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HASTINGS

AVOIDING AND DEFENDING RETALIATION CLAIMS

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I. A BRIEF OVERVIEW OF THE RETALIATION CAUSE OF ACTION

A. Key Statutory Provisions.

1. Most of the employment discrimination statutes contain anti-retaliation provisions.

a. Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e-3(a)).

b. The Age Discrimination in Employment Act (29 U.S.C. § 623(d)).

c. The Americans with Disabilities Act (42 U.S.C. § 12203(a)).

d. Employees also may bring causes of action, in certain circumstances, under the Civil Rights Act of 1866 (42 U.S.C. § 1981); the Civil Rights Act of 1871 (42 U.S.C. §§ 1983, 1985(3) and 1986); the National Labor Relations Act (29 U.S.C. §§ 157 and 158(a)(1)); or the Fair Labor Standards Act (29 U.S.C. §§ 201-219).

e. The Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1514A) ("SOX") provides federal protection to employees of public companies when they lawfully disclose certain information about fraudulent activities within their companies.

f. Public employees have some First Amendment rights to express their opposition to discriminatory employment practices by their employers.

g. The Supreme Court determined that Title IX of the 1964 Civil Rights Act provides a cause of action to redress retaliation when an individual is punished for complaining about unequal treatment. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (because Title IX prohibits discrimination "on the basis of sex" by recipients of federal education funding, "We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX.").

h. Most states (including California) prohibit retaliation in their own state fair employment practices statutes. Cal. Gov't Code § 12940.

i. In addition, many states have recognized anti-retaliation (or whistleblower) exceptions to the at-will employment doctrine under the general theory of wrongful discharge in violation of

public policy. (The author has a separate paper on the California law of tortious discharge.)

2. Title VII's retaliation principles.

a. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), makes it unlawful to retaliate against an individual:

(i) "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title]"; or

(ii) "because he has opposed any practice made an unlawful employment practice by this [title]."

b. The former section is known as the "participation" clause; the latter, the "opposition" clause.

c. Courts *sanction* retaliation but will not *presume* that retaliation will occur. *Macias v. Aaron Rents, Inc.*, 288 Fed. Appx. 913, 916 (5th Cir. 2008) (unpublished) (prevailing Title VII plaintiff's fear that prospective employers conducting background checks would locate the case does not warrant an order sealing the record or changing to "X" all references to his name; the theoretical potential for employer retaliation against litigious employees could apply to virtually every case filed in the federal courts).

B. Plaintiff's *Prima Facie* Case.

Many cases say that, to establish a *prima facie* case of unlawful retaliation, a plaintiff must prove that: (1) he or she engaged in some protected activity; (2) the employer subjected him or her to some adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *E.g.*, *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998); *King v. Town of Hanover*, 116 F.3d 965, 968 (1st Cir. 1997); *Little v. United Techs.*, 103 F.3d 956, 959 (11th Cir. 1997); *Grimes v. Texas Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996).

Some courts also have held that a retaliation plaintiff must establish other elements of the traditional prima facie case. *See, e.g.*, *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001) ("We have never expressly made qualification a *prima facie* element of an ADEA retaliation claim, but today we decide that such an element is necessary."); *Velez v. Janssen Ortho LLC*, 467 F.3d 802, 809 (1st Cir. 2006) (a rejected job applicant failed to establish a prima facie case of retaliatory failure to hire; plaintiff did not show that she applied for a specific position; a letter expressing general interest is not enough).

The California Supreme Court has held that in order to prevail on a retaliation claim, "[t]he plaintiff . . . bears the burden of establishing . . . that the employer's conduct was motivated by impermissible considerations under a 'but for' standard of causation." *Gen. Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 1191 (1994).

Some courts dispense with portions of the administrative exhaustion requirement for retaliation claims. *E.g.*, *Jones v. Calvert Group Ltd.*, 551 F.3d 297, 302-03 (4th Cir. 2009) (a plaintiff need not file a new discrimination charge in order to pursue a retaliatory discharge claim; she was not required to exhaust administrative remedies in order to pursue a claim that she was fired because of the prior discrimination charge).

II. FRAMEWORK FOR ANALYZING RETALIATION CLAIMS

A. A Plaintiff Claiming Retaliation Must Be An "Employee" Under Title VII.

1. Bona fide partners and independent contractors are not "employees."

Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 450-51 (2003) (whether a shareholder is an "employee" for Title VII purposes depends on a multifactor test aimed chiefly measuring whether the individual exercises control, as the employer, or is subject to the entity's control; one's title is not determinative).

Solon v. Kaplan, 398 F.3d 629, 634 (7th Cir. 2005) (a former general partner of a Chicago law firm who claimed that he was pushed out in retaliation for objecting to another partner's alleged sexual harassment of two secretaries is not an employee protected by Title VII of the 1964 Civil Rights Act; as one of four general partners with equal voting rights, Solon "substantially controlled the direction of the firm, his employment and compensation, and the hiring, firing, and compensation of others," and thus, Solon had "control that he exercised in fact as managing partner, and control that he had the right to assert by virtue of the partnership agreement").

Sibbald v. Johnson, 294 F. Supp. 2d 1173, 1178 (S.D. Cal. 2003) (plaintiff could not sustain retaliation claim against the Navy because she was an employee of an independent contractor).

2. However, both current and former employees can raise retaliation claims.

a. Former employees.

Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997) (Title VII's anti-retaliation protections extend to post-employment adverse actions, such as adverse job references; Title VII's definition of term "employee" was ambiguous, but the statutory purpose plainly was to provide relief to former employees).

Ruedlinger v. Jarrett, 106 F.3d 212, 214 (7th Cir. 1997) (retaliatory acts affecting future employment, such as calling a future employer and divulging confidential information about a former employee, can give rise to a Title VII retaliation claim).

Smith v. St. Louis Univ., 109 F.3d 1261, 1266 (8th Cir. 1997) (former resident at university's medical school presented a *prima facie* case where she alleged that a university made negative comments to future employers after she complained of harassment by her former department chair).

EEOC Guidance on Investigating, Analyzing Retaliation Claims, EEOC Compliance Manual ("EEOC GUIDELINES"), vol. 2, § 8-II.D.2 ("Examples of post-employment retaliation include actions that are designed to interfere with the individual's prospects for employment, such as giving an unjustified negative job reference, refusing to provide a reference, and informing an individual's prospective employer about the individual's protected activity.").

But see Matthews v. Wis. Energy Corp., 534 F.3d 547, 559 (7th Cir. 2008) (discharged employee and a company agreed that the company would respond to references by giving only dates of employment, job held, and compensation; the company responded to a reference request by saying that the plaintiff had been involved in "legal actions against the company"; summary judgment affirmed on retaliation claim, but reversed on breach of contract claim; *Burlington Northern* defines adverse employment action as an action likely to dissuade a reasonable worker from filing a charge; "[H]er prior litigation history was objectively true, so . . . disclosure of this fact was not adverse."; there was no adverse employment action and thus no statutory retaliation claim, even though the breach of contract claim survived).

b. Employees are protected in opposing discriminatory practices or participating in prior or pending statutory proceedings against other employers.

McMenemy v. City of Rochester, 241 F.3d 279, 283-84 (2d Cir. 2001) (Title VII prohibits retaliation against any employee who has opposed unlawful employment practice, even if the unlawful employment practice opposed is not committed by the same employer who retaliated).

EEOC GUIDELINES, vol. 2, § 8-II.B.3.d ("There is no requirement that the entity charged with retaliation be the same as the entity whose allegedly discriminatory practices were opposed by the charging party. For example, a violation would be found if a respondent refused to hire the charging party because it was aware that she opposed her previous employer's allegedly discriminatory practices."); *id.*, vol. 2, § 8-II.C.4 ("An individual is protected against retaliation for participation in employment discrimination proceedings even if those proceedings involved a different entity. For example, a violation would be found if a respondent refused to hire the charging party because it was aware that she filed an EEOC charge against her former employer.").

B. Be Mindful Of The Important Distinction Between The "Participation" Clause And The "Opposition" Clause.

1. The "participation" clause protects any person who has participated in any manner in Title VII proceedings (or the necessary precursors to such proceedings). Good faith is normally not required.

a. The majority rule is that all manner of participation is protected, even if done in bad faith.

EEOC Guidelines, vol. 2, § 8-II.C.2 (protected "participation" includes testifying, assisting, or preparing an affidavit in conjunction with a proceeding or investigation under Title VII, ADEA, EPA, or ADA, without regard to whether the allegations are valid or reasonable).

Kelley v. City of Albuquerque, 542 F.3d 802, 813-14 (10th Cir. 2008) (a lawyer who represented Albuquerque, N.M., in an Equal Employment Opportunity Commission matter was protected from being fired in retaliation for that representation after her opposing counsel in the case became mayor).

Deravin v. Kerik, 335 F.3d 195, 203-05 (2d Cir. 2003) (for purposes of retaliation protection, employee who defended himself from charges of co-worker sexual harassment and alleged that he was denied a promotion because he defended himself was covered by the participation clause of Title VII, which "is expansive and seemingly contains no limits"; the court emphasized, however, that its interpretation of the participation clause "should not be read as prohibiting employers from legitimately disciplining employees who engage in discriminatory conduct").

Merritt v. Dillard Paper Co., 120 F.3d 1181, 1188-89 (11th Cir. 1997) (plaintiff was discharged after he admitted in deposition that he and several male colleagues had engaged in sexually harassing activities; the discharge was unlawful, even though it was of an admitted harasser, if the discharge was based on fact and content of his testimony, rather than the harassing conduct itself; plaintiff was protected under Title VII's "participation" clause because he "participated" in a Title VII suit by testifying; the law's protections are not limited to those who are Title VII claimants).

McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 486 (7th Cir. 1996) (dictum) (the employer instructed — indeed, threatened — employees not to provide affidavits that would assist plaintiff in her lawsuit; if the employer had carried out its threat, then employees would have had a claim for retaliation for participating in plaintiff's EEO lawsuit).

Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 175 (2d Cir. 2005) (retaliation claimant who volunteered to testify in support of sexual harassment lawsuit but was never called was entitled to protection under the participation clause; it protects employees who participate "in any manner" in a Title VII proceeding).

McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (holding protected the "passive" participation of an ally of an employee who asserted Title VII rights; plaintiff, a supervisor, was told by the employer to prevent his subordinates from filing discrimination complaints; disobeying employer's orders, plaintiff did not intervene, and subordinates did file charges against the employer; plaintiff's passive resistance was held to be legally protected "participation").

But cf. Twisdale v. Snow, 325 F.3d 950, 952-53 (7th Cir.) (employee participating on employer's side in a dispute is not

protected from retaliation under § 704(a)), *cert. denied*, 540 U.S. 1088 (2003).

b. These same principles often apply to state discrimination statutes.

Crown Appliance v. Workers' Comp. Appeals Bd., 115 Cal. App. 4th 620, 626-27 (2004) (evidence supported finding that the employee was discharged for filing a workers' compensation claim).

Iwekaogwu v. City of Los Angeles, 75 Cal. App. 4th 803, 815 (1999) (court upheld jury verdict finding that the employer retaliated against employee for threatening to file a state race discrimination action based on evidence that after plaintiff suggested he may file such claim, he was not promoted on two occasions; one position was filled by someone less qualified than plaintiff, and plaintiff's requests for overtime were denied).

c. Most cases under the "participation" clause say that the plaintiff need not act reasonably or even in good faith to be protected.

Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 412, 414 (4th Cir. 1999) (plaintiff's testimony at deposition in another woman's Title VII action did not lose its protected status because the plaintiff offered not only facts relevant to that woman's claims, but accused her own successor at defendant employer of "mismanagement, destruction of office documents, wasting funds, inappropriate behavior, dishonesty, and discrimination"; rejecting defendant's claim that employee's conduct is protected only if it is reasonable, the court concluded that "[a] straightforward reading of [Title VII's] unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action").

Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994) (plaintiff filed complaints with a state agency claiming that his employer had engaged in what plaintiff viewed as sexual harassment; plaintiff had a *prima facie* case of retaliation because, "[a]s for the participation clause, there is nothing in its wording requiring that the charges be valid, nor even an implied requirement that they be reasonable") (internal quotation marks omitted).

Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969) (seminal case; a false and malicious letter to EEOC was held protected).

d. The minority view requires the plaintiff to demonstrate a reasonable, good-faith belief that his or her activity is protected.

Neely v. City of Broken Arrow, 2007 WL 1574762, *2 (N.D. Okla. 2007) ("A plaintiff need only show that he had a reasonable and good faith belief that he opposed or participated in the investigation of conduct made unlawful under Title VII. In other words, there is a subjective (*i.e.*, good faith) and an objective (*i.e.*, reasonable) component to establishing a retaliation claim.").

Fiscus v. Triumph Group Operations, Inc., 24 F. Supp. 2d 1229, 1241 (D. Kan. 1998) (plaintiffs may state retaliation claims based on the participation clause, even though they failed to demonstrate an underlying violation, given that they harbored a "reasonable good faith belief that the employer discriminated") (dictum; internal quotation marks omitted).

Amos v. Hous. Auth. of Birmingham Dist., 927 F. Supp. 416, 421-22 (N.D. Ala. 1996) (employer lawfully may discipline employee who in bad faith files knowingly baseless charge; rejecting notion that "a disgruntled current employee can, with impunity, even acting with malice, file an EEOC claim with a smirk, knowing that her employer is a helpless, squirming victim").

Ramsey v. Centerpoint Energy/Entex, 2006 WL 149065, at *3 (S.D. Miss. 2006) (granting summary judgment even though plaintiff alleged that he was discharged in retaliation for filing an EEOC charge; the charge did not allege a discriminatory *employment* practice, though; "the substance of the Charge must constitute protected activity," and here it did not).

e. Note, however, that the plaintiff may lose the law's protection if he or she repeats a false claim *outside* the privileged context.

EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1175 (11th Cir. 2000) (summary judgment for employer affirmed; court held that the employer's good-faith belief that an employee lied during an internal sexual harassment investigation constituted a legitimate nondiscriminatory reason for termination; the internal investigation is distinct from EEOC proceedings).

Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) (lying during an internal investigation was unprotected, even though lies in charge or lawsuit would have been protected under the "participation" clause).

EEOC GUIDELINES, vol. 2, § 8-II.C.2 (retaliation for participation in strictly internal personnel investigations, *i.e.*, investigations unconnected to statutory investigation or proceeding, is not protected "participation").

But see Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999) (reversing its position in a prior panel decision in case, the court held that "where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that evidence gathered in that inquiry will be considered by EEOC as part of its investigation, employee's role constitutes participation 'in any manner' in the EEOC investigation").

f. Even under the "participation" clause, the law still requires participation in a proceeding under Title VII.

DeHart v. Baker Hughes Oilfield Operations, Inc., 214 Fed. Appx. 437, 441 (5th Cir. 2007) (an employee cannot claim a co-worker's protected activity as her own, even though the employee alleged she had previously complained about racial discrimination against herself and that co-worker).

Slagle v. County of Clarion, 435 F.3d 262, 268 (3d Cir. 2006) (affirming summary judgment; an employee's invalid charge purporting to allege Title VII violations does not arise to "participation" in a Title VII proceeding; a county jail correctional officer filed a claim with the EEOC alleging that his employer discriminated against him "because of whistleblowing, in violation of my Civil Rights, and invasion of privacy"; "All that is required is that plaintiff allege in the charge that his or her employer violated Title VII by discrimination against him or her on the basis of race, color, religion, sex or national origin, in any manner. . . . Slagle's complaint, with its vague allegations of "civil rights" violations, did not meet even this low bar.").

Balazs v. Liebenthal, 32 F.3d 151, 159 (4th Cir. 1994) (plaintiff's charge alleged that he had been accused unjustly of sexual harassment; no claim was stated; being accused unjustly of sexual harassment "ha[s] nothing to do with [employee's] race, color, religion, sex or national origin," so plaintiff was not a protected individual; "The EEOC had no more jurisdiction of this claim than it would have had of a charge that defendant had falsely accused him of reckless driving in the company parking lot.").

