

Pennsylvania Bar Institute

## Navigating the Rising Tide of Retaliation Claims

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## Retaliation

› EEOC Fiscal Year 2010 – Retaliation Statistics

- Total Number of Charges = 99,922

	# of Charges	% of Total Charges
◦ Retaliation – All Statutes	<b>36,258</b>	<b>36.3%</b>
◦ Retaliation – Title VII Only	30,948	31.0%
◦ Race Claims	35,890	35.9%
◦ Sex Claims	29,029	29.1%
◦ Age Claims	23,264	23.3%
◦ Disability Claims	25,165	25.2%

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## Retaliation

› Steady Increase In Retaliation Charges 2005–2010

- Post Supreme Court’s 2006 Burlington Northern Decision

	# of Retaliation Charges	% of Total Charges
◦ 2005	22,278	29.5%
◦ <b>2006</b>	<b>22,555</b>	<b>29.8%</b>
◦ <b>2007</b>	<b>26,663</b>	<b>32.3%</b>
◦ 2008	32,690	34.3%
◦ 2009	33,613	36.0%
◦ <b>2010</b>	<b>36,258</b>	<b>36.3%</b>

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**Retaliation – The Parties**

- ▶ Retaliation Protection for Complaining Employees under:
  - Title VII - "person claiming to be aggrieved"
  - ADA - "any individual" who has opposed any act or practice made unlawful by the ADA or who has filed an ADA charge
    - DON'T NEED TO BE A QUALIFIED PERSON WITH A DISABILITY
  - ADEA - any employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under the ADEA."
    - Applies to Private and Federal employees
  - FLSA - filing a complaint; instituting a proceeding (or causing); testifying at a proceeding; serving on an industry committee
    - Employees only!! See, *Dellinger v. Science Applications Int'l Corp.* (4<sup>th</sup> Cir. Aug 12, 2011) (No retaliation protection for applicants).

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**Retaliation – The Parties**

- ▶ Retaliation by Association - "Within the Zone of Interest"
  - *Thompson v. North American Stainless, L.P.*, 131 S. Ct. 863, 178 L. Ed. 2d 694 (2011).
    - Claimed unlawful termination because fiancé, also an NAS employee, filed an EEOC discrimination charge
  - District Court granted Summary Judgment for NAS
    - Held: Title VII does not recognize 3<sup>rd</sup> party claims for retaliation
  - Sixth Circuit - Affirmed

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**Retaliation – The Parties**

- ▶ *Thompson v. North American Stainless, L.P.*
- ▶ Supreme Court - Reversed
  - TITLE VII'S ANTI RETALIATION PROVISION CONSTRUED BROADLY
    - Thompson's firing constituted unlawful retaliation
      - A reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired.
  - No fixed class of relationships to assert retaliation claims
    - Firing a *close family member* almost always meet the standard, but mild reprisal on an *acquaintance* will almost never.

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**Retaliation – The Parties**

- ▶ *Thompson v. North American Stainless, L.P*
  - Was Thompson “a person claiming to be aggrieved as required by Title VII?”
    - YES!!
    - Thompson was within the “zone of interests protected by Title VII”
      - He was an employee of NAS injured by NAS’ unlawful conduct
      - Thompson was an “aggrieved person with standing to sue”
  - Justice Alito’s Concern
    - WHERE DO EMPLOYERS DRAW THE LINE?
      - Lunch partner, someone you dated once, etc.?

