

<b>EEOC</b>	<b><i>NOTICE</i></b>	Number 915.004
		Date 8/25/16

**SUBJECT:** *EEOC Enforcement Guidance on Retaliation and Related Issues*

**PURPOSE:** This transmittal covers the issuance of the *EEOC Enforcement Guidance on Retaliation and Related Issues*, a sub-regulatory document that provides guidance regarding the statutes enforced by the EEOC. It is intended to communicate the Commission's position on important legal issues.

**EFFECTIVE DATE:** Upon issuance.

**EXPIRATION DATE:** This Notice will remain in effect until rescinded or superseded.

**OBSOLETE DATA:** This document supersedes the *EEOC Compliance Manual Section 8: Retaliation* (1998).

**ORIGINATOR:** Office of Legal Counsel

\_\_\_\_\_/s/\_\_\_\_\_  
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## I. INTRODUCTION

### A. Background

The federal employment discrimination laws depend on the willingness of employees and applicants to challenge discrimination without fear of punishment. Individuals rely on the statutory prohibitions against retaliation, also known as “reprisal,” when they complain to an employer about an alleged equal employment opportunity (EEO) violation, provide information as a witness in a company or agency investigation, or file a charge with the Equal Employment Opportunity Commission (Commission or EEOC).

This Enforcement Guidance replaces the EEOC’s *Compliance Manual Section 8: Retaliation*, issued in 1998. Since that time, the Supreme Court and the lower courts have issued numerous significant rulings regarding employment-related retaliation.<sup>1</sup> Further, the percentage of EEOC private sector and state and local government charges alleging retaliation has essentially doubled since 1998.<sup>2</sup> Retaliation is now the most frequently alleged basis of discrimination in all sectors, including the federal government workforce.<sup>3</sup>

This document sets forth the Commission’s interpretation of the law of retaliation and related issues. In crafting this guidance, the Commission analyzed how courts have interpreted and applied the law to specific facts. Regarding many retaliation issues, the lower courts are uniform in their interpretations of the relevant statutes. This guidance explains the law on such issues with concrete examples, where the Commission agrees with those interpretations. Where the lower courts have not consistently applied the law or the EEOC’s interpretation of the law differs in some respect, this guidance sets forth

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<sup>1</sup> Supreme Court decisions handed down after issuance of the EEOC’s 1998 *Compliance Manual* that concern retaliation under EEOC-enforced laws include: *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011); *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011); *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006); and *Clark County School District v. Breeden*, 532 U.S. 268 (2001).

<sup>2</sup> Beginning in fiscal year (FY) 2009, charges of retaliation surpassed race discrimination as the most frequently alleged basis of discrimination. In FY 2015, retaliation claims were included in 44.5% of all charges received by the EEOC, and 35.7% of the Title VII charges received. See Charge Statistics, FY 1997 Through FY 2015, Equal Emp’t Opportunity Comm’n, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Aug. 18, 2016).

<sup>3</sup> In the federal sector, retaliation has been the most frequently alleged basis since 2008, and between fiscal years 2009 and 2015, retaliation findings comprised between 42% and 53% of all findings of EEO violations. See Equal Employment Opportunity Data Posted Pursuant to the No Fear Act, Equal Emp’t Opportunity Comm’n, <https://www.eeoc.gov/eeoc/statistics/nofear/index.cfm> (last visited Aug. 18, 2016).

the EEOC's considered position and explains its analysis. The positions explained below represent the Commission's well-considered guidance on its interpretation of the laws it enforces. This document also serves as a reference for staff of the Commission and staff of other federal agencies who investigate, adjudicate, litigate, or conduct outreach on EEO retaliation issues. It will also be useful for employers, employees, and practitioners seeking detailed information about the EEOC's position on retaliation issues, and for employers seeking promising practices.

## B. Overview

**Retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the EEO laws the Commission enforces. The EEO anti-retaliation provisions ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without employers taking materially adverse actions in response.**

Retaliation occurs when an employer takes a materially adverse action because an individual has engaged, or may engage, in activity in furtherance of the EEO laws the Commission enforces.<sup>4</sup> Each of the EEO laws prohibits retaliation and related conduct: Title VII of the Civil Rights Act of 1964 (Title VII),<sup>5</sup> the Age Discrimination in

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<sup>4</sup> For example, complaining or threatening to complain about alleged discrimination against oneself or others may constitute protected activity. *See infra* § II-A.2.e. (Examples of Opposition). In addition, the doctrine of anticipatory retaliation (also called preemptive retaliation) prohibits an employer from threatening adverse action against an employee who has not yet engaged in protected activity for the purpose of discouraging him or her from doing so. *See, e.g., Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002) (holding that threatening to fire plaintiff if she sued “would be a form of anticipatory retaliation, actionable as retaliation under Title VII”); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1128 (10th Cir. 1993) (“Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.”). Note: issues related to waivers and releases that might be retaliatory are not addressed in this guidance.

<sup>5</sup> Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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.

Employment Act (ADEA),<sup>6</sup> Title V of the Americans with Disabilities Act (ADA),<sup>7</sup> Section 501 of the Rehabilitation Act (Section 501),<sup>8</sup> the Equal Pay Act (EPA),<sup>9</sup>

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<sup>6</sup> Section 4(d) of the ADEA, 29 U.S.C. § 623(d), provides:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

<sup>7</sup> Section 503 of the ADA, 42 U.S.C. § 12203, provides:

(a) Retaliation

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.

(b) Interference, coercion, or intimidation

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 chapter.

(c) Remedies and procedures.

The remedies and procedures available under sections 12117, 12133, and 12188 of this title [*sections 107, 203 and 308*] shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III, respectively, of this chapter [*title I, title II and title III*].

<sup>8</sup> Section 501 of the Rehabilitation Act, 29 U.S.C. § 791(f) (“Standards used in determining violation of section”), covering designated federal government applicants and employees, provides:

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

<sup>9</sup> The EPA incorporates the anti-retaliation provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3). This provision does not delineate types of protected activity such as opposition and participation, but its language has been construed to prohibit retaliation for both oral and written complaints, whether made internally to an employer or externally to the EEOC or a state/local Fair Employment Practices Agency. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14–16 (2011) (interpreting the FLSA anti-retaliation provision to find

and Title II of the Genetic Information Nondiscrimination Act (GINA).<sup>10</sup> These statutory provisions prohibit government or private employers, employment agencies, and labor organizations<sup>11</sup> from retaliating because an individual engaged in “protected activity.”<sup>12</sup> Generally, protected activity consists of either participating in an EEO process or opposing conduct made unlawful by an EEO law.

Section II of this guidance explains the concepts of participation and opposition, what types of employer actions can be challenged as retaliation, and the legal standards for determining whether the employer’s action was caused by retaliation in a given case.

Section III addresses the additional ADA prohibition of “interference” with the exercise of rights under the ADA.<sup>13</sup> The interference provision goes beyond the

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that oral complaints may be protected activity, but declining to decide whether internally filed complaints to management suffice), *on remand*, 703 F.3d 966, 976 (7th Cir. 2012) (holding that plaintiff’s oral complaint to his manager was protected activity); *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 115–16 (2d Cir. 2015) (concluding, consistent with all circuits to have addressed the issue, that the FLSA’s anti-retaliation provision incorporated into the EPA prohibits retaliation against employees who orally complain to their employers); *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 432–33 (4th Cir. 2012) (ruling that intra-company complaints are protected activity under the FLSA, consistent with the majority of circuits to have addressed the issue).

<sup>10</sup> Section 207(f) of Title II of GINA, 42 U.S.C. § 2000ff–6(f), 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. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

<sup>11</sup> The terms “employer” and “employee” are used throughout this document to refer to all those covered under the EEO laws. The *EEOC Compliance Manual Section 2: Threshold Issues* (2000), <https://www.eeoc.gov/policy/docs/threshold.html>, provides guidance to determine whether a particular entity is subject to these laws based on its size or other characteristics, and whether a worker is considered an “employee” for purposes of the EEO laws regardless of whether called an “independent contractor” or other name. Federal employers are included as covered entities prohibited from engaging in retaliation under each of the employment discrimination statutes. See *Gomez-Perez v. Potter*, 553 U.S. 474, 487 (2008) (inferring a cause of action in the federal sector for retaliation under the ADEA and describing § 633 of the ADEA as a “broad prohibition of ‘discrimination’ rather than a list of specific prohibited practices”).

<sup>12</sup> Where it appears that an allegation of retaliation raised in an EEOC charge may be *solely* subject to the jurisdiction of another federal agency or a state or local government, rather than EEOC, the charging party should be referred promptly to the appropriate agency. For example, claims of retaliation for union activity should be referred to the National Labor Relations Board. Similarly, claims of retaliation for raising violations of federal wage and hour laws, such as reprisal for raising timekeeping violations, or withholding of overtime pay, should be referred to the Department of Labor, Wage and Hour Division.

<sup>13</sup> See 42 U.S.C. § 12203(b); *supra* note 7.

retaliation prohibition to make it also unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual's exercise of any right under the ADA, or with an individual who is assisting another to exercise ADA rights.

Section IV addresses remedies, and Section V addresses promising practices for preventing retaliation or interference.

The breadth of these anti-retaliation protections does not mean that employees can immunize themselves from consequences for poor performance or improper behavior by raising an internal EEO allegation or filing a discrimination claim with an enforcement agency. Employers remain free to discipline or terminate employees for legitimate, non-discriminatory, non-retaliatory reasons, notwithstanding any prior protected activity.<sup>14</sup> Whether an adverse action was taken because of the employee's protected activity depends on the facts. If a manager recommends an adverse action in the wake of an employee's filing of an EEOC charge or other protected activity, the employer may reduce the chance of potential retaliation by independently evaluating whether the adverse action is appropriate.

Short companion publications on retaliation are available on the EEOC's website:

*Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, <https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm>.

*Small Business Fact Sheet: Retaliation and Related Issues*, <https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm>.

## II. ELEMENTS OF A RETALIATION CLAIM

A retaliation claim challenging action taken because of EEO-related activity has three elements:

(1) **protected activity**: "participation" in an EEO process or "opposition" to discrimination;<sup>15</sup>

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<sup>14</sup> *Glover v. S.C. Law Enf't Div.*, 170 F.3d 411, 414 (4th Cir. 1999) ("[A]n EEOC complaint creates no right on the part of an employee to miss work, fail to perform assigned work, or leave work without notice." (quoting *Brown v. Ralston Purina Co.*, 557 F.2d 570, 572 (6th Cir. 1977))); *Jackson v. Saint Joseph State Hosp.*, 840 F.2d 1387, 1390–91 (8th Cir. 1988) (upholding dismissal of employee for past conduct and for an "abusive attempt" to have a witness change her story). However, the Commission disagrees with the notion that this principle should be extended to allow an employer to retaliate against an employee for positions taken or manner of advocacy in an adversarial EEO proceeding. See, e.g., *Benes v. A.B. Data, Ltd.*, 724 F.3d 752, 754 (7th Cir. 2013).

<sup>15</sup> See note 4 (anticipatory retaliation can occur before any protected activity, e.g., employer policies that threaten workers with disciplinary action if they engage in protected activity, or other policies that would deter an employee from exercising an EEO right).

(2) **materially adverse action** taken by the employer; and

(3) requisite level of **causal connection** between the protected activity and the materially adverse action.

### **A. Protected Activity**

The first question when analyzing a claim that a materially adverse action was retaliatory is whether there was an earlier complaint or other EEO activity that is protected by the law (known as “protected activity”). Protected activity includes “participating” in an EEO process or “opposing” discrimination. These two types of protected activity arise directly from two distinct statutory retaliation clauses that differ in scope. Participation in an EEO process is more narrowly defined to refer specifically to raising a claim, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under the EEO laws, but it is very broadly protected. By contrast, opposition activity encompasses a broader range of activity by which an individual opposes any practice made unlawful by the EEO statutes. The protection for opposition is limited, however, to those individuals who act with a reasonable good faith belief that a potential EEO violation exists and who act in a reasonable manner to oppose it.

#### **1. Participation**

**One type of protected activity is participation. An individual is protected from retaliation for having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA. Participation may include, for example, filing or serving as a witness in an administrative proceeding or lawsuit alleging discrimination.**

The anti-retaliation provisions make it unlawful to discriminate because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA. This language, known as the “participation clause,” provides protection from retaliation for many actions, including filing or serving as a witness for any side in an administrative proceeding or lawsuit alleging discrimination in violation of an EEO law.<sup>16</sup> The participation clause applies even if the underlying allegation is not meritorious or was not timely filed.<sup>17</sup>

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<sup>16</sup> In the Commission’s view, playing *any* role in an internal investigation should be deemed to constitute protected participation. Otherwise, those providing information that supports the employer rather than the complainant could be left unprotected from retaliation.

<sup>17</sup> “It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge.” *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th

The Commission has long taken the position that the participation clause broadly protects EEO participation regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct.<sup>18</sup> Although the Supreme Court has not addressed this question, the participation clause by its terms contains no limiting language, and protects from retaliation employees' participation in a complaint, investigation, or adjudication process.<sup>19</sup> In contrast to the opposition clause, which protects opposition to practices "made . . . unlawful" by the statute, and therefore requires a reasonable good faith belief that conduct potentially violates the law, the participation clause protects participating "in any manner in an investigation, proceeding, or hearing" under the statute. 42 U.S.C. § 2000e-3(a). As one appellate court explained, "[r]eading a reasonableness test into section 704(a)'s participation clause would do violence to the text of that provision and would undermine the objectives of Title VII."<sup>20</sup>

The Supreme Court has reasoned that broad participation protection is necessary to achieve the primary statutory purpose of anti-retaliation provisions, which is "maintaining unfettered access to statutory remedial mechanisms."<sup>21</sup> The application of

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Cir. 1978) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1004–1007 (5th Cir. 1969)); see also *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000).

<sup>18</sup> See, e.g., Brief of the EEOC as Amicus Curiae Supporting the Appellant, *Risley v. Fordham Univ.*, No. 01–7306 (2d Cir. filed Aug. 21, 2001), <https://www.eeoc.gov/eeoc/litigation/briefs/risley.txt> (arguing that "Title VII prohibits an employer from retaliating against an employee for filing a charge with the EEOC without regard to whether the employee reasonably believed that the actions challenged in the charge violated Title VII"); EEOC Decision No. 71–1115, 1971 WL 3855 (Jan. 11, 1971) (citing *Pettway*, the Commission held that even though the record did not show that charging party's allegations of race discrimination were made in bad faith, "[i]n any event, any disparate treatment accorded her because of her protestations and filing of charges is in violation of [Title VII]").

<sup>19</sup> *Glover*, 170 F.3d at 414 (concluding that the application "of the participation clause should not turn on the substance of the testimony" (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d at 1006 n.18 (5th Cir.1969))); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1187 (11th Cir. 1997) (holding anti-retaliation protection for participation is not conditioned on the type of testimony or motive of the individual, because "[c]ourts have no authority to alter statutory language"); *Wyatt v. City of Bos.*, 35 F.3d 13, 15 (1st Cir. 1994) ("[T]here is nothing in [the participation clause's] wording requiring that the charges be valid, nor even an implied requirement that they be reasonable.") (citation omitted); *Pettway*, 411 F.2d at 1006 n.18, 1007 (holding that even "maliciously libelous statements" in an EEOC charge are protected participation); *Ayala v. Summit Constructors, Inc.*, 788 F. Supp. 2d 703, 720–21 (M.D. Tenn. 2011) (holding that anti-retaliation protection for participation is "not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong" (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000))).

<sup>20</sup> *Glover*, 170 F.3d at 414 ("The plain language of the participation clause itself forecloses us from improvising such a reasonableness test.").

<sup>21</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that Title VII extends to protect individuals from retaliation by current, former, or prospective employers).

the participation clause cannot depend on the substance of testimony because, “[i]f a witness in [an EEO] proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forthcoming.”<sup>22</sup> These protections ensure that individuals are not intimidated into forgoing the complaint process, and that those investigating and adjudicating EEO allegations can obtain witnesses’ unchilled testimony.<sup>23</sup> It also avoids pre-judging the merits of a given allegation. For these reasons, the Commission disagrees with decisions holding to the contrary.<sup>24</sup>

This does not mean that bad faith actions taken in the course of participation are without consequence. False or bad faith statements by either the employee or the employer should be taken into appropriate account by the factfinder, investigator, or adjudicator of the EEO allegation when weighing credibility, ruling on procedural matters, deciding on the scope of the factfinding process, and deciding if the claim has merit. It is the Commission’s position, however, that an employer can be liable for retaliation if it takes it upon itself to impose consequences for actions taken in the course of participation.

Although courts often limit the participation clause to administrative charges or lawsuits filed to enforce rights under an EEO statute, and instead characterize EEO complaints made internally (e.g., to a company manager or human resources department) as “opposition,”<sup>25</sup> the Supreme Court in *Crawford v. Metropolitan Government of*

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<sup>22</sup> *Glover*, 170 F.3d at 414.

<sup>23</sup> *Merritt*, 120 F.3d at 1186 (holding that the participation clause applies even where a witness does not testify for the purpose of assisting the claimant, or does so involuntarily).

<sup>24</sup> *See, e.g., Gilooly v. Mo. Dep’t of Health & Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005) (ruling that it “cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees without suffering repercussions simply because the investigation was about sexual harassment”); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004) (holding that employee’s letter to the EEOC containing false, malicious statements was not protected participation).

<sup>25</sup> *See, e.g., Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 49 (2d Cir. 2012) (ruling that the participation clause includes participation in internal investigations only after a charge has been filed); *Hatmaker v. Mem’l Med. Ctr.*, 619 F.3d 741, 746–47 (7th Cir. 2010) (holding that the participation clause does not cover internal investigations before the filing of a charge with the EEOC, but not addressing Supreme Court precedents); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) (declining to decide whether the participation clause covers all internal investigations, and ruling that “at least where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee’s participation is participation ‘in any manner’ in the EEOC investigation”); *see also EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 n.3 (11th Cir. 2000) (distinguishing case from *Clover* on the ground that no EEOC charge had been filed before the alleged retaliatory act, the court concluded that plaintiff’s internal sexual harassment complaint could not be protected under the participation clause).