Millstein v. Henske, 79 FEP 176, 176-77 (D.C. Cir. 1999) (a plaintiff could not state a viable retaliation claim based on complaint of discrimination filed by individual with whom she had only professional relationship).

Burns v. Republic Sav. Bank, 25 F. Supp. 2d 809, 828-29 (N.D. Ohio 1998) (employee's vague oral threat to file a lawsuit is not participation; participation requires filing of actual charge).

g. Is there a "perceived as" or "regarded as" theory of participation?

Johnson v. Napolitano, 686 F. Supp. 2d 32, 375 (D.D.C. 2010) (refusing to dismiss a retaliation claim by a Secret Service employee alleging that the agency retaliated against her because it perceived her as having participated in her husband's race class action against the agency; "Whether or not [Title VII] allows . . . a claim of retaliation based on the protected activity of a third party, Johnson has identified a genuine issue of material fact with respect to her claim of retaliation based on a perception theory of retaliation.").

2. The "opposition" clause, by contrast, provides less-absolute protection to the individual, as shown below.

C. Recurring Coverage Issues Under The "Opposition" Clause.

1. What constitutes statutorily protected opposition?

a. The obvious case is when an employee says "I oppose" or "please stop" discriminatory behavior. But no magic words are required.

Miller v. Dep't of Corr., 36 Cal. 4th 446, 474-75 (2005) ("We do not believe employees should be required to elaborate to their employer on the legal theory underlying the complaints they are making, in order to be protected by the FEHA. . . . Furthermore, even if ultimately it is concluded defendants' conduct did not constitute a violation of the FEHA, we are not persuaded by defendant's claim that only an employee's mistake of fact, and not a mistake of law, may establish an employee's good faith but mistaken belief that he or she is opposing conduct prohibited by the FEHA.").

b. Less obviously, complaints and refusals to follow the employer's instructions may be opposition.

Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000) (reversing summary judgment for the employer; the employee may state a retaliation claim based on that employee's complaints that other employees were being harassed in workplace; "[A]n employee's complaints about the treatment of others is considered a protected activity, even if the employee is not a member of the class that he claims suffered from discrimination, and even if the discrimination he complained about was not legally cognizable.").

Moore v. Philadelphia, 461 F.3d 331, 342 (3d Cir. 2006) (reversing summary judgment for the defendant; white police officers who complained about the department's treatment of black officers could proceed with their claims of retaliation; ". . . Title VII's whistleblower protection is not limited to those who blow the whistle on their own mistreatment or on the mistreatment of their own race, sex, or other protected class.").

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996) (finding opposition under Title VII where the employee complained of race discrimination on numerous occasions and refused the employer's request to gather derogatory personnel information about another employee who had also complained of race discrimination).

Oliver v. Gen. Nutrition Ctr., 1999 WL 435208, at *3 (S.D.N.Y. 1999) (store manager who was fired after rejecting advice of the company to testify negatively about a colleague's job performance in an arbitration could proceed with retaliation claims against her former employer under opposition theory).

Van Pfullman v. Tex. Dep't of Transp., 24 F. Supp. 2d 707, 712 (W.D. Tex. 1998) (male employee's complaints about other male employees' sexually harassing behavior, which included sitting on his lap and "rock[ing] around," and making sexual insinuations while plaintiff was eating sausage, constituted protected activity).

Farrell v. Planters LifeSavers Co., 22 F. Supp. 2d 372, 392 (D.N.J. 1998) (deeming protected a female employee's rejection of her male supervisor's sexual advance during a business trip), *rev'd in part on other grounds*, 206 F.3d 271 (3d Cir. 2000).

EEOC GUIDELINES, vol. 2, § 8-II.B.2 (a worker engages in protected activity if he or she "explicitly or implicitly communicates to his or her employer . . . a belief that its activity constitutes a form of employment discrimination"; such protected activity includes: (1) threatening to file charge or other formal complaint alleging discrimination; (2) complaining to anyone (including union official, co-worker, attorney or newspaper reporter) about alleged discrimination, and even non-verbal acts (such as picketing or engaging in production slowdown); (3) refusing to obey order based on reasonable belief that it is discriminatory; and (4) requesting accommodation of disability or religious belief).

But cf. Sawicki v. Am. Plastic Toys, Inc., 180 F. Supp. 2d 910, 917 (E.D. Mich. 2001) (former group leader who delivered subordinates' sexual-harassment complaint against their supervisor to plant manager, mailed copy to human resources manager, and informed management that an attorney had been contacted, did not engage in protected opposition activity where she did not oppose sexual harassment directed at her but only delivered a claim brought by other employees).

Tate v. Executive Mgmt. Servs., Inc., 546 F.3d 528, 532-33 (7th Cir. 2008) (although resistance to a supervisor's sexual advances may be protected activity in some cases, a retaliation plaintiff must demonstrate a good-faith belief that he or she was opposing unlawful activity; there was no such evidence here; plaintiff refused to continue a previously consensual sexual relationship with the supervisor mainly because he recently married someone else).

Lightner v. City of Wilmington, 545 F.3d 260, 264 (4th Cir. 2008) (affirming summary judgment; plaintiff undermined his Title VII case by alleging that the city suspended him until his early retirement in order to cover up wrongdoing among city police officers; Lightner's Title VII claim "founders on its terms"; "[Lightner] has tried to take a statute aimed at discrete forms of discrimination and turn it into a general whistleblower statute, which of course Title VII is not.").

Curry v. Telect Inc., 2009 WL 1659344, at *6 (N.D. Tex. 2009) (granting summary judgment on claim that employer retaliated against plaintiff for complaining that his protective equipment was defective; Curry's complaint did not constitute protected activity

under Title VII; the act does not protect opposition to all unlawful employment practices, only those it made unlawful).

Burnell v. Gates Rubber Co., 2011 U.S. App. LEXIS 15422, at *11 (7th Cir. 2011) (employee's regular complaints of real and perceived racial discrimination were protected activity, including being sprayed with a hose, segregation in training assignments, discrimination in application of the Operator A test, being passed over for a job, supervisors' rumored desire not to work with black people, and lack of training from supervisor).

Davis v. Time Warner Cable of Southeastern Wis., L.P., 2011 U.S. App. LEXIS 13636, at *25-26 (7th Cir. 2011) (plaintiff's informal complaints of racial discrimination to manager are protected activity).

c. Complaints to diverse recipients may constitute protected activity.

Worth v. Tyer, 276 F.3d 249, 265 (7th Cir. 2001) (sexual-harassment claimant's police report alleging that employer's main decisionmaker touched her breast while she was in her office constituted protected activity under Title VII's "opposition" clause).

O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1255 (10th Cir. 2001) (employee was reassigned after filing a charge of discrimination with EEOC and subsequently terminated the day after his employer received a letter from his attorney alleging the reassignment was retaliatory; defendants argued the letter was not a "complaint" and that employee did not engage in protected activity, but the court held otherwise).

Conetta v. Nat'l Hair Care Ctrs., Inc., 236 F.3d 67, 76 (1st Cir. 2001) (a former employee opposed a supervisor's alleged sexual advances; she complained about it to a fellow employee, who was also the son of the employer's general manager; supervisor found out about her complaint and called her to tell her that he would "get even"; two months after she made her complaint she was discharged; court held that expressing opposition to harassment to management or to anyone else is protected conduct that may support liability).

d. Complaints made not on an employee's own initiative but as part of an employer's investigation may constitute opposition.

Crawford v. Metro. Gov't of Nashville, ___ U.S. ___, 129 S. Ct. 846, 851 (2009) (reversing the Sixth Circuit's conclusion that the Opposition Clause demanded "active, consistent" opposing activities; the Opposition Clause extends to an employee who speaks out about discrimination, not on her own initiative, but in answering the employer's questions; stating, in dictum, that opposition includes someone who has taken no action at all to advance a position beyond disclosing it: "[W]e would call it 'opposition' if an employee took a stand against an employer's discriminatory practices by not 'instigating' action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons.").

Crawford v. Metropolitan Gov't of Nashville & Davidson County, No. 3:03-0996 (M.D. Tenn. 2010) (on remand from Supreme Court, plaintiff won $1.5 million jury verdict).

But cf. Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 745, 747 (7th Cir. 2010) (affirming dismissal of plaintiff's discharge claim; she alleged that she was fired after an internal investigation into a possible sexually hostile work environment at the hospital; plaintiff's retaliation claim under the "participation" clause failed because "[h]er communications . . . constituted participation in a purely internal investigation of possible sex discrimination, and even if an internal investigation is an 'investigation' within the meaning . . . of Title VII . . . she was not fired for participating in it."; "She was fired because of comments she made that demonstrated bad judgment and a preoccupation with superficial characteristics of her new boss, and for harping on issues, at once irrelevant and sensitive . . . ."; her "opposition" clause argument also failed, because opposition conduct "must be based on a good-faith (that is, honest) and reasonable belief that it is opposition to a statutory violation," which did not exist here).

Thampi v. Manatee County Bd. of Comm'rs, ___ Fed. Appx. ___, 2010 WL 2600638, at *5-6 (11th Cir. 2010) ("[S]imply being listed as a witness on an internal complaint form, without actively volunteering to serve as a witness or offering some indication of the nature of the proposed testimony does not constitute 'opposition' under Title VII."; and even if being listed constituted "opposition" conduct, plaintiff failed to show a causal connection to his termination; nothing showed that his supervisor was aware that plaintiff was listed as a witness at the time he was fired).

2. What if the plaintiff is factually or legally wrong?

a. Under the "participation" clause, as noted above, the majority view is that it does not matter; the employee is legally privileged to "participate," even if the claim is flawed as a matter of fact or law (or even if the claim is asserted in bad faith).

b. Under the "opposition" clause, the plaintiff's statements or conduct must have been based in good faith.

c. Courts review several factors to determine whether an employee's complaint is based on a good faith reasonable belief:

(i) Timing of the employee's complaint:

Alexander v. Gerhardt Enters., 40 F.3d 187, 195-96 (7th Cir. 1994) (plaintiff was terminated by employer the day after sending a memorandum objecting to a racial slur in the workplace and requesting a public apology; plaintiff reasonably could have believed that utterance of single racial slur violated Title VII).

Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1457-58 (7th Cir. 1994) (employee's belief that her supervisor's offensive utterance constituted sexual harassment was reasonable and sincere because she complained about the offensive utterance after learning from a friend that her supervisor's behavior may violate the law).

Cf. Little v. United Techs., 103 F.3d 956, 960 (11th Cir. 1997) (white employee's claim that he was retaliated against after objecting to co-worker's racial slur did not have an objectively reasonable good faith belief that he opposed an unlawful employment practice because plaintiff never voiced concern over the racial slur to a supervisor or management and did not report the comment until a team meeting held eight months after remark was made).

(ii) Employee's motivation for raising complaint:

McCullough v. Univ. of Ark., 559 F.3d 855, 865 (8th Cir. 2009) (affirming summary judgment against a male employee accused of harassment; the man had filed a harassment charge against the women who accused him, but that did not insulate him from discharge; McCullough claimed that his termination letter stated that he was fired for filing sexual harassment complaints; the letter did not make such a statement; "It states that he was discharged for filing *untruthful* complaints, as well as for sexually harassing his co-workers.") (emphasis added).

Monteiro v. Poole Silver Co., 615 F.2d 4, 8 (1st Cir. 1980) (plaintiff's accusations of discrimination did not constitute protected opposition conduct because the allegations were unfounded and raised in bad faith; the court found that the employee raised accusations of discrimination "as a smokescreen in challenge to the supervisor's legitimate criticism"; opposition protection is unavailable for "an

employee who makes unfounded claims of discrimination in order to excuse non-compliance with legitimate company demands").

Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004) (employee's malicious claim held not protected by the participation clause of Title VII because not only was the claim unreasonable and meritless, it also was motivated by bad faith; if participation clause claims did not require a good faith and reasonableness standard, "an employee could ensure himself of unlimited tenure by filing continuous complaints with the government agency if he fears that his employer will discover his duplicitous behavior").

Spadola v. New York City Transit Auth., 242 F. Supp. 2d 284, 292 (S.D.N.Y. 2003) (male employee's accusation that female supervisor engaged in sexual harassment was not protected, as plaintiff did not then believe the comment to be harassment; "Congress could not have contemplated . . . as a legitimate purpose of Title VII retaliation claims: to arm employees with a tactical coercive weapon that may be turned against the employer as a means for the asserted victims to advance their own retaliatory motives and strategies, and thereby extract employment concessions on account of minor social lapses or harmless infractions in the workplace, or even to escape appropriate disciplinary measures.").

(iii) Knowledge or constructive knowledge of legal precedent:

Drinkwater v. Union Carbide Corp., 904 F.2d 853, 865-66 (3d Cir. 1990) (there was sufficient evidence to support a finding that plaintiff was harassed for complaining about what she thought was a discriminatory atmosphere; "In determining the reasonableness of plaintiff's belief that she was being discriminated against, it is necessary to look first to pre-existing case law. . . . [T]he fact that, when plaintiff began her lawsuit, there was conflicting authority (in different circuits) . . . certainly would support a finding that plaintiff was reasonable in believing that she had a claim.").

Berg v. La Crosse Cooler Co., 612 F.2d 1041, 1045-46 (7th Cir. 1980) (plaintiff's discharge, for advising a fellow

employee that the employer's pregnancy disability policy was illegal, violated Title VII, even though the Supreme Court later established that the policy was then lawful, because plaintiff had a reasonable belief that the policy was illegal; plaintiff's belief was based on information she received in a college course; "Even though [the plaintiff] was proved wrong, her interpretation coincided with all of the courts of appeals that decided the question, with the EEOC Guidelines, with three justices of the Supreme Court, and with Congress.").

But cf. Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1317 (11th Cir. 2002) (employees who were discharged for refusing to sign a new employee handbook that included compulsory arbitration provision regarding employment discrimination claims could not have had a reasonable belief that the refusal to sign such agreement constituted protected activity[,] . . . [and they] may not stand on their ignorance of the substantive law to argue that their belief was reasonable"; employees' belief was not objectively reasonable given the near-universal approval of arbitration agreements which gave employees reasonable notice that such agreements were lawful).

Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1389 (11th Cir. 1998) (plaintiffs, four male video store employees, alleged that they were retaliated against for protesting their employer's grooming policy, which prohibited males from wearing long hair; given long-standing precedent holding that such policy was not unlawfully discriminatory, plaintiffs could not prove that complaint was based on an objectively reasonable belief).

(iv) Employee's level of sophistication:

Moyo v. Gomez, 40 F.3d 982, 984-85 (9th Cir. 1994) (plaintiff, a correctional officer, allegedly was discharged for refusing to implement a policy of allowing showers after work shifts to white but not to black inmates; plaintiff would be able to state a retaliation claim if he could show that he reasonably believed that a violation of Title VII had occurred; "An erroneous belief that an employer engaged in an unlawful employment practice is reasonable . . . if premised on a mistake made in good faith."; "The reasonableness of [the employee's] belief must be assessed

according to an objective standard — one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims.").

Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1020 (D.C. Cir. 1981) (opposition to an affirmative action plan would constitute protected activity under § 704(a), even if the plan were found to be legally valid, as long as the plaintiff demonstrated "a good faith, reasonable belief that the challenged practice violate[d] Title VII"; "[A] layperson should not be burdened with the 'sometimes impossible task' of correctly anticipating how a given court will interpret a particular statute.").

Berg v. La Crosse Cooler Co., 612 F.2d 1041, 1045-46 (7th Cir. 1980) (plaintiff's discharge, for advising fellow employee that the employer's pregnancy disability policy was illegal, violated Title VII, even though the Supreme Court later established that the policy was then lawful; "The plaintiff here was an educated and informed layperson who should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute.").

Gifford v. Atchison, Topeka & Santa Fe Ry. Co., 685 F.2d 1149, 1157 (9th Cir. 1982) (plaintiff who complained that a collective bargaining agreement had a disproportionate impact on women was protected by the opposition clause, even though the agreement was lawful under Title VII; an employee does not have to be aware that an employer practice is covered by Title VII or label the practice as "sex discrimination" at time of opposition in order to have a reasonable belief).