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**Retaliation – The Parties**

- ▶ **Newly-Invigorated EEOC**
  - 2001 to 2009 problems with the EEOC
    - Budget cuts, reduced investigatory power, decline in employees from 2,850 to less than 2,200
    - FLSA violations by EEOC – required employees to work more than 40 hours a week without paying overtime
    - Complaints that agency understaffed and overworked
  - Fiscal 2010
    - Budget increase of \$23.4 Million and 155 new employees
    - Increased capacity to address charges

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**Retaliation – The Parties**

- ▶ **Newly-Invigorated EEOC**
  - Fiscal 2011 – Enhanced Vision and Mission
    - At least 54% of all private sector charges resolved in 180 days
    - Hire new investigators
    - Quicker and higher quality investigations
    - Enhance litigation efforts to combat systemic discrimination
    - More vigorous enforcement already evident in retaliation cases!!
      - e.g. March 2011, EEOC secured a \$1.4 Million jury verdict in Tennessee in a sexual harassment and retaliation case.

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**Retaliation – The Parties**

▶ **PRACTICE POINTERS**

- After *Thompson*, carefully evaluate which employees may fall with the protected “zone of interests”
- When advising on terminations, carefully consider an employee’s ability to make a retaliation claim based on another employee’s conduct
- Be mindful of more aggressive, rigorous and robust EEOC investigation

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**Retaliation – Prima Facie Case**

▶ **Burden of Proof**

▶ Title VII prohibition against retaliation – unlawful to discriminate:

- because employee has “opposed” a practice made unlawful by Title VII [the “opposition clause”]
- because employee has “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing” under Title VII [the “participation clause”]

▶ **ADA and ADEA**

- Prohibit retaliation against employees for protected activity

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**Retaliation – Prima Facie Case**

▶ **Prima Facie Case of Retaliation**

- (1) Employee engaged in protected activity;
- (2) Employer took an adverse employment action after or contemporaneous with protected activity; and
- (3) A “causal link” exists between the protected activity and the adverse action
  - “Causal link” may be inferred from:
    - “unusually suggestive” temporal proximity;
    - an intervening pattern of antagonism following protected activity; or
    - Proffered evidence examined as a whole

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**Retaliation – Prima Facie Case**

- ▶ **Burden Shifting – *McDonnell Douglas***
  - Once Plaintiff establishes Prima Facie Case:
    - Burden of production shifts to defendant
    - Defendant must articulate a “legitimate non-discriminatory reason” for its actions
      - Satisfied by introducing evidence “which, taken as true, would permit the conclusion that there was a non-discriminatory reason for the unfavorable decision”.
  - If Defendant successful, burden of proof shifts back to Plaintiff to prove pretext
    - Must demonstrate Defendant’s proffered reason is pretextual and the impermissible factor was determinative in the adverse action

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**Retaliation**

- ▶ **Protected Activity**
  - **Statements Made During Internal Investigation**
  - *Crawford v. Metropolitan Gov. of Nashville*, 2009 U.S. LEXIS 870, 129 S.Ct. 846 (2009).
    - Supreme Court clarified and expanded breadth of retaliation claims under Title VII
    - Statements made during an employer’s internal investigation can constitute Title VII protected activity.
      - Crawford participated in County’s sexual harassment investigation of School District employee relations director
      - Answered questions revealing sexual physical contact
      - Crawford had not filed a complaint of sexual harassment

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**Retaliation**

- ▶ ***Crawford continued***
  - Alleged harasser not disciplined, but Crawford was terminated for alleged embezzlement.
  - District Court – Granted employer’s Motion for SJ
    - Crawford had not engaged in protected activity under Title VII
    - Did not satisfy the “opposition” or “participation” clauses (no complaint of discrimination and no charge pending with EEOC)
  - Sixth Circuit – Affirmed
    - Opposition clause demands active, consistent opposing activities to warrant protection
    - Failed to demonstrate sufficient opposition – no complaint prior to investigation, no action following investigation and prior to firing

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**Retaliation**

- ▶ Crawford continued
  - Issue on Appeal to Supreme Court:
    - Does retaliation protection extend to “an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer’s internal investigation.”
  - Supreme Court concluded :
    - Crawford’s statement was “covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense”