*Nashville & Davidson County* explicitly left open the question of whether internal EEO complaints might be considered “participation” as well.<sup>26</sup> The Commission and the Solicitor General have long taken the view that participation and opposition have some overlap, in that raising complaints, serving as a voluntary or involuntary witness, or otherwise participating in an employer’s internal complaint or investigation process, whether before or after an EEOC or Fair Employment Practices Agency (FEPA) charge has been filed, is covered under the broad protections of the participation clause, although it is also covered as “opposition.”<sup>27</sup> The plain terms of the participation clause prohibit retaliation against those who “participated *in any manner* in an investigation, proceeding, or hearing” under the statute. 42 U.S.C. § 2000e-3(a) (emphasis added). As courts have observed, these statutory terms are broad, unqualified, and not expressly limited to investigations conducted by the EEOC.<sup>28</sup> Similarly, contacting a federal agency employer’s internal EEO Counselor under 29 C.F.R. § 1614.105 to allege discrimination is participation.<sup>29</sup>

This application of the participation clause is supported by the Supreme Court’s decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), which created an affirmative defense to discriminatory harassment liability based on the availability and proper functioning of internal complaint and investigation processes. The adoption of such policies or the fact that an employee unreasonably failed to utilize them governs liability for various types of harassment claims. An effective process necessitates that employees be willing to participate, whether by providing information that is pro-employer, pro-employee, or neutral. Such participation enables an employer to take prompt corrective action where needed, and may later shield the employer from liability under the EEO laws.<sup>30</sup> It

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<sup>26</sup> 555 U.S. 271, 280 (2009).

<sup>27</sup> See Brief of the EEOC as Amicus Curiae in Support of Appellant and in Favor of Reversal, *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015) (No. 13–2278), <https://www.eeoc.gov/eeoc/litigation/briefs/demasters.html>; Brief of the EEOC as Amicus Curiae in Support of Appellant and in Favor of Reversal, *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41 (2d Cir. 2012) (No. 09–0197–cv(L)), <https://www.eeoc.gov/eeoc/litigation/briefs/townsend1.txt>; Brief of the EEOC as Amicus Curiae in Support of Suggestion for Rehearing En Banc, *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346 (11th Cir. 1999) (No. 97–9229); Brief for the United States as Amicus Curiae Supporting Petitioner, *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271 (2009) (No. 06–1595), <https://www.justice.gov/osg/brief/crawford-v-metropolitan-govt-nashville-amicus-merits>.

<sup>28</sup> *Merritt*, 120 F.3d at 1186 (reasoning that “[t]he word ‘testified’ is not preceded or followed by any restrictive language that limits its reach” and it is followed by the phrase “in any manner,” indicating its intended broad sweep); *United States v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997) (reasoning that the statutory term “‘any’ is a term of great breadth”).

<sup>29</sup> *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (ruling that federal employee’s pre-complaint contact with agency EEO Counselor is participation under Title VII).

<sup>30</sup> See, e.g., *Beard v. Flying J, Inc.*, 266 F.3d 792, 799 (8th Cir. 2001) (holding that affirmative defense was not established where employer interviewed only alleged harasser and victim, not other employees who could have told of harassment, and where investigation ended only with a

follows that participation in such complaint and investigation processes is participation in an “investigation” or “proceeding” within the meaning and interpretation of the statute.

## 2. Opposition

**In addition to participation, an individual is protected from retaliation for opposing any practice made unlawful under the EEO laws. Protected “opposition” activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination. The manner of opposition must be reasonable, and the opposition must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful.**

The EEO anti-retaliation provisions also make it unlawful to retaliate against an individual for opposing any practice made unlawful under the employment discrimination statutes.<sup>31</sup> Depending on the facts, the same conduct may qualify for protection as both “participation” and “opposition.” However, the opposition clause protects a broader range of conduct than the participation clause.

### a. Expansive Definition

The opposition clause of Title VII has an “expansive definition,” and “great deference” is given to the EEOC’s interpretation of opposing conduct.<sup>32</sup> As the Supreme Court stated in *Crawford v. Metropolitan Government of Nashville and Davidson County*, “[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication’ *virtually always* ‘constitutes the employee’s *opposition* to the activity.’”<sup>33</sup> For example, accompanying a coworker to the human resources office in order to file an internal EEO

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warning for the harasser to cease alleged conduct that included actions the court later characterized as “battery”); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1314–15 (11th Cir. 2001) (holding that an employer must have responded to an internal harassment complaint in a “reasonably prompt manner” to establish part of the defense).

<sup>31</sup> *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 276–80 (2009); see also *Valentín-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006) (“[P]rotected conduct includes not only the filing of administrative complaints . . . but also complaining to one’s supervisors.”); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989–90 (6th Cir. 1992) (holding that retaliation claim was actionable under the FLSA, as incorporated into the Equal Pay Act, for complaint to supervisor about male counterparts being paid \$1/hour more); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989).

<sup>32</sup> *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015) (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579, 580 n.8 (6th Cir. 2000)).

<sup>33</sup> *Crawford*, 555 U.S. at 276 (first emphasis added) (adopting the Commission’s position in the *EEOC Compliance Manual*, as quoted in Brief for the United States as Amicus Curiae).

complaint,<sup>34</sup> or complaining to management about discrimination against oneself or coworkers, likely constitutes protected activity.<sup>35</sup> Opposition includes situations where “an employee [takes] 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.”<sup>36</sup> It is also opposition when an employee who did not initiate a complaint answers an employer’s questions about potential discrimination.<sup>37</sup>

The opposition clause applies if an individual explicitly or implicitly communicates his or her belief that the matter complained of is, or could become, harassment or other discrimination.<sup>38</sup> The communication itself may be informal and need not include the words “harassment,” “discrimination,” or any other legal terminology, as long as circumstances show that the individual is conveying opposition

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<sup>34</sup> *Id.* at 279 n.3 (“[E]mployees will often face retaliation not for opposing discrimination they themselves face, but for reporting discrimination suffered by others.”); *see also Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 47–48 (1st Cir. 2010) (holding that plaintiff engaged in opposition by assisting a female scientist under his supervision in filing and pursuing an internal sexual harassment complaint, even though he did not “utter words” when he and the subordinate met with a human resources official, since his action in accompanying her “effectively and purposefully communicated his opposition to” the alleged harassment).

<sup>35</sup> *See, e.g., Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) (holding that *complaining* about discrimination against coworkers and refusing to fulfill employer’s request to gather derogatory information about those who complained was protected opposition). The Commission has challenged retaliation against individuals who complain to management about discrimination against others. *See, e.g., EEOC v. Mountaire Farms, Inc.*, No. 7:13–CV–00182 (E.D.N.C. consent decree entered Nov. 2013) (settlement of retaliation claim against company translator who made repeated complaints to supervisors and the human resources department about incidents of mistreatment of Haitian workers at the company in comparison to non-Haitian workers).

<sup>36</sup> *Crawford*, 555 U.S. at 277; *Collazo*, 617 F.3d at 47 (ruling that employee “opposed” a supervisor’s harassment by, *inter alia*, speaking to the supervisor individually and eliciting a limited apology); *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 406 (4th Cir. 2005) (ruling that a supervisor “opposed” unlawful retaliation by refusing to sign a discriminatory negative evaluation of subordinate).

<sup>37</sup> *Crawford*, 555 U.S. at 277–78 (explaining that the opposition clause in Title VII extends beyond “active, consistent” conduct “instigat[ed]” or “initiat[ed]” by the employee, the Court stated that “[t]here is . . . no reason to doubt that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”). In the Commission’s view, responding to an employer’s questions about potential discrimination is protected both as participation, *see supra* note 27, and as opposition.

<sup>38</sup> *See, e.g.,* Examples 4–5 and 8, and *infra* note 75; *see also Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701–02 (3d Cir. 1995) (ruling that plaintiff’s letter to human resources complaining that job he sought went to a less qualified individual did not constitute ADEA opposition, because the letter did not explicitly or implicitly allege age was the reason for the alleged unfairness).

or resistance to a perceived potential EEO violation.<sup>39</sup> Individuals may make broad or ambiguous complaints of unfair treatment, in some instances because they may not know the specific requirements of the anti-discrimination laws. Such communication is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination.

Although the opposition clause applies broadly, it does not protect every protest against perceived job discrimination. The following principles apply.

### **b. Manner of Opposition Must Be Reasonable**

Courts and the Commission balance the right to oppose employment discrimination against the employer's need to have a stable and productive work environment. For this reason, the protection of the opposition clause only applies where the *manner* of opposition is reasonable.

Complaints to Someone Other Than Employer. “Courts have not limited the scope of the opposition clause to complaints made *to the employer*; complaints about the employer to others that the employer learns about can be protected opposition.”<sup>40</sup> Although opposition typically involves complaints to managers,<sup>41</sup> it may be a reasonable manner of opposition to inform others of alleged discrimination, including union officials, coworkers, an attorney, or others outside the company.<sup>42</sup> For instance, it is

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<sup>39</sup> *Okoli v. City of Balt.*, 648 F.3d 216, 224 (4th Cir. 2011) (ruling that it was sufficient to constitute “opposition” that plaintiff complained about “harassment” and described some facts about the sexual behavior in the workplace that was unwelcome, and that she did not need to use the term “sexual harassment” or other specific terminology); *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 964 (9th Cir. 2009) (holding that allegations need not have identified all incidents of the discriminatory behavior complained of to constitute opposition because “a complaint about one or more of the comments is protected behavior”); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (ruling that reasonable jury could conclude plaintiff “opposed discriminatory conduct” when she told her harasser, who was also her supervisor, to stop harassing her).

<sup>40</sup> 1 B. Lindemann, P. Grossman, & C. Weirich, *Employment Discrimination Law* 15–20 (5th ed. 2012) (collecting cases).

<sup>41</sup> *Cf. Crawford*, 555 U.S. at 276 (endorsing the EEOC’s position that communicating to one’s employer a belief that the employer has engaged in employment discrimination “virtually always” constitutes “opposition” to the activity, and stating that any exceptions would be “eccentric cases”); *see, e.g., Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 438 (4th Cir. 2012) (holding that plaintiff’s meeting with a corporate executive to protest a supervisor’s direction to falsify time records to avoid overtime was FLSA protected activity).

<sup>42</sup> *See Pearson v. Mass. Bay Transp. Auth.*, 723 F.3d 36, 42 (1st Cir. 2013) (observing that “there is no dispute that writing one’s legislator is protected conduct”); *Conetta v. Nat’l Hair Care Ctrs., Inc.*, 236 F.3d 67, 76 (1st Cir. 2001) (ruling that employee’s complaints of sexual harassment to coworker who was a son of general manager was protected opposition); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) (stating that “there is no qualification on . . . the party to whom the complaint is made known,” and it may include management, unions, other employees, newspaper reporters, or “anyone else”).

protected opposition for an employee to contact the police seeking criminal prosecution of a coworker who engaged in a workplace assault motivated by disability, race, or sex, even though it is not a complaint to a manager or to a government agency that enforces EEO laws.<sup>43</sup>

Complaints Raised Publicly. Depending on the circumstances, calling public attention to alleged discrimination may constitute reasonable opposition, provided that it is connected to an alleged violation of the EEO laws.<sup>44</sup> Opposition may include even activities such as picketing.<sup>45</sup> It includes making informal or public protests against discrimination, “including . . . writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of coworkers who have filed formal charges,”<sup>46</sup> provided that it is not done in so disruptive or excessive a manner as to be unreasonable.<sup>47</sup> Moreover, going outside a chain of command or prescribed internal complaint procedure in order to bring forth discrimination allegations may be reasonable.<sup>48</sup>

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<sup>43</sup> “Although involving the police in an employment dispute will not always be considered part of the protected conduct that prohibits retaliatory action, where, as here, it allegedly derived from an effort to protect against actions that are intertwined and interrelated with alleged sexual harassment, it cannot be deemed the ‘unprofessional’ conduct for which an employee can be terminated.” *Scarborough v. Bd. of Trs. Fla. A&M Univ.*, 504 F.3d 1220, 1222 (11th Cir. 2007) (concluding a reasonable jury could find that university employee engaged in protected activity by involving the campus police after he was threatened and physically accosted as a result of rejecting his supervisor’s sexual advances).

<sup>44</sup> *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983) (observing that all actions of opposition to an employer’s practices constitute some level of disloyalty, and therefore in order to reach the level of being unreasonable, such opposition must “significantly disrupt[] the workplace” or “directly hinder[]” the plaintiff’s ability to perform his or her job); *EEOC v. Kidney Replacement Servs.*, No. 06–13351, 2007 WL 1218770, at \*4–6 (E.D. Mich. 2007) (concluding that medical workers engaged in reasonable opposition when they raised their sexual harassment complaints directly to the onsite supervisor at the correctional facility to which their employer had assigned them, even though they were in effect raising a complaint to their employer’s customer).

<sup>45</sup> See, e.g., *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1136 (5th Cir. 1981) (holding that picketing in opposition to employer’s alleged unlawful practice was protected activity under Title VII even though employer’s business suffered); *EEOC Dec. 71–1804*, 3 FEP 955 (1971) (holding that right to strike over unlawful discrimination cannot be bargained away in union contract).

<sup>46</sup> *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990); see also *Crown Zellerbach*, 720 F.2d at 1013–14 (holding that employer violated Title VII when it imposed disciplinary suspension in retaliation for public protest letter by several employees of an “affirmative action award” given to a major customer; reasoning that even though the letter could potentially harm the employer’s economic interests, it was a reasonable manner of opposition because it did not interfere with job performance).

<sup>47</sup> See, e.g., *Matima v. Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000) (collecting cases).

<sup>48</sup> See *supra* notes 40–45.

Advising Employer of Intent to File, or Complaining Before Matter is Actionable. It is also a reasonable manner of opposition for an employee candidly to tell the employer of her intention to file a charge with the EEOC or a complaint with a state or local FEPA, union, court, employer's human resources department, higher-level manager, or company CEO. For example, where an employee intends to file an EEOC charge challenging a disparity in pay with a male coworker as sex discrimination, disclosing this to her manager would be protected opposition.<sup>49</sup> Moreover, it is reasonable opposition for an employee to inform the employer about alleged or potential discrimination or harassment, even if the alleged harassment has not yet risen to the level of a "severe or pervasive" hostile work environment.<sup>50</sup>

Examples of Unreasonable Manner of Opposition. On the other hand, it is not reasonable opposition if an employee, for example, makes an overwhelming number of patently specious complaints,<sup>51</sup> or badgers a subordinate employee to give a witness statement in support of an EEOC charge and attempts to coerce her to change that statement.<sup>52</sup> The activity also will not be considered reasonable if it involves an unlawful act, such as committing or threatening violence to life or property. These examples are not exhaustive; whether the manner of opposition is unreasonable is a context- and fact-specific inquiry.

Opposition to perceived discrimination also does not serve as license for the employee to neglect job duties. If an employee's protests render the employee ineffective in the job, the retaliation provisions do not immunize the employee from appropriate discipline or discharge.<sup>53</sup>

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<sup>49</sup> *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) (finding that plaintiff had engaged in protected activity when she informed her employer she intended to file a sex discrimination charge, even though she later changed her mind), *cert. denied*, 522 U.S. 1147 (1998).

<sup>50</sup> See *infra* notes 55–64 and accompanying text for extended discussions of this issue.

<sup>51</sup> *Rollins v. Fla. Dep't of Law Enf't*, 868 F.2d 397, 399, 401 (11th Cir. 1989) (describing "the sheer number and frequency" of plaintiff's "mostly spurious" discrimination complaints as "overwhelming," and holding that the manner of opposition was not reasonable).

<sup>52</sup> *Jackson v. Saint Joseph State Hosp.*, 840 F.2d 1387, 1392 (8th Cir. 1988) (noting that district court characterized employee's attempts to persuade coworker to revise witness statement she had provided as "grossly persistent," "disruptive," "almost frantic," and "bizarre").

<sup>53</sup> See, e.g., *Coutu v. Martin Cty. Bd. of Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (ruling that evidence showed plaintiff was terminated for spending an inordinate amount of time in "employee advocacy" activities and failing to complete other aspects of her personnel job).

### **c. Opposition May Be Based on Reasonable Good Faith Belief, Even if Conduct Opposed Is Ultimately Deemed Lawful**

As with participation, a retaliation claim based on opposition is not defeated merely because the underlying challenged practice ultimately is found to be lawful.<sup>54</sup> For statements or actions to be protected opposition, however, they must be based on a reasonable good faith belief that the conduct opposed violates the EEO laws, or could do so if repeated.<sup>55</sup> Because there is conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII, the reasonable belief standard can apply to protect complainants as well as witnesses or bystanders who intervene or report what was observed.<sup>56</sup>

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<sup>54</sup> *Trent v. Valley Elec. Ass'n, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (“[A] plaintiff [in an opposition case] does not need to prove that the employment practice at issue was in fact unlawful under Title VII . . . [A plaintiff] must only show that she had a “reasonable belief” that the employment practice she protested was prohibited under Title VII.”); *see also Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980) (“Limiting retaliation protections to those individuals whose discrimination claims are meritorious would ‘undermine[] Title VII’s central purpose, the elimination of employment discrimination by informal means; destroy[] one of the chief means of achieving that purpose, the frank and non-disruptive exchange of ideas between employers and employees; and serve[] no redeeming statutory or policy purposes of its own.’”). For this reason, if an employer takes a materially adverse action against an employee because it concludes that the employee has acted in bad faith in raising EEO allegations, it is not certain to prevail on a retaliation claim, since a jury may conclude that the claim was in fact made in good faith even if the employer subjectively thought otherwise. *Cf. Sanders v. Madison Square Garden*, 525 F. Supp. 2d 364, 367 (S.D.N.Y. Sept. 5, 2007) (“[I]f an employer chooses to fire an employee for making false or bad accusations, he does so at his peril, and takes the risk that a jury will later disagree with his characterization.”); *see also supra* note 18.

<sup>55</sup> *Cf. Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282 (4th Cir. 2015) (en banc) (holding that “an employee is protected from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress”); *see also Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 470 (6th Cir. 2012) (holding that complaints of sexual harassment were protected opposition even though there was insufficient evidence to prove the alleged harassment was based on sex, because “[a] plaintiff does not need to have an egg-shell skull in order to demonstrate a good faith belief that he was victimized”); *Ayala v. Summit Constructors, Inc.*, 788 F. Supp. 2d 703, 719–22 (M.D. Tenn. 2011) (ruling that even where a reasonable good faith requirement applies, an allegation is not unreasonable or made in bad faith simply because it may have overstated the concerns or misinterpreted the reasons for the challenged action).

<sup>56</sup> *See, e.g., Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1352 (11th Cir. 1999) (holding that when applying the reasonable belief standard to a witness, “the relevant conduct . . . is only the conduct that person opposed, which cannot be more than what she was aware of”). Because witnesses typically may have observed only part rather than all of the events at issue in a case, the Commission has argued that the reasonable belief standard need not be applied to third-party witness testimony. *See* Brief of EEOC as Appellant, *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235 (5th Cir. 2016) (No. 15-60380), <https://www.eeoc.gov/eeoc/litigation/briefs/riteway.html>.