Cf. Volberg v. Pataki, 917 F. Supp. 909, 914-15 (N.D.N.Y.) (where plaintiff deputy counsel knew that employer layoffs had resulted from employer's bona fide seniority system, there was no reasonable good faith belief that the employer had engaged in unlawful discrimination; "When analyzing plaintiff's belief in this case, this Court must take into account the fact that she was acting not as a typical lay employee but rather as [defendant's] General Counsel. In other words, the Court will infer an absence of good faith on plaintiff's part if a reasonable attorney in plaintiff's

position would not have believed that defendants' proposed downsizing violated the law."), *aff'd mem.*, 112 F.3d 507 (2d Cir. 1996).

But see Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 n.2 (11th Cir. 1998) (plaintiffs, four male video store employees, alleged that they were retaliated against for protesting their employer's grooming policy, which prohibited males from wearing long hair; court rejected plaintiffs' argument that they should not be charged with substantive knowledge of the law because "it would eviscerate the objective component of our reasonableness inquiry"; "If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge.").

Richey v. City of Independence, 540 F.3d 779, 786 (8th Cir. 2008) (affirming summary judgment against a retaliation claim by a male employee who was found to have made false allegations of sexual harassment against a female colleague; even if the employee had an objectively reasonable belief that his reports about a co-worker's sexual harassment were opposition to a violation of the law, there was no genuine issue for trial; the employer's proffered reason for terminating the employee was that he violated the city's personnel policies by filing a false claim against a co-worker, and corroboration supported that reason; rejecting contention that the protests were informal and hence not grounds for discharge; "The City, like any employer, 'can choose how to run its business, including not to follow its own personnel policies regarding termination of an employee . . . , as long as it does not unlawfully discriminate in doing so.'") (quoting *Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005)).

Jordan v. Alternative Resources Corp., 458 F.3d 332, 341-42 (2-1 decision) (affirming dismissal; plaintiff alleged that he was mistreated and eventually discharged after he reported to management a co-worker's racist remark; the remark was isolated; "[N]o objectively reasonable person could have believed that [the] office was in the grips of a hostile work environment or that one was taking shape."; here it was not reasonable for the employee "to believe that the isolated harassing event he has witnessed is the

component of a hostile workplace that is permeated with discriminatory intimidation, ridicule and insult"), *rehearing en banc denied by an equally divided vote*, 467 F.3d 378 (4th Cir. 2006).

(v) Extent of factual support at hand:

Byers v. Dallas Morning News, Inc., 209 F.3d 419, 428 (5th Cir. 2000) (where plaintiff failed to submit any evidence supporting the allegations submitted to his employer that he or others were victims of reverse discrimination, these beliefs were objectively unreasonable).

(vi) Proximity of the facts to the relevant legal standard:

Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768-69 (2d Cir. 1998) (plaintiff's allegations of sex discrimination were based upon two allegations: co-worker stated that plaintiff had "'sleekest ass' in the office," and the same co-worker deliberately touched plaintiff's breast with some papers; these allegations satisfied the good-faith requirement, even though they provided insufficient proof of sex discrimination).

Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1179-80 (2d Cir. 1996) (plaintiff complained to employer about co-employee's vulgar comments regarding gender roles; although incident was an isolated event, plaintiff reasonably could have believed that such conduct might have constituted a hostile work environment in violation of Title VII).

Trent v. Valley Elec. Ass'n, 41 F.3d 524, 527 (9th Cir. 1994) (plaintiff had reasonable belief that it was unlawful under Title VII for her to be subjected to series of sexually offensive remarks at a seminar that the company required her to attend to learn about essential aspect of her job).

EEOC v. Go Daddy Software, Inc., ___ F.3d ___, 2009 U.S. App. LEXIS 20159, at *29-30, 46-47 (9th Cir. 2009) (jury could have found that the company discharged the charging party for two or three complaints to Human Resources about approximately two comments about the charging party's national origin and religion, even though there was no evidence that the principal decisionmaker was

aware of the complaints; dissenting judge described the result as "a miscarriage of justice").

But cf. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) (finding no protected conduct where no reasonable person could have believed that a single sexual comment constituted sexual harassment under Title VII).

Howard v. Walgreen Co., 605 F.3d 1239, 1245 (11th Cir. 2010) (reversing a $300,000 jury verdict; plaintiff alleged that he was discharged for complaining about his supervisor's telephone message threatening that plaintiff's job was in jeopardy; that telephone message was not an adverse action, so the complaint about it was not protected activity; "Even if [plaintiff] subjectively believed [the supervisor] unlawfully discriminated against him when he left a message stating that [plaintiff's] job was in jeopardy, his belief could not have been objectively reasonable.").

Brannum v. Mo. Dep't of Corr., 518 F.3d 542, 548-49 (8th Cir. 2008) (plaintiff who corroborated a sexist remark could not reasonably have believed that she was engaged in protected activity; the alleged statement by the supervisor was a "single, relatively tame comment" that no reasonable person could have believed amounted to sexual harassment).

Roland v. Unity Ltd. P'ship, 2010 U.S. Dist. LEXIS 29623, at *19 (E.D. Wisc. 2010) (rejecting retaliation claim of a nurse allegedly discharged for complaining about the employer's failure to pay for on-call time; no wages in fact were owed, because the employee was subject to receiving a call but was free to do as she pleased while waiting; "[P]laintiffs' complaints about Unity's call policy are based largely on their own, somewhat idiosyncratic, reactions to the policy rather than any requirements the policy would impose on a typical person.").

Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1214 (11th Cir. 2008) (granting judgment as a matter of law on appeal following a $200,000 verdict; an African-American employee did not oppose an unlawful employment practice or experience a hostile work environment; a complaint about a single racially derogatory remark by a co-worker

failed to rise to the level of an unlawful employment practice under the opposition clause).

Smith v. Int'l Paper Co., 523 F.3d 845, 849-50 (8th Cir. 2008) (finding that no reasonable person could believe that complaints about workplace civility — complaints that supervisor was "hollering and cussing" at plaintiff — were protected under Title VII).

Jordan v. Alternative Resources Corp., 458 F.3d 332, 343 (2-1 decision; finding no protected conduct where no reasonable person could believe that a co-worker's single utterance of a racial epithet created a hostile work environment).

Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999) (finding no good-faith, reasonable belief that employer engaged in sexual harassment where plaintiff informed the company's internal investigatory committee only of other employee's "ordinary socializing in the workplace," such as frequent visits to another employee's desk, that came nowhere "near constituting sexual harassment"; "We do not mean to hold that the conduct opposed must actually be sexual harassment, but it must be close enough to support an objectively reasonable belief that it is. The conduct [plaintiff] described misses the mark by a country mile.").

Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988) (because the employee "did not allege that he ever opposed any discrimination based upon race, color, religion, sex, or national origin[,] . . . . [he] could not reasonably have believed that [his employer] discriminated against him in violation of Title VII, and therefore, he cannot claim that he was retaliated against for opposing discrimination prohibited by Title VII").

Neely v. City of Broken Arrow, 2007 WL 1574762, at *4 (N.D. Okla. 2007) (finding that plaintiff had not stated a claim of retaliation because plaintiff could show no reasonable, good faith belief that the conduct he opposed — that three firefighters engaged in sexually harassing conduct toward members of the public — violated Title VII).

(vii) Awareness of the relevant legal standard:

Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 693-94 (2d Cir. 1998) (at the time plaintiff was denied promotions, she asserted denial-of-promotion claim under 42 U.S.C. § 1981; however, her complaint to administrative agencies did not involve assertion of a right that was then protected by § 1981, even though it was protected by Title VII; retaliation for engaging in activity protected by Title VII (but not § 1981) does not give rise to claim for retaliation that is cognizable under § 1981).

Love v. Motion Indus., Inc., 309 F. Supp. 2d 1128, 1134 (N.D. Cal. 2004) (granting summary judgment on employee's retaliation claim under Cal. Lab. Code § 1102.5(b) because the employee's disclosure of safety conditions did not violate any federal or state statute, rule, or regulation; court rejected plaintiff's argument that he reasonably believed that defendant's activity violated some unnamed statute; plaintiff's inability to cite any statute, rule, or regulation "indicates a lack of any foundation for the reasonableness of his belief").

(viii) Whether the complaint is supported by third-party evidence:

EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1013 (9th Cir. 1983) (protest letter written by employees of paper company to the local school board was a statutorily protected expression of opposition to employer discriminatory practices; fact that General Services Administration investigation resulted in findings that employer practices were "discriminatory" and "deficient" in certain respects is enough to support that employees reasonably believed that the employer had practiced discrimination).

(ix) Whether the complaint is supported by employer's own policies:

Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1195 (8th Cir. 2001) (plaintiff alleged that her opposition to defendant's sick leave policy regarding an epileptic co-worker was protected by the ADA; sufficient evidence existed that plaintiff had an objectively reasonable belief

that defendant was violating the ADA because a new sick leave policy conflicted with defendant's human resource manual, which listed epilepsy as a disability under the ADA).

(x) Whether the complaint is supported by employer's own actions:

Drinkwater v. Union Carbide Corp., 904 F.2d 853, 865-66 (3d Cir. 1990) (sufficient evidence existed to support a finding that plaintiff was harassed for complaining about what she thought was a discriminatory atmosphere; defendants' own activities, such as increased pressure to have plaintiff sign a non-disclosure statement regarding a sexual harassment complaint filed by a previous employee, suggested that defendants themselves might have thought that the plaintiff had a sex discrimination claim).

But see Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351-52 (11th Cir. 1999) (fact that opposed conduct led to an in-house investigation does not alter the conclusion that plaintiff's belief was not objectively reasonable).

(xi) Cases that employ conclusory labels without analysis:

(a) Good faith reasonable belief found:

Leitgen v. Franciscan Skemp Healthcare, Inc., 630 F.3d 668, 674 (7th Cir. 2011) (employee raised genuine issue of material fact regarding whether she was engaged in a protected activity where she had a reasonable, good-faith belief that the hospital's pay scheme was discriminatory based on gender and voiced these concerns to the hospital's secretary of the compensation committee).

Pickett v. Sheridan Health Care Ctr., 610 F.3d 434, 441 (7th Cir. 2010) (affirming plaintiff's verdict where a housekeeper claimed she was fired for complaining of sexual harassment by a nursing home resident; even though the alleged harassment was not perpetrated by an employee of the defendant company, "Our prior decisions have repudiated the idea that sexual harassment is actionable only when committed by employees and

have extended employer liability to some actions by 'unaffiliated' third parties."; and even if that were not true, complaints such as Pickett's might constitute protected activity if the employee "reasonably believes" the conduct violated Title VII).

Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002) (female corporate services manager who reported to employer's president that she had been raped by potential client had shown, for purposes of *prima facie* retaliation case, that she reasonably believed she was opposing an unlawful employment practice in reporting rape, given her belief that her relationship with potential client was strictly business, as she met with him because it was part of job).

Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982) (employee, fired because he opposed discrimination against a fellow employee, was protected by 42 U.S.C. § 2000e-3 even if employee was mistaken and there was no discrimination; "The mistake, of course, must be a sincere one; and presumably it must be reasonable . . . for it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry.").

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140-41 (5th Cir. 1981) (plaintiff who was not rehired after boycotting and picketing store regarding alleged discriminatory practices was not required to prove existence of the unlawful employment practices because he had a reasonable belief; that plaintiff had a reasonable belief is "implicit and is sufficiently supported by evidence in the record").

Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) (plaintiff terminated for writing

letter about employer's allegedly discriminatory practices is protected since opposition was based on reasonable belief that employer's practices violated Title VII; "[Limiting the opposition clause's protection] to cases where the employer has in fact engaged in an unlawful employment practice . . . would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances.").

Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1058 (11th Cir. 1999) (court held that jury's finding against employee on sexual harassment claim did not preclude it from finding for employee on his retaliation claim; court rejected employer's argument that dismissal of harassment claim meant that employee lacked an objectively reasonable good-faith belief that harassment occurred; "For example, the jury could well have determined that the incident occurred but did not rise to the level of harassment prohibited by Title VII. Courts may not reach behind jury verdicts to evaluate their reasoning . . . . Moreover, retaliation is a separate offense under Title VII; an employee need not prove the underlying claim of discrimination for the retaliation claim to succeed.").

Flait v. N. Am. Watch Corp., 3 Cal. App. 4th 467, 477 (1992) (an employer may not fire an employee because he opposed discrimination against a fellow employee, even if he was mistaken and there was no discrimination; "Whether [the plaintiff's] belief that [his co-worker] was being [sexually] harassed was reasonable, in good faith and sincere . . . is a credibility question that cannot be resolved by summary judgment.").

Collier v. Superior Court, 228 Cal. App. 3d 1117, 1122-23 (1991) (plaintiff was terminated for reporting suspected illegal conduct of co-workers to the employer; court noted the numerous public policy implications raised by the co-workers' active violations of antitrust laws and laws against bribery

and kickbacks, embezzlement, tax evasion, and possibly even drug trafficking and money laundering; plaintiff served the public interest in deterring crime, in addition to the interests of the persons who stood to be damaged by the conduct; alleged wrongdoing would harm more than private interests of employer).

(b) Good faith reasonable belief not found:

Robinson v. Cavalry Portfolio Servs. LLC, 2010 U.S. App. LEXIS 2723, at *20, 24 (10th Cir. 2010) (reversing a plaintiff's jury verdict for retaliation; plaintiff submitted to management a written statement reporting racist statements by a co-worker; later, she received less-desirable accounts and lower commissions, and she was not given a promotion; nevertheless, there was no triable question; "No reasonable person could have believed that the single [racist] incident violated Title VII's standard."; "A complaint of a single racist remark by a colleague, without more, is not 'opposition conduct protected by Title VII'") (citing *Jordan v. Alternative Resources Corp.*, 467 F.3d 378 (4th Cir. 2006) (opinion of Niemeyer, J., in support of denying rehearing *en banc*).

Coleman v. Loudoun County Sch. Bd., 294 Fed. Appx. 778, 782 (4th Cir. 2008) (African-American employee did not engage in protected activity when she complained that an interview panel on which she sat was biased against black candidates; "even assuming, *arguendo*, that Coleman's belief was in good faith . . . such belief was not objectively reasonable").

Curd v. Hank's Disc. Fine Furniture, Inc., 272 F.3d 1039, 1041-42 (8th Cir. 2001) (female employee was discharged 37 days after she sent an e-mail to store supervisor complaining that she was offended by seeing "salesman standing on the showroom floor with his pants open tucking in his shirt"; she voiced her opinion on this on numerous prior occasions; this was not protected activity because no reasonable person could have found that alleged conduct violated Title VII).

Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 292 (2d Cir. 1998) (a complaint about having to work on her supervisor's personal matters was not an objection to any alleged discrimination or harassment; "The reasonableness of plaintiff's

belief is to be assessed in light of the totality of circumstances.").

3. Did the plaintiff "protest too little"?

Vague complaints about mistreatment, unfair decisions or even "harassment" — not expressly tied to some protected basis — are generally not enough to trigger statutory coverage.

Hood v. Pfizer, Inc., 322 Fed. Appx. 124, 131 (3d Cir. 2009) (plaintiff did not engage in protected activity; at a large company meeting, he asked "why more wasn't being done to promote diversity" within his department; "This statement expresses a generalized concern about the extent of Pfizer's marking department's affirmative diversity efforts . . . . [, but] [i]t is worlds apart from the kind of particularized statement targeting discrete past events that this Court has held allows an employment discrimination plaintiff's retaliation claim to survive summary judgment.").

Zokari v. Gates, 561 F.3d 1076, 1082 (10th Cir. 2009) (a Nigerian-born employee allegedly fired from his Defense Department job because he refused a supervisor's suggestion that he take English lessons to overcome his accent did not raise a claim for retaliation; Zokari did not engage in protected activity when, in response to the suggestion that he take an English class, he said people would be able to understand him better once they got used to his accent; "Although Mr. Zokari may have refused the English class because he felt that the request was discriminatory, he has not presented evidence that he made this basis of his refusal known to his supervisors."; "The natural interpretation of his remarks is that he was refusing the request because he thought the course unnecessary.").

