

## Navigating the Rising Tide of Retaliation Claims

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### Retaliation Discrimination under the PHRA and the PFEOA

**Both the Pennsylvania  
Human Relations Act and the  
Pennsylvania Fair Educational  
Opportunities Act prohibit  
discrimination that occurs as  
an act of retaliation.**

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### Retaliation Discrimination

- What does the term  
“retaliation” mean when used  
in the PHRA?
  
- What does the term  
“retaliation” mean when used  
in the PFEOA?

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Retaliation Discrimination under the PHRA and the PFEOA

While both the PHRA and the PFEOA prohibit discrimination as an act of retaliation, it is important to note that the statutory language in each Act differs regarding the scope of protection offered.

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Retaliation Discrimination under the PHRA

Section 5 (d) declares it to be an unlawful discriminatory practice:  
"For any person, employer, employment agency or labor organization to **discriminate in any manner** against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act."

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Retaliation Discrimination under the PFEOA

Section 4 (a) (4) declares it to be an unfair educational practice for an educational institution:  
"To penalize or discriminate against any individual because he has initiated, testified, participated or assisted in any proceedings under this act."

An identical provision is found in Section 4 (a.1) (4) related to religious educational institutions.

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**PHRA/PFEOA SCOPE OF  
COVERAGE DIFFERENCE**

The PHRA prohibits retaliation where an individual has opposed any practice forbidden by the act (the "**Opposition**" clause); **and** where an individual has made a charge; testified or assisted, in any manner, in any investigation, proceeding or hearing under the act (the "**Participation**" clause).

The PFEOA does not have an "**Opposition**" clause; only a "**Participation**" clause.

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**Scope of Coverage under the PHRA**

As is evident from the use of the word "person" in Section 5 (d), coverage extends to all areas of the Commission's jurisdiction:

- Employment;
- Housing and Commercial Property;
- Public Accommodations (including Educational Institutions; see also PFEOA for coverage).

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**WHO CAN FILE A COMPLAINT  
UNDER THE PHRA?**

- The PHRA provides that "Any person claiming to be aggrieved by an alleged unlawful discriminatory practice, may make, sign and file with the Commission a verified complaint, in writing, ...."

43 P.S. §959 (a).

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**SIGNIFICANCE OF THE PROBLEM**

□ Complaints that include an allegation of retaliation filed with the PHRC:

- 2010-2011: 839 of 3190 complaints filed - (26%)
- 2009-2010: 947 of 3922 complaints filed - (24%)
- 2008-2009: 950 of 3914 complaints filed - (24%)
- 2007-2008: 971 of 3956 complaints filed - (25%)
- 2006-2007: 882 of 4300 complaints filed - (21%)
- 2005-2006: 831 of 3887 complaints filed - (21%)
- 2004-2005: 840 of 4144 complaints filed - (20%)
- 2003-2004: 840 of 4473 complaints filed - (19%)
- 2002-2003: 1033 of 5010 complaints filed - (21%)
- 2001-2002: 925 of 6565 complaints filed - (14%)

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**Burden of Proof – Pretext Case  
Alleging Unlawful Retaliation**

**Disparate Treatment in Pretext Case:**

- a. PRIMA FACIE
  
- b. ARTICULATED DEFENSE
  
- c. PRETEXT FOR UNLAWFUL DISCRIMINATION

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**ELEMENTS IN ESTABLISHING  
A PRIMA FACIE CASE**

- (1) The complainant engaged in protected activity;
- (2) The respondent was aware of the protected activity;
- (3) Subsequent to participation in the protected activity the complainant was subjected to an adverse action by the respondent; and
- (4) There is a causal connection between the protected activity and the adverse employment action.

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**FIRST ELEMENT**

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The Complainant engaged in protected activity.

- WHAT CONSTITUTES PROTECTED ACTIVITY UNDER:
  - THE "OPPOSITION" CLAUSE?
  - THE "PARTICIPATION" CLAUSE?

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**PROTECTED ACTIVITY**  
**"OPPOSITION" – TO WHAT?**

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Protection extends to any individual who has:  
"Opposed any practice **forbidden by the act**"

What is covered/excluded from coverage under the opposition clause language?

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**Some Examples Of What Is Protected**

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- Complaining about discrimination against oneself or others;
- Threatening to file a complaint;
- Participating in a protest in opposition to discrimination;
- Signing a petition expressing opposition to discrimination;
- Refusing to obey an order reasonably believed to be discriminatory.
- What else?

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**Some Examples Of What Is  
Not Protected**

- Unlawful activities such as acts or threats of violence;
- Actions that interfere with job performance;
- Other acts that would not be considered a “reasonable” manner of expressing opposition (e.g., searching and photocopying confidential documents and distributing them to co-workers);
- Broad or ambiguous statements that could not reasonably be interpreted to constitute opposition.

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**PROTECTED ACTIVITY  
“PARTICIPATION” – HOW?**

Protection extends to any individual who, **in any manner**, has:

- **MADE A CHARGE**
- **TESTIFIED**
- **ASSISTED**

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**PROTECTED ACTIVITY  
“PARTICIPATION” – HOW?**

- What does “made a charge” mean?
- The **Saint-Gobain** “filed any complaint” U.S. Supreme Court FLSA statutory construction decision and its implications.