**EXAMPLE 1**  
**Protected Opposition –**  
**Reasonable Good Faith Belief**

An employee complains to her office manager that her supervisor failed to promote her because of her sex after an apparently less qualified man was selected. Because the complaint was based on a reasonable good faith belief that discrimination occurred, she has engaged in protected opposition regardless of whether the promotion decision was in fact discriminatory.

**EXAMPLE 2**  
**Not Protected Opposition –**  
**Complaint Not Motivated By**  
**Reasonable Good Faith Belief**

Same as above, except the job sought by the employee was in accounting and it required a CPA license, which she lacked and the selectee had. She knew that it was necessary to have a CPA license to perform this job. She has not engaged in protected opposition because she did not have a reasonable good faith belief that she was rejected because of sex discrimination.

Applying the reasonable belief standard for opposition to alleged harassment in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (per curiam), the Supreme Court held that, on the particular facts of the case, no reasonable person could have believed that a male, serving with plaintiff on a hiring panel screening job applicants, had engaged in potential unlawful harassment when he, on one occasion, read aloud a job applicant’s description of sexual conduct, stated that he did not know what it meant, and then laughed when another male employee said, “I’ll tell you later.” The Court in *Breeden* noted: “The ordinary terms and conditions of the [plaintiff’s] job required her to review the sexually explicit statement in the course of screening job applicants. Her coworkers who participated in the hiring process were subject to the same requirement,” and the plaintiff “conceded that it did not bother or upset her” to read the statement in the application. Accordingly, the Court held that the plaintiff’s complaints about the incident did not constitute protected opposition, and she could not maintain a retaliation claim under Title VII.<sup>57</sup>

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<sup>57</sup> See *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 194–95 (3d Cir. 2015) (ruling that plaintiff’s complaint to school principal about his off-hand comment that many of the teachers looked old enough to be grandparents was not protected activity, but that it was protected activity when she sent a letter to human resources complaining about age discrimination in which she noted the “grandparent” comment, increased scrutiny, being referred to as “old school” by colleagues, lack of assistance in disciplining her students, negative evaluations, the principal questioning students

*Breeden* did not alter the well-established observation that “[c]omplaining about alleged sexual harassment to company management is classic opposition activity.”<sup>58</sup> Indeed, the hostile work environment liability standard is predicated on encouraging employees to “report harassing conduct *before it becomes severe or pervasive.*”<sup>59</sup> In *Faragher*, 524 U.S. 775, and *Ellerth*, 524 U.S. 742, the Supreme Court created an affirmative defense to discriminatory harassment liability based in part on an employee’s failure “to take advantage of any preventive or corrective opportunities provided by the employer.”<sup>60</sup> It is well-recognized that “the victim is compelled by the *Faragher/Ellerth* defense to make an internal complaint.”<sup>61</sup>

If an employee’s internal complaint were not protected, therefore, an employee would be in a catch-22: either complain to the employer about offensive conduct experienced or witnessed before it becomes severe or pervasive (taking the risk that the employer would be permitted to fire her for complaining), or wait to complain until the harassment is so severe or pervasive that she is certain she will be protected from retaliation (taking the risk of further harm, and that her failure to complain sooner will relieve the employer of liability even if a court later finds there was a hostile work environment). Under *Faragher* and *Ellerth*, “the victim is commanded to ‘report the misconduct, not investigate, gather evidence, and then approach company officials.’”<sup>62</sup>

Therefore, even reporting an isolated single incident of harassment is protected opposition if the employee “reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create

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about the plaintiff’s pedagogy, and his failure to inform her about her teaching status until after the new school year started despite multiple requests for information); *Collazo v. Bristol-Myers Squibb Mfg.*, 617 F.3d 39, 48 (1st Cir. 2010) (“[T]he challenged conduct [in *Breeden*] amounted to a single, mild incident or offhand comment, such that no reasonable person could have believed that this conduct violated Title VII.”); *Byers v. Dall. Morning News*, 209 F.3d 419, 428 (5th Cir. 2000) (ruling that employee’s complaint of reverse discrimination was objectively unreasonable absent any supporting evidence).

<sup>58</sup> *Wasek*, 682 F.3d at 470–71.

<sup>59</sup> 524 U.S. at 764 (emphasis added). Such complaints play a critical role in EEO compliance and enforcement, because typically “if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability.” EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

<sup>60</sup> *Faragher*, 524 U.S. at 807.

<sup>61</sup> *Boyer-Liberto*, 786 F.3d at 282.

<sup>62</sup> *Id.* at 282–83 (quoting *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269 (4th Cir. 2001) (holding that employee could not pursue harassment claim where she waited until more incidents occurred before complaining); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (holding that an employee’s “generalized fear of retaliation does not excuse a failure to report . . . harassment”)).

such an environment or that such an environment is likely to occur.”<sup>63</sup> Likewise, it is protected opposition if the employee complains about offensive conduct that, if repeated often enough, would result in an actionable hostile work environment.<sup>64</sup>

It is reasonable for an employee to believe conduct violates the EEO laws if the Commission, as the primary agency charged with enforcement, has adopted that interpretation.<sup>65</sup>

**EXAMPLE 3**  
**Protected Opposition – Complaints to**  
**Management Consistent with Legal Position**  
**Taken by the EEOC**

An employee believes he is being harassed by coworkers based on his sexual orientation, and complains to his manager and human resources. This is protected activity under Title VII because, in light of the EEOC’s stated legal position and enforcement efforts, it is reasonable for an

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<sup>63</sup> *Boyer-Liberto*, 786 F.3d at 282, 268 (“[A]n employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone.”); *see also Magyar v. Saint Joseph Reg’l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008) (explaining that a plaintiff need only have a “sincere and reasonable belief” that she was opposing an unlawful practice, so the conduct complained of need not have been persistent or severe enough to be unlawful, but need only “fall[] into the category of conduct prohibited by the statute”); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007) (reasoning that the *Faragher-Ellerth* “design works only if employees report harassment promptly, earlier instead of later, and the sooner the better”).

<sup>64</sup> This view, which extends beyond the holding in *Boyer-Liberto*, was advocated by the Commission in its amicus brief filed in that case. *See, e.g.*, EEOC’s Brief as Amicus Curiae Supporting Appellant’s Petition for Rehearing *en banc*, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc) (No. 13–1473) (arguing that “employees engage in protected opposition for retaliation purposes if they complain about racially offensive conduct that would create a hostile work environment if repeated often enough”), <https://www.eeoc.gov/eeoc/litigation/briefs/fontainebleau.html>. The Commission has long disagreed with cases that find no protection from retaliation for employees complaining of harassment because it is not yet “severe or pervasive” or could not be reasonably viewed as such.

<sup>65</sup> For example, asserting in a retaliation case that an employee’s complaints related to sexual orientation discrimination should be deemed protected activity in light of the EEOC’s interpretation of Title VII, the Commission explained: “To hold otherwise would require discrimination victims or witnesses – usually ‘lay’ persons – to master the subtleties of sex-discrimination law before securing safe harbor in the broad remedial protections of Title VII’s anti-retaliation rule.” Brief of EEOC as Amicus Curiae in Support of Panel Rehearing, *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014) (No. 12–1723), <https://www.eeoc.gov/eeoc/litigation/briefs/caterpillar2.html>.

individual to believe that sexual orientation discrimination is actionable as sex discrimination under Title VII.<sup>66</sup>

#### **d. Who Is Protected from Retaliation for Opposition?**

In the Commission's view, all employees who engage in opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors.<sup>67</sup> The statutory purpose of the opposition clause is promoted by

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<sup>66</sup> *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*10 (EEOC July 15, 2015), <https://www.eeoc.gov/decisions/0120133080.pdf>; see also Brief of EEOC as Amicus Curiae, *Evans v. Ga. Reg'l Hosp.*, No. 15–15234 (11th Cir. filed Jan. 11, 2016), <https://www.eeoc.gov/eeoc/litigation/briefs/evans4.html>. A number of courts have since agreed with the EEOC's position that Title VII's prohibition on sex discrimination encompasses a prohibition on sexual orientation discrimination. See e.g., *Isaacs v. Felder Servs.*, 2015 WL 6560655, at \*3 (M.D. Ala. Oct. 29, 2015); *Videckis v. Pepperdine Univ.*, 2015 WL 8916764, at \*8 (C.D. Cal. Dec. 15, 2015) (Title IX case); cf. *Roberts v. UPS*, 115 F. Supp. 344, 363–68 (E.D.N.Y. 2015) (construing state law); but see *Hively v. Ivy Tech Cmty. Coll.*, No. 15–1720, 2016 WL 4039703, at \*6–14 (7th Cir. July 28, 2016). Yet protection against retaliation for opposing sexual orientation discrimination is not limited to those jurisdictions that have agreed with the EEOC. An individual is protected from retaliation for opposing practices that discriminate based on sexual orientation even if a court has not adopted the EEOC's position on sexual orientation discrimination. See, e.g., *Birkholz v. City of New York*, No. 10–CV–4719 (NGG)(SMG), 2012 WL 580522, at \*7–8 (E.D.N.Y. Feb. 22, 2012) (“If opposition to sexual-orientation-based discrimination was not protected activity, employees subjected to gender stereotyping would have to base their decision to oppose or not oppose unlawful conduct on a brittle legal distinction [between sexual orientation and sex discrimination], a situation that might produce a chilling effect on gender stereotyping claims.”). Similarly, if an employee requested that an employer provide her with light duty due to her pregnancy, as provided to other employees for other reasons, the request would constitute protected activity based on a reasonable good faith belief, even if the legal application of the rules is new or the facts of her employer's workplace may not be fully known to her. See generally EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (2015), [https://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).

<sup>67</sup> See Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as Amici Curiae in Support of Plaintiff-Appellant, *Rosenfield v. GlobalTranz Enters., Inc.*, 811 F.3d 282 (9th Cir. 2015) (No. 13–15292) (rejecting the so-called “manager rule” adopted by some courts to require that managers must “step outside” a management role and assume a position adverse to the employer in order to engage in protected activity), <https://www.eeoc.gov/eeoc/litigation/briefs/globaltranz.pdf>; *DeMasters v. Carilion Clinic*, 796 F.3d 409, 422 (4th Cir. 2015) (holding, in a case of opposition by an Employee Assistance Program counselor on behalf of an employee client, that “the ‘manager rule’ has no place in Title VII jurisprudence,” and stating: “Nothing in the language of Title VII indicates that the statutory protection accorded an employee's oppositional conduct turns on the employee's job description or that Congress intended to excise a large category of workers from its anti-retaliation protections.”); *Warren v. Ohio Dep't of Pub. Safety*, 24 F. App'x 259, 265 (6th Cir. 2001) (same); *Rangel v. Omni Hotel Mgmt. Corp.*, No. SA–09–CV–0811, 2010 WL 3927744, at \*5 (W.D. Tex. Oct. 4, 2010) (same).

protecting all communications about potential EEO violations by the very officials most likely to discover, investigate, and report them; otherwise, there would be a disincentive for them to do so.<sup>68</sup>

A managerial employee with a duty to report or investigate discrimination still must satisfy the same requirements as any other employee alleging retaliation under the opposition clause – meeting the definition of “opposition,” using a manner of opposition that is reasonable, and having a reasonable good faith belief that the opposed practice is unlawful (or would be if repeated), as well as proving a materially adverse action, the requisite causation, and liability.<sup>69</sup>

#### e. Examples of Opposition

**Protected opposition includes actions such as: complaining or threatening to complain about alleged discrimination against oneself or others; providing information in an employer’s internal investigation of an EEO matter; refusing to obey an order reasonably believed to be discriminatory; advising an employer on EEO compliance; resisting sexual advances or intervening to protect others; passive resistance (allowing others to express opposition); and requesting reasonable accommodation for disability or religion.**

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<sup>68</sup> Even where courts have applied a different rule for human resources personnel or others whose job duties involve processing internal EEO complaints, a number of courts have concluded that such employees are nonetheless protected when they “step[] outside” that role. *See, e.g., Littlejohn v. City of New York*, 795 F.3d 297, 318 (2d Cir. 2015) (holding that an internal EEO director does not engage in protected opposition by fulfilling a job duty to report or investigate other employees’ discrimination complaints, but that actively supporting other employees in exercising Title VII rights, personally complaining, or being critical of discriminatory employment practices is opposition); *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 49 (1st Cir. 2010) (reasoning that “an employer cannot be permitted to avoid liability for retaliation simply by crafting equal employment policies that require its employees to report unlawful employment practices,” and holding that even assuming *arguendo* that a “step outside” rule applies under Title VII, plaintiff stepped outside his managerial duties when he supported a subordinate in lodging and pursuing a sexual harassment complaint and was therefore protected).

<sup>69</sup> *Warren*, 24 F. App’x at 265 (holding that plaintiff, who served as senior EEO compliance officer and Chief of Human Resources, engaged in protected opposition when she met with the employer’s counsel to report alleged mishandling of discrimination matters, but finding she was terminated for her own mismanagement and not in retaliation for her reports).

- **Complaining or threatening to complain about alleged discrimination against oneself or others**<sup>70</sup>

**EXAMPLE 4**  
**Protected Opposition –**  
**Complaint About Sexual Harassment, Even if**  
**Not Yet Severe or Pervasive**

An employee complains to her supervisor about graffiti in her workplace that is derogatory toward women. Although she does not specify that she believes the graffiti creates a hostile work environment based on sex, her complaint reasonably would have been interpreted by the supervisor as opposition to sex discrimination, due to the sex-based content of the graffiti. The graffiti does not need to rise to the level of severe or pervasive hostile work environment harassment in order for her complaint to be reasonable opposition.

- **Providing information in an employer’s internal investigation of an EEO matter**

**EXAMPLE 5**  
**Protected Opposition – Providing Information to**  
**Employer to Corroborate Part of Coworker’s**  
**Harassment Allegation**

An employee who has not lodged any complaint of her own is identified as a witness in an employer’s internal investigation of a coworker’s sexual harassment allegations. The employee is interviewed by the employer and provides corroborating information about sexual harassment she witnessed and/or experienced. This is protected opposition, even though she has not lodged an internal complaint of her own.<sup>71</sup>

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<sup>70</sup> As discussed in § II-A.1., because participation and opposition have some overlap, the Commission and the Solicitor General have long taken the view that raising complaints, serving as a voluntary or involuntary witness, or otherwise participating in an employer’s internal complaint or investigation process can be seen as participation. If they are characterized as opposition, the analysis here would apply.

<sup>71</sup> *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 279–80 (2009) (holding that participating in an employer’s internal investigation of another worker’s harassment complaint was protected activity because opposition extends beyond “active, consistent” conduct “instigat[ed]” or “initiat[ed]” by the employee). In *Crawford*, the court explained “nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own

- **Refusing to obey an order reasonably believed to be discriminatory**

Refusing to obey an order constitutes protected opposition if the individual reasonably believes that the order requires him or her to carry out unlawful employment discrimination. Protected opposition also includes refusal to implement a discriminatory policy.<sup>72</sup>

**EXAMPLE 6**  
**Protected Opposition – Refusal to Obey**  
**Order to Make Assignments Based on Race**

Plaintiff, who works for an employment agency referring individuals to fill temporary and permanent positions with corporate clients, is instructed by his manager not to refer any African Americans to a particular client per the client’s request. Plaintiff tells the manager this would be discriminatory, and proceeds instead to refer employees to this client on an equal opportunity basis. Plaintiff’s refusal to obey the order constitutes “opposition” to an unlawful employment practice.<sup>73</sup>

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initiative but not one who reports the same discrimination in the same words when her boss asks a question,” *id.* at 277–78, and that any other rule would undermine the *Faragher-Ellerth* framework because “prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others,” *id.* at 279. *See also Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166 (2d Cir. 2005) (holding that Title VII’s anti-retaliation provision protects a person who volunteers to testify on behalf of a coworker, even if the person is never actually called to testify). *Cf. EEOC v. Creative Networks, LLC*, No. CV 05–3032–PHX–SMM, 2010 WL 276742, at \*8 (D. Ariz. Jan. 15, 2010) (ruling that Title VII’s retaliation provision protects a worker whether “poised to support coworker’s discrimination claim, dispute the claim, or merely present percipient observations”).

<sup>72</sup> *Crawford*, 555 U.S. at 277 (“[W]e 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.”); *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998) (ruling that personnel director’s refusal to fire employee because of his race constituted protected activity because he was opposing the employer’s discriminatory policy of excluding African-American employees from important positions).

<sup>73</sup> “A manager may be shown to have engaged in protected conduct if she refused to implement a discriminatory policy or took some action against it.” *Foster v. Time Warner Entm’t. Co.*, 250 F.3d 1189, 1994 (8th Cir. 2001) (holding that customer service manager engaged in protected opposition activity where she repeatedly questioned her new supervisor about how a revised sick leave policy affected ADA accommodations previously granted to an employee with epilepsy whom she supervised, and then refused to implement the new policy by continuing to allow the employee to work flexible hours); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581 (6th Cir. 2000) (concluding that action taken by a university vice president, in his capacity as an

- **Advising an employer on EEO compliance**

#### **EXAMPLE 7**

#### **Protected Opposition – Human Resources Manager Reports ADA Violations to Company**

XYZ Corp.’s human resources manager came to believe that the company was improperly denying certain requested reasonable accommodations to which individuals with disabilities were entitled under the ADA. Shortly after she reported this to supervisory management, her employment was terminated. Even though her reports to supervisors fell within the ambit of her managerial duties, her reports of unlawful company actions were protected opposition. Protected activity includes EEO complaints by managers, human resources staff, and EEO advisors – even when those complaints happen to grow out of the individual’s job duties – provided the complaint meets all the other relevant requirements for protected activity.<sup>74</sup>

- **Resisting sexual advances or intervening to protect others**

#### **EXAMPLE 8**

#### **Protected Opposition – Resisting Supervisor’s Sexual Advances**

In response to a supervisor’s repeated sexual comments to her, an employee tells the supervisor “leave me alone” and “stop it.” A coworker intervenes on her behalf, also asking the manager to stop. The employee’s resistance and the coworker’s intervention both constitute protected opposition. A materially adverse action by the supervisor in retaliation would be actionable.<sup>75</sup>

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affirmative action official, to respond to hiring decisions that he believed discriminated against women and minorities, constituted protected opposition under Title VII).

<sup>74</sup> *Foster*, 250 F.3d at 1194–95; *see also supra* notes 67–69.