Hervey v. County of Koochiching, 527 F.3d 711, 726 (8th Cir. 2008) (affirming summary judgment; the employee's invocation of an internal "respectful workplace" policy was not an allegation of discrimination, and hence not predicate for a retaliation claim; a later discrimination complaint was protected, but there was no triable question of retaliation; "An employee in trouble with supervisors, and on the verge of disciplinary action, may not insulate herself from discipline by filing a claim of discrimination").

Fox v. Eagle Distrib. Co., 510 F.3d 587, 592 (6th Cir. 2007) (plaintiff's ADEA retaliation claim failed because, although he mentioned to a customer that he planned to file a "ten million dollar lawsuit" against his employer and that he had not received a desired promotion, he did not state that he had been denied a promotion due to his age or that his

employer had engaged in any unlawful employment practice; "vague charge that Eagle management was 'out to get him' [was] insufficient to constitute opposition").

Sitar v. Ind. Dep't of Transp., 344 F.3d 720, 727-28 (7th Cir. 2003) (an employee's claim of retaliation fails because the plaintiff "complained only that she felt picked on, not that she was discriminated against 'because of' sex or gender, which is what Title VII requires. Although an employee need not use the magic words 'sex' or 'gender discrimination' to bring her speech within Title VII's retaliation protections, 'she has to at least say something to indicate her [gender] is an issue. An employee can honestly believe she is the object of discrimination, but if she never mentions it, a claim of retaliation is not implicated, for an employer cannot retaliate when it is unaware of any complaints.'") (citation omitted).

Albrechtsen v. Bd. of Regents, 309 F.3d 433, 436 (7th Cir. 2002) (reversing judgment for plaintiff after jury trial; court found no protected opposition where plaintiff's only complaint was a letter that, "though full of protests about the management of the Department — [did] not contain the words 'sex' or 'gender.' Instead, the letter contend[ed] that the Department [was] mistreating *all* members of the faculty . . . a position that [was] incompatible with a contention that men [had] been preferred over women, or the reverse . . . .") (citation and some internal quotation marks omitted), *cert. denied*, 539 U.S. 941 (2003).

Pool v. VanRheen, 297 F.3d 899, 910-11 (9th Cir. 2002) (affirming summary judgment for defendants and finding no retaliation where plaintiff, an African-American female sheriff's office commander, was demoted following her letter to editor that critiqued sheriff's office and "good ol' boy atmosphere"; the letter did not allege unlawful discrimination against anyone based on race or sex).

Petersen v. Utah Dep't of Corr., 301 F.3d 1182, 1189 (10th Cir. 2002) (affirming summary judgment for employer where plaintiff, who had complained about supervisor's treatment of co-worker, had not communicated to anyone her belief that treatment was result of racial or religious discrimination), *cert. denied*, 537 U.S. 1197 (2003).

Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1117-18 (6th Cir. 2001) (former employee did not engage in protected activity for purpose of his claim of retaliatory discharge when he sent letter to employer's corporate office that attempted to defend his poor performance and criticized his supervisor's supervision; even though one sentence in the attachment to the letter stated, "I was not doing anything different than my co-workers and I felt like they were trying to fire me before I was

forty," this was an isolated statement that did not concern recent conduct, and the letter also stated that entire department under supervisor's supervision, which included people both over and under 40, felt discriminated against by supervisor).

Millstein v. Henske, 79 FEP 176, 180 (D.C. Cir. 1999) (plaintiff had not engaged in protected activity when she questioned at a staff meeting why doctor who filed discrimination claim had not received promotion at issue; she did not mention doctor's discrimination claim in questioning promotion decision or personally voice any discrimination concerns).

Barber v. CSX Distrib. Servs., 68 F.3d 694, 701-02 (3d Cir. 1995) (plaintiff wrote a letter to employer complaining about unfair treatment and expressing dissatisfaction that another employee received a promotion; because plaintiff's letter did not apprise employer that plaintiff's complaint was related to alleged discrimination, plaintiff's conduct was not protected under "opposition" clause).

Maynard v. City of San Jose, 37 F.3d 1396, 1405 (9th Cir. 1994) (plaintiff, a white city employee, supported a black employee who sought promotion by leaking the letter awarding the promotion to another white applicant; plaintiff, however, never contended that the black employee had been a victim of discrimination; while plaintiff in one sense may have been "retaliated" against, it was not due to "opposition" to discrimination).

Clark v. Johanns, 460 F.3d 1064, 1067 (8th Cir. 2006) (plaintiff did not "participate" in a Title VII activity when a co-worker filed an EEOC charge protesting the treatment of women in the office and used an example concerning the plaintiff).

Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir. 1999) (postal service employee's visit to employer's EEO counselor did not constitute "participation" where employee's purpose in visiting counselor was to "explore her EEO options" and she did not state or imply that she had been treated unfairly because of her race, color, religion, sex, or national origin; "Not all discussions with individuals who are part of the Title VII grievance process or all informal complaints will amount to participation in a Title VII proceeding. . . . At a minimum, there would have to be factual allegations of discrimination against a member of a protected group and the beginning of a proceeding or investigation under Title VII.").

Hurst v. Sam's E. Inc., 2010 WL 234793, at *11 (M.D. Ga. 2010) (granting summary judgment; a white male employee was fired after complaining that he was "tired of diversity being used as an excuse"; he

lacked a prima facie case; plaintiff did not subjectively believe at the time that he was opposing an unlawful employment practice).

Feinerman v. T-Mobile USA, ___ F. Supp. 2d ___, 2010 WL 331692, at *12 (S.D.N.Y. 2010) (granting summary judgment; plaintiff, a regional sales director, was fired after she became reluctant to travel to company conferences because she was the mother of two infants; plaintiff claimed that she was fired because of her request for an accommodation that would have eliminated or reduced her travel; Title VII, however, only prohibits employer reprisals for protected activity, such as an employee opposing conduct that is prohibited by the statute or participating in a discrimination investigation, hearing, or other proceeding; "A request to be excused from attending conferences cannot be construed as opposition to an employer's prohibited activities and therefore does not constitute a protected activity under Title VII.").

Peeples v. Coastal Office Prods., Inc., 203 F. Supp. 2d 432, 446, 466 (D. Md. 2002) (court held that sending "highly informal e-mail" to company's president which mentions that employee believes he is "protected by the ADA" does not amount to protected activity; plaintiff was not charging or claiming that defendant was in violation of ADA), *aff'd*, 64 Fed. Appx. 860 (4th Cir. 2003).

Jermer v. Siemens Energy & Automation, Inc., 395 F.3d 655, 660 (6th Cir. 2005) (upholding summary judgment against a manufacturing engineer who alleged that he was dismissed in retaliation for raising complaints about the air quality at the employer's facility, because the plaintiff's complaints to his former employer — including a request for an air filter — were "more in the nature of request to turn the air conditioner or heat up and down" and did not implicate public policy; the plaintiff's "statements and requests to Siemens failed to refer to any underlying governmental policy with the degree of specificity and clarity necessary to give a reasonable employer notice of the policy basis of the complaint").

Woolner v. Flair Commc'ns Agency, Inc., 2004 WL 2032717, at *9-10 (N.D. Ill. 2004) (discharged female employee who allegedly was sexually harassed by company's owner cannot make out claim for retaliation; she did not specifically complain about the sexual nature of her troubles with the owner in a manner that would put the employer on notice of sexual harassment, but rather told the owner only that he was "hurting" her when he allegedly gave her gift and hugged her, and had three conversations with her direct manager concerning the owner's behavior that were vague and never specifically relayed even the most general details of the owner's alleged harassment, including telling manager during her review that

owner was an "at-risk person" whose "aggressive behavior towards people was worrisome," without explaining what she meant).

Villanueva v. City of Colton, 160 Cal. App. 4th 1188, 1198-99 (2008) (claim of retaliation fails because there is no evidence that plaintiff ever engaged in a protected activity related to an employment practice proscribed by the FEHA; "'[A]n employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation . . . .'") (quoting *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1046 (2005)).

Gerard v. Bd. of Regents, 324 Fed. Appx. 818, 826-27 (11th Cir. 2009) (even if plaintiff was not hired for a position at Georgia Tech because of his letter to the director of a Georgia Tech research institute, he had no Title VII retaliation claim; the letter — which compared Georgia Tech to a Haitian dictator — did not constitute protected activity because it did not claim discrimination on the basis of a protected status).

Cf. Media Gen. Ops. Inc., 394 F.3d 207, 211-12 (4th Cir. 2005) (words such as "bastard," "redneck son-of-a-bitch," and other words of similar import are merely words of offense, devoid of meaningful value that could convey a message of grievance or concern; the use of such words is not "protected activity" within the meaning of the NLRA).

But cf. Collazo v. Bristol-Myers Squibb Mfg. Inc., 617 F.3d 39, 47 (1st Cir. 2010) (reversing summary judgment on a retaliation claim of a scientist who was fired; a fellow employee, Hiraldo, had asserted that another scientist was sexually harassing her; "A jury could reasonably view [plaintiff's] persistent efforts to help Hiraldo initiate her sexual harassment complaint and urge Human Resources to act upon that complaint as resistant or antagonistic to the complained-of conduct."; the court rejected the defendant's contention "that [plaintiff] did not 'oppose' any discriminatory conduct" because he did not utter any words and merely listened to Hiraldo during the meetings with HR).

Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1181 (2d Cir. 1996) (plaintiff complained to employer about co-employee's vulgar comments regarding gender roles; rather than remedying the complaint, employer discharged plaintiff; plaintiff's opposition to co-employee's comment constituted opposition to unlawful employment practice and was therefore protected conduct).

But see EEOC v. Creative Networks LLC, ___ F. Supp. 2d ___, 2010 WL 276742, at *6 (D. Ariz. 2010) (an employee named as a potential witness

in a co-worker's written discrimination charge has sufficiently "participated" in an EEOC proceeding to be deemed protected under the anti-retaliation provision of Title VII; rejecting the employer's contention that "passive acts" — being named in an EEOC charge, and telling others in the workplace that she had been named — were insufficient to gain protection under Title VII's "participation" clause).

McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (plaintiff, a supervisor, was told by the employer to prevent his subordinates from filing EEO complaints; supervisor disobeyed the employer's orders; this kind of passive resistance is a form of opposition protected by Title VII).

Alexander v. Gerhardt Enters., 40 F.3d 187, 195-96 (7th Cir. 1994) (plaintiff was terminated by employer the day after she sent a memorandum objecting to a racial slur in workplace and requesting a public apology from employer; although plaintiff did not specifically ask that racial slurs cease in workplace, plaintiff's conduct still was protected activity).

Burns v. Republic Sav. Bank, 25 F. Supp. 2d 809, 819 (N.D. Ohio 1998) (a female plaintiff, who was terminated without severance pay, discussed with her supervisor her intent to go see a lawyer; court found that a reasonable person in supervisor's position would have understood that plaintiff, without mentioning the word "discrimination," was threatening to file a sex discrimination lawsuit).

Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1045-46 (2005) (sales manager's refusal to follow her supervisor's order to terminate a female cosmetic sales associate, which was based on her supervisor's opinion that the associate was sexually unattractive, constitutes a protected activity under the California Fair Employment and Housing Act, because her repeated requests that supervisor provide "adequate justification" for his order were sufficient to notify the employer that her refusal to comply was based on a reasonable belief that the order was discriminatory, even though she did not explicitly complain about her supervisor's perceived sexist behavior; "an employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination. It is not difficult to envision circumstances in which a subordinate employee may wish to avoid directly confronting a supervisor with a charge of discrimination and the employee engages in subtler or more indirect means in order to avoid furthering or engaging in discriminatory conduct.") (citation and internal quotation marks omitted).

Steele v. Youthful Offender Parole Bd., 162 Cal. App. 4th 1241, 1255 (2008) (recognizing a theory of preemptive retaliation; "Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines [the] legislative purpose [of FEHA] just as effectively as retaliation after the filing of a complaint.").

4. Did the plaintiff "protest too much"?

When a plaintiff's conduct is considered wholly inappropriate or unnecessarily injurious to the employer's interests, statutory protection may be lost, even though the conduct otherwise would be protected "opposition."

Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 745, 747 (7th Cir. 2010) (affirming dismissal of plaintiff's discharge claim; she alleged that she was fired after an internal investigation into a possible sexually hostile work environment at the hospital; plaintiff's retaliation claim under the "participation" clause failed because "[h]er communications . . . constituted participation in a purely internal investigation of possible sex discrimination, and even if an internal investigation is an 'investigation' within the meaning . . . of Title VII . . . she was not fired for participating in it."; "She was fired because of comments she made that demonstrated bad judgment and a preoccupation with superficial characteristics of her new boss, and for harping on issues, at once irrelevant and sensitive . . . ."; her "opposition" clause argument also failed, because opposition conduct "must be based on a good-faith (that is, honest) and reasonable belief that it is opposition to a statutory violation," which did not exist here).

Tiggs-Vaughn v. Tuscaloosa Hous. Auth., ___ Fed. Appx. ___, 2010 WL 2690305, at *5 (11th Cir. 2010) (plaintiff was discharged for insubordination, disruptive behavior, and dishonesty after she wrote a letter to THA's executive director accusing him of unethical and racially discriminatory practices and unprofessional behavior; affirming summary judgment; "Tiggs-Vaughn presented no evidence that the performance-related reasons cited by THA were false and that discrimination was the true reason for her termination.").

Alvarez v. Royal Atl. Developers Inc., 610 F.3d 1253, 1270 (11th Cir. 2010) ("Discrimination laws do not require that their goals be pursued at the cost of jeopardizing innocent life or that employers tolerate a serious risk that employees in sensitive positions will sabotage the company's operations. We are confident that if an employer removes an employee because of a reasonable, fact-based fear of sabotage or violence, the anti-retaliation provisions of our laws will not punish that employer for doing

so."; here, however, plaintiff's letter contained no threats against the company and did not provide a reasonable basis for inferring that she would try to disrupt company operations; the company also did not show that it lacked means short of firing plaintiff to protect itself from any possible sabotage, such as by reassigning her to other duties).

Vaughn v. Epworth Villa, 537 F.3d 1147, 1155 (10th Cir. 2008) (affirming summary judgment; plaintiff was discharged for providing unredacted confidential patient records to the Equal Employment Opportunity Commission to bolster her job bias claims; this was a legitimate, nonretaliatory reason for firing her), *cert. denied*, 129 S. Ct. 1528 (2009).

Argyropoulos v. City of Alton, 539 F.3d 724, 733-34 (7th Cir. 2008) (affirming summary judgment; the employee was discharged for secretly taping a discussion with superiors about her sexual harassment and performance issues; Argyropoulos claimed that she engaged in statutorily protected activity by doing so; "The argument fails because it rests upon a transparently overbroad view of the scope of the statute's protection."; "[Title VII] does not grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination.").

Weaver v. Chavez, 458 F.3d 1096, 1002-03 (10th Cir. 2006) (rejecting a First Amendment retaliation claim; plaintiff, a city attorney, alleged that her new boss and colleagues were hired for political reasons rather than because of merit; while this was a matter of public concern, the disruptive effect of plaintiff's insubordination and breach of confidentiality regarding hiring practices justified her termination).

Matima v. Celli, 228 F.3d 68, 79, 81 (2d Cir. 2000) (although retaliation was a factor in the employer's decision to dismiss the plaintiff, defendant would have terminated plaintiff even absent the retaliation; plaintiff voiced his opposition to perceived discrimination through unseemly confrontations that caused substantial workplace disruption; "An employer does not violate Title VII when it takes adverse employment action against an employee to preserve a workplace environment that is governed by rules, subject to a chain of command, free of commotion, and conducive to the work enterprise.").

