. 1987).

189. *Id.* at 1254-56.

190. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) ("Following a trial on the merits, the district court, therefore, cannot return to a consideration of whether plaintiff has proven its *prima facie* case" of retaliation.). Of course, this is distinct from cases in which appellate courts may review *prima facie* retaliation showings on matters disposed of by summary judgment or another pre-trial manner. *See, e.g.,* *Harrison v. Metropolitan Gov't of Nashville*, 80 F.3d 1107, 1119 (6th Cir. 1996).

191. *Avery*, 104 F.3d at 861.

192. *Id.*

193. 42 U.S.C. § 2000e-5(g) (1994).

least initially.¹⁹⁴ On the other hand, the ADEA always has allowed for doubling of back pay upon a finding of “willfulness.”¹⁹⁵ Damages under the ADEA remain unchanged, but the Civil Rights Act of 1991 significantly impacted recoverable damages under Title VII and the ADA, the latter of which had not even come into effect as to employers at the time those additional damages were added. Importantly, employers, depending on their size, may now be liable for compensatory and punitive damages in amounts up to \$300,000.¹⁹⁶ These damages are available for violations of the retaliation clauses, again, even if the underlying substantive discrimination claim has proven unsuccessful. Further, courts interpreting the amendments have allowed plaintiffs to recover damages for statutory emotional distress claims even though the plaintiffs suffered no economic loss.¹⁹⁷

Certainly, these new and expanded damages provide added incentive for an affected employee to pursue her retaliation claim. Conversely, their existence should serve as an additional incentive for employers to avoid actions that appear to be retaliatory.

VII. EVALUATION

As they are wont to do, courts have taken what began as a straightforward, three-element test for actionable retaliation and turned it into a labyrinth of conflicting decisions and poorly defined required showings. And, as employees increasingly turn to the retaliation clauses either as independent causes of action or to buttress their discrimination claims, it is likely that the conflicts regarding the elements of retaliation only will compound, becoming more nebulous in

194. 42 U.S.C. § 12117 (1994). The ADA incorporates the same remedies available under Title VII in this section.

195. Section 7(b) of the ADEA, 29 U.S.C. § 626(b) (1994), incorporates the remedies contained in Section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 (1994). The Supreme Court has defined “willful” conduct as the employer either knowing or showing “reckless disregard for the matter of whether its conduct was prohibited by the statute.” *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993). In order to prove “willfulness,” the plaintiff need not provide “direct evidence of the employer’s motivation” nor show that the defendant employer’s conduct was “outrageous.” *Id.* Liquidated damages are available to a non-federal discriminatee and to the EEOC. *See* Section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 (1994).

196. 42 U.S.C. § 1981(a)(1) (1994).

197. *See, e.g., Davis v. New York City Dept. of Mental Health*, No. 88 Civ. 8999, 1995 WL 580892 (S.D.N.Y. March 24, 1995) (plaintiff belittled during staff meetings, was given little work to do and was otherwise harassed). Importantly, *Davis* indicates that emotional distress claims under Title VII may be defined more broadly than common law state tort actions, which generally require “extreme and outrageous” conduct by the employer. *Id.* *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965). *See generally* Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 431 (1997).

certain areas while more sharply defined in others. Nevertheless, at least two of the currently conflicting lines of decisions must be reconciled at some point lest the nation become a checkerboard of alternately employee- or employer-friendly jurisdictions.

A. Adverse Employment Action

The most pressing issue is the question of what constitutes “adverse employment action.” Given (1) the complete absence of any language in Title VII and the ADEA that would restrict retaliation to ultimate employment decisions, and (2) certain courts’ flimsy resort to the inapposite decision of *Page v. Bolger*, the position taken by those courts imposing a restrictive standard on the meaning of “adverse action” seems to be the least tenable. Such restrictive standards simply do not reflect a reading of the employment statutes in their “broader context” so as not to “undermine [their] effectiveness,” a judicial goal that the current Supreme Court in *Robinson* expressly held was necessary in interpreting the statutes.¹⁹⁸

Additionally, the fact that the ADA explicitly allows for retaliation in the form of mere coercion, intimidation, threats, or interference should serve to clarify the meaning of retaliation under the ADA’s predecessors. The fact that such definitive language was excluded from Title VII and the ADEA should not be considered representative of Congress’ intent regarding the prior statutes because the distasteful but inescapable conclusion would be that Congress somehow intended to provide disabled victims of discrimination greater protection from workplace retaliation than victims of racial or sexual discrimination.

Despite the “ultimate employment decision” courts’ zeal to protect employers from being unduly restricted in disciplining their employees, the courts’ harsh, unyielding standard practically encourages employers to retaliate against protected employees in numerous intangible manners which, in their totality, may in fact be as tangible, if not more so, than any ultimate employment decision. It is exactly such “perverse [employer] incentives” that the Supreme Court in *Robinson* explicitly sought to avoid in interpreting Title VII.¹⁹⁹

B. Retaliation for Third-Party Activities

On a lesser note, though only because it is not as recurrent an issue as matters of adverse employment action, employer retaliation against third parties who have not themselves engaged in protected conduct also creates important division among the courts. However, unlike the issue of adverse action, the plain language of the employment statutes, providing as it does that an employee is

198. *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 847-48 (1997).

199. *Id.* at 848.

protected only for his own activity, does not support a broad, more equitable reading of the anti-retaliation clauses. However, the equitable mandates of the *Robinson* Court also may provide a starting point for employees in such cases. The Court in *Robinson* sternly warned against courts creating “perverse incentives for employers to fire employees” and “undermining the effectiveness of Title VII,”²⁰⁰ both of which are clearly encouraged by allowing retaliation for third parties’ protected activities. Nonetheless, despite the *Robinson* decision, more conservative courts are inarguably more justified in their treatment of cases in this area than they are in their treatment of employees alleging adverse employment action that is less than an ultimate employment decision.

C. Conclusion

Without question, an inherent tension exists between protecting the rights of one engaged in protected activity and ensuring the efficient operation of businesses in the management of their employees. This tension surfaces in the “ultimate employment decision” cases, where the courts appear to regard anti-retaliation clauses as creating yet another cumbersome statutory civil right that an employee can use to harass and hinder her employer. Great danger exists in importing that philosophy into the construction of the statutes, which are otherwise clear in their protective intent. But, on the other hand, more liberal courts should utilize caution before expanding the reach of the statutes beyond their intended scope and literal terms.

200. *Id.*