<sup>75</sup> *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015) (holding that demanding a supervisor stop harassment is protected opposition, i.e., when one “resists or confronts the supervisor’s unlawful harassment”); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (holding that a reasonable jury could conclude plaintiff engaged in protected opposition when she told her supervisor to stop harassing her); *EEOC v. IPS Indus., Inc.*, 899 F. Supp. 2d 507, 521 (N.D. Miss. 2012) (ruling that employee’s informally confronting her supervisor about his insinuations that the employee was involved in a relationship with a coworker, telling the supervisor not to touch her again after he reached around behind her, and informing him that she

- **Passive resistance**

Passive opposition refers to certain acts that allow others to express opposition, such as refusing to implement an instruction to interfere with other employees' complaints. Such an action may itself be protected under the opposition clause.

### **EXAMPLE 9**

#### **Protected Opposition – Refusal to Implement Instruction to Interfere with Exercise of EEO Rights**

A supervisor does not carry out his management's instruction to dissuade his subordinates from filing discrimination complaints. The supervisor's refusal is protected opposition, and a materially adverse action by management against the supervisor because of his refusal to prevent complaints would be actionable retaliation.<sup>76</sup>

- **Requesting reasonable accommodation for disability or religion**

A request for reasonable accommodation of a disability constitutes protected activity under the ADA, and therefore retaliation for such requests is unlawful.<sup>77</sup> By the same rationale, persons requesting religious accommodation under Title VII are protected against retaliation for making such requests.<sup>78</sup> Although a person making such a request

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would only return to work if he stopped touching her, were not "mere rejections" of inappropriate sexual conduct, but rather constituted protected opposition); *Ross v. Baldwin Cty. Bd. of Educ.*, No. 06-0275, 2008 WL 820573, at \*6 (S.D. Ala. Mar. 24, 2008) ("It would be anomalous, and would undermine the fundamental purpose of the statute, if Title's VII's protections from retaliation were triggered only if the employee complained to some particular official designated by the employer."). These protections could also extend to non-verbal resistance to an unwanted sexual advance by a supervisor, such as walking away or removing the supervisor's hand from the employee's body.

<sup>76</sup> *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (ruling that employee stated cause of action for retaliation when he alleged that his employer retaliated against him for failing to prevent subordinate from filing a sexual harassment complaint).

<sup>77</sup> *Solomon v. Vilsack*, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014) (citing rulings from every federal judicial circuit holding that requests for reasonable accommodation are protected activity); 9 Lex K. Larson, *Employment Discrimination* § 154.10, at p. 154-105 & n. 25 (2d ed. 2014) ("In addition to the activities specifically protected by the statute, courts have found that requesting reasonable accommodation is a protected activity.").

<sup>78</sup> EEOC, *Compliance Manual Section 12: Religious Discrimination* § 12-V.B (2008) ("EEOC has taken the position that requesting religious accommodation is protected activity."), <https://www.eeoc.gov/policy/docs/religion.html>; see also *Ollis v. HearthStone Homes, Inc.*, 495 F.3d 570 (8th Cir. 2007) (upholding jury verdict finding that an employee's complaints about

might not literally “oppose” discrimination or “participate” in a complaint process, the individual is protected against retaliation for making the request. One court explained: “It would seem anomalous . . . to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge. This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation.”<sup>79</sup>

**EXAMPLE 10**  
**Protected Opposition – Request for Exception to**  
**Uniform Policy as a Religious Accommodation**

After a retail employee’s supervisor denies her request to wear her religious headscarf as an exception to the new uniform policy, the corporate human resources department instructs the supervisor to grant the request because there is no undue hardship. Angry about being overruled, the supervisor thereafter gives the employee an unjustified poor performance rating and denies her request to attend training that he approves for her coworkers. The employee’s request for an exception as a religious accommodation was protected activity, and the supervisor’s action in response is retaliation in violation of Title VII.

**f. Inquiries and Other Discussions Related to Compensation**

**Federal protections for inquiring about or otherwise discussing compensation information include, among others: protections enforced by the EEOC that prohibit retaliation for protected activity; protections enforced by the U.S. Department of Labor that prohibit discrimination by federal contractors and subcontractors for discussing compensation; and protections enforced by the National Labor Relations Board for discussion of wages as concerted activity.**

Taking adverse action for discussing compensation may implicate the EEO anti-retaliation protections as well as a number of other federal laws, some examples of which follow in order to illustrate how related authorities apply. Additional protections exist under various state laws.<sup>80</sup>

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required participation in activities violate his religious beliefs constituted protected activity under Title VII); *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 190 (3d Cir. 2003).

<sup>79</sup> *Soileau v. Guilford of Me.*, 105 F.3d 12, 16 (1st Cir. 1997); *see also A.C. v. Shelby Cty. Bd. of Educ.*, 711 F.3d 687, 698 & n.4 (6th Cir. 2013).

<sup>80</sup> Women’s Bureau, DOL, *Pay Secrecy Fact Sheet* (Aug. 2014), [https://www.dol.gov/wb/media/pay\\_secrecy.pdf](https://www.dol.gov/wb/media/pay_secrecy.pdf) (reviewing examples of state laws enacted between 1982 and 2014 addressing employer pay secrecy policies).

According to the U.S. Department of Labor, approximately 60% of private sector workers surveyed nationally reported that they were either contractually forbidden or strongly discouraged by management from discussing their pay with their colleagues.<sup>81</sup> Although most private employers are under no obligation to make wage information public, actions taken by an employer to prohibit employees from discussing their compensation with one another may impede knowledge of discrimination and deter protected activity, whether pursuant to a so-called “pay secrecy” policy or other employer action.

### **(1) Compensation Discussions as Opposition Under the EEO Laws**

When an employee communicates to management or coworkers to complain or ask about compensation, or otherwise discusses rates of pay, the communication may constitute protected opposition under the EEO laws, making employer retaliation actionable based upon the facts of a given case. For example, talking to coworkers to gather information or evidence in support of a potential EEO claim is protected opposition, provided the manner of opposition is reasonable.<sup>82</sup>

#### **EXAMPLE 11 Protected Opposition – Wage Complaint Reasonably Interpreted as EEO-Related**

A temporary custodian learns that she is being paid a dollar less per hour than previously hired male counterparts. She approaches her supervisor and says she believes they are “breaking some sort of law” by paying her lower wages than previously paid to male temporary custodians. This is protected opposition.<sup>83</sup> Similarly, it would be protected

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<sup>81</sup> *Id.* (noting results from 2010 Institute for Women’s Policy Research/Rockefeller Survey of Economic Security).

<sup>82</sup> See *Jackson v. Saint Joseph State Hosp.*, 840 F.2d 1387, 1390–91 (8th Cir. 1988) (majority and dissent agreeing that gathering information or evidence from coworkers is protected activity, though reaching different conclusions about whether employee’s manner of opposition was reasonable on facts of the case); *EEOC v. Kallir, Phillips, Ross, Inc.*, 401 F. Supp. 66, 72 (S.D.N.Y. 1975) (holding that employee’s discreet request to one of the company’s clients with whom he worked, asking for written statement describing work duties in support of his pending EEO claim, was protected activity).

<sup>83</sup> *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989–90 (6th Cir. 1992) (holding that female temporary custodian stated a retaliation claim under the Equal Pay Act for alleged actions in response to her oral complaint to a supervisor that male counterparts earned \$1/hour more); see also *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 288–89 (6th Cir. 2012) (ruling that plaintiff’s

opposition if she had said “I don’t think I am being paid fairly. Would you please tell me what men in this job are being paid?”

**EXAMPLE 12**  
**Protected Opposition –**  
**Discussion of Suspected Pay Discrimination Despite**  
**Employer’s Policy Prohibiting Discussions of Pay**

An African-American employee discussed with coworkers her belief that she was being discriminated against based on race because her pay was lower than that of Caucasian employees doing similar work. Her employer then disciplined her for engaging in discussions about suspected pay discrimination. The discipline constitutes unlawful retaliation for protected opposition. The fact that the employer has a “Code of Conduct” prohibiting discussions of pay would not insulate it from liability for retaliation under Title VII.

**(2) Related Protections Under Other Federal Authorities**

In addition to the retaliation provisions of the laws enforced by the EEOC, there are also various other federal protections for discussions related to compensation that apply to certain employers. Two examples include Executive Order (E.O.) 11246 and the National Labor Relations Act (NLRA).

**a. Executive Order 11246, as amended –**  
**Federal Contractors and Subcontractors**

Under E.O. 11246, as amended by E.O. 13665 (April 8, 2014), federal contractors and subcontractors are prohibited from discharging or otherwise discriminating in any way against employees or applicants who inquire about, discuss, or disclose their compensation or that of other employees or applicants.<sup>84</sup> This nondiscrimination requirement protects *any* compensation inquiries, discussions, or disclosures. Neither opposition to alleged discrimination nor participation in EEO activity is a necessary element of a pay transparency violation of E.O. 11246. Rather, the pay transparency provisions protect even simple inquiries between coworkers about their compensation,

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oral complaint to the Director of Human Resources that she was “treated differently than younger employees” was protected opposition).

<sup>84</sup> E.O. 11246, as amended, applies to companies with federal contracts or subcontracts in excess of \$10,000. *See* 41 C.F.R. § 60–1.5.

and generally prohibit contractors from having policies that prohibit or tend to restrict employees or applicants from discussing or disclosing compensation.<sup>85</sup>

The Office of Federal Contract Compliance Programs (OFCCP) at the U.S. Department of Labor enforces E.O. 11246 and has issued regulations implementing the pay transparency provisions of E.O. 13665, which became effective on January 11, 2016.<sup>86</sup> Though their protection is broad, the regulations contain two specific contractor defenses to a claim of pay transparency discrimination. A contractor may show that it disciplined the employee for violating a uniformly applied rule, policy, practice, or agreement that does not prohibit or tend to prohibit applicants or employees from discussing or disclosing compensation. A contractor may also show that it disciplined an employee because the employee (a) had access to the compensation information of other employees or applicants as part of his or her essential job duties, and (b) disclosed such information to individuals who did not otherwise have access to it, unless the employee was discussing his or her own compensation, or unless the disclosure occurred in certain specified circumstances.<sup>87</sup>

#### **b. National Labor Relations Act (NLRA)**

The NLRA protects non-supervisory employees who are covered by that law from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved in the effort.<sup>88</sup> The NLRA prohibits employers from

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<sup>85</sup> See Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,934, 54,944 (Sept. 11, 2015).

<sup>86</sup> Regulations promulgated by OFCCP implementing E.O. 13665 can be found on OFCCP's pay transparency web page at <https://www.dol.gov/ofccp/PayTransparency.html> (last visited Aug. 18, 2016). Contractors and individuals with questions about the OFCCP pay transparency protections or how to file a complaint may contact OFCCP by calling 1-800-397-6251, sending an e-mail to [OFCCCP-Public@dol.gov](mailto:OFCCCP-Public@dol.gov), or contacting the nearest OFCCP office. More information is available on the OFCCP web site at <https://www.dol.gov/ofccp/>.

<sup>87</sup> Under the OFCCP regulations, the two circumstances in which disclosures can be made are: (1) the disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, or in accordance with the contractor's legal duty to furnish information; or (2) the disclosure occurs during discussions with management officials, or while using the contractor's internal complaint process, about possible disparities involving another employee's compensation, or the disclosure was of compensation information received through means other than access granted through their essential job functions.

<sup>88</sup> See, e.g., *NLRB v. Main St. Terrace Care*, 218 F.3d 531 (6th Cir. 2000) (concluding that employer violated the NLRA by imposing a rule prohibiting pay discussions, even though it was unwritten and not routinely enforced, and improperly fired plaintiff because, in violation of oral instruction by managers, she discussed wages with coworkers to determine whether they were being paid fairly); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510 (9th Cir. 1993) ("As [the employer] concedes, an unqualified rule barring wage discussions among employees without limitations as to time or place is presumptively invalid under the Act."); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (holding that employer's rule broadly prohibiting wage

discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants. The NLRA protection, however, does not extend to supervisors, managers, agricultural workers, and employees of rail and air carriers. More information about the scope of the NLRA protections, charge filing, and compliance and enforcement can be found on the National Labor Relations Board’s website at <https://www.nlrb.gov/>.

### 3. Range of Individuals Who Engage in Protected Activity

**Anti-retaliation protections extend to many individuals, including those who make formal or informal allegations of EEO violations (whether or not successful), those who serve as witnesses or participate in investigations, those who exercise rights such as requesting religious or disability accommodation, and even those who are retaliated against after their employment relationship ends.**

As the above discussion illustrates, protected activity can take many forms. Individuals who engage in protected activity include:

- those who participate in the EEO process in any way, including as a complainant, representative, or witness for any side, regardless of their job duties or managerial status;<sup>89</sup>
- those who oppose discrimination on behalf of themselves or others,<sup>90</sup> even if their underlying discrimination allegation ultimately is not successful;<sup>91</sup>

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discussions was an unfair labor practice under the NLRA, because “wage discussions can be protected activity” and “an employer’s unqualified rule barring such discussions has the tendency to inhibit such activity”).

<sup>89</sup> See supra §§ II-A.1. (discussion of participation as protected activity) and II-A.2. (discussion of opposition as protected activity). However, the anti-retaliation provisions are not a “catch-all” providing rights to anyone who has challenged his or her employer in the past for any reason. See, e.g., *Rorrer v. City of Stow*, 743 F.3d 1025, 1046–47 (6th Cir. 2014) (holding that plaintiff’s prior testimony in arbitration of non-EEO claims was not protected activity that could support subsequent ADA retaliation claim).

<sup>90</sup> *Kelley v. City of Albuquerque*, 542 F.3d 802, 820–21 (10th Cir. 2008) (concluding that attorney who represented city in EEO mediation was protected against retaliation when his opposing counsel, who subsequently was elected mayor, terminated his employment); *Moore v. City of Phila.*, 461 F.3d 331, 342 (3d Cir. 2006) (holding that white employees who complain about a racially hostile work environment against African-Americans are protected against retaliation for their complaints); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993) (holding that Title VII protects plaintiff against retaliation even where plaintiff did not himself engage in protected activity, but rather his coworker engaged in protected activity on his behalf).

<sup>91</sup> *Supra* note 54; see also *Learned v. City of Bellevue*, 860 F.2d 928, 932–33 (9th Cir. 1988) (“[I]t is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation . . . . If the availability of that protection

- those who tell their employer of their intention to file a charge or lawsuit, even if the filing is not ultimately made;<sup>92</sup>
- those whose protected activity involved a different employer (e.g., an applicant who is not hired because she filed an ADA charge against her former employer for failure to provide a sign language interpreter, or because she opposed her previous employer’s exclusion of qualified applicants with hearing impairments);<sup>93</sup>
- those whose protected activity occurred while they were still employed but who are not retaliated against until later, after the employment relationship ends<sup>94</sup> (e.g., when a former employer retaliates by giving an unjustified, untruthful negative job reference, by refusing to provide a job reference, or by informing an individual’s prospective employer about the individual’s prior EEO complaint);<sup>95</sup>

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were to turn on whether the employee’s charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled.”).

<sup>92</sup> See, e.g., *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) (holding that plaintiff engaged in protected activity when she informed her supervisor that she intended to file charge); *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) (ruling that writing a letter to employer and union threatening to file EEOC charge is protected); cf. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (ruling that federal employee’s contact with agency EEO Counselor is participation under Title VII).

<sup>93</sup> For example, in *McMenemy v. City of Rochester*, 241 F.3d 279, 283–84 (2d Cir. 2001), a firefighter’s initiation of an investigation into a union president’s sexual assault of a union secretary was held to be “protected activity.” The court rejected a lower court ruling that “protected activity” only includes opposition to unlawful employment practices by the same covered entity that engaged in the alleged retaliatory acts. In rejecting this argument, the court adopted the EEOC’s position that “[a]n individual is protected against retaliation for participation in employment discrimination proceedings involving a different entity.” *Id.* This is especially true, the court held, where “the two employers have a relationship that may give one of them an incentive to retaliate for an employee’s protected activities against the other.” *Id.* at 284–85; see also *Christopher v. Stouder Mem’l Hosp.*, 936 F.2d 870, 873–74 (6th Cir. 1991) (concluding that defendant’s frequent reference to plaintiff’s sex discrimination action against prior employer warranted inference that defendant’s refusal to hire was retaliatory).

<sup>94</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345–46 (1997) (ruling that plaintiff may sue a former employer for retaliation when it provided a negative reference to a prospective employer for whom plaintiff subsequently applied to work, because Title VII’s definition of employee lacks any “temporal qualifier”).

<sup>95</sup> See, e.g., *infra* Example 19; *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 178–80 (2d Cir. 2005) (holding that evidence could support a finding that plaintiff’s job offer was rescinded after his prospective employer was told by his former employer that plaintiff, who had been listed as a favorable witness in a coworker’s EEO litigation, “had a lawsuit pending” against the company); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1033–35 (10th Cir. 2004) (holding that plaintiff may allege an unjustified negative job reference was retaliatory and need not prove that she would have

- those who raise discrimination allegations but are not covered by the substantive provisions of the applicable discrimination laws (e.g., retaliation against an individual for filing a disability discrimination charge, even if it is ultimately determined that she is not qualified for the position held or desired,<sup>96</sup> or retaliation against an individual for raising an age discrimination allegation, even if he is not age 40 or over);<sup>97</sup> and
- those whose protected activity relates to any provision of the ADA, not just the employment discrimination title of the statute (e.g., opposition to disability discrimination in state and local government services, public accommodations, commercial facilities, or telecommunications).<sup>98</sup>

In addition, those whom an employer mistakenly believes have engaged in protected activity are protected from retaliation.<sup>99</sup> *See also infra* § II.B.4. (Third Party Retaliation).

## B. Materially Adverse Action

**Retaliation expansively reaches any action that is “materially adverse,” meaning any action that might well deter a reasonable person from engaging in protected activity.**

### 1. General Rule

The anti-retaliation provisions make it unlawful to take a materially adverse action against an individual because of protected activity. The Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), that a “materially adverse action” subject to challenge under the anti-retaliation provisions encompasses a broader range of actions than an “adverse action” subject to challenge

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received the job absent the reference); *see also L.B. Foster Co.*, 123 F.3d at 753–54; *Ruedlinger v. Jarrett*, 106 F.3d 212, 214 (7th Cir. 1997); *Serrano v. Schneider, Kleinick, Weitz, Damashek & Shoot*, No. 02–CV–1660, 2004 WL 345520, at \*7–8 (S.D.N.Y. Feb. 24, 2004) (holding that informing a prospective employer about an employee’s lawsuit constitutes an adverse action under Title VII, because “surely” the plaintiff’s former supervisor “knew or should have known” that, by revealing the fact that the plaintiff had sued her former employer, “he could severely hurt her chances of finding employment”).

<sup>96</sup> *Krouse v. Am. Sterilizer*, 126 F.3d 494, 502 (3d Cir. 1997).