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**Retaliation**

- ▶ Crawford continued
  - Justice Souter explained:
    - “Oppose” goes beyond “active, consistent” behavior in ordinary course
    - Countless people were known to “oppose” slavery before Emancipation or “oppose” capital punishment today, without writing public letters, taking to the streets or resisting the government
    - We would call it “opposition” if an employee took a stand against an employer’s discriminatory practices not by instigating action, but by standing pat, say by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons

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**Retaliation**

- ▶ Protected Activity
  - Discrimination Opposed Need Not Be Unlawful
    - Conduct complained about need not actually be unlawful
    - Good faith, objectively reasonable belief the activity employee opposes is unlawful
    - Underlying claim must be based upon “colorable claim” of Title VII violation
  - Particularized Statement Required
    - Generalized concerns or complaints of unfairness not enough to constitute protected activity

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**Retaliation**

- ▶ **Protected Activity**
  - **Opposition Must Identify Employer and Illegal Practice**
    - Identify practice being opposed specifically
    - Cannot be generalized statement of unfair treatment
  - **Informal Complaints**
    - Can constitute protected activity under Title VII & ADEA
    - Employers should not ignore any employee complaint that comes to their attention

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**Retaliation**

- ▶ **Protected Activity**
  - **Oral Complaints – Protected Under FLSA**
  - *Kasten v. Saint-Gobain Performance Plastics Corp.* (decided by Supreme Court on March 22, 2011)
    - FLSA anti-retaliation provision prohibits discharge or discrimination because employee “filed a complaint”
    - Kasten claimed he was fired for orally complaining about the location of time clocks which he claimed prevented credit for donning and doffing time
    - **Issue** – Are “oral” complaints “filed” complaint?
    - District Court and 7<sup>th</sup> Circuit said No.

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**Retaliation**

- ▶ **Protected Activity**
  - **Oral Complaints – Protected Under FLSA**
  - *Kasten v. Saint-Gobain Performance Plastics Corp.* (decided by Supreme Court on March 22, 2011)
  - Supreme Court concluded an oral complaint is “filed” and protected under the FLSA if it is:
    - “sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute”
  - Dramatically broadens scope of complaints and potential FLSA retaliation claims

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**Retaliation**

- ▶ **Adverse Action**
  - **Material Adversity Required**
    - Sufficiently material that it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" *Thompson v. North American Stainless*
    - Materiality threshold necessary to distinguish trivial harms
  - **Failure to Extend Temporary Assignment – Material**
    - Promise of employment following temp assignment reneged on after complaint made
      - Third Circuit reversed District Court grant of SJ and permitted case to go to trial – *Sanders v. Nicholson*, (3d Cir. 2009)

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**Retaliation**

- ▶ **Adverse Action**
  - **Failure to Rehire – Material**
    - *Wilkerson v. New Media Tech Charter Sch., Inc.* (3d Cir. 2008)  
– failure to rehire can constitute adverse employment action
  - **Mere Administrative Action – May Not Be Material**
    - Alleged refusal to return phone calls, provide training or temporary "shorting" of paychecks – *Amati v. US Steel Corp* (3d Cir. 2008)
  - **Internal Investigation – May Not Be Material**
    - Employer investigation into inconsistency on employment application not sufficiently material to constitute adverse employment action – *Tarr v. FedEx Ground* (3d. Cir. 2010)

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**Retaliation**

- ▶ **Causal Connection**
  - **Temporal Proximity**
    - Time between protected activity and adverse action is "unusually suggestive"
      - creates inference of causality
    - "Contemporaneous" or "Immediate" still necessary
    - No Bright-Line test, fact-based analysis
  - **Look to Record as a Whole for Corroborating Evidence**
    - Intervening antagonism, retaliatory animus, employer inconsistencies
  - **Employer knowledge of Protected Activity**
    - Did adverse action occur before plaintiff's complaint