Cruz v. Coach Stores, Inc., 202 F.3d 560, 567 (2d Cir. 2000) (male and female co-workers both were terminated for a physical altercation at work; the male employee had made extremely inappropriate sexual remarks, female employee had slapped the male employee, and the male employee then placed the female employee in a headlock; retaliation claim dismissed under Rule 12(b)(6) and affirmed; slapping was not appropriate opposition

to unlawful practices; the female employee had other options for resisting co-worker's offensive conduct).

Miller v. Am. Family Mut. Ins. Co., 203 F.3d 997, 1001-02, 1008-09 (7th Cir. 2000) (supervisor told plaintiff she would be paid more if she would "stop having kids"; while pregnant, she was given a larger raise than her colleagues but she continued to earn less than they did; plaintiff gave ultimatum to a management that she would quit if she did not immediately receive larger raise, and she called her supervisor incompetent and a political hack; her discharge was not because of pregnancy discrimination or retaliation; rather, firing employee who delivers such an ultimatum is a legitimate, non-retaliatory employment decision).

Robbins v. Jefferson County Sch. Dist., 186 F.3d 1253, 1259-60 (10th Cir. 1999) (plaintiff's "activities were not reasonable and did not constitute protected opposition" where she had "lodged frequent, voluminous, and sometimes specious complaints and engaged in antagonistic behavior toward her superiors").

Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259-60 (4th Cir. 1998) (plaintiff, a secretary, removed personnel documents from her supervisor's desk, photocopied them, and sent copies to a woman who had recently resigned after complaining about sexual harassment; this is not legally protected opposition; employer's interest in maintaining security and confidentiality of sensitive personnel documents outweighed the secretary's interest in supporting terminated employee).

Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 726, 730 (6th Cir. 2008) (an employee fired after she delivered files containing policyholder names and other confidential data to attorneys pursuing a sex discrimination class action against the company did not engage in protected activity under the retaliation provision of Title VII; applying a six-factor test for determining when an employee's delivery to outsiders of confidential documents in violation of company policy may be considered "protected activity"; those factors were: (i) how the documents were obtained; (ii) to whom they were produced; (iii) their content, both in terms of the need to keep the information confidential and its relevance to the plaintiff's claim; (iv) why the documents were produced, including whether production was in direct response to a discovery request; (v) the scope of the employer's privacy policy; and (vi) the employee's ability to preserve the evidence in a manner that would not breach the privacy policy; a concurring judge would have held that "if a nonbreaching alternative exists, then an employee's breach of the company's privacy policy can never be reasonable").

Harris v. Richland Cmty. Health Care Ass'n, 2009 WL 2983010, at *4-5 (D.S.C. 2009) (granting summary judgment; plaintiff engaged in protected activity by filing a state fair employment practices charge, but she lost the law's protection by violating her employer's employee-record confidentiality policy by attaching other employees' confidential records to her charge) (citing and applying *Niswander*).

Quinlan v. Curtiss-Wright Corp., 976 A.2d 429, 438-39 (N.J. Super. App. Div. 2009) (a human resources executive did not engage in protected activity when she removed from her employer's office a copy of her male co-worker's performance evaluation and later used it at his deposition; the trial court erred in instructing the jury that state law protected the use of confidential documents received in the course of her duties and removed from the workplace without permission).

Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 372 (5th Cir. 1998) (plaintiff, in-house counsel of a federal government contractor, was discharged after she gave the government a copy of letter she wrote complaining of racial and sexual discrimination; the letter discussed confidential attorney-client matters that she had handled for her employer; court held that retaliation provisions of Title VII do not protect conduct by attorney that breaches rules of legal ethics), *cert. denied*, 525 U.S. 1068 (1999).

Nelson v. Pima Cmty. College, 83 F.3d 1075, 1082 (9th Cir. 1996) (plaintiff, a college affirmative action officer, claimed that her employer retaliated against her for opposing the college's affirmative action practices; plaintiff's conduct was not protected because she consistently disobeyed instructions and usurped college president's powers; insubordination is not protected activity).

Folkerson v. Circus Circus Enters., 107 F.3d 754, 756 (9th Cir. 1997) (punching a customer was not a reasonably calibrated response, even to impending unwelcome physical touching).

Burns v. Blackhawk Mgmt. Corp., 494 F. Supp. 2d 427, 435 (S.D. Miss. 2007) (dismissing plaintiff's retaliation claim after finding that plaintiff was fired, not because he complained of an alleged FLSA violation, but because of the "unreasonable manner" in which he complained; plaintiff went outside the company and complained to a direct and indirect customer instead of following the appropriate channels and filing a complaint with the Department of Labor).

Hellman v. Weisberg, 2007 WL 4218973, at *5 (D. Ariz. 2007) (plaintiff's unauthorized copying and release to a co-worker of two confidential

memoranda, in violation of workplace rules of conduct, does not constitute protected opposition, even though plaintiff gave the memoranda to the co-worker to support the co-worker's EEOC charge).

Giordano v. Thomson, 564 F.3d 163, 169 (2d Cir. 2009) (rejecting retaliation claim of corporate executive who refused to sign a document that released all of his claims against the company and its purchaser; plaintiff was not fired because he declined to sign a release waiving any claims for ERISA benefits, but because his behavior during the sale was counterproductive and jeopardized the sale).

Arteaga v. Brinks, Inc., 163 Cal. App. 4th 327, 354 (2008) ("'employees who are performing poorly, engaging in improper work conduct, or severely disrupting the workplace'" are not immunized from discipline or discharge "'simply because the employee [recently] engaged in a protected work activity'") (citation omitted; alteration in original).

Cf. Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1024 (7th Cir. 1998) (National Labor Relations Act case overturning the Board's finding that restaurant employees' mass walkout during restaurant hours was protected, stating that "the reasonableness of the means of protest is one of variety of factors that are examined in order to determine whether employee activity is protected"); EEOC GUIDELINES, vol. 2, § 8-II.B.3.a ("The manner in which an [employee] protests . . . must be reasonable. . . . If an employee's protests against allegedly discriminatory employment practices interfere with job performance to the extent that they render him or her ineffective in the job, the retaliation provisions do not immunize the worker from appropriate discipline or discharge.").

Media Gen. Operations, Inc. v. NLRB, 560 F.3d 181, 187-88 (4th Cir. 2009) (the NLRB erred as a matter of law in concluding that the law protects an employee's use of profanity regarding his employer, directed to his supervisors, during work hours and in the work place, in a setting physically and temporarily removed from the site of the ongoing collective bargaining negotiations).

Windross v. Barton Protective Servs. Inc., 586 F.3d 98, 104 (1st Cir. 2009) (affirming summary judgment in a discrimination case; plaintiff was discharged after refusing to meet with a human resources manager; "It was not up to Windross to decide if and when to meet with Ordman, and Windross does not deny that he twice refused Ordman's orders to speak with her."; "When Windross refused to meet with Ordman for a second time, the company was justified in terminating Windross.").

But see Kempcke v. Monsanto Co., 132 F.3d 442, 445 (8th Cir. 1998) (plaintiff discovered documents on his office computer comprising what he believed to be a discriminatory outplacement plan; he gave materials to his lawyer and then told his supervisor that his attorney would negotiate their return; employer discharged plaintiff; plaintiff arguably was engaged in protected "opposition").

Valentino v. S. Chicago Heights, 575 F.3d 664, 671-72 (7th Cir. 2009) (reversing summary judgment; an employee fired for alleged "theft" of employee time sheets may pursue a First Amendment retaliation claim; evidence shows she copied the documents to verify her suspicions that the mayor's family members and political supporters were being paid for time they never worked; Valentino's "theft" of employee sign-in sheets provided a legitimate reason to fire her, but given the suspicious timing, a reasonable jury could find the village's explanation was a pretext for retaliation).

Jordan v. Sprint Nextel Corp., DOL ARB, No. 06-105 (2009) (a complainant may rely on statements or documents covered by the attorney-client privilege in support of a whistleblower retaliation claim under SOX).

Cf. Paquin v. Fannie Mae, 119 F.3d 23, 31-32 (D.C. Cir. 1997) (plaintiff authorized his attorney to send a letter accusing employer of discharging him for age-related reasons and offering settlement; this is protected activity under the ADEA; in dictum, court said that it would have been unlawful had employer withdrawn its previously offered severance package in retaliation for the letter having been sent).

5. Was the protest connected to employment practices?

Bonds v. Leavitt, 629 F.3d 369, 383-85 (4th Cir. 2011) (although 42 U.S.C. § 2000e-16(a) incorporates protections against retaliation for federal employees, it does not cover retaliation for conduct that does not constitute opposition to an unlawful *employment practice*; court refused to recognize plaintiff's claim that Title VII protected her from retaliation based on her opposition to the use of cell lines, which were created from genetic material donated primarily by African-Americas, regardless of whether the conduct she opposed constituted employment discrimination) (emphasis added).

Bonn v. City of Omaha, ___ F.3d ___, 2010 WL 4068754, at *4 (8th Cir. 2010) (a public-safety auditor, fired for releasing a report critical of police officers' conduct of traffic stops, could not establish that her discharge violated Title VII; her report concerned potentially discriminatory *policing*

tactics, not *employment* discrimination against police department employees or applicants).

Bakhtiari v. Lutz, 507 F.3d 1132, 1137 (8th Cir. 2007) (graduate student who was also a teacher's assistant complained to the university about a grade he received, about the school's compliance with Homeland Security regulations, and about his treatment by the school's affirmative action office; complaints were not protected activity because they pertained to his status as a student and not to his status as a university employee).

Artis v. Francis Howell N. Band Booster Ass'n, 161 F.3d 1178, 1183 (8th Cir. 1998) (music coach, who complained that Caucasian and African-American band members were treated in disparate manner, did not engage in protected activity; discipline of students was not employment issue).

Folkerson v. Circus Circus Enters., 107 F.3d 754, 756 (9th Cir. 1997) (plaintiff, a mime working in casino, was discharged for physically striking customer who approached her as if to hug her; plaintiff's conduct was not protected by Title VII because the statute only protects opposition directed at unlawful practices by employers, not improper acts by private individuals; her conduct — punching out a customer — exceeded the scope of proper "opposition" in any event).

Evans v. Kan. City Sch. Dist., 65 F.3d 98, 101 (8th Cir. 1995) (plaintiff, a teacher, was discharged for opposing a high school principal's actions in complying with desegregation order by attempting to increase the non-minority student population; plaintiff's action in one sense was "opposition," but it was not opposition to unlawful employment practices under Title VII; the principal's directives concerned desegregation of the student body, not anything related to employment practices).

Rossell v. County Bank, 2006 WL 777074, at *3 (D. Del. 2006) (dismissing retaliation claim of bank teller who alleged that she was terminated for failing to treat two African-American customers with suspicion, based on their race; even if the allegations were true, no employment practice covered by Title VII is at issue; "plaintiff does not allege any discrimination action taken against an employee").

Ramsey v. Centerpoint Energy/Entex, 2006 WL 149065, at *3 (S.D. Miss. 2006) (granting summary judgment even though plaintiff alleged that he was discharged for complaining that African-American customers were treated less favorably than Caucasians; the complaint did not concern an employment practice).

Denham v. Saks Inc. d/b/a Saks Fifth Avenue, 2008 WL 2952308, at *7-8 (N.D. Ill. 2008) (complaints of employee discrimination against customers were not protected by Title VII's prohibition against retaliation; no employment practice is at issue).

But see Van Horn v. Specialized Support Serv., Inc., 241 F. Supp. 2d 994, 1101-02 (S.D. Iowa 2003) (slapping client after he grabbed plaintiff's breast was protected activity when there was evidence that employee had complained repeatedly, and employer had not provided adequate training for appropriate response, thereby giving appearance of approval or acquiescence to prohibited activity).

Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1278-79 (11th Cir. 2008) (affirming plaintiff's verdict; an employee with a pending racial hostile environment claim was asked to sign an arbitration agreement that required arbitration of past, present or future disputes; the employee was discharged for refusing; the employer could require all incumbent employees to agree to arbitrate *future* claims, but this situation differed from that).

6. Does the claim fail because of the nature of the plaintiff's job?

Robinson v. Wal-Mart Stores, Inc., 341 F. Supp. 2d 759, 763 (W.D. Mich. 2004) (employer's personnel training coordinator did not engage in protected activity under the FLSA even though she expressed to her immediate supervisor concerns about under-reporting hours worked or reporting hours worked as having been worked during following week to avoid overtime, and said that she would be reluctant to testify on behalf of employer in a lawsuit; her demotion and discharge shortly thereafter did not violate the FLSA's anti-retaliation provisions, because she never crossed the line from being an employee merely performing her job as personnel training coordinator to an employee lodging a personal complaint about wage-and-hour practices of her employer).

Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99, 102-03 (1st Cir. 2004) (employee, whose job responsibilities included approving invoices documenting hours worked and corresponding pay, did not assert rights adverse to his employer by informing the employer of potential overtime violations, because he acted "in furtherance of his job responsibilities" and he "never crossed the line from being an employee merely performing his job to an employee lodging a personal complaint"; "To engage in protected activity, the employee must step outside his or her role of representing the company and file an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as

directed towards the assertion of rights protected by the FLSA.") (citation, alterations, and internal quotation marks omitted).

McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 (10th Cir. 1996) (plaintiff, a discharged personnel director, brought retaliation claim against her employer based on her contention that employer was angered because she pointed out wage-and-hour violations; no violation; alerting management to possible labor law violations was part of her job and, therefore, was not protected activity under FLSA).

Herrejon v. Appetizers &, Inc., 1998 U.S. Dist. LEXIS 8449, at *13-14 (N.D. Ill. 1998) (human resources employee engaged in no legally protected activity; "It is not enough for Herrejon to have merely investigated the sexual harassment incident, as she was required to do so as part of her job duties . . . ."; "Herrejon merely informed [her boss] of other incidents of harassment and handed over the investigation to him.").

But cf. Marable v. Nitchman, 511 F.3d 924, 932-33 (9th Cir. 2007) (plaintiff's position as chief engineer on a ferry did not prevent him from making statements criticizing perceived corruption by his employer; the engineer's official duties did not include ensuring that his superiors abstain from corrupt financial schemes).

Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 179-80 (3d Cir. 1997) (plaintiff's position as in-house counsel to company did not prevent her from bringing a lawsuit, despite of possible disclosure of confidential information).

Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996 (9th Cir. 2009) (18 U.S.C. § 1514A(b) protects any "person" alleging discrimination based on protected activity; "Nothing in this section indicates that in-house attorneys are not also protected from retaliation under this section, even though Congress plainly considered the role attorneys might play in reporting possible securities fraud.").

Robinson v. Morgan Stanley, Discovery Fin. Servs., DOL ARB, No. 07-070 (2010) (complaints about the delayed charge-offs of debt based on customer bankruptcies were covered by SOX's whistleblower protections even though they were made in the course of the claimant performing her job as an auditor; nothing in the Act requires that a protected complaint "must involve actions outside the complainant's assigned duties"; on the facts, however, the claimant failed to show that her protected activity caused the termination of her employment).

D. The United States Supreme Court Has Held That Third-Party Retaliation Claims Are Actionable, *i.e.*, Whether The Anti-Retaliation Provisions Prohibit An Employer From Taking Adverse Action Against A Third Party In Retaliation For Another's Protected Activity.

1. The Supreme Court has held that third-party retaliation claims are actionable.

Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 867-70 (U.S. 2011) (male employee who alleged that he was fired because his fiancée filed a sex discrimination charge against their mutual employer may bring a third-party retaliation claim, as the male employee fell within the "zone of interests" protected by Title VII, 8-0 decision).

2. Courts holding third-party retaliation claims are not actionable.

Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 564-65 (3d Cir. 2002) (plaintiff was discharged after his father, also an employee, sued for age and disability discrimination; the court affirmed summary judgment for the employer on plaintiff's third-party ADEA retaliation claim because "the plain text of [the ADEA] clearly prohibits only retaliation against the actual person who engaged in protected activity"; however, the court reversed summary judgment for the employer on plaintiff's third-party ADA retaliation claim because the ADA contains an additional anti-retaliation provision that the court interpreted as recognizing third-party retaliation claims).

Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998) ("We believe that the rule advocated by [plaintiff] — that a plaintiff bringing a retaliation claim need not have personally engaged in statutorily protected activity if his or her spouse or significant other, who works for the same employer, has done so — is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation. . . . Accordingly, we hold that a plaintiff bringing a retaliation claim under Title VII must establish that she personally engaged in the protected conduct.").

Holt v. JTM Indus., Inc., 89 F.3d 1224, 1227 (5th Cir. 1996) ("[W]hen an individual, spouse or otherwise, has not participated 'in any manner' in conduct that is protected by the ADEA, we hold that he does not have automatic standing to sue for retaliation under [the anti-retaliation provision of the ADEA] simply because his spouse has engaged in protected activity.").

EEOC v. Wal-Mart Stores, Inc., 576 F. Supp. 2d 1240, 1246-47 (D.N.M. 2008) (rejecting the EEOC's allegation that Title VII's anti-retaliation provision was broad enough to protect third parties (here, job applicants who were the children of an employee who had filed an EEOC charge); the plain language of Title VII's provision on retaliation "limits causes of action to persons who engage in opposition or who participate in some way, even if minimally, in the protected activity. . . [and] expanding the scope of persons by whom an action can be brought beyond the clear language of the statute is not within the purview of the courts, but is the responsibility of Congress").

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 241 F. Supp. 2d 1123, 1143 (D. Kan. 2002) (rejecting as matter of law plaintiff's third-party retaliation claim because "the plain text of [Title VII's anti-retaliation] provision clearly prohibits only retaliation against the individual who engaged in protected activity").

Elsensohn v. St. Tammany Parish Sheriff's Office, 530 F.3d 368, 374 (5th Cir. 2008) (sheriff's officer has no retaliation claim under the Family and Medical Leave Act because his support for his wife's FMLA claim against the same employer is not a protected activity under the FMLA; his willingness to testify as a witness in his wife's FMLA case against the sheriff's office was not enough; FMLA's retaliation clause only protects those who "participate[] in an [FMLA] investigation, proceeding or litigation").

3. Courts holding third-party retaliation claims are actionable.

EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1212 (E.D. Cal. 1998) (holding that employee's third-party retaliation claim was actionable under Title VII's anti-retaliation provision; "Recognizing third-party retaliation claims effectuates the underlying purpose of Title VII's anti-retaliation provision and the statute's broad remedial purposes. To hold otherwise[] would thwart congressional intent and produce an absurd result.").

Gonzalez v. N.Y. State Dep't of Corr. Servs. Fishkill Corr. Facility, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000) ("[B]ecause Plaintiff alleges to have suffered adverse employment action by Defendants because of her husband's complaints of discrimination, she has standing to assert a Title VII retaliation claim.").

De Medina v. Reinhardt, 444 F. Supp. 573, 581 (D.D.C. 1978) ("plaintiff's allegation of reprisal for her husband's anti-discrimination

activities . . . states a claim upon which relief can be granted under Title VII").

EEOC GUIDELINES, vol. 2, § 8-II.C.3 (anti-retaliation statutes prohibit retaliation against someone so closely related to or associated with person exercising his or her statutory rights that it would discourage or prevent that person from pursuing those rights; for example, it would be unlawful for respondent to retaliate against employee because his or her spouse, who is also employee, filed an EEOC charge); *id.*, § 8-II.B.3.c ("Retaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees.").

E. Other Anti-Retaliation Statutes.

Many other statutes include retaliation proscriptions. While complete coverage of those statutes is beyond the scope of this paper, some highlights follow.

1. Fair Labor Standards Act.

a. There is a dispute whether the Fair Labor Standards Act (and Equal Pay Act, which is made part of the FLSA) protects from retaliation only *formal* participation (filing FLSA complaints or testifying in FLSA proceedings).

Hagan v. Echostar Satellite LLC, 529 F.3d 617, 627-28 (5th Cir. 2008) (the Fair Labor Standards Act prohibits retaliation against workers who make "informal, internal" complaints about violations of the federal wage and hour law; here, though, plaintiff's comments about overtime pay for his subordinates lacked statutory protection because they were made in his capacity as a representative of Echostar and never "crossed the line" into an "adversarial role").

Valerio v. Putnam Assocs., 173 F.3d 35, 41 (1st Cir. 1999) (court held that employee who was terminated shortly after complaining in letter to her employer that she believed she had been misclassified as exempt under FLSA was entitled to proceed with her claim under the act's retaliation provision despite fact that statute prohibits retaliation only against employees who "ha[ve] filed any complaint or instituted or caused to be instituted any proceeding").

Lambert v. Ackerley, 180 F.3d 997, 1004-05 (9th Cir. 1999) (en banc) (FLSA's anti-retaliation provision protects employees who complain to their employer about alleged violations of the statute).

Hernandez v. City Wide Insulation of Madison, Inc., 508 F. Supp. 2d 682, 689 (E.D. Wis. 2007) (agreeing with the "majority of courts" that "§ 215(a)(3) covers informal complaints to an employer"; protected "informal complaints" include oral complaints to supervisors about employer's failure to pay overtime but do not include employees' oral complaints about unpaid overtime made to union representatives when the union never relayed the complaints to anyone).

Randolph v. ADT Sec. Servs. Inc., ___ F. Supp. 2d ___, 2010 WL 1233989, at *5 (D. Md. 2010) ("Plaintiffs have properly alleged that they engaged in an activity protected by the FLSA by filing a good-faith complaint with [a state agency]"; rejecting the argument that plaintiffs' complaints to the agency did not suffice under Section 215(a)(3) of the FLSA).

But see Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1152 (9th Cir. 2000) (under the "FLSA's anti-retaliation provision, the [employees'] career fraud claims are not covered. [This court has] interpreted the anti-retaliation provision to include employees, not only who have filed complaints with the courts or the appropriate agency, but also who have complained to their employers. . . . However, [i]n this case, the appellants never filed a complaint with an agency or the courts. They never complained to their supervisors of a FLSA violation or notified the Department of Labor. They never instituted or caused to be instituted any proceedings. . . . Thus, . . . [the employer's] conduct would not be actionable under the [FLSA's] anti-retaliation provision.").

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (U.S. 2011) (an employee fired after he made oral complaints about time-clock irregularities has retaliation claim under FLSA; FLSA prohibits retaliation against workers for complaining about employer's violations of the Act, regardless of whether complaints are oral or written).

Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99, 102-03 (1st Cir. 2004) (employee, who as part of his job responsibilities reported to employer that security guards working at employer's plant were not being properly paid for overtime, did not file a "complaint" within meaning of the FLSA's retaliation provision by refusing to sign invoices submitted by the contractor that had supplied the guards, where the employee earlier had learned that the contractor rather than the employer employed guards and was therefore responsible for paying them overtime, and that employer had informed the contractor of the potential problem).

Lambert v. Genesee Hosp., 10 F.3d 46, 56 (2d Cir. 1993) (female employees, alleging violation of Equal Pay Act, did not satisfy participation element of *prima facie* case of retaliation where their grievances were "simply oral complaints to a supervisor").

b. The FLSA prohibits retaliation by all "persons," not just the "employer."

Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir. 1999) ("To enjoy [the FLSA's protections against retaliation,] [t]here is no requirement that those laws must actually be violated. It is sufficient that the plaintiff had a good-faith belief that they might be violated."; here, even if plaintiff's minimum-wage and

maximum-hours claims were not actionable because employer did not fall under statute's definition of "employer" — it did not have annual gross sales in excess of $500,000 — his retaliation claim still would be actionable because the FLSA retaliation provision is not limited to "employers," but instead applies broadly to "persons").

c. The FLSA's retaliation provision provides protection if the employee is "about to testify" in a proceeding.

Ball v. Memphis Bar-B-Q Co., Inc., 228 F.3d 360, 364 (4th Cir. 2000) ("it [is] unlawful for an employer covered by the FLSA to discharge or in any other manner discriminate against any employee because such employee . . . has testified or is about to testify in any such proceeding"; however, the FLSA's protection does not extend to an employee's complaint made to a supervisor about a violation of the FLSA; affirming dismissal in favor of defendant) (emphasis added).

Cf. EEOC v. Swift Transp. Co., 120 F. Supp. 2d 982, 993 (D. Kan. 2000) (employee was entitled to protection from retaliation under the "about to testify" prong of Section 215(a)(3) of FLSA only if she was on the verge of testifying and her testimony was relatively certain to occur; letter from EEOC which reflected that they "might be" contacting "some of them" to discuss another's charge was not sufficient; summary judgment in favor of defendant affirmed).

d. The availability of punitive damages is unclear.

Wolfe v. Clear Title LLC, 2009 WL 2913647, at *5 (E.D. Ark. 2009) (FLSA retaliation claimant may recover punitive damages if she prevails on her claim; noting a split in the circuits on the issue).

2. Americans with Disabilities Act.

a. 42 U.S.C. section 12203 provides:

(i) 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.

(ii) 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.

b. Where do accommodation requests fall in the analysis? "Participation"? "Opposition"? Something else?

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 16 (1st Cir. 1997) (plaintiff claimed that employer retaliated against him after he requested accommodation under ADA; although plaintiff's request did not strictly constitute "participation" or "opposition" within normal meaning of those terms, the request logically was protected by ADA's anti-retaliation provision; otherwise, employees would be "unprotected if employer granted the accommodation and shortly thereafter terminated the employee in retaliation" for asking for it).

Jacobs v. Marietta Mem'l Hosp., ___ F. Supp. 2d ___, 2010 WL 749897, at *5 (S.D. Ohio 2010) (a hospital manager with bipolar disorder, fired after a new supervisor denied her request to work on occasion from home, can pursue a retaliation claim under the ADA; plaintiff raised a jury issue that she was fired in retaliation for her protected activity of seeking a reasonable accommodation).

But cf. Kirkeberg v. Canadian Pac. Ry., 619 F.3d 898, 908 (8th Cir. 2010) (affirming dismissal of plaintiff's ADA retaliation claim even though plaintiff was discharged following "a spat" with his supervisor over the theft of a special computer that the individual needed for his monocular vision; no reasonable jury could find that incident amounted to a request for a reasonable accommodation; the remark did not request a prospective accommodation and it was not a renewal of any previous request).

c. Are individuals protected against retaliation even where they had no right to the accommodation requested (for example, where the individual was not disabled, or the accommodation requested was not reasonable)?

Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 759 n.2 (3d Cir. 2004) ("Unlike a claim for discrimination under

the ADA, an ADA retaliation claim based upon an employee having requested an accommodation does not require that a plaintiff show that he or she is 'disabled' within the meaning of the ADA. The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC, and we have already explained that the ADA protects one who engages in the latter activity without regard to whether the complainant is 'disabled'; Thus, as opposed to showing disability, a plaintiff need only show that she had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested.") (citation and some internal quotation marks omitted), *cert. denied*, 544 U.S. 961 (2005).

Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 159-60 (2d Cir. 1999) (plaintiff's filing of EEOC charge alleging disability discrimination was protected activity, even if he did not have disability under ADA, so long as plaintiff had a good-faith belief that he did).

Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 786 (3d Cir. 1998) (individual adjudged not to be a "qualified individual with a disability" may still pursue ADA retaliation claim).

But cf. Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1322 (11th Cir. 1998) (upholding summary judgment for the employer where the employee who had requested accommodation failed to show a reasonable, good-faith belief that his back injury limited any major life activity).

Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1096-97 (7th Cir. 1998) (plaintiff, a fast-food store manager, was not retaliatorily discharged for his refusal to move a worker with missing teeth from a counter position in the restaurant; plaintiff could not have reasonably believed that he was opposing unlawful discrimination; the worker did not consider herself disabled, the worker was not limited in any major life activities, and removing the worker from counter was not, in and of itself, discriminatory).

d. What relief is available?

Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1269-70 (9th Cir. 2009) (ADA retaliation claims are limited to equitable relief, and do not provide for damages; plaintiff therefore was not entitled to a jury trial on his retaliation claim; the court found persuasive

Kramer v. Banc of Am. Sec., 355 F.3d 961 (7th Cir.), *cert. denied*, 542 U.S. 932 (2004) and "the plain language of 42 U.S.C. § 1981a(a)(2)").

Contra Baker v. Windsor Republic Doors, 635 F. Supp. 2d 765, 771 (W.D. Tenn. 2009) (ADA plaintiff alleging retaliation may recover compensatory damages even though the Civil Rights Act of 1991 did not specifically mention the ADA's retaliation provision; disagreeing with *Kramer v. Bank of Am. Sec.*, 355 F.3d 961 (7th Cir. 2004)).

e. Must a retaliation plaintiff have a disability?

Barker v. Riverside County Office of Educ., 584 F.3d 821, 824-25 (9th Cir. 2009) (reversing dismissal of ADA retaliation case; plaintiff filed a class discrimination complaint with the U.S. Department of Education's Office for Civil Rights, alleging that the county denied its disabled students the free, appropriate public education that they are entitled to receive under federal and state law; plaintiff's supervisors allegedly retaliated against and constructively terminated her; plaintiff had standing to sue for retaliation under the ADA even though she herself had no disability or a close relationship with a disabled individual; the ADA's anti-retaliation provision states that no entity shall discriminate against "any individual" because that individual has opposed any act or practice made unlawful by the ADA).

Cf. Reinhardt v. Albuquerque Pub. Schs. Bd. of Educ., 595 F.3d 1126, 1132 (10th Cir. 2010) (reversing summary judgment in a case under the Rehabilitation Act; plaintiff complained that she was not receiving accurate and timely caseload lists of students, causing special education students not to receive speech and language services; she also advocated for the rights of a student to receive a neuropsychological evaluation and specialized reading instruction; ". . . Ms. Reinhardt's advocacy on behalf of disabled students constitute[s] protected activity under the Rehabilitation Act.").

3. First Amendment.

a. Refusing to recognize a claim.

Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2491-92 (U.S. 2011) (government employer's allegedly retaliatory actions against an employee do not give rise to liability under the First

Amendment's *Petition Clause* unless the employee's petition relates to a matter of public concern).

Garcetti v. Ceballos, 547 U.S. 410, 416, 421-22 (2006) (rejecting a First Amendment retaliation claim of a district attorney who alleged that he was retaliated against for making a written internal complaint about another DA's handling of a search warrant application; the internal complaint was not legally protected activity; there is a "distinction 'between speech offered by a[n] employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import'"; "The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting [that] speech . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.") (citations omitted).

Bowie v. Maddox, 642 F.3d 1122, 1133-34 (D.C. Cir. 2011) (plaintiff's *First Amendment* retaliation claim failed because his alleged protected activity was to produce an affidavit for the EEOC under the direction of his employer and in his *official capacity* as assistant inspector general for investigations, under holding of *Garcetti v. Ceballos*) (emphasis added).

Huth v. Haslun, 598 F.3d 70, 74 (2d Cir. 2010) (a state transit manager who was demoted following her reports of internal misconduct lacked a retaliation claim under the First Amendment; her reports to a supervisor about possible reverse discrimination and criminal conduct in the New York State Thruway Authority were not constitutionally protected speech because her reports were made pursuant to her official duties, not as a citizen).

Fox v. Traverse City Area Pub. Schs. Bd. of Educ., 605 F.3d 345, 349 (6th Cir. 2010) (affirming summary judgment; plaintiff, a teacher, alleged that the Board of Education declined to renew her employment contract because she complained that she was required to supervise more students than permitted under state law; she addressed her complaints to school system managers and acted "as a public employee rather than as a citizen").

Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 748-49 (10th Cir. 2010) (reports to co-workers, supervisors, and other hospital personnel concerning an alleged "staffing crisis," as well as "occurrence reports" she generated to document certain allegedly unsafe conditions, all were made in conjunction with her

official duties as a public employee and were not grounds for First Amendment retaliation liability).