<sup>97</sup> *Anderson v. Phillips Petrol.*, 722 F. Supp. 668, 671–72 (D. Kan. 1989).

<sup>98</sup> 42 U.S.C. § 12203(a).

<sup>99</sup> *Fogleman v. Mercy Hosp.*, 283 F.3d 561, 572 (3d Cir. 2002) (holding that employee who did not engage in protected activity could nevertheless challenge retaliation where employer took adverse action because it erroneously believed plaintiff had engaged in protected activity); *Brock v. Richardson*, 812 F.2d 121, 123–25 (3d Cir. 1987) (holding that FLSA’s anti-retaliation provision prohibits retaliation by employer where employer believed employee had engaged in protected activity, even though employee had not done so).

under the non-discrimination provisions.<sup>100</sup> In light of the purpose of anti-retaliation protection, it expansively covers any employer action that “might well deter a reasonable employee from complaining about discrimination.”<sup>101</sup> An action need not be materially adverse standing alone, as long as the employer’s retaliatory conduct, considered as a whole, would deter protected activity.<sup>102</sup> Although “normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence,” the standard can be satisfied even if the individual was not in fact deterred.<sup>103</sup>

The *Burlington Northern* decision made clear that whether an action is reasonably likely to deter protected activity depends on the surrounding facts – although the standard is “objective,” it is phrased in “general terms” because the “significance of any given act will often depend on the particular circumstances. Context matters.”<sup>104</sup> An “act that would be immaterial in some situations is material in others.”<sup>105</sup> Indeed, the Supreme Court has held that transferring plaintiff to a harder, dirtier job within the same pay grade and job category and suspending her without pay for 37 days even though the lost pay was later reimbursed, were both “materially adverse actions” that could be challenged as retaliation.<sup>106</sup> Other examples of actionable retaliation cited by the Supreme Court include the FBI’s refusing to investigate “death threats” against an agent, the filing of

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<sup>100</sup> See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (“Title VII’s substantive [discrimination] provision and its antiretaliation provision are not coterminous” because the “scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm . . . . Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.”). Thus, it also extends beyond the scope of “adverse actions” involving federal employees that are subject to the jurisdiction of the Merit Systems Protection Board.

<sup>101</sup> *Id.* at 69.

<sup>102</sup> See, e.g., *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72 (2d Cir. 2015) (holding that a high school teacher stated a claim for retaliation based on the combination of “his assignment of notoriously absent students, his temporary paycheck reduction, and the District’s failure to notify him of a curriculum change”); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App’x 587, 599 (6th Cir. 2009) (holding that although some of the incidents alone may not rise to the level of an adverse action, “the incidents taken together might dissuade a reasonable worker from making or supporting a discrimination charge”).

<sup>103</sup> *Burlington N.*, 548 U.S. at 68; see, e.g., *Patane v. Clark*, 508 F.3d 106, 116 (2d Cir. 2007) (rejecting the employer’s argument that the challenged action was not sufficiently adverse under *Burlington Northern* since it did not dissuade the plaintiff herself from reporting sexual harassment again when it recurred, the court also commented that this argument was “entirely unconvincing, since it would require that *no* plaintiff who makes a second complaint about harassment could *ever* have been retaliated against for an earlier complaint”).

<sup>104</sup> *Burlington N.*, 548 U.S. at 69 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81–82 (1998)).

<sup>105</sup> *Id.* (citation omitted).

<sup>106</sup> *Id.* at 71–73.

false criminal charges against a former employee, changing the work schedule of a parent who has caretaking responsibilities for school-age children, and excluding an employee from a weekly training lunch that contributes to professional advancement.<sup>107</sup>

This broad definition of “materially adverse” from *Burlington Northern* applies not only to private and state and local government employment, but also to federal sector employment under all the statutes enforced by the EEOC.<sup>108</sup>

## 2. Types of Materially Adverse Actions

Work-Related Actions. The most obvious types of adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.<sup>109</sup> Other types of adverse actions may include work-related threats,<sup>110</sup> warnings, reprimands,<sup>111</sup> transfers,<sup>112</sup> negative or lowered evaluations,<sup>113</sup> transfers to less

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<sup>107</sup> *Id.* at 63, 69; *see also Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1090 (10th Cir. 2007) (denying summary judgment for employer on retaliation claim because jury could find defendants’ threats to ruin plaintiff’s family and marriage, and opposition to her receipt of employment benefits, constituted adverse actions that would have dissuaded a reasonable person from engaging in protected activity).

<sup>108</sup> Notwithstanding that the federal sector retaliation provision of Title VII refers to “personnel actions affecting employees or applicants,” the Commission views all employees covered by EEOC-enforced anti-retaliation provisions to be protected from any action that would likely deter a reasonable person from engaging in protected activity. *See Federal Sector Equal Employment Opportunity*, 77 Fed. Reg. 43,498, 43,501–43,502 (July 25, 2012) (codified at 29 C.F.R. § 1614), <https://federalregister.gov/a/2012-18134>; *see, e.g., Caldwell v. Johnson*, 289 F. App’x 579, 589 (4th Cir. 2008) (applying *Burlington Northern* and expressly rejecting different standards for retaliation claims for non-federal versus federal sector employers).

<sup>109</sup> *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (observing that suspensions and terminations “are by their nature adverse”).

<sup>110</sup> *Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169 (1st Cir. 2015) (holding that a supervisor’s multiple threats to fire plaintiff were materially adverse and thus actionable as retaliation, but plaintiff failed to prove they were motivated by her protected activity).

<sup>111</sup> *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) (applying the Title VII retaliation standard for materially adverse action in an FMLA retaliation claim, the court held that a letter of reprimand is materially adverse even if it “does not directly or immediately result in any loss of wages or benefits, and does not remain in the employment file permanently”); *Ridley v. Costco Wholesale Corp.*, 217 F. App’x 130, 135 (3d Cir. 2007) (upholding a jury verdict finding that although demotion was not retaliatory, the post-demotion transfer to warehouse, counseling notices for minor incidents, and failure to investigate complaints about these actions were unlawful retaliation).

<sup>112</sup> *Kessler v. Westchester Cty. Dep’t of Soc. Servs.*, 461 F.3d 199, 209 (2d Cir. 2006) (holding that transfer of high level executive without any loss of pay was actionable as retaliation where he was relegated to a non-supervisory role and non-substantive duties).

<sup>113</sup> *See, e.g., Walker v. Johnson*, 798 F.3d 1085, 1095 (D.C. Cir. 2015) (holding that the “denial of a deserved rise in performance rating” can be actionable as retaliation); *Porter v. Shah*, 606

prestigious or desirable work<sup>114</sup> or work locations,<sup>115</sup> and any other type of adverse treatment that in the circumstances might well dissuade a reasonable person from engaging in protected activity. For example, as one appellate court observed, “[a] formal reprimand issued by an employer is not a ‘petty slight,’ ‘minor annoyance,’ or ‘trivial’ punishment; it can reduce an employee’s likelihood of receiving future bonuses, raises, and promotions, and it may lead the employee to believe (correctly or not) that his job is in jeopardy.”<sup>116</sup> Another court of appeals reasoned that the same can be said of lowered performance appraisals:

If the Supreme Court views excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional development as materially adverse conduct, *see Burlington [Northern & Santa Fe Railway Co. v. White]*, 548 U.S. 53, 69 (2006)], then markedly lower performance-evaluation scores that significantly impact an

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F.3d 809, 817–18 (D.C. Cir. 2010) (ruling that on the facts of the particular case an interim performance of “borderline acceptable” was not materially adverse because it was delivered orally, with no written record placed in the plaintiff’s personnel file, and the evaluation was superseded by the plaintiff’s year-end review); *see also Halfacre v. Home Depot, U.S.A., Inc.*, 221 F. App’x 424, 432–33 (6th Cir. 2007); *Parikh v. N.Y.C. Transit Auth.*, No. 06 CV 3401(NG)(KAM), 2010 WL 364526, at \*9 (E.D.N.Y. Feb. 2, 2010).

<sup>114</sup> *See, e.g., O’Neal v. City of Chi.*, 588 F.3d 406, 409–10 (7th Cir. 2009) (holding that alleged repetitive reassignments negatively affecting plaintiff’s eligibility to be promoted from sergeant to lieutenant on the police force constituted materially adverse action); *Billings v. Town of Grafton*, 515 F.3d 39, 53 (1st Cir. 2008) (ruling that although the plaintiff’s own displeasure, standing alone, would be insufficient to render an action materially adverse, there was sufficient evidence for a jury to find that in retaliation for complaining about sexual harassment she had been subject to a materially adverse action when she was transferred to an objectively less prestigious position that reported to a lower-ranked supervisor, provided much less contact with the Board of Selectmen, the Town, and members of the public, and required less experience and fewer qualifications).

<sup>115</sup> *Loya v. Sebelius*, 840 F. Supp. 2d 245, 252–53 (D.D.C. 2012) (holding that it was materially adverse to move plaintiff’s office to a different building in the same complex, where the move isolated her from her colleagues, made it difficult for her to complete her job duties, diminished her standing as a senior staff member, contributed to a loss of responsibilities, cut off her access to administrative support services, forced her to travel between buildings in dangerously wet or icy walking conditions, and made it difficult for her to manage her diabetes).

<sup>116</sup> *Millea*, 658 F.3d at 165; *see also Alvarado v. Metro. Transp. Auth.*, No. 07 Civ. 3561(DAB), 2012 WL 1132143, at \*13 (S.D.N.Y. Mar. 30, 2012) (holding that retaliation claim could proceed to trial where “Letter of Instruction” was permanently placed in the plaintiff’s personnel file and could be used in future disciplinary actions); *cf. White v. Dep’t of Corr. Servs.*, 814 F. Supp. 2d 374, 388 (S.D.N.Y. 2011) (ruling that although a counseling memo and negative comment in a performance evaluation may not be adverse actions in themselves, a jury could find them actionable when considered in combination with a notice of discipline).

employee's wages or professional advancement are also materially adverse.<sup>117</sup>

Actions That Are Not Work-Related. A materially adverse action may also be an action that has no tangible effect on employment, or even an action that takes place exclusively outside of work, as long as it might well dissuade a reasonable person from engaging in protected activity. Prohibiting only employment-related actions would not achieve the goal of avoiding retaliation because “an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.”<sup>118</sup> The Supreme Court in *Burlington Northern* observed that, although the substantive anti-discrimination provisions seek elimination of discrimination that affects employment opportunities because of employees' racial, ethnic, or other protected status, the anti-retaliation provisions seek to secure that objective by preventing an employer from interfering in a materially adverse way with efforts to enforce the law's basic guarantees.<sup>119</sup>

Additional Examples. Other examples of materially adverse actions may include:

- disparaging the person to others or in the media;<sup>120</sup>
- making false reports to government authorities;<sup>121</sup>

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<sup>117</sup> *Halfacre*, 221 F. App'x at 433 (citing *Burlington N.*, 548 U.S. at 69–70, in which the Supreme Court stated that excluding an employee from a weekly training lunch “might well deter a reasonable employee from complaining”); see also *Pérez-Cordero v. Wal-Mart P.R., Inc.*, 656 F.3d 19, 31 (1st Cir. 2011) (“Although Pérez-Cordero did not suffer a tangible employment detriment in response to this protected activity, such as a retaliatory firing, we have previously held that the escalation of a supervisor's harassment on the heels of an employee's complaints about the supervisor is a sufficiently adverse action to support a claim of employer retaliation.”).

<sup>118</sup> *Burlington N.*, 548 U.S. at 63; see, e.g., *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 347–48 (6th Cir. 2008) (ruling that setting fire to employee's car and threatening to “kill the bitch” was actionable as retaliation); *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 604 (7th Cir. 1999) (ruling that falsely telling police that employee had a gun and had threatened to shoot supervisor, resulting in police injuring employee so severely he was unable to work for six weeks, was actionable as retaliation); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996) (ruling that filing false criminal charges was actionable as retaliation).

<sup>119</sup> *Burlington N.*, 548 U.S. at 63–64.

<sup>120</sup> *Szeinbach v. Ohio State Univ.*, 493 F. App'x 690, 694–96 (6th Cir. 2012) (holding that retaliatory accusations of misconduct in plaintiff's academic research, made in emails to a journal editor and professors at other universities, could be materially adverse); *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 84 (1st Cir. 2007) (affirming a jury verdict in plaintiff's favor, the court held that comments by a union president on television program regarding plaintiff being unfit for her job and implying she would pay a price for her discrimination claim constituted retaliation).

<sup>121</sup> *Greengrass v. Int'l Monetary Sys., Ltd.*, 776 F.3d 481, 485–86 (7th Cir. 2015) (ruling that employer's listing of employee's name in public filing with the Securities and Exchange

- filing a civil action;<sup>122</sup>
- threatening reassignment;
- scrutinizing work or attendance more closely than that of other employees, without justification;
- removal of supervisory responsibilities;<sup>123</sup>
- abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently “severe or pervasive” to create a hostile work environment;
- requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities because of protected activity;<sup>124</sup>

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Commission was materially adverse); *Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2012) (ruling that a statement to the press that employee had stolen paychecks could be found to be materially adverse action, because “though not affecting the terms or conditions of Lore’s employment, [the statement] might well have dissuaded a reasonable police officer from making a complaint of discrimination”); *see also Berry*, 74 F.3d at 986 (holding that instigating criminal theft and forgery charges against former employee who filed EEOC charge was retaliatory).

<sup>122</sup> *Burlington N.*, 548 U.S. at 66–67 (citing with approval the example of an employer’s lawsuit against an employee held actionable under the NLRA’s anti-retaliation provision, as explained in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983)).

<sup>123</sup> *Compare Geleta v. Gray*, 645 F.3d 408, 412 (D.C. Cir. 2011) (ruling that fact issue for jury existed as to material adversity when, among other things, plaintiff went from supervising 20 employees to supervising none), *and Burke v. Gould*, 286 F.3d 513, 515, 521–22 (D.C. Cir. 2002) (denying employer’s motion for summary judgment on retaliation claim challenging removal of supervisory duties from “supervisory computer systems analyst”), *with Higbie v. Kerry*, 605 F. App’x 304, 308–11 (5th Cir. 2015) (ruling that employer’s moving of employee’s desk and modifying his role were not materially adverse actions because employee had only an intermittent supervisory role in any event).

<sup>124</sup> The Commission has repeatedly filed lawsuits based on such facts. *EEOC v. Queen’s Med. Ctr.*, Civil Action No. 01–CV–00389 (D. Haw. consent decree entered July 2002) (settlement of retaliation case alleging that shortly after employee lodged an internal complaint, employer contacted the Immigration and Naturalization Service to retract its support for his permanent visa application, resulting in the INS initiating a hearing into his immigration status and therefore requiring him to hire a lawyer to defend his lawful resident status; case was settled for \$150,000 for emotional distress damages); *EEOC v. Holiday Inn Express*, No. 0:00–cv-0034 (D. Minn. consent decree entered Jan. 11, 2000) (employer who allegedly reported workers to INS after they engaged in protected activity under NLRA and Title VII settled discrimination and retaliation claims for \$72,000; INS deferred deportation action for two years to allow the workers time to be witnesses in case); *see also Bartolon-Perez v. Island Granite & Stone, Inc.*, 108 F. Supp. 3d 1335, 1340–41 (S.D. Fla. 2015) (citing Title VII case law, the court held that a factfinder could conclude an employer engaged in retaliation under the FLSA where it knew about plaintiff’s immigration status but waited until after he engaged in protected activity to “hold it . . . over his head”); *cf. EEOC v. Restaurant Co.*, 490 F. Supp. 2d 1039, 1050–51 (D. Minn. 2007) (denying

- terminating a union grievance process or other action to block access to otherwise available remedial mechanisms;<sup>125</sup>
- taking (or threatening to take) a materially adverse action against a close family member (who could bring a claim as an aggrieved individual in addition to the person who engaged in protected activity);<sup>126</sup> and
- any other action that might well deter reasonable individuals from engaging in protected activity.<sup>127</sup>

A fact-driven analysis applies to determine if the challenged employer action(s) in question would be likely to deter participation or opposition. To the extent some lower courts applying *Burlington Northern* have found that some of the above-listed actions can never be significant enough to deter protected activity, the Commission concludes that such a categorical view is contrary to the context-specific analysis, broad reasoning, and specific examples endorsed by the Supreme Court.

Matters are not actionable as retaliation if they are not likely to dissuade an employee from engaging in protected activity in the circumstances. For example, courts have concluded on the facts of given cases that a temporary transfer from an office to a cubicle consistent with office policy was not a materially adverse action<sup>128</sup> and that occasional brief delays by an employer in issuing refund checks to an employee that involved small amounts of money were not materially adverse.<sup>129</sup> Such actions were not deemed likely to deter protected activity, as distinguished from the transfer to harder work, the exclusion from a weekly training lunch, or the unfavorable schedule change described by the Supreme Court in *Burlington Northern* as materially adverse.

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summary judgment for the employer, the court ruled that the timing of a human resources director asking plaintiff to submit valid I-9 documentation two days after reporting sexual harassment could be found by a jury to support an inference of retaliatory motive for her subsequent termination).

<sup>125</sup> See, e.g., *EEOC v. Bd. of Governors*, 957 F.2d 424, 430 (7th Cir. 1992).

<sup>126</sup> *Thompson v. North American Stainless, LP*, 562 U.S. 170, 178 (2011).

<sup>127</sup> *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1268–70 (11th Cir. 2010) (ruling that terminating plaintiff sooner than planned due to her protected activity was actionable as retaliation); *Passer v. Am. Chem. Soc.*, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding that canceling a symposium in honor of retired employee who filed ADEA charge was retaliatory).

<sup>128</sup> *Roncallo v. Sikorski Aircraft, Inc.*, 447 F. App'x 243 (2d Cir. 2011).

<sup>129</sup> *Fanning v. Potter*, 614 F.3d 845, 850 (8th Cir. 2010) (ruling that a brief delay in payment of \$300 quarterly health benefit refund representing less than 2% of plaintiff's monthly income was not materially adverse). By contrast, the Commission has challenged retaliatory withholding of funds due to an employee. See, e.g., *EEOC v. Cardiac Sci. Corp.*, Civil Action No. 2:13-cv-01079 (E.D. Wis. consent decree entered July 2014) (settlement of retaliation claim based on employer's alleged refusal to provide severance payments and benefits and payments previously promised because it learned employee had previously filed an EEOC charge).

If the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal.<sup>130</sup> The degree of harm suffered by the individual "goes to the issue of damages, not liability."<sup>131</sup> Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing charges.<sup>132</sup> An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions.

Determining whether an action is reasonably likely to deter protected activity under *Burlington Northern* is fact-dependent.

