

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

Samuel J. Cordes, Esquire
Samuel J. Cordes & Associates
Pittsburgh

**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.

What is Protected Activity?

Perception Theory of Retaliation/Discrimination

Employer believes employee complained of discrimination, even if employee arguably did not.

Bradley v. Kemper Insurance Co., 121 Fed. Appx. 468 (3d Cir. 2005)

Fogleman v. Mercy Hospital, 283 F.3d 561 (3d Cir. 2002)

Thompson v. Tractor Supply Co., 2011 WL 4433268 at *10-11 (W.D. Pa. Sept. 21, 2011)(Ambrose SJ)

Rejection or Resisting of a Sexual Advance is Protected Activity Under Title VII

Straub v. First Media Radio, 2005 WL 3158042 at *13 (W.D. Pa. Nov. 28, 2005)(Gibson, J)

Farrell v. Planters Lifesavers Co., 22 F.Supp.2d 372, 392 (D. N.J. 1998), *aff'd in part, rev'd in part on other grounds*, 206 F.3d 271, 279 n. 4 (3d Cir. 2000)

**Reporting of Discrimination by
an Employee to a Co-worker if
Employer Knows About it**

Hazen v. Modern Food Services, Inc., 113 Fed. Appx. 442, 443-44 (3d Cir. 2004)

Neiderlander v. American Video Glass Co., 80 Fed. Appx. 256, 260-61 (3d Cir. 2003)

Straub v. First Media Radio, 2005 WL 3158042 at *13 (W.D. Pa. Nov. 28, 2005)(Gibson, J)

**Complaining of Discrimination
Directed at Others**

Gravamen of Retaliation is Punishment for WHAT employee did, NOT WHO THE EMPLOYEE IS!

Jarzabek v. UPMC Passavant Hospital, 2009 WL 693251 (W.D. Pa. March 13, 2009)(Conti, J).

Moore v. City of Philadelphia, 461 F.3d 331, 342-343 (3d Cir. 2006).

Fogleman v. Mercy Hospital, Inc., 283 F.3d 561, 571-72 (3d Cir. 2002)

**ADA Retaliation: Plaintiff
Need Not Be Disabled**

Krouse v. American Sterilizer, 126 F.3d 494, 498 (3d Cir. 1997)

Asking for an Accommodation

Requesting Reasonable Accommodation is Protected Conduct under ADA, and Title VII

Mondzelewski v. Pathmark Stores Inc., 162 F.3d 778, 786 (3d Cir. 1998)

Shellenberger v. Summit Bancorp., 318 F.3d 183, 187-88 (3d Cir. 2003)

Williams v. Philadelphia Housing Authority Police Department, 380 F.3d 751 (3d Cir. 2004)

Williams v. Shenango, Inc., 986 F. Supp. 309, 321 (W.D. Pa. 1997)

The Breeden Trap

When do indications of discrimination suffice to protect the employee who complains?

Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001)

Greene v. MPW Industrial Services, Inc., 2006 WL 3308577 (W.D. Pa. Oct. 4, 2006)(Ambrose, CJ)

Sprull v. Golden Gate National Senior Care, LLC, 2010 WL 1409658 (W.D. Pa. April 1, 2010)(McVerry, J)

Thieriault v. Dollar General, 2008 WL 2184977 (W.D. Pa. 2008)(McVerry, J), aff'd 336 Fed.Appx. 172 (3d Cir. 2009)

What is an Adverse Action?

The Standard

Burlington N. & Santa Fe Ry. Co. v White, 548 U.S. 53 (2006)

Must show that a reasonable employee would have found the alleged retaliatory actions "materially adverse" in that they "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

The Bizzare

Sykes v. Pennsylvania State Police, 2007 WL 141064 at *7 (W.D. Pa. Ciazza, MJ)

Fact that plaintiff continued to file complaints and allegations of discrimination after adverse actions precludes finding of materially adversity.

"Sykes vigorous and repeated use of all available means to supplement, expand and pursue allegations of discrimination destroys the second element of her prima facie retaliation claim. Sykes own aggressive response to what she identified as instances of discrimination belies any argument she might make that a reasonable person confronted with the "adverse employment actions" that she describes would be dissuaded from voicing additional allegations.

Failure to Accommodate an Employee is Itself an Adverse Employment Action

Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751, 761 (3d Cir. 2004)

Storey v. Burns Inter. Security Svs., 390 F.3d 769, 764 (3d Cir. 2004)

Retaliatory Investigation

Dilenno v. Goodwill Industries Of Mid-Eastern Pennsylvania, 162 F.3d 235, 236 (3d Cir. 1998)(Transferring the complaining employee, in the course of an investigation, to a position it knew she could not perform, constituted adverse action and was retaliatory)

Contesting UE Benefits

Yes:

Grace v. Starwood Hotels & Resorts Worldwide Inc., 2008 WL 437027 (W.D. Pa. Feb. 14, 2008)(Ambrose, CJ)

No:

Adamchik v. Computerserve, Inc., 2010 WL 5139076 (W.D. Pa. Dec. 9, 2010)(Bisson, MJ).

Ostracism and Shunning by Co-Workers May Well Dissuade a Reasonable Worker From Complaining of Discrimination

In *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264, 1265 (10th Cir. 1998),

In *Knox v. State of Indiana*, 93 F.3d 1327, 1330 (7th Cir. 1996),

Beardsley v. Webb, 30 F.3d 524, 528-530 (4th Cir. 1994)

(cont.)

Walt v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (per curium) (citing "constant rudeness" as a possible basis for an adverse employment action);

Flannery v. Trans World Airlines, Inc., 160 F.3d 425, 428 (8th Cir. 1998) (considering whether plaintiff was shunned in her new position as evidence of an adverse employment action).

Amy C. Singleton, Civil Rights--Hostile Work Environment Harassment--Duty of Employer to Eliminate "Cold Shoulder Treatment" 64 Tenn. L. Rev. 537, 554 (1996)

**Causal Connection:
Timing**

When did the Adverse Action Happen?

Sets in Motion events leading to discharge.

The Third Circuit repeatedly has held that a temporal proximity analysis looks to a comparison between the protected conduct and action by the employer that *sets in motion* the events leading to termination.

**Causal Connection:
Timing (cont.)**

Marra v. Phila. Hous. Auth., 497 F.3d 286, 305 (3d Cir. 2007) (comparing date of protected conduct with *date employer resolved to discharge*);

Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997)(although employee not officially discharged until January 1994, her allegation that she was told her position would be offered to a male in November 1993 would show defendant had *resolved to discharge* her shortly after the latest protected activity in mid-1993);

Hill v. City of Scranton, 411 F.3d 118, 129, 13 (3d Cir. 2005) (considering as part of temporal proximity analysis fact that discharged employee's pre-termination hearing initially was scheduled 3 months before actual discharge).

**When Can Employer Do
Something About It?**

First Opportunity to Retaliate: The Lying in Wait Doctrine

Hamilton v. General Elec. Co., 556 F.3d 428, 436 (6th Cir. 2009)

Templeton v. First Tennessee Bank. 424 Fed. Appx. 249, 250 (4th Cir. April 22, 2011)

Tahiliani v. Bayer Corp., 170 Fed. Appx. 215, 217 (3d Cir. Feb. 6, 2006)

Langford v. City of Atlantic City, 235 F.3d 845, 851 (3d Cir. 2000)

Reilly v. City of Atlantic City, 532 F.3d 216, 220 (3d Cir. 2008).

Taylor v. Cherry Hill Bd. Of Ed., 85 Fed. Appx. 836, 841 (3d Cir. 2004)