Evans-Marshall v. Bd. of Educ., ___ F.3d ___, 2010 WL 4117286, at *7, 9 (6th Cir. 2010) (affirming summary judgment on a high school teacher's claim for retaliation for the teacher's disagreement with the school district's choice of student reading materials and its criticisms of her teaching methods; teachers do not forfeit their constitutional rights by accepting public employment, but teachers "are not everyday citizens"; "when Evans-Marshall taught 9th grade English, she did something she was hired (and paid) to do"; the government employer retains control over "what the employer itself has created or commissioned': the employee's job") (citation omitted).

Weintraub v. Board of Educ. of City School Dist. of City of New York, 593 F.3d 196, 201 (2d Cir. 2010) (2-1 decision; a public school teacher who alleged he was harassed and ultimately fired in retaliation for filing a grievance with the United Federation of Teachers was not protected by the First Amendment; because plaintiff challenged an assistant principal's failure to discipline an unruly fifth grader using a grievance procedure that was not available to members of the public, plaintiff was "speaking pursuant to his official duties" and was not engaged in expression protected by the First Amendment).

Abdur-Rahman v. Walker, 567 F.3d 1278, 1284-85 (11th Cir. 2009) (county sewer inspectors who were fired after telling their supervisors that the county was not complying with the Clean Water Act may not maintain retaliatory termination suits; "The inspectors' reports about sewer overflows concerned information they requested and investigations they performed for the purpose of fulfilling their assigned job duties."; the inspectors spoke directly with their supervisor instead of reporting their concerns to the construction and maintenance unit, which was in charge of compliance issues for sewer overflows; "This choice suggests that the inspectors did not believe that raising concerns about sewer overflows was exclusively the responsibility of someone else in some other unit of their department . . . ."; 2-1 decision).

Curran v. Cousins, 509 F.3d 36, 49-50 (1st Cir. 2007) (although the public had an interest in a corrections officer's inflammatory internet postings criticizing the sheriff, the sheriff's department's interest in preventing disruption in carrying out its law enforcement mission was greater; therefore, the correction officer's

First Amendment rights were not violated by his termination because of the postings).

Campbell v. Galloway, 483 F.3d 258, 271 (4th Cir. 2007) (a police officer's complaints of sexual harassment by members of the city police department may, depending on their content, form, and context, be matters of public concern and therefore protected by the First Amendment; however, complaints by plaintiff in this case were not protected because they focused "on personal grievances and vague gripes").

Nixon v. City of Houston, 511 F.3d 494, 499-500 (5th Cir. 2007) (police officer's unauthorized statements to the media at the scene of an accident were not protected by the First Amendment because they were made pursuant to his official duties and during the course of performing his job; police officer's statements to radio talk shows and TV news programs the following day, in addition to articles he wrote for a magazine, also were not protected by the First Amendment, because the police department's interests in maintaining discipline among employees and in maintaining public confidence outweighed any interest the police officer had in commenting on matters of public concern; therefore, the indefinite suspension of the police officer's employment as a result of this speech was not unlawful retaliation).

Williams v. Dallas Independent School District, 480 F.3d 689, 694 (5th Cir. 2007) (memos written by a teacher who was athletic director and head football coach to the school principal, criticizing the school's use of athletic funds, were not protected speech under the First Amendment; although the teacher was not required to write such memos as part of his official duties, he was still acting within the course of performing his job by writing them; teacher was not protected from retaliation as a result of the memos).

Haynes v. City of Circleville, 474 F.3d 357, 364 (6th Cir.) (patrol officer who was also a canine handler was not protected by the First Amendment when he complained about training cutbacks in the canine program; the complaints were made pursuant to his duties as a canine handler and patrolman), *cert. denied*, 128 S. Ct. 538 (2007).

Green v. Bd. of County Commissioners, 472 F.3d 794, 800-01 (10th Cir. 2007) (county drug lab technician alleged unlawful retaliation by her employer after she expressed her concerns about the unreliability of drug-screening tests used by county; plaintiff's

statements were not protected by the First Amendment; "even if not explicitly required as part of her day-to-day job responsibilities, her activities stemmed from and were the type of activities she was paid to do").

Boyce v. Andrew, 510 F.3d 1333, 1346-47 (11th Cir. 2007) (County Division of Family and Children Services caseworkers who complained of being overworked and overwhelmed by the high caseloads and mismanagement problems they experienced in their workplace were not protected by the First Amendment because the purpose of their complaints was to address personal grievances and frustrations rather than to raise public awareness about children in danger).

Spiegla v. Hull, 481 F.3d 961, 965-66 (7th Cir. 2007) (state prison correctional officer who complained of a possible breach in a prison's search policy was not protected by the First Amendment because ensuring compliance with the prison security policy was part of her job).

Battle ex rel. United States v. Georgia Bd. of Regents, 468 F.3d 755, 759-62 (11th Cir. 2006) (financial aid counselor who alleged fraudulent practices was not protected by the First Amendment because reporting fraud was part of her job).

Sasse v. U.S. Dep't of Labor, 409 F.3d 773, 780 (6th Cir. 2005) (an Assistant United States Attorney who alleged the Justice Department retaliated against him while he was investigating environmental crimes failed to show the agency violated the whistleblower provisions of various environmental laws, because the performance of his job duties was not protected whistleblowing activity; "By their plain language, these whistleblower provisions protect employees who risk their job security by taking steps to protect the public good," and because the plaintiff "had a fiduciary duty to carry out those investigations and prosecutions, [he] cannot be said to have risked his personal job security by performing the duties required of him in that job.").

Brooks v. Univ. of Wis. Bd. of Regents, 406 F.3d 476, 480 (7th Cir. 2005) (medical researchers, whose clinic was shut down after they clashed with a top University of Wisconsin official, failed to prove their First Amendment rights were violated, because such criticism was not an issue of public concern; in any event, the plaintiffs could not prove their clinic closure was connected to criticizing the medical school's financing policies).

McKenzie v. Milwaukee County, 381 F.3d 619, 626-67 (7th Cir. 2004) (a female sheriff's deputy was not subjected to First Amendment retaliation when she was "demoted," because the alleged speech consisted of personal notations in a book, which the deputy characterized as a "personal diary" or "daybook" detailing her interactions at work and her personal life; court held that "book was an expression of personal rather than public concern, and therefore was not entitled to constitutional protection"; "Sexual harassment is indeed an important matter, but not all speech relating to sexual harassment enjoys constitutional protection.").

Pool v. VanRheen, 297 F.3d 899, 908-09 (9th Cir. 2002) (African-American female sheriff's office commander claimed she was demoted and received a pay cut in retaliation for her speech on a matter of public concern; the court affirmed summary judgment for defendants because defendants' "legitimate interest in running the Sheriff's Office outweighed [plaintiff's] free speech rights"; "A wide degree of deference to the employer's judgment is appropriate when close working relationships are essential to fulfilling public responsibilities . . . . [I]nterference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.") (internal quotation marks omitted).

Henry v. City of Tallahassee, 149 F. Supp. 2d 1324, 1330 (N.D. Fla. 2001) ("The relevant inquiry . . . is not whether [the public employee's] charges raised issues of public concern. The relevant inquiry is, instead, whether the *purpose* of his charges was to raise issues of public concern. Because the pleadings reveal no such purpose, this court concludes that [plaintiff's] administrative charges, like his lawsuit, took the form of a private employee grievance. As such, his administrative charges were not protected by the First Amendment.") (emphasis added).

Steadman v. Tex. Rangers, 179 F.3d 360, 368 (5th Cir. 1999) (court held that female officer could not recover under civil rights statute on theory that she was retaliated against for exercising her First Amendment rights; finding no evidence that plaintiff actually said anything supporting women's rights or showing outward sign of membership in feminist organization).

b. Recognizing a claim.

Anthoine v. North Cent. Counties Consortium, 605 F.3d 740, 748-49 (9th Cir. 2010) (reversing summary judgment; an employee's claim that he was fired after "jumping the chain of command" to report a supervisor's alleged noncompliance with government reporting requirements implicated the First Amendment; "A report regarding the agency's failure to comply with its legal obligations is clearly relevant to the public's evaluation of NCCC's performance."; it was not determinative under *Garcetti v. Ceballos* that Anthoine did not air his concerns publicly).

LeFande v. Dist. of Columbia, 613 F.3d 1155, 1160 (D.C. Cir. 2010) (trial court erred in dismissing a lawsuit by a former reserve officer for the District of Columbia police department who claimed he was fired in violation of his free speech rights because he had filed a potential labor law class action against the city; LeFande's lawsuit addressed a matter of public concern; he challenged an emergency rule changing the reserve officers' right to organize and stripping them of the right to appeal their terminations; these claims are relevant to the public's evaluation of the police department and its leadership).

Deutsch v. Jordan, 618 F.3d 1093, 1100-01 (10th Cir. 2010) (a former police chief who alleged that he was fired for testifying in support of his defamation lawsuit against a private citizen was engaged in constitutionally protected speech on a matter of public concern; rejecting contention that the lawsuit was a purely personal effort to clear his name of a citizen's allegation that he misappropriated public funds).

Andrew v. Clark, 561 F.3d 261, 268 (4th Cir. 2009) (vacating the dismissal of retaliation claims of a police commander who was fired after he gave a reporter a copy of a memorandum he wrote questioning the shooting of a suspect by Baltimore police; even if the employee "wrote his memorandum as part of his official duties, the district court failed to consider whether . . . Andrew's dissemination of his memorandum was citizen speech regarding a matter of public conern, or whether the publication of it affected the operation" of the police department).

Sousa v. Roque, 578 F.3d 164, 169, 174 (2d Cir. 2009) (reversing summary judgment on claims by a former employee that his First Amendment rights were violated when he was fired after he lodged repeated complaints about workplace violence; "the speaker's motive is not dispositive in determining whether speech is on a matter of public concern"; speech on purely private matters, such

as that concerning a party's specific working conditions, does not implicate matters of public concern; "We make clear today, however, that it does not follow that a person *motivated by* a personal grievance cannot be speaking on a matter of public concern.") (citation and internal quotation marks omitted; emphasis in original).

Reilly v. City of Atlantic City, 532 F.3d 216, 231 (3d Cir. 2008) (truthful trial testimony arising out of a public employee's duties remains protected speech under the First Amendment notwithstanding *Garcetti v. Ceballos*; the defendant police supervisors asserted that the plaintiff officer's testimony in the corruption investigation was part of his duties and thus not protected; the court held, however, that a testifying employee acts as a citizen; despite that, the district court still would have to balance the employee's interest in speaking against the employer's interest in regulating that speech).

Hufford v. McEnaney, 249 F.3d 1142, 1150 (9th Cir. 2001) (public employer who discharges an employee in retaliation for legitimate whistleblowing does so in violation of employee's clearly established First Amendment rights and thus is not protected by qualified immunity in a 42 U.S.C. § 1983 action arising from discharge).

Marable v. Nitchman, 511 F.3d 924, 932-33 (9th Cir. 2007) (a whistle-blowing ferry engineer was protected by the First Amendment against retaliation for complaining about perceived corruption by his employer; the complaints were not made pursuant to the engineer's official duties; these included ensuring his ferry's machinery functioned properly, but did not include ensuring that his superiors abstained from corrupt financial schemes).

Casey v. West Las Vegas Indep. School District, 473 F.3d 1323, 1329-34 (10th Cir. 2007) (statements by school superintendent to state Attorney General regarding perceived legal violations by the school board were protected by the First Amendment because they were outside the scope of superintendent's duties; however, statements made to school board regarding the school district's noncompliance with federal regulations were not protected by the First Amendment because they were made within the scope of the school superintendent's employment).

Konits v. Valley Stream Cent. High Sch. Dist., 394 F.3d 121, 125-26 (2d Cir. 2005) (a school teacher, who claimed she was passed over for promotion after settling claims that her school district retaliated against her for supporting the sex discrimination suit of a co-worker, stated viable claims under the First Amendment, because the plaintiff adequately alleged that she had engaged in speech on a matter of public concern).

Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 923 (9th Cir. 2004) (weatherization contractor's testimony at grievance proceeding initiated by former county employee asserting race and age discrimination against county, and contractor's affidavit and agreement to testify on former employee's behalf in judicial proceedings, comprised speech relating to a matter of public concern, entitled to First Amendment protection; even if contractor had a personal motivation for providing the testimony, the affidavit and the speech concerned technical aspects of county's weatherization contract work, helped expose potential race and age discrimination by county, and was offered to support employee's discrimination complaints; additionally, "[w]hen a business vendor operates under a contract with a public agency, [the court] analyze[s] its First Amendment retaliation claim under § 1983 using the same basic approach that [the court] would use if the claim had been raised by an employee of the agency"), *cert. denied*, 544 U.S. 975 (2005).

Thomas v. City of Beaverton, 379 F.3d 802, 809-11 (9th Cir. 2004) (government employee need not expressly accuse her supervisor or employer of illegal activity for her speech to be protected under First Amendment; rather, she may convey an implicit message of disapproval of the illegality of the activity through her conduct by refusing to facilitate or participate in it; court also held that the fact that plaintiff chose to convey her underlying views privately, rather than publicly, is not determinative of whether her expression is entitled to protection as addressing matter of public concern).

Posey v. Lake Pend Oreille Sch. Dist. No. 84, 564 F.3d 1121, 1123, 1129 (9th Cir. 2008) ("[T]he inquiry into whether a public employee's speech is protected by the First Amendment . . . presents a mixed question of fact and law."; "Summary judgment is therefore inappropriate where, as here, . . . there is a genuine and material dispute as to the scope and content of plaintiff's employment duties").

Adler v. Pataki, 185 F.3d 35, 43-44 (2d Cir. 1999) (former state employee could pursue First Amendment retaliation claim based on allegation that he was terminated because of his wife's employment discrimination lawsuit against the state in violation of his First Amendment right of intimate association).

Greenwood v. Ross, 778 F.2d 448, 457 (8th Cir. 1985) ("[F]iling of an EEOC charge and a civil rights lawsuit [by public employee] are activities protected by the first amendment.").

4. Sarbanes-Oxley Act.

Fraser v. Fiduciary Trust Co. Int'l, ___ Fed. Appx. ___, 2010 WL 4009134, at *1 (2d Cir. 2010) (affirming summary judgment in SOX case even though plaintiff was discharged after complaining to his superiors about documents he claimed overstated the defendant's assets-under-management; plaintiff adduced no evidence that would permit a reasonable factfinder to conclude that a factfinder to Fraser held both a subjective and objectively reasonable belief that he was reporting conduct prohibited by SOX).

Vodopia v. Koninklijke Phillips Elec. NV., 2010 WL 4186469, at *3 (2d Cir. 2010) (summarily dismissing a SOX claim where a former in-house lawyer objected that certain of the employer's patents were procured by fraud; under SOX, a plaintiff must allege communications that "definitively and specifically" relate to a SOX-covered form of fraud or a securities law violation; here, the complaint "clearly centers on" plaintiff's concern that patents were *invalid*, not on the company's *valuation* of the patents; "[M]ore important, the complaint does not allege that the $50 million value assigned to those patents was ever reported to the public or to shareholders.").

Stone v. Instrumentation Laboratory Co., 491 F.3d 239, 245 (4th Cir. 2009) (reversing dismissal of SOX claim; former employee's SOX lawsuit was not barred by an adverse ruling of a Labor Department administrative law judge; where the Labor Department has not issued a final decision on an administrative complaint, Sarbanes-Oxley allows an employee to file an action for "de novo review" in a federal court).

Day v. Staples, Inc., 555 F.3d 42, 55-58 (1st Cir. 2009) (plaintiff had no valid SOX claim even though he complained about the company's product-return policies and described them in terms of "shareholder fraud" and "violations of GAAP"; at bottom the dispute was over internal practices that did not mislead investors; the employee lacked an

objectively reasonable belief that an investor misrepresentation was at issue).

Allen v. Administrative Review Board, 514 F.3d 468, 477-81 (5th Cir. 2008) (rejecting the SOX claims of three persons who made internal reports of alleged financial problems; the three lacked an objectively reasonable belief that a financial fraud on investors was occurring).