### **EXAMPLE 13** **Exclusion from Team Lunches**

A federal agency employee filed a formal complaint with her agency EEO office alleging that she was denied a promotion by her supervisor because of her sex. One week later, her supervisor invited a few other employees out to lunch. She believed that her supervisor excluded her from lunch because of her complaint. Even if the supervisor chose not to invite the employee because of her complaint, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity. By contrast, if her supervisor invited all employees in her unit to regular weekly lunches, and she is excluded because she files the sex discrimination complaint, this might constitute unlawful retaliation since it could reasonably deter her or others from engaging in protected activity.<sup>133</sup>

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<sup>130</sup> *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997); *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) ("[A]n employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result.").

<sup>131</sup> *Hashimoto*, 118 F.3d at 676; *see also L.B. Foster*, 123 F.3d at 754 n.4 (ruling that a retaliatory job reference violated Title VII even though it did not cause failure to hire, because such a consequence is relevant only to damages, not liability).

<sup>132</sup> *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986).

<sup>133</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) ("A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.").

### **EXAMPLE 14**

#### **Workplace Surveillance**

An employee filed an EEOC charge alleging that he was racially harassed by his supervisor and coworkers. He also alleged that, after he had complained to management about the harassment, his supervisor asked two coworkers to conduct surveillance on the employee and report back about his activities. The surveillance constitutes a materially adverse action because it is likely to deter protected activity, and it is unlawful if it was conducted because of the employee's protected activity.

### **EXAMPLE 15**

#### **Threats to Report Immigration Status**

A contractor employs farm workers and other laborers whom it places in rural agricultural and manufacturing facilities operated by its corporate clients. Together, the contractor and these facilities are joint employers under the EEO laws. The contractor and its clients suspect that many of the employees may be undocumented workers but, in order to meet their staffing needs, they do not attempt to verify their authorization to work as required by the immigration laws. Several of the female farm workers and laborers, who are in fact undocumented, complain to a client supervisor and to the contractor about sexual harassment by male coworkers, including physical assaults and persistent unwelcome sexual remarks and advances. The client supervisor and the contractor threaten to expose the workers' immigration status if they continue to complain about the harassment. Threatening to report the workers' suspected immigration status to government authorities, or actually reporting the workers, is materially adverse and actionable as retaliation against workers who have engaged in protected activity under the EEO laws because it is likely to deter them from engaging in protected activity. If an EEOC charge is filed, both the contractor and the facility owner can each be found liable for retaliation. Neither the workers' undocumented status, nor the fact that they were placed by a contractor acting as a staffing firm, is a defense.<sup>134</sup>

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<sup>134</sup> EEOC, *Compliance Manual Section 2: Threshold Issues* § III-A.4 (2000), <https://www.eeoc.gov/policy/docs/threshold.html> (“Individuals who are employed in the United States are protected by the EEO statutes regardless of their citizenship or immigration status.”).

**EXAMPLE 16**  
**Workplace Sabotage, Assignment to Unfavorable  
Location, and Abusive Scheduling Practices**

After an employee cooperated in a workplace investigation of a coworker’s race discrimination complaint, a supervisor intentionally left a window ajar to prevent the employee from setting the building alarm (one of his job duties) and thereby subjected him to discipline. The supervisor also engaged in punitive scheduling, including shortening off-duty time between workdays and changing the employee’s work schedule in a way that would require him to work alone at a more dangerous facility than the one at which he usually worked. These acts of workplace sabotage, his assignment to an unfavorable location, and the punitive scheduling constitute materially adverse actions.<sup>135</sup>

**EXAMPLE 17**  
**Disclosure of Confidential EEO Information  
and Assignment of Disproportionate Workload**

Three weeks after a federal employee sought EEO counseling regarding her complaint of disability and gender discrimination, her supervisor posted the EEO complaint on the agency’s intranet where coworkers accessed it. The supervisor also increased her workload to five or six times

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The Commission has filed both individual and systemic lawsuits based on such facts. *See, e.g., EEOC v. DeCoster Farms*, No. 3:02-cv-03077-MWB (N.D. Iowa consent decree entered Sept. 2002) (EEOC alleged that supervisors sexually harassed and raped female workers, especially those of Mexican and other Hispanic national origin – some of whom were undocumented at the time – and threatened to deport and terminate any of the victims who cooperated with EEOC; consent decree provided \$1.525 million; undocumented victims were granted deferred status and visas); *EEOC v. Quality Art*, No. 2:00-cv-01171-SMM (D. Ariz. consent decree entered Aug. 2001) (case involved sexual and national origin harassment; employer threatened to report employees to the INS and subsequently contacted INS in an attempt to secure arrest and/or deportation; consent decree provided \$3.5 million to victims); *supra* note 124 (collecting additional cases).

<sup>135</sup> *Hicks v. Baines*, 593 F.3d 159, 167–70 (2d Cir. 2010) (applying *Burlington Northern* standard to find punitive scheduling was materially adverse on the facts of the case). A materially adverse action could also include, for example, moving a retail employee who has a straight schedule to “on-call” scheduling, or revoking a previously-approved flexible schedule. *See, e.g., Washington v. Illinois Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (holding that because employee’s flex-time schedule was previously approved to care for her child with a disability, its revocation could be materially adverse given the financial and other consequences that resulted).

that of other employees. Both of the supervisor's actions are materially adverse and actionable as alleged retaliation.<sup>136</sup>

### **3. Harassing Conduct as Retaliation**

Sometimes retaliatory conduct is characterized as “retaliatory harassment.” The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the *Burlington Northern* standard even if it is not severe or pervasive enough to alter the terms and conditions of employment.<sup>137</sup> If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.

### **4. Third Party Retaliation – Person Claiming Retaliation Need Not Be the Person Who Engaged in Opposition**

#### **a. Materially Adverse Action Against Employee**

Sometimes an employer takes a materially adverse action against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee.<sup>138</sup> For example, the Supreme Court explained that it is “obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”<sup>139</sup> Similarly, if an employer punishes an employee for engaging in protected activity by cancelling a vendor contract with the employee's husband (even though he was employed by a contractor, not the employer), it would dissuade a reasonable worker from engaging in protected

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<sup>136</sup> Cf. *Moghan v. Napolitano*, 613 F.3d 1162, 1166–67 (D.C. Cir. 2010) (ruling it was materially adverse to publicize an employee's EEO complaint to her colleagues and to “bury[ ] her in work,” “perhaps alone but certainly in combination”).

<sup>137</sup> See, e.g., *Martinelli v. Penn Millers Ins. Co.*, 269 F. App'x 226, 230 (3d Cir. 2008) (ruling that after *Burlington Northern*, an employee claiming “retaliation by workplace harassment” is “no longer required to show that the harassment was severe or pervasive”); *EEOC v. Chrysler Grp., LLC*, No. 08–C–1067, 2011 WL 693642, at \*8–11 (E.D. Wis. Feb. 17, 2011) (holding that reasonable jury could conclude employees were subjected to unlawful retaliation under *Burlington Northern* standard when human resources supervisor verbally harassed them by screaming and pounding his fists on the table while threatening termination if they filed grievances). The Commission also articulated this position in its 2012 final rulemaking to update federal sector regulations. See Federal Sector Equal Employment Opportunity, 77 Fed. Reg. 43,498, 43,502 (July 25, 2012) (codified at 29 C.F.R. § 1614), <https://federalregister.gov/a/2012-18134>.

<sup>138</sup> *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011); see also *EEOC v. Fred Fuller Oil Co.*, No. 13–cv–295–PB, 2014 WL 347635, at \*6 (D.N.H. Jan. 31, 2014) (denying motion to dismiss retaliation claim involving close friend of individual who had filed EEOC charge).

<sup>139</sup> *Thompson*, 562 U.S. at 174.

activity.<sup>140</sup> Although there is no “fixed class of relationships for which third-party reprisals are unlawful[,] . . . firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so.”<sup>141</sup>

### **b. Standing to Challenge: “Zone of Interests”**

Where there is actionable third party retaliation, both the employee who engaged in the protected activity and the third party who is subjected to the materially adverse action may state a claim. The third party may bring a claim even if he did not engage in the protected activity, and even if he has never been employed by the defendant employer. “Regardless of whether the plaintiffs are employed by the defendant, . . . the harm they suffered is no less a product of the defendant’s purposeful violation of the anti-retaliation provision.”<sup>142</sup> As the Supreme Court stated, the third party was not an “accidental victim”; “[t]o the contrary, injuring him was the employer’s intended means of harming the [employee who engaged in protected activity].”<sup>143</sup> Thus, the third party “falls within the ‘zone of interests’ sought to be protected by [the retaliation provision]” and has standing to seek recovery from the employer for his harm.<sup>144</sup>

### **C. Causal Connection**

**A materially adverse action does not violate the EEO laws unless there is a causal connection between the action and the protected activity.**

#### **1. Causation Standards**

Unlawful retaliation is established when a causal connection is established between a materially adverse action and the individual’s protected activity. The

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<sup>140</sup> *McGhee v. Healthcare Servs. Grp., Inc.*, No. 5:10cv279/RS–EMT, 2011 WL 818662, at \*2–3 (N.D. Fla. Mar. 2, 2011) (ruling that plaintiff could proceed with a Title VII retaliation claim based on allegations that after his wife filed an EEOC charge against her employer, plaintiff was fired from his job with a company that held a contract with his wife’s employer, allegedly at the request of his wife’s employer).

<sup>141</sup> *Thompson*, 562 U.S. at 178.

<sup>142</sup> *Tolar v. Cummings*, No. 2:13–cv–00132–JEO, 2014 WL 3974671, at \*12 (N.D. Ala. Aug. 11, 2014).

<sup>143</sup> *Thompson*, 562 U.S. at 178.

<sup>144</sup> *Id.* at 177 (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990) (internal quotation marks omitted)); see also Brief for the United States as Amicus Curiae Supporting Petitioner at 16–23, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (No. 09–291) (arguing petitioner was “aggrieved” by his own dismissal, which was the employer’s means of retaliating against his fiancée for alleging sex discrimination), [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/thompsonbr\\_sctmerits.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/thompsonbr_sctmerits.pdf).

retaliatory animus need not necessarily be held by the employer’s official who took the materially adverse action; an employer still may be vicariously liable if one of its agents, motivated by discriminatory or retaliatory animus, intentionally and proximately caused the official to take the action.<sup>145</sup> A retaliation claim will not succeed absent enough evidence to prove retaliation under the applicable causation standard.

**a. “But-For” Causation Standard for Retaliation Claims Against Private Sector and State and Local Government Employers**

In private sector and state and local government retaliation cases under the statutes the EEOC enforces, the causation standard requires the evidence to show that “but for” a retaliatory motive, the employer would not have taken the adverse action, as set forth by the Supreme Court in *University of Texas Southwest Medical Center v. Nassar*.<sup>146</sup> By contrast, the “motivating factor” causation standard for discrimination claims can be met even if the employer would have taken the same action absent a discriminatory motive.<sup>147</sup>

The “but-for” causation standard does not require that retaliation be the “sole cause” of the action. There can be multiple “but-for” causes, and retaliation need only be “a but-for” cause of the materially adverse action in order for the employee to prevail.<sup>148</sup>

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<sup>145</sup> *Staub v. Proctor Hosp.*, 562 U.S. 411, 418–22 (2011) (applying “cat’s paw” theory to a retaliation claim under the Uniformed Services Employment and Reemployment Rights Act, which is “very similar to Title VII”; holding that “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable”); *Zamora v. City of Hous.*, 798 F.3d 326, 333–34 (5th Cir. 2015) (applying *Staub*, the court held there was sufficient evidence to support a jury verdict finding retaliatory suspension); *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 552 (8th Cir. 2013) (applying *Staub*, the court upheld a jury verdict in favor of white workers who were laid off by management after complaining about their direct supervisors’ use of racial epithets to disparage minority coworkers, where the supervisors recommended them for layoff shortly after workers’ original complaints were found to have merit).

<sup>146</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (holding that “but-for” causation is required to prove Title VII retaliation claims raised under 42 U.S.C. § 2000e–3(a), even though claims raised under other provisions of Title VII only require “motivating factor” causation).

<sup>147</sup> Preponderance of the evidence (more likely than not) is the evidentiary burden under both causation standards. *Id.* at 2534; *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178 n.4 (2009) (emphasizing that under the “but-for” causation standard “[t]here is no heightened evidentiary requirement”).

<sup>148</sup> *Nassar*, 133 S. Ct. at 2534; *see also Kwan v. Andalex Grp.*, 737 F.3d 834, 846 (2d Cir. 2013) (“‘[B]ut-for’ causation does not require proof that retaliation was the only cause of the employer’s action, but only that the adverse action would not have occurred in the absence of a retaliatory motive.”). Circuit courts analyzing “but-for” causation under other EEOC-enforced laws also have explained that the standard does not require “sole” causation. *See, e.g., Ponce v.*

The Supreme Court has explained how “but-for” causation can be demonstrated even if multiple causes exist:

“[W]here A shoots B, who is hit and dies, we can say that A [actually] caused B’s death, since but for A’s conduct B would not have died.” *LaFave* 467–468 (italics omitted). The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel’s back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.<sup>149</sup>

#### **b. “Motivating Factor” Causation Standard for Title VII and ADEA Retaliation Claims Against Federal Sector Employers**

By contrast, in federal sector Title VII and ADEA retaliation cases, the Commission has held that the “but-for” standard does not apply because the relevant federal sector statutory provisions do not employ the same language on which the Court based its holding in *Nassar*.<sup>150</sup> The federal sector provisions contain a “broad prohibition of ‘discrimination’ rather than a list of specific prohibited practices,” requiring that employment “be made free from any discrimination,” including retaliation. Therefore, in Title VII and ADEA cases against a federal employer, retaliation is prohibited if it was a motivating factor.<sup>151</sup>

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*Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012) (explaining in Title VII case where the plaintiff chose to pursue only but-for causation, not mixed motive, that “nothing in Title VII requires a plaintiff to show that illegal discrimination was the sole cause of an adverse employment action”); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 316–17 (6th Cir. 2012) (ruling that “but-for” causation required by language in Title I of the ADA does not mean “sole cause”); *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 777 (5th Cir. 2009) (rejecting defendant’s challenge to Title VII jury instructions because “a ‘but for’ cause is simply not synonymous with ‘sole’ cause”); *Miller v. Am. Airlines, Inc.*, 525 F.3d 520, 523 (7th Cir. 2008) (“The plaintiffs do not have to show, however, that their age was the sole motivation for the employer’s decision; it is sufficient if age was a “determining factor” or a “but for” element in the decision.”).

<sup>149</sup> *Burrage v. United States*, 134 S. Ct. 881, 888–89 (2014) (citing *State v. Frazier*, 339 Mo. 966, 974–975, 98 S.W. 2d 707, 712–713 (1936)).

<sup>150</sup> See, e.g., *Nita H. v. Dep’t of Interior*, EEOC Petition No. 0320110050, 2014 WL 3788011, at \*10 n.6 (EEOC July 16, 2014) (holding that the “but-for” standard does not apply in federal sector Title VII case); *Ford v. Mabus*, 629 F.3d 198, 205–06 (D.C. Cir. 2010) (holding that the “but-for” standard does not apply to ADEA claims by federal employees).

<sup>151</sup> See *Gomez-Perez v. Potter*, 553 U.S. 474, 487–88 (2008) (holding that the broad prohibition in 29 U.S.C. § 633a(a) that personnel actions affecting federal employees who are at least 40 years of age “shall be made free from any discrimination based on age” prohibits retaliation by

## 2. Evidence of Causation

In order for the employee to prevail in demonstrating a violation, the evidence must show that it is more likely than not that retaliation has occurred. It is not the employer's burden to disprove the claim.<sup>152</sup>

There are instances in which the evidence demonstrates that the employer acknowledges or betrays a retaliatory motive for its materially adverse action, orally or in writing.<sup>153</sup> In many cases, however, the employer proffers a non-retaliatory reason for the challenged action. For example, the employer may assert that it could not have been motivated by retaliation because it was not aware of the protected activity,<sup>154</sup> or that even if it was aware the employee made complaints, it did not know that they concerned discrimination.<sup>155</sup> Or, an employer may contend that it was not motivated by retaliation but by a legitimate unrelated reason, such as: poor job performance or misconduct;<sup>156</sup> inadequate qualifications for the position sought;<sup>157</sup> or, with regard to negative job

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federal agencies); *see also* 42 U.S.C. § 2000e–16(a) (providing that personnel actions affecting federal employees “shall be made free from any discrimination” based on race, color, religion, sex, or national origin).

<sup>152</sup> In private sector and state and local government employment cases, EEOC gathers evidence and determines whether, based on its investigation, there is “reasonable cause” to believe that retaliation or discrimination occurred.

<sup>153</sup> For example, in one case the employer told the employee being terminated that “[y]our deposition was the most damning to [the employer’s] case, and you no longer have a place here. . . .” *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1190–91 (11th Cir. 1997).

<sup>154</sup> *See, e.g., Henry v. Wyeth Pharm.*, 616 F.3d 134, 148 (2d Cir. 2010) (ruling that jury instruction was erroneous where it did not allow finding that decisionmakers had requisite knowledge of plaintiff’s protected activity based on evidence they acted under instructions from management officials who had knowledge).

<sup>155</sup> *Compare Zokari v. Gates*, 561 F.3d 1076, 1081–82 (10th Cir. 2009) (holding that plaintiff failed to adduce any evidence that employer knew he had refused English class because he believed employer’s suggestion to attend was discriminatory), *with Hennagir v. Utah Dep’t of Corr.*, 587 F.3d 1255, 1267 (10th Cir. 2009) (finding that given employer’s awareness of plaintiff’s charge, that plaintiff’s supervisor was specifically named as a transgressor in the charge, and that the supervisor lowered the plaintiff’s performance evaluation the day after the employer received the charge, a reasonable jury could infer that the supervisor was aware of the charge when he lowered the evaluation).

<sup>156</sup> *Brown v. City of Jacksonville*, 711 F.3d 883, 892–94 (8th Cir. 2013) (concluding that employer was not liable for retaliation based on evidence that termination was based on plaintiff’s mistreatment of coworkers and inefficient work performance); *Hypolite v. City of Hous.*, 493 F. App’x 597, 606 (5th Cir. 2012) (concluding that evidence showed suspension was not motivated by retaliatory animus but by employee’s using e-mail improperly and making racial slurs).