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**PROTECTED ACTIVITY**  
**WHO IS PROTECTED?**

- ❑ Can anyone other than the person engaging in the protected activity file a complaint?

The **THOMPSON** decision and the “zone of interest” Title VII test.

- ❑ The PHRA “anyone claiming to be aggrieved” provision.
- ❑ How far does the zone extend?

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**PROTECTED ACTIVITY**  
**“PARTICIPATION” - IN WHAT?**

Protection extends whenever the participation involves:

- any investigation under the act;
- any proceeding under the act;
- any hearing under the act.

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**SECOND ELEMENT OF**  
**PRIMA FACIE**

The Respondent was aware of the protected activity.

How can a respondent become aware?

- ✓ personal knowledge;
- ✓ imputed knowledge.

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**THIRD ELEMENT OF PRIMA FACIE**

The Complainant is subjected to an adverse action subsequent to the participation in a protected activity.

WHAT CONSTITUTES "ADVERSE ACTION"?

\* The **Burlington Northern** Supreme Court Decision

\* Possible Difference under PHRA – The **Uber** Decision - **Uber v. Slippery Rock University**, 887 A.2d 362 (Cmwlth. Ct. 2005).

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**ADVERSE ACTION - CONTINUED**

U.S. Supreme Court Case:

**White v. Burlington Northern & Santa Fe Railroad Co.**

**Question for the Court:** "How harmful must the adverse action (s) be to fall within the scope of the anti-retaliation provision?"

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**ADVERSE ACTION - CONTINUED**

□ Court concluded that a plaintiff must show that a *reasonable employee* or applicant would have found the challenged action "**materially adverse**".

□ The Court defined "materially adverse" to mean:

■ The employer's actions must be harmful to the point that they could dissuade a reasonable worker from making or supporting a complaint of discrimination.

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**ADVERSE ACTION - CONTINUED**

There is agreement that adverse action would not include actions that are **de minimus** or trivial in nature such as petty slights and annoyances (e.g., stray negative comments in an otherwise positive or neutral evaluation; “snubbing” a colleague; or other trivial employment actions.)

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**ADVERSE ACTION - CONTINUED**

The retaliation provision found in the PHRA uses the phrase “to discriminate **in any manner**”.

This suggests a broad scope of protection in line with the U.S. Supreme Court’s interpretation.

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**ADVERSE ACTION - CONTINUED**

However, in the **Uber** case (prior to Supreme Court decision) the court determined that a performance evaluation that listed several performance categories lower than a prior evaluation **did not constitute an adverse action**:

**At least absent evidence** that the evaluation results negatively affected work hours, duties, salary, benefits, overtime opportunities or otherwise negatively affected either the complainant’s present or any possible future positions.

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**FOURTH ELEMENT OF  
PRIMA FACIE**

**There is a causal connection between the protected activity and the adverse action.**

HOW DO YOU ESTABLISH A "CAUSAL CONNECTION"?

"When participation in a protected activity and the occurrence of an adverse action occur within close proximity in time, causation is inferred."

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**CAUSAL CONNECTION -  
CONTINUED**

How close in time does it have to be in order to infer causation?

- no bright line test established by the courts;
- the shorter the time the more likely the inference of causation;

Are there other ways to establish a causal connection?

- yes, by examining to see if there is other evidence that raises an inference of differing treatment.

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**BURDEN ON RESPONDENT**

If the Complainant establishes the existence of a prima facie case, the burden of production (not proof) shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the adverse action taken.

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**EVIDENCE OF PRETEXT**

Where the Respondent articulates a legitimate, non-discriminatory reason for the adverse action, a Complainant, to prevail, must demonstrate that the articulated reason is a pretext for unlawful discrimination.

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**EVIDENCE OF PRETEXT -  
CONTINUED**

- Pretext is established in same manner as any other disparate treatment/pretext case through the gathering and evaluation of circumstantial evidence:
- Did the Respondent treat similarly situated individuals who did not engage in protected activity differently from the Complainant?
- Did the Respondent begin to treat the Complainant differently after the protected activity (e.g., subjecting the Complainant to heightened scrutiny)?

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**BURDEN OF PROOF IN A  
DIRECT EVIDENCE CASE**

Where there is credible direct evidence of retaliatory treatment (i.e., a statement or document from the decision-maker admitting that the adverse action occurred because the complainant engaged in protected activity), liability is established.

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**BURDEN OF PROOF IN A  
MIXED MOTIVE CASE**

Where there is evidence that both an unlawful motive, whether established directly or through circumstantial evidence, and a legitimate reason motivated the respondent to take the adverse action, liability is established and the question of appropriate remedy must be explored.

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**SOME WORDS TO REMEMBER**

- ❑ Harm need not be employment related nor occur in the workplace
- ❑ Reasonable Worker Test
- ❑ Material Adversity
- ❑ Significant vs. Trivial Harm
- ❑ Context matters
- ❑ Zone of Interest Test

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