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**Retaliation**

▶ **PRACTICE POINTERS**

- After *Crawford*, employers must be aware of protection that may be afforded to employees participating in an investigation
  - More imperative to carefully and thoroughly document reasons for adverse actions
- *Kasten* and *Thompson* significantly expanded the scope of employees protected by anti-retaliation provisions
  - Look out for new forms of "water cooler" complaints and "me-too" plaintiffs

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**Retaliation**

▶ **Motions To Dismiss (Post Twombly/Iqbal)**

- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)
  - Rule 8(a)(2) requires more than mere labels and conclusions
  - Pleading must have enough "heft"
  - Factual allegations must push complaint over the line from possibility or conceivability to plausibility
  - Overrules *Conley v. Gibson* (Court should not dismiss a complaint unless it was determined that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief.")
- *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)
  - Clarified *Twombly*
  - Expounded pleading standard for all civil actions
  - Pleadings must set forth "sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face"

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**Retaliation**

▶ **Motions To Dismiss (Post Twombly/Iqbal)**

- *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)
  - Recitation of "threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice. . ."
  - Two Step Analysis for Rule 12(b)(6) motions to dismiss
    - 1) a court must ignore legal conclusions; and
    - 2) consider only those allegations entitled to a presumption of truth to determine if they plausibly give rise to an entitlement to relief
  - Facts alleged must show "plausible claim to relief"
  - More than allegations to be entitled to relief
    - Now must show it with facts

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**Retaliation**

▶ Post-Iqbal Practice Pointers

- Employer's counsel should now more carefully consider the use of Rule 12(b)(6) motions to dismiss
- When drafting or evaluating a retaliation complaint, carefully assess if allegations are supported by specific facts, and if the elements of the retaliation claim are met.
  - Plaintiff's counsel should abandon "form" complaints
- If there are any doubts about the sufficiency of a complaint, give serious consideration to amending it. (F.R.C.P 15(a), a party can amend his/her complaint within twenty-one days of the filing of a 12(b)(6)).

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**Retaliation**

▶ Motions For Summary Judgment (Post Twombly/Iqbal)

- Recent data – 80% chance all or part of Plaintiff's claims will be thrown out on Summary Judgment
- Some scholars have argued that the 12(b)(6) motion to dismiss is the "New Summary Judgment" motion.
- Legislative attempts to restore notice pleading in Federal Courts have failed
  - Notice Pleading Restoration Act of 2009, S. 1504, was introduced by Senator Arlen Specter (D-Pa) to restore *Conley*
  - Open Access to Courts Act of 2009, H.R. 4115 introduced by Representative Jerry Nadler (D-NY)

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**Retaliation**

▶ Practice Tips For Plaintiff's Counsel

- Look for who may be in the "Zone" (No bright line)
- Be careful about Timing
  - Don't rely only on timing to establish casual connection
- Anticipate Rule 12(b)(6) Motion when Drafting Complaint
- Employee rights are expanding, but statistics show the majority of discrimination and retaliation case still do not reach trial
  - Marshall evidence to support each element of case to defeat dispositive motions
  - If you reach trial, retaliation claims remain a powerful way to secure punitive damages
- Be vigilant about making sure clients assert objections to unlawful conduct
  - Identify unlawful conduct and individuals involved

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**Retaliation**

▶ **Practice Tips For Defendant's Counsel**

- Watch out for the protected "Zone of Interests"
  - Who is in the Know?
- Do not underestimate the EEOC process
- Place Plaintiff's Complaint under a Microscope
  - Ability to apply significant pressure
  - Force Plaintiff to demonstrate retaliation is not just an "add-on"
- File that Motion for Summary Judgment
  - Dispositive motions are a major weapon in Defendant's arsenal against retaliation claims.

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**Retaliation**

▶ **Conclusion**

- Expansive interpretation of protected opposition conduct & expanded enforcement
- Will likely cause the continued proliferation of retaliation cases

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**Navigating the Rising Tide of Retaliation Claims**

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