<sup>157</sup> *Compare Hoppe v. Lewis Univ.*, 692 F.3d 833, 843 (7th Cir. 2012) (concluding that employer had legitimate, non-retaliatory reason for firing aviation ethics teacher because she had never worked in aviation field, lacked formal aviation training, and had no relevant degrees, regardless of her past experience teaching philosophy and positive student reviews), *with Patrick v. Ridge*,

references, truthfulness of the information in the reference.<sup>158</sup>

There may be proof that the employer's asserted non-retaliatory explanation is pretextual, such as evidence that the former employer routinely declines to offer information about its former employees' job performance but departed from that policy with regard to an individual who engaged in protected activity.<sup>159</sup> If an employer's proffered explanation is shown to be false, a factfinder may infer retaliation or alternatively may conclude that the falsehood was given for a different reason (e.g., to cover up embarrassing facts). This determination must be made based on the totality of the evidence.

### **EXAMPLE 18** **Explanation for Non-Selection Was** **Pretext for Retaliation**

An employee alleges that she was denied a promotion because she opposed the under-representation of women in management jobs and was therefore viewed as a "troublemaker." The employer asserts that the selectee was better qualified for the job because she has a master's degree, whereas the employee only has a bachelor's degree. If the employee has significantly greater experience working at this company and experience has long been the company's most important criterion for selecting managers, this explanation may be found to be a pretext for retaliation.

### **3. Examples of Facts That May Support Finding of Retaliation**

Different types or pieces of evidence, either alone or in combination, may be relevant to determine if the above causation standard has been met. In other words,

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394 F.3d 311, 317 (5th Cir. 2004) (holding that employer's assertion that applicant for promotion was "not sufficiently suited" was vague and, if left unexplained, might not even qualify as a nondiscriminatory reason).

<sup>158</sup> E.g., *Fields v. Phillips Sch. of Bus. & Tech.*, 870 F. Supp. 149, 153–154 (W.D. Tex.), *aff'd mem.*, 59 F.3d 1242 (5th Cir. 1994) (concluding that evidence established that negative reference for plaintiff, a former employee, was based on the former supervisor's personal observations of plaintiff during his employment and contemporary business records documenting those observations).

<sup>159</sup> Cf. *Thomas v. iStar Fin., Inc.*, 448 F. Supp. 2d 532, 536 (S.D.N.Y. 2006) (ruling that providing a neutral reference was not evidence of retaliatory motive where such references are consistent with established company policy).

different pieces of evidence, considered together, may allow an inference that the materially adverse action was retaliatory.<sup>160</sup>

The evidence may include, for example, suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the employer's proffered reason for the adverse action, or any other pieces of evidence which, when viewed together, may permit an inference of retaliatory intent.<sup>161</sup>

Suspicious timing. The causal link between the adverse action and the protected activity is often established by evidence that the adverse action occurred shortly after the plaintiff engaged in protected activity.<sup>162</sup> However, temporal proximity is not necessary to establish a causal link.<sup>163</sup> Even when the time between the protected activity and the adverse action is lengthy, other evidence of retaliatory motive may establish the causal link.<sup>164</sup> For example, actions related to the continued processing of a complaint may

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<sup>160</sup> Some courts have used the concept of a “convincing mosaic” to describe the combination of different pieces of evidence to show retaliatory intent. This is not a legal requirement or a causation standard, but rather simply a description of combining different pieces of evidence to satisfy the applicable causation standard. *Ortiz v. Werner Enters., Inc.*, No. 15-2574, 2016 WL 4411434, at \*3–4 (7th Cir. Aug. 19, 2016); *Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R.*, 671 F.3d 49, 56 (1st Cir. 2012) (holding that “[w]hen all of these pieces are viewed together and in [plaintiff’s] favor, they form a mosaic that is enough to support the jury’s finding of retaliation,” even though challenged termination occurred five years after he filed his ADEA lawsuit); *see also Nita H. v. Dep’t of Interior*, EEOC Petition No. 0320110050, 2014 WL 3788011, at \*10 (EEOC July 16, 2014) (adopting and applying the “convincing mosaic” concept, the Commission rejected the employer’s contention that this requires plaintiff to make all the evidence fit in an interlocking pattern with no spaces).

<sup>161</sup> *Ortiz*, 2016 WL 4411434, at \*3–4.

<sup>162</sup> *See, e.g., Quiles-Quiles v. Henderson*, 439 F.3d 1, 8–9 (1st Cir. 2006) (concluding that jury could infer causation from evidence that harassment by supervisors intensified shortly after plaintiff filed an internal complaint); *Hossaini v. W. Mo. Med. Ctr.*, 97 F.3d 1085, 1089 (8th Cir. 1996) (holding that a reasonable factfinder could infer that defendant’s explanation for plaintiff’s discharge was pretextual where defendant launched investigation into allegedly improper conduct by plaintiff shortly after she engaged in protected activity).

<sup>163</sup> *Abbott v. Crown Motor Co.*, 348 F.3d 537 (6th Cir. 2003) (ruling that causation shown notwithstanding 11-month interim because supervisor stated his intention to “get back at” those who had supported the discrimination allegations); *Kachmar v. SunGard Data Sys.*, 109 F.3d 173, 178 (3d Cir. 1997) (ruling that district court erroneously dismissed plaintiff’s retaliation claim because termination occurred nearly one year after her protected activity; when there may be reasons why adverse action was not taken immediately, absence of immediacy does not disprove causation); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 44 (5th Cir. 1992).

<sup>164</sup> *See, e.g., Muñoz*, 671 F.3d at 56–57 (concluding that evidence supported jury’s finding that plaintiff, a doctor, was discharged in retaliation for ADEA lawsuit filed 5 years earlier, where the evidence showed plaintiff was fired for common conduct for which others were not disciplined, he was not given an opportunity to defend himself, and had been threatened years earlier by one of the decisionmakers that if he filed the suit he would never work at the hospital or in Puerto

remind an employer of its pendency or stoke an employer's animus. Moreover, an opportunity to engage in a retaliatory act may not arise right away. In these circumstances, a materially adverse action might occur long after the original protected activity occurs, and retaliatory motive is nevertheless proven.<sup>165</sup>

Oral or written statements. Oral or written statements made by the individuals recommending or approving the challenged adverse action may reveal retaliatory intent by expressing retaliatory animus or by revealing inconsistencies, pre-determined decisions, or other indications that the reasons given for the adverse action are false.<sup>166</sup> Such statements may have been made to the employee or to others.<sup>167</sup>

Comparative evidence. An inference that the adverse action was motivated by retaliation could also be supported by evidence that the employer treated more favorably a similarly situated employee who had not engaged in protected activity. For example, where a disciplinary action was taken for alleged retaliatory reasons, evidence of selective enforcement (i.e., that infraction regularly goes undisciplined in that workplace, or that another employee who committed the same infraction was not disciplined, or was not disciplined as severely) could be sufficient to infer retaliatory motive.<sup>168</sup> Similarly, absent evidence of new performance problems, a retaliatory motive might be inferred

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Rico again); *Rao v. Tex. Parks & Wildlife Dep't*, No. 4:13-cv-0726, 2014 WL 1846102, at \*3 (S.D. Tex. May 8, 2014) (holding that denial of promotion could be shown to be in retaliation for complaint filed three years earlier, where decisionmaker said to plaintiff "you didn't do anything wrong, but you filed that complaint").

<sup>165</sup> *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1094 (9th Cir. 2008); *Goldsmith v. Babgy Elevator Co.*, 513 F.3d 1261, 1278 (11th Cir. 2008); *Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 436 (6th Cir. 2009).

<sup>166</sup> *See, e.g., Burnell v. Gates Rubber Co.*, 647 F.3d 704, 709–10 (7th Cir. 2011) (concluding that evidence of plant manager's statement to African-American employee that he was "playing the race card" was sufficient to deny employer's motion for summary judgment on claim of retaliatory termination for race discrimination complaints); *Abbott*, 348 F.3d at 544 (ruling that summary judgment for employer on retaliation claim was improper where evidence showed supervisor stated he would "get back at those who had supported the charge of discrimination," told plaintiff he was being discharged for bringing "the morale of the shop down," and told the managing partner he fired plaintiff because he had put his nose in other people's business by testifying in support of coworker's discrimination allegations).

<sup>167</sup> *See, e.g., Burnell*, 647 F.3d at 709–10 (ruling summary judgment for employer improper based on evidence that included statements made to plaintiff); *Abbott*, 348 F.3d at 544 (ruling summary judgment for employer improper based on statements made both to plaintiff and to others).

<sup>168</sup> *Spengler v. Worthington Cylinders*, 615 F.3d 481, 494–95 (6th Cir. 2010) (concluding that evidence showed that plaintiff, who was discharged after raising an age discrimination allegation, was a valuable employee and that the rule pursuant to which he was terminated had been selectively enforced).

where an employee had higher performance appraisals prior to engaging in protected activity.<sup>169</sup>

Inconsistent or shifting explanations. If the employer changes its stated reason for the challenged adverse action over time or in different settings (e.g., reasons stated to employee in termination meeting differ from reasons employer cites in position statement filed with the EEOC), pretext may be inferred.<sup>170</sup> The inference of discrimination drawn from such changes, however, will be undermined to the extent the inconsistencies are innocuous or can be credibly explained by the employer (e.g., additional information is discovered).

Other evidence that employer's explanation was pretextual. There may be other evidence that the employer's justification for the challenged action is not believable and that the explanation is a pretext to hide retaliation.<sup>171</sup>

**EXAMPLE 19**  
**Evidence of Retaliatory Intent –**  
**Manager Advised No-Hire Based on**  
**Prior EEO Activity**

An employee files a suit against company A, alleging that her supervisor sexually harassed and constructively discharged her. The suit is ultimately settled. She applies for a new job with company B and receives a conditional offer subject to a reference check. When B calls A, the employee's former supervisor says that she was a

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<sup>169</sup> See *supra* notes 113 and 116.

<sup>170</sup> *Pantoja v. Am. NTN Bearing Mfg. Corp.*, 495 F.3d 840, 851 (7th Cir. 2007) (ruling that inconsistent explanations by employer presented issue for jury); *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011) (ruling that pretext could be shown because between the EEOC investigation and the litigation, the employer shifted its explanation for plaintiff's termination from reduction in force to mutual decision and then to violation of a company policy).

<sup>171</sup> See, e.g., *Tuli v. Brigham & Women's Hosp.*, 656 F.3d 33, 42 (1st Cir. 2011) (concluding that although supervisor contended that his actions were designed simply to give credential review committee a legitimate assessment of complaints against plaintiff, the evidence showed he overstated his objections and failed to disclose that he had been the subject of several prior complaints by plaintiff, which could lead the jury to conclude that his motives were attributable to discriminatory and/or retaliatory animus); *Spengler*, 615 F.3d at 495 (ruling that pretext could be shown because employer's explanation that seasonal employees are discharged after 12 months was inconsistent with testimony that the policy was only applied in the event of a production slowdown, which had not occurred); *Franklin v. Local 2 of the Sheet Metal Workers Int'l Ass'n*, 565 F.3d 508, 521 (8th Cir. 2009) (ruling that defendant's reading aloud at union meetings of legal bills identifying employees who had filed discrimination charges against the union may have been retaliatory, since degree of detail disclosed was not necessary given proffered non-retaliatory explanation that it was done in order to obtain member approval for expenditures).

“troublemaker,” started a sex harassment lawsuit, and was not anyone B “would want to get mixed up with.” B then withdraws its conditional offer. These statements support the conclusion that because of the employee’s prior sexual harassment allegation, A provided a negative job reference and B rescinded its job offer. Both A and B can be liable for retaliation.

**EXAMPLE 20**  
**Evidence of Retaliatory Intent –**  
**Manager Departed from Practice**

Jane, a saleswoman, has been employed at a retail store for more than a decade, and has always exceeded her sales quota and received excellent performance appraisals. Shortly after the company learned that Jane had provided a witness statement to the EEOC in support of a coworker’s sexual harassment claim, it terminated Jane, citing her failure to provide 48-hours advance notice to her supervisor about a shift swap with a coworker. She alleges retaliatory termination, and evidence reveals that same-day notice of shift swap was a widespread company practice that had commonly been permitted. This evidence, in combination with the proximity in time of her discharge to the company’s learning of her protected activity, could support the conclusion that the discharge was retaliatory.

**4. Examples of Facts That May Defeat a Claim of Retaliation**

Even if protected activity and a materially adverse action occurred, evidence of any of the following facts alone or in combination may be credited by the factfinder in a given case and, as a result, lead to the conclusion that the action was not in retaliation for the protected activity under the applicable causation standard.

Employer Unaware of Protected Activity. Retaliation cannot be shown without establishing that the employer (either the decisionmaker or someone who influenced the decisionmaker) knew of the prior protected activity.<sup>172</sup> Absent knowledge, there can be no retaliatory intent, and therefore no causal connection.<sup>173</sup>

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<sup>172</sup> As discussed *supra* note 145, an employer can be liable under “cat’s paw” theory where an individual due to retaliatory animus influenced a decisionmaker who did not know of the protected conduct or animus.

<sup>173</sup> See, e.g., *Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009) (holding that plaintiff failed to show that interviewers who scored his oral interview were aware of his previous discrimination complaints).

Legitimate Non-Retaliatory Reason for Challenged Action. An employer may proffer a legitimate non-retaliatory reason for the challenged action. Examples of non-retaliatory reasons include:

- poor performance;
- inadequate qualifications for position sought;
- qualifications, application, or interview performance inferior to the selectee;
- negative job references;
- misconduct (e.g., threats, insubordination, unexcused absences, employee dishonesty, abusive or threatening conduct, or theft); and
- reduction in force or other downsizing.

Though the employer does not have the burden to disprove retaliation, the employer may have evidence supporting its proffered explanation for the challenged action, such as comparative evidence revealing like treatment of similarly situated individuals who did not engage in protected activity, or supporting documentary and/or witness testimony.

**EXAMPLE 21**  
**Negative Reference Was Truthful, Not Retaliatory**

An employee alleges that his former private sector employer gave him a negative job reference because he had filed an EEO discrimination claim after being terminated. The employer produces evidence that it usually provides information about previous employees' job performance and that its negative statements to the prospective employer were honest assessments of the former employee's job performance. Unless it can be concluded that the negative reference was because of the discrimination claim, retaliation would not be found.

**EXAMPLE 22**  
**Action Not Motivated By Retaliation**

Plaintiff, the office manager of a service company, believed her non-selection for various managerial positions was due to sex discrimination, and she posted on an online social media platform, "anyone know a good EEO lawyer? need

one now.” Management saw this and shared it with human resources. Plaintiff was subsequently discharged and alleged it was retaliatory. However, the evidence showed the termination was due to Plaintiff’s extensive unauthorized use of overtime and her repeated violations of company finance procedures, which were enforced for other employees, and for which Plaintiff had been previously issued written discipline. Even though management was aware of Plaintiff’s protected activity (her intention to take action on a potential EEO claim), Plaintiff cannot prove retaliatory discharge.

Evidence of Retaliatory Motive But Adverse Action Would Have Happened Anyway. In a case where the “but for” standard applies, the claim will fail unless retaliation was a “but-for” cause of the adverse action. In other words, causation cannot be proven if the evidence shows that the challenged adverse action would have occurred anyway, even without a retaliatory motive.

### **EXAMPLE 23** **“But-For” Causation Not Shown**

A private sector employee alleges retaliatory termination. The evidence shows that management admitted to being “mad” at the employee for filing a prior religious discrimination charge, but this was not enough to show that her protected activity was a “but-for” cause of her termination, where she was fired for her repeated violations of workplace safety rules and for insubordination. The employee admitted to repeatedly violating the rules and to being uncooperative with her supervisor. Further, the evidence shows that the employee was warned prior to her filing the EEO claim that her continued violation of the safety rules could result in her termination.<sup>174</sup>

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<sup>174</sup> See *Etienne v. Spanish Lake Truck & Casino Plaza, LLC*, 547 F. App’x 484, 489–90 (5th Cir. 2013) (affirming summary judgment for the employer on a Title VII retaliation claim, the court applied *Nassar* and concluded that the employee failed to show that retaliatory motive was the “but-for” cause for her discharge, not merely a motivating factor).

### III. ADA INTERFERENCE PROVISION

**The ADA prohibits not just retaliation, but also “interference” with the exercise or enjoyment of ADA rights. The interference provision is broader than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights.**

In addition to retaliation, the ADA prohibits “interference” with the exercise or enjoyment of ADA rights, or with the assistance of another in exercising or enjoying those rights.<sup>175</sup> The scope of the interference provision is broader than the anti-retaliation provision. It protects any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights. 42 U.S.C. § 12203(b).<sup>176</sup> As with ADA retaliation, an applicant or employee need not establish that he is an “individual with a disability” or “qualified” in order to prove interference under the ADA

The statute, regulations, and court decisions have not separately defined the terms “coerce,” “intimidate,” “threaten,” and “interfere.” Rather, as a group, these terms have been interpreted to include at least certain types of actions which, whether or not they rise to the level of unlawful retaliation, are nevertheless actionable as interference.<sup>177</sup>

Of course, many instances of employer threats or coercion might in and of themselves be actionable under the ADA as a denial of accommodation, discrimination, or retaliation, and many examples in this section could be actionable under those theories of liability as well. Because the “interference” provision is broader, however, it will

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<sup>175</sup> The ADA interference provision uses the same language as a parallel provision in the Fair Housing Act, and Congress intended it to be interpreted in the same way. H.R. Rep. No. 101-485, pt. 2, at 138 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 421 (“The Committee intends that the interpretation given by the Department of Housing and Urban Development to a similar provision in the Fair Housing Act . . . be used as a basis for regulations for this section.”). The National Labor Relations Act (NLRA) also contains an interference provision with similar language to the ADA provision. *See* 29 U.S.C. § 158(a)(1) (making it unlawful under the NLRA for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [the Act]”).

<sup>176</sup> *See Brown v. City of Tucson*, 336 F.3d 1181, 1192 (9th Cir. 2003) (holding that in comparison to the retaliation provision, the interference provision protects a broader class of persons against less clearly defined wrongs; demands that plaintiff stop taking her medications and perform duties contrary to her medical restrictions or be forcibly retired constituted actionable interference).

<sup>177</sup> The EEOC regulation implementing the interference provision additionally includes the term “harass.” *See* 29 C.F.R. § 1630.12(b) (providing it is “unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or because the individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part”). The inclusion of the term “harass” in the regulation is intended to characterize the type of adverse treatment that may in some circumstances violate the interference provision.

reach even those instances when conduct does not meet the “materially adverse” standard required for retaliation. Examples of conduct by an employer prohibited under the ADA as interference would include:

- coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
- intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- threatening an employee with loss of employment or other adverse treatment if he does not “voluntarily” submit to a medical examination or inquiry that is otherwise prohibited under the statute;
- issuing a policy or requirement that purports to limit an employee’s rights to invoke ADA protections (e.g., a fixed leave policy that states “no exceptions will be made for any reason”);
- interfering with a former employee’s right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.

