

A Guide to the Intake of Retaliation Claims from the Plaintiff's Perspective

Jim Bell
Bell & Bell LLP

Retaliation is More Than Just an "Add On" Claim

Everybody understands the desire for revenge.

Recent case law has expanded the pool of potential plaintiffs.

Good retaliation claims make for good storytelling.

Think Hard During Intake

Plaintiff's case may be with you a long time.

Twombly and Iqbal should make you pause, but not necessarily change the cases you take.

You should have real metrics. One reasonable question, do I have what I need to survive summary judgment, or, if not, is it likely to be uncovered during discovery?

Is There a Law Prohibiting the Retaliation the Potential Client is Raising?

Title VII

The PHRA

The Americans with Disabilities Act

The Age Discrimination in Employment Act

The Fair Labor Standards Act

The Family & Medical Leave Act

Was There Protected Activity?

Did the employee complain to a supervisor or manager about an illegal practice?

Did the employee file a Charge of Discrimination or Complaint with an Agency?

If the employee filed with an Administrative Agency, was the employer aware at the time it took adverse employment action complained of?

Complaints in Writing are a Really Good Thing!

How Specific Was the Complaint?

Did Client mention age, race, sex, sexual harassment, gender or disability, accommodation, overtime wages or a request for family leave?

Only think through exceptions to specificity when other facts are egregious.

Timing of Complaint is Really Important!

So, Wouldn't it be helpful if either the client's memory or supporting documents fix the making of complaints in time relative to the Adverse Employment Action...

"Unusually Suggestive" Timing
(which fancy lawyers call temporal proximity)

If Timing is Suggestive but Not “Unusually Suggestive”

When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy does not disprove causation.

It is causation, not temporal proximity itself that is an element of Plaintiff’s Prima Facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn.

Where There is an Extended Period Between Complaint and Adverse Action...

May need to show a pattern of antagonism and/or hostility having the complaint as its genesis and leading up to the final retaliatory act, all of which might be viewed as retaliatory.

Woodson v. Scott Paper Co., 109 F.3d 913 (3d. Cir. 1997) Two Years!

Potential Clients Are People Too

So you need to know their sins.

How many times were they disciplined before retaliation? What did their performance reviews look like before retaliation? What was their attendance and lateness record like before retaliation, is there a record of counseling before retaliation?

Some of these “issues”, if they exist, may be mitigated where there is a discrimination claim.

Is There a Smoking Gun?

Take the Case.

McDonnell Douglas is Your Friend

Judge Posner stated in EEOC v. G-K-G, Inc., 39 F.3d 740, 747 (7th Cir. 1994) that:

"[T]he McDonnell Douglas standard was intended to make it easier for plaintiffs in discrimination cases to resist summary judgment." Id. (emphasis added).

The Elements

To establish a prima facie retaliation claim under Title VII, a plaintiff must demonstrate that:

- (1) he engaged in protected activity;
- (2) after or contemporaneous with that protected activity, he was subject to a materially adverse employment action; and
- (3) a causal connection existed between the protected activity and the adverse employment action. Marra v. Phila. Hous. Auth., 497 F.3d 286, 300 (3d Cir. 2007)

Then Defendant Offers or Makes
Up a Legitimate
Nondiscriminatory/Nonretaliatory
Reason and Tells It to You...

You Still Need to Show Pretext

Plaintiff may establish pretext by pointing to "some evidence, direct or circumstantial, from which a fact finder could reasonably either:

(1) disbelieve the employer's articulated legitimate reasons; or

(2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)(emphasis added)

Changing Reasons is Pretext

"Elaborating on inconsistency in particular as evidence of pretext, the Third Circuit explained in *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 284 (3d Cir.2001), that "[i]f a plaintiff demonstrates that the reasons given for her termination did not remain consistent, beginning at the time they were proffered and continuing throughout the proceedings, this may be viewed as evidence tending to show pretext, though of course it should be considered in light of the entire record."

See *Mikell v. Marriott Int'l, Inc.*, 2011 WL 1899563 at *6 (E.D.Pa. May 19, 2011). In *Mikell*, Judge Brody surveyed the law in the Third Circuit regarding how an employer's failure to provide consistent proffered reasons over time can evidence pretext.