The interference provision does not apply to any and all conduct or statements that an individual finds intimidating.<sup>178</sup> In the Commission’s view, it only prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights.<sup>179</sup>

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<sup>178</sup> *Brown*, 336 F.3d at 1192–93 (ruling that the ADA’s interference provision is not so broad as to prohibit “any action whatsoever that in any way hinders a member of a protected class,” and observing that supervisor’s statement that other employees were complaining about plaintiff’s long lunches and early departures did not alone violate the interference provision) (citation omitted).

<sup>179</sup> See Brief of the EEOC as Amicus Curiae in Support of the Plaintiff-Appellant, *Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir. 2003) (No. 01–16938).

**EXAMPLE 24**  
**Manager Pressures Employee Not to Advise Coworker  
of Right to Reasonable Accommodation**

Joe, a mail room employee with an intellectual disability, is having difficulty remembering the supervisor's instructions that are delivered orally at morning staff meetings. Dave, a coworker, explains to Joe that he may be entitled to written instructions as a reasonable accommodation under the ADA and then takes Joe to the human resources department to assist him in requesting accommodation. When the supervisor learns what has happened, he is annoyed that he may have to do "more work" by providing written instructions, and he tells Dave that if he continues to "stir things up" by "putting foolish ideas in Joe's head" with this "accommodation business," he will regret it. The supervisor's threat against Dave for assisting another employee in exercising his ADA rights can constitute interference.

**EXAMPLE 25**  
**Manager Refuses to Consider Accommodation  
Unless Employee Tries Medication First**

When reviewing medical information received in support of an employee's request for accommodation of her depression, the employer learns that, although the employee's physician had previously prescribed a medication that might eliminate the need for the requested accommodation, the employee chose not to take the medication because of its side effects. The employer advises the employee that if she does not try the medication first, he will not consider the accommodation. The employer's actions constitute both denial of reasonable accommodation and interference in violation of the ADA.

A threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.

**EXAMPLE 26**  
**Manager Warns Employee  
Not to Request Accommodation**

An employee with a vision disability needs special technology in order to use a computer at work. She

requests paid administrative leave as an accommodation to visit an off-site vocational technology center with the employer's human resources manager in order to decide on appropriate equipment, as well as for several subsequent appointments at the center during which she will be trained on the computer program selected. Her supervisor objects, but the human resources manager advises him that this is part of the process of accommodating the employee with the equipment under the ADA, and that the leave should be granted. The supervisor calls the employee into his office and tells her that he will allow it this time, but if she ever brings up the ADA again, she "will be sorry." The supervisor's threat constitutes interference with the exercise of ADA rights in violation of the statute, even if not accompanied or followed by any adverse action.

#### **EXAMPLE 27**

#### **Manager Conditions Accommodation on Withdrawal of Formal Accommodation Request**

After a lengthy interactive process, an employee with multiple sclerosis is granted a change in schedule as an accommodation. When her condition subsequently worsens, she requests additional accommodations, including telecommuting on days when her symptoms flare up and prevent her from walking. The employer has a policy that prohibits telework. When her supervisor consults human resources, he is advised that the ADA may require making an exception to the usual policy as a reasonable accommodation, unless it would pose an undue hardship. Instead of proceeding with the interactive process, the supervisor tells the employee that if she withdraws her request for accommodation, he will informally allow her to work from home one day per week, but that, if she persists with her formal accommodation request, he will tell human resources that her job cannot be performed from home. The supervisor's actions constitute interference in violation of the ADA.

#### **EXAMPLE 28**

#### **Manager Threatens Employee with Adverse Action If She Does Not Forgo Accommodation Previously Granted**

Due to post-traumatic stress disorder following a nighttime attack, an employee is accommodated with shift

assignments that assure that she can commute to and from work during daytime hours. She is subsequently assigned a new supervisor who threatens to have her transferred, demoted, or placed on medical retirement if she does not work a “normal schedule.” Based on these facts, the supervisor has violated the interference provision of the ADA.

#### **EXAMPLE 29**

##### **Refusal to Consider Applicant Unless He Submits to Unlawful Pre-Employment Medical Examination**

A job applicant declines an interviewer’s request to submit to a pre-offer medical examination, citing the ADA’s prohibition against conducting medical examinations prior to making a conditional offer of employment. The interviewer refuses to consider the application without the examination, so the applicant submits to it. Regardless of whether or not the applicant is qualified or is hired, the employer engaged in interference as well as an improper disability-related examination in violation of the ADA.

#### **IV. REMEDIES**

##### **A. Temporary or Preliminary Relief**

The EEOC has the authority to seek temporary injunctive relief before final disposition of a charge when a preliminary investigation indicates that prompt judicial action is necessary to carry out the purposes of Title VII, and the ADA and GINA incorporate this provision.<sup>180</sup> Although the ADEA and the EPA do not authorize a court to give interim relief pending resolution of an EEOC charge, the EEOC can seek such relief as part of a lawsuit for permanent relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Temporary or preliminary relief allows a court to stop retaliation before it occurs or continues. Such relief is appropriate if there is a substantial likelihood that the challenged action will be found to constitute unlawful retaliation and if the charging party and/or the public interest will likely suffer irreparable harm because of the retaliation. Although courts have ruled that financial hardships are not irreparable, other harms that accompany loss of a job may be irreparable. For example, courts have held that forced

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<sup>180</sup> 42 U.S.C. § 2000e–5(f)(2) (“Whenever a charge is filed . . . and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.”); 42 U.S.C § 12117 (ADA); 42 U.S.C. § 2000ff–6(a) (GINA).

retirees showed irreparable harm and qualified for a preliminary injunction where they lost work and future prospects for work, consequently suffering emotional distress, depression, a contracted social life, and other related harms.<sup>181</sup>

**EXAMPLE 30**  
**Preliminary Relief Granted to Prohibit Retaliatory**  
**Transfer During Pendency of EEO Case**

An employee filed an enforcement action in court to obtain compliance with the relief obtained in his Title VII national origin discrimination case. Within two months, his employer ordered him to transfer from its Los Angeles office to its facility in Detroit or be discharged. The court granted preliminary relief to forestall the alleged retaliatory transfer and permit the employee to retain employment pending its adjudication of the merits.<sup>182</sup>

A temporary injunction also is appropriate if the respondent's retaliation will likely cause irreparable harm to the Commission's ability to investigate the charging party's original charge of discrimination. For example, if the alleged retaliatory act might discourage others from providing testimony or from filing additional charges based on the same or other alleged unlawful acts, preliminary relief is justified.<sup>183</sup>

**EXAMPLE 31**  
**Preliminary Relief Prohibiting**  
**Intimidation of Witnesses**

During the EEOC's systemic investigation of sexual harassment at a large agricultural producer with many low-

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<sup>181</sup> *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984); *see also EEOC v. City of Bowling Green*, 607 F. Supp. 524, 527 (W.D. Ky. 1985) (granting preliminary injunction preventing defendant from mandatorily retiring police department employee because of his age; although plaintiff could have collected back pay and been reinstated at later time, he would have suffered from inability to keep up with current matters in police department and would have suffered anxiety or emotional problems due to compulsory retirement).

<sup>182</sup> *Garcia v. Lawn*, 805 F.2d 1400, 1405–06 (9th Cir. 1986).

<sup>183</sup> *Id.* (ruling that the employer's retaliation would have a chilling effect on other employees' willingness to exercise their rights or testify for plaintiff, and therefore would cause irreparable harm); *cf. EEOC v. Peters' Bakery*, 13–CV–04507–BLF (N.D. Cal. preliminary injunction issued July 2015) (ruling that harassment about the pending claim, combined with the likelihood of success on the merits, may support entry of a preliminary injunction prohibiting an employer from terminating an employee during the pendency of a federal EEO lawsuit, because "permitting [the individual] to be terminated under such circumstances may well have a chilling effect on other employees who might wish to file charges with the EEOC, and thus could interfere with the EEOC's mission").

wage, seasonal employees, the Commission learned that management was creating an environment of intimidation to deter current and former employees from cooperating as witnesses. The court granted the Commission preliminary relief prohibiting any retaliatory measures against the EEOC's potential class members, witnesses, or their family members, as well as any actions that would discourage association with those individuals. It also enjoined the company from paying or offering to pay for favorable testimony in the EEOC's case.<sup>184</sup>

## **B. Compensatory and Punitive Damages for Retaliation**

Compensatory and punitive damages are potentially available under the anti-retaliation provisions in accordance with the standards explained below. *Note:* punitive damages are only available against private employers, not against government entities.

### **1. Title VII and GINA**

Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, compensatory and punitive damages are available for a range of violations under Title VII, including retaliation. A cap on combined compensatory and punitive damages (excluding past monetary losses) ranges from \$50,000 for employers with 15–100 employees, to \$300,000 for employers with more than 500 employees. Section 207 of GINA incorporates all the same remedies available under Title VII. Punitive damages are available when a practice is undertaken “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1). Eligibility for punitive damages depends on the employer's state of mind, not on the “egregiousness” of the employer's misconduct.<sup>185</sup>

### **2. ADEA and EPA**

Compensatory and punitive damages are available for retaliation claims brought under the ADEA and the EPA, even though such relief is not available for non-retaliation

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<sup>184</sup> See *EEOC v. Evans Fruit Co.*, No. CV–10–3033–LRS, 2010 WL 2594960, at \*1–2 (E.D. Wash. June 24, 2010) (granting EEOC's request for preliminary injunction while the investigation continues) (citing the likelihood of irreparable injury if alleged witness tampering was allowed to continue, in that “(a) the Commission's prosecution of its case is likely to be chilled; (b) the Commission's investigation of retaliation charges now pending . . . is likely to be chilled; and (c) current and past . . . employees are likely to be deterred from exercising their rights under Title VII”).

<sup>185</sup> *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999).

claims under those statutes.<sup>186</sup> Any compensatory and punitive damages obtained under the EPA and the ADEA are not subject to statutory caps.

### 3. ADA and Rehabilitation Act

Title V of the ADA sets forth the retaliation and interference provisions but contains no remedy provision of its own. Among courts, there remains a split of authority regarding whether compensatory and punitive damages are available for retaliation or interference in violation of the ADA.<sup>187</sup> Although the Civil Rights Act of 1991's damages provision does not explicitly mention retaliation claims under the ADA, the Commission and the U.S. Department of Justice maintain that compensatory and punitive damages are available for retaliation or interference in violation of the ADA.<sup>188</sup> The ADA retaliation provision refers to 42 U.S.C. § 12117 for its remedy, which in turn adopts the remedies set forth in Title VII at 42 U.S.C. § 2000e-5 and 42 U.S.C. § 1981a(a)(2). Moreover, the reference in the damages provision of the Civil Rights Act of 1991 to the intentional discrimination provision of the ADA (section 102, 42 U.S.C. § 12112) must encompass retaliation as a form of intentional discrimination. Accordingly, availability of damages for ADA and Rehabilitation Act retaliation claims should be assessed under the standards applicable to Title VII.<sup>189</sup>

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<sup>186</sup> The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under both the EPA and the ADEA. See *Moore v. Freeman*, 355 F.3d 558, 563–64 (6th Cir. 2004); *Moskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279, 283–84 (7th Cir. 1993).

<sup>187</sup> Compare *Edwards v. Brookhaven Sci. Assocs.*, 390 F. Supp. 2d 225, 236 (E.D.N.Y. 2005) (ruling that compensatory and punitive damages for retaliation are available under the ADA), and *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236, 240–41 (W.D.N.Y. 2003) (same), with *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1264–70 (9th Cir. 2009) (ruling that compensatory and punitive damages are not available for ADA retaliation), and *Kramer v. Banc of Am. Sec.*, 355 F.3d 961, 964–66 (7th Cir. 2004) (same). Several appellate courts, without analyzing the availability of compensatory damages, have affirmed awards to plaintiffs who have prevailed in retaliation claims under the ADA. See, e.g., *Salitros v. Chrysler Corp.*, 306 F.3d 562, 570 (8th Cir. 2002); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248–49 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 314–15 (2d Cir. 1999).

<sup>188</sup> See Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellee Cross-Appellant, *Mascarella v. CPlace Univ. SNF*, No. 15–30970 (5th Cir. filed June 10, 2016), <https://www.eeoc.gov/eeoc/litigation/briefs/mascarella.html>.

<sup>189</sup> Although some courts have held that state government employers may have sovereign immunity from retaliation claims by individuals for money damages under the ADA, see, e.g., *Demshki v. Monteith*, 255 F.3d 986, 988 (9th Cir. 2001), such employers are still subject to suit by the U.S. government, which can obtain full relief including damages for the individual. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001); *United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 499 (5th Cir. 2003). Therefore it is in the interest of such employers to take the same care as all others to comply with retaliation prohibitions.

## C. Other Relief

Under all the statutes enforced by the EEOC, relief may also potentially include back pay if the retaliation resulted in termination, constructive discharge, or non-selection, as well as front pay or reinstatement. Equitable relief also frequently sought by the Commission includes changes in employer policies and procedures, managerial training, reporting to the Commission, and other measures designed to prevent violations and promote future compliance with the law.

## V. PROMISING PRACTICES

Although each workplace is different, there are many different types of promising policy, training, and organizational changes that employers may wish to consider implementing in an effort to minimize the likelihood of retaliation violations.<sup>190</sup> The Commission uses the term “promising practices” here because these steps may help reduce the risk of violations. However, the Commission is aware there is not a single best approach for every workplace or circumstance.

Moreover, adopting these practices does not insulate an employer from liability or damages for unlawful actions. Rather, meaningful implementation of these steps may help reduce the risk of violations, even where they are not legal requirements.

### A. Written Employer Policies

Employers should maintain a written, plain-language anti-retaliation policy, and provide practical guidance on the employer’s expectations with user-friendly examples of what to do and not to do. The policy should include:

- examples of retaliation that managers may not otherwise realize are actionable, including actions that would not be cognizable as discriminatory disparate treatment but are actionable as retaliation because they would likely deter a reasonable person from engaging in protected activity;
- proactive steps for avoiding actual or perceived retaliation, including practical guidance on interactions by managers and supervisors with employees who have lodged discrimination allegations against them;
- a reporting mechanism for employee concerns about retaliation, including access to a mechanism for informal resolution; and

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<sup>190</sup> A number of these practices were developed from testimony and discussion at the EEOC’s *Meeting on Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention*, held on June 17, 2015. Written witness statements, as well as a transcript and video of the meeting, are available at <https://www.eeoc.gov/eeoc/meetings/6-17-15/>.

- a clear explanation that retaliation can be subject to discipline, up to and including termination.

Employers should consider any necessary revisions to eliminate punitive formal or informal policies that may deter employees from engaging in protected activity, such as policies that would impose materially adverse actions for inquiring, disclosing, or otherwise discussing wages. Although most private employers are under no obligation to disclose or make wages public, actions that deter or punish employees with respect to pay inquiries or discussions may constitute retaliation under provisions in federal and/or state law. *See supra* § II-A.2.f. (Inquiries and Other Discussions Related to Compensation).

## **B. Training**

Employers should consider these ideas for training:

- Train all managers, supervisors, and employees on the employer's written anti-retaliation policy.
- Send a message from top management that retaliation will not be tolerated, provide information on policies and procedures in several different formats, and hold periodic refresher training.
- Tailor training to address any specific deficits in EEO knowledge and behavioral standards that have arisen in that particular workplace, ensuring that employees are aware of what conduct is protected activity and providing examples on how to avoid problematic situations that have actually manifested or might be likely to do so.
- Offer explicit instruction on alternative proactive, EEO-compliant ways these situations could have been handled. In particular, managers and supervisors may benefit from scenarios and advice for ensuring that discipline and performance evaluations of employees are motivated by legitimate, non-retaliatory reasons.
- Emphasize that those accused of EEO violations, and in particular managers and supervisors, should not act on feelings of revenge or retribution, although also acknowledge that those emotions may occur.
- Include training for management and human resources staff regarding how to be responsive and proactive when employees do raise concerns about potential EEO violations, including basics such as asking for clarification and additional information to ensure that the question or concern raised is fully understood, consulting as needed with superiors to address the issues raised, and following up as soon as possible with the employee who raised the concern.

- Do not limit training to those who work in offices. Provide EEO compliance and anti-retaliation training for those working in a range of workplace settings, including for example employees and supervisors in lower-wage manufacturing and service industries, manual laborers, and farm workers.
- Consider overall efforts to encourage a respectful workplace, which some social scientists have suggested may help curb retaliatory behavior.

### **C. Anti-Retaliation Advice and Individualized Support for Employees, Managers, and Supervisors**

An automatic part of an employer's response and investigation following EEO allegations should be to provide information to all parties and witnesses regarding the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it. As part of this debriefing, managers and supervisors alleged to have engaged in discrimination should be provided with guidance on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace.

- Provide tips for avoiding actual or perceived retaliation, as well as access to a resource individual for advice and counsel on managing the situation. This may occur as part of the standard debriefing of a manager, supervisor, or witness immediately following an allegation having been made, ensuring that those alleged to have discriminated receive prompt advice from a human resources, EEO, or other designated manager or specialist, both to air any concerns or resentments about the situation and to assist with strategies for avoiding actual or perceived retaliation going forward.

### **D. Proactive Follow-Up**

Employers may wish to check in with employees, managers, and witnesses during the pendency of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation, and to provide guidance. This provides an opportunity to identify issues before they fester, and to reassure employees and witnesses of the employer's commitment to protect against retaliation. It also provides an opportunity to give ongoing support and advice to those managers and supervisors who may be named in discrimination matters that are pending over a long period of time prior to reaching a final resolution.

### **E. Review of Employment Actions to Ensure EEO Compliance**

Consider ensuring that a human resources or EEO specialist, a designated management official, in-house counsel, or other resource individual reviews proposed

employment actions of consequence to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons. These reviewers should:

- require decisionmakers to identify their reasons for taking consequential actions, and ensure that necessary documentation supports the decision;
- scrutinize performance assessments to ensure they have a sound factual basis and are free from unlawful motivations, and emphasize the need for consistency to managers;
- where retaliation is found to have occurred, identify and implement any process changes that may be useful; and
- review any available data or other resources to determine if there are particular organizational components with compliance deficiencies, identify causes, and implement responsive training, oversight, or other changes to address the weaknesses identified.

Additional suggestions for reducing incidences of retaliation are available at *Retaliation – Making it Personal*, Equal Emp't Opportunity Comm'n, [https://www.eeoc.gov/laws/types/retaliation\\_considerations.cfm](https://www.eeoc.gov/laws/types/retaliation_considerations.cfm).