Welch v. Chao, 536 F.3d 269, 278-79 (4th Cir. 2008) (the Sarbanes-Oxley Act did not prohibit the firing of a bank executive who complained about accounting irregularities that could not reasonably have been considered violations of federal securities laws; he failed to demonstrate how the company's conduct could have violated any of the federal laws referred to in the statute's whistleblower protection provision).

Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996 (9th Cir. 2009) (18 U.S.C. § 1514A(b) protects any "person" alleging discrimination based on protected activity; "Nothing in this section indicates that in-house attorneys are not also protected from retaliation under this section, even though Congress plainly considered the role attorneys might play in reporting possible securities fraud.").

Livingston v. Wyeth Inc., 520 F.3d 344 (4th Cir. 2008) (SOX's whistleblower provision did not protect plaintiff from termination for complaining about perceived unlawful activity by his employer; plaintiff could not show that he "reasonably" believed that his employer misrepresented or concealed anything in violation of SOX, nor could he show a reasonable belief that his employer had engaged in any violation of federal securities laws).

Lawson v. FMR LLC, ___ F. Supp. 2d ___, 2010 U.S. Dist. LEXIS 31258, at *55-56 (D. Mass. 2010) (two former employees of Fidelity Investments, who alleged that they were fired or forced to resign because of whistleblowing activity, may pursue retaliation claims under the Sarbanes-Oxley Act even though the Fidelity companies they sued are all privately owned organizations; because Fidelity served as the investment advisor for publicly held mutual funds, the firm's employees were covered by Sarbanes-Oxley's whistleblower protections as a publicly held company's "contractor, subcontractor, or agent").

Smith v. Hewlett Packard, 2006 WL 3246894, at *8-10 (U.S. Dep't of Lab. 2006) (Pulver, ALJ) (SOX's whistleblower provision did not protect an employee-relations staffer who threatened to take allegations of race discrimination to the EEOC and DOL and spoke of a possible class action; without an actual lawsuit or class action, the employer had few obligations

to shareholders; although rejecting the claim, the ALJ left open the possibility that an individual race discrimination claim could be the basis of SOX whistleblower claim because of the effect of such a case on investors; "Fraudulent disclosures to shareholders about a company's diversity or opportunity for those within protected classes could very well impact a company's value on the public market. Socially responsible investors may move their money upon learning of a company's discriminatory practices.").

Platone v. FLYI Inc., 2006 WL 3246910, at *8-11 (U.S. Dep't of Lab. 2006) (employee's allegations that employer purposefully overpaid pilots was not a protected action because the complaint did not concern fraud against stockholders, as required by SOX).

Lewandowski v. Viacom Inc., DOL ARB No. 08-026 (2009) (an employee of Paramount Pictures who was fired after reporting that a vice president was leaking motion picture ideas to competitors was not engaged in whistleblowing activity that was protected by the Sarbanes-Oxley Act; the former employee could not establish that the executive's disclosures would have been seen as significant by a reasonable investor in Viacom's stock).

Miles v. Wal-Mart Stores, Inc., 2008 WL 222694, at *3-4 (W.D. Ark. 2008) (plaintiff's SOX retaliation claim could move forward because she created a genuine issue as to whether she engaged in protected activity by providing assistance in response to a subpoena issued in connection with grand jury proceedings against a Wal-Mart executive who was ultimately convicted of wire fraud).

Schmidt v. Levi Strauss & Co., 625 F. Supp. 2d 796, 805-07 (N.D. Cal. 2008) (there is no right to a jury trial for retaliation claims filed under the Sarbanes-Oxley Act).

5. 42 U.S.C. § 1981.

CBOCS West Inc. v. Humphries, ___ U.S. ___, 128 S. Ct. 1951, 1960-61 (2008) (42 U.S.C. § 1981 provides a cause of action for retaliation even though section 1981 does not expressly prohibit retaliation).

6. False Claims Act.

United States ex rel. Summers v. LHC Grp. Inc., ___ F.3d ___, 2010 WL 3917058, at *7 (6th Cir. 2010) (disagreeing with other courts, the court dismissed a False Claims Act retaliation case because the plaintiff asserted the retaliation claim without following the FCA's procedures for presenting the underlying *qui tam* claim; "violations of the procedural

requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status" under the FCA's retaliation section as well).

United States ex rel. Sanchez v. Lymphatx Inc., 596 F.3d 1300, 1304 (11th Cir. 2010) (a former manager's report that Medicare fraud posed "significant" legal problems for the company was sufficient to bring plaintiff within the protection of the False Claims Act; if an employee describes an employer's conduct as illegal or fraudulent, the worker's characterization may support a conclusion that the employer could have feared being reported to the government or sued in a *qui tam* action).

Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1103 (9th Cir. 2008) ("A plaintiff alleging a FCA retaliation claim must show three elements: (1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity."; additionally, the heightened pleading requirements of FRCP 9(b) do not apply to FCA retaliation claims; a plaintiff must meet only the FRCP 8(a) notice pleading standard).

United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 735 (4th Cir. 2010) (plaintiff's comments to a construction company about "construction mistakes" on an embassy project was not an effort to expose fraud and therefore lacked whistleblower protection under the FCA).

Hoyte v. American National Red Cross, 518 F.3d 61, 67 (D.C. Cir. 2008) (2-1 decision rejecting False Claims Act retaliation claim of an internal whistleblower who objected to Red Cross blood-handling procedures that allegedly violated a prior FDA consent decree; the putative whistleblower's issues pertained to "mere regulatory compliance," not a false claim to the government).

Yesudian v. Howard Univ., 153 F.3d 731, 739-40, 743-45 (D.C. Cir. 1996) (reversing in relevant part a district court decision that had granted judgment as a matter of law to the employer following a large False Claims Act jury verdict; while it is true that "[m]ere dissatisfaction with one's treatment on the job is not . . . of course, enough" to implicate the False Claims Act, that "an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations" does not trigger the Act, and that "[m]erely grumbling to the employer about job dissatisfaction or regulatory violations does not satisfy the requirement [of whistleblowing]," here there was more; even disgruntled employees can

be protected depending on what they do, and here the plaintiff objected to financial improprieties, including falsified time and attendance records and vendor improprieties that resulted in misuse of taxpayer funds).

Lang v. Northwestern Univ., 472 F.3d 493, 495 (7th Cir. 2006) (the employee reported to the FBI a good-faith, but objectively unreasonable, suspicion that her employer was attempting to defraud the Federal Reserve; "The district court concluded that Lang had played the part of Chicken Little.").

Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 193-94 (3d Cir. 2001) (rejecting the False Claims Act claim of a law firm employee who wrote a memo objecting to the firm's practice of charging a 50% premium on computer research expenses; the plaintiff never branded the practice as "illegal" or threatened to report it to the government).

Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951-52 (5th Cir. 1994) (rejecting the claim of a plaintiff who reported internally questionable charges on a government contract; the internal reports were unaccompanied by allegations of illegality or a reference to a *qui tam* proceeding).

McKenzie v. BellSouth Telecommunications, Inc., 219 F.3d 508, 518 (6th Cir. 2000) (plaintiff made internal complaints about records falsifications, but the court rejected the claim because the plaintiff grounded it in the stress associated with the employer's pressure to falsify records, rather than in the fact of fraud on the government).

Green v. City of St. Louis, 507 F.3d 662, 668 (8th Cir. 2007) (there was no protected activity under the False Claims Act where plaintiff complained to city officials and the news media about the city's practices of certifying businesses as women- or minority-owned; plaintiff did not, however, describe an actual fraudulent claim being presented to the government, and the employee conceded in deposition that he had no knowledge of actual fraudulent information).

Brandon v. Anesthesia & Pain Management Assocs., 277 F.3d 936, 944-45 (7th Cir. 2002) (plaintiff did not engage in protected activity by reporting internally that he suspected doctors were committing Medicare fraud; reporting suspected fraud was part of plaintiff's job, so the allegations did not put the employer on notice of impending False Claims Act litigation).

Maturi v. McLaughlin Research Corp., 413 F.3d 166, 172-74 (1st Cir. 2005) (the allegedly protected activity was a factual investigation that was

well within the scope of the employee's regular responsibilities; such a plaintiff "must make it clear that his actions go beyond his regular duties to establish that his employer was on notice that he was engaged in protected conduct").

Shekoyan v. Sibley International, 409 F.3d 414, 423 (D.C. Cir. 2005) (there were internal complaints about misuse of project property and government funds, but there was no allegation of corruption, just allegations of problems that needed to be fixed for the benefit of the employer).

United States ex rel. Bartlett v. Tyrone Hosp., Inc., 234 F.R.D. 113, 129-30 (W.D. Pa. 2006) (CEO's actions in seeking an internal audit were for internal business purposes).

United States ex rel. McKenzie v. BellSouth Telecommunications, Inc., 123 F.3d 935, 944-45 (6th Cir. 1997) (plaintiff stated a claim of protected activity by alleging that he showed the employer a news article describing a *qui tam* action that had arisen against another employer based on similar conduct).

United States ex rel. Barrett v. Columbia/HCA Health Care Corp., 251 F. Supp. 2d 28, 37-38 (D.D.C. 2003) (for pleading purposes it sufficed that plaintiff alleged that he spoke to supervisors and managers about alleged Medicare improprieties).

Mann v. Olsten Certified Healthcare Corp., 49 F. Supp. 2d 1307, 1314-16 (M.D. Ala. 1999) (plaintiff made internal complaints about Medicare billing activity and tried to stop a supervisor from billing Medicare for particular charges; plaintiff never said that the billing was illegal or fraudulent, but the complaints could have led the company to believe that the employee was contemplating a *qui tam* action or reporting fraud to the government; routine efforts to correct Medicare billing errors would not rise to the level of protected activity under the False Claims Act, but here there was more).

United States ex rel. Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1260-62 (D.C. Cir. 2004) (affirming in part and reversing in part dismissal of False Claims Act retaliation claim; the Act protects employees while they are merely collecting information about a possible fraud; however, the employer must have notice that a *qui tam* claim might be in the works).

United States ex rel. Conner v. Salina Regional Health Center, Inc., 459 F. Supp. 2d 1081, 1092-93 (D. Kan. 2006) (plaintiff failed to plead that the

hospital knew of ophthalmologist's investigation into possible misconduct; leave to amend granted).

7. Family and Medical Leave Act.

Dollar Gen. Corp. v. Bryant, 538 F.3d 394, 401-02 (6th Cir. 2008) (rejecting contention that the FMLA does not prohibit retaliation for taking leave, as opposed to "oppositional" activity).

Breeden v. Novartis Pharms. Corp., ___ F. Supp. 2d ___, 2010 WL 2102325, at *3 (D.D.C. 2010) (granting judgment as a matter of law following a half-million dollar jury verdict; although plaintiff presented evidence that she would not have been discharged in 2008 "but for" a 2005 realignment of her duties that may have violated the FMLA, the FMLA requires a showing that the company's earlier action was a proximate cause of the termination).

Daugherty v. Wabash Ctr. Inc., 577 F.3d 747, 750 (7th Cir. 2009) (affirming summary judgment; "[B]ecause the FMLA only entitles employees to the same position they would have otherwise been entitled to, 29 U.S.C. § 2614(a)(3)(B), an employer may terminate employees — even when on leave — if the employer discovers misconduct that would justify termination had leave not been taken.").

Schaaf v. SmithKline Beecham Corp., 602 F.3d 1236, 1242-43 (11th Cir. 2010) (rejecting as "legally incorrect" and "logically unsound" plaintiff's argument that, because the company discovered some of her alleged performance deficiencies while she was on FMLA leave, its decision to demote her was "caused" by her protected leave and therefore violated the FMLA; "The purpose of the FMLA is to allow individuals to temporarily put their careers on hold in order to tend to certain personal matters, like the care of a newborn child. Its purpose is not to aid an employee in covering up her work-related deficiencies."; "[T]he evidence shows that Schaaf was demoted because of managerial ineffectiveness that revealed itself in full only in her absence; she was not demoted because (i.e., *for the reason that*) she took FMLA leave.").

Krutzig v. Pulte Home Corp., 602 F.3d 1231, 1236 (11th Cir. 2010) (an employee's "right to commence FMLA leave is not absolute"; he or she may be discharged before his or her leave starts if he or she would have been discharged anyway, regardless of his or her leave request).

8. The American Recovery and Reinvestment Act of 2009.

This new statute, Pub. Law No. 111-5, 123 Stat. 115 (2009), in section 1553, contains an extraordinary broad whistleblower protection provision.

The law prohibits retaliation against whistleblowing employees of state and local governments and private sector employers, including grantees, contractors and subcontractors of federal, state and local governments that benefit from federal stimulus funds.

The scope of protected activity is quite broad, and includes day-to-day performance of a whistleblower's job. Protected whistleblowing by ARRA-covered employees includes disclosures to "the Recovery Accountability and Transparency Board, an inspector general, the comptroller general, a member of Congress, a state or federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a federal agency or their representatives."

Protected complaints include not only those in which the whistleblower reasonably believes he is reporting evidence of "a violation of law, rule or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds," but also those involving "gross mismanagement of an agency contract or grant relating to covered funds," "a gross waste of covered funds," "a substantial and specific danger to public health or safety relating to the implementation or use of covered funds," or "an abuse of authority related to the implementation or use of covered funds."

"Abuse of authority," for example, is defined as "an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons."

The ARRA's express inclusion of "ordinary-duty" disclosures will make it very difficult for federal contractors to manage the performance of employees whose duties include contract compliance and oversight. An internal auditor, for example, could turn virtually any disagreement with his supervisor into a protected act of "whistleblowing."

Complaints of prohibited reprisals are filed initially with the inspector general of the federal agency from which the stimulus funds were distributed. Unless the complaint is deemed to be frivolous, does not relate to stimulus funds, or is the subject of another pre-existing judicial or administrative proceeding, the relevant inspector general is responsible for investigating the complaint and making a report within 180 days, subject to the inspector general's ability to grant himself an extension of no more than 180 days, and the complainant's ability to consent to a (presumably longer) extension. The head of the relevant federal agency is then charged

with making a final decision, granting or denying relief to the complainant, within 30 days after receiving the inspector general's report.

The burden of proof is placed on the complainant to show that his protected activity was a "contributing factor" in the challenged employment action. Plaintiff may rely on circumstantial evidence, which section 1553(c) says can be as little as "evidence" that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal," *or* evidence that the decisionmaker knew of the disclosure." The employer then can defeat liability if it shows by clear and convincing evidence that it would have taken the challenged action even in the absence of the protected activity.

The ARRA permits a complainant to opt-out of the administrative process and proceed *de novo* in federal district court if a final agency decision is not rendered within the specified timeframe (210 days, or longer if an extension is granted). The ARRA also allows the complainant to proceed *de novo* in federal district court if he does not like the outcome of the agency proceeding. On the other hand, if the employer is dissatisfied with the agency head's determination, its only recourse is to seek review of the final agency action in a court of appeals.

Rights under the provision are not waivable and not subject to predispute arbitration agreements. The effect of these provisions on settlement agreements/release is likewise uncertain. They could be read, for example, to prohibit the release of such claims in a standard waiver and release agreement, at least without approval of a court or agency, or they could be read more narrowly to prohibit only prospective waivers of rights.

There is no listed statute of limitations.

A whistleblower complaint also may put the employer at risk for debarment or other criminal or civil enforcement proceedings.

9. ADEA.

Gomez-Perez v. Potter, ___ U.S. ___, 128 S. Ct. 1931, 1933 (2008) (the ADEA prohibits retaliation against federal employees who have filed ADEA bias complaints, even though the statute does not include an express prohibition against retaliation like the provision covering private sector workers).

10. Whistleblower Protection Act.

Chambers v. Dep't of Interior, 602 F.3d 1370, 1378-79 (Fed. Cir. 2010) (reversing a defense decision under the Whistleblower Protection Act; a former chief of the U.S. Park Police made protected disclosures to a House staffer and the *Washington Post* that traffic accidents had increased on the Baltimore-Washington Parkway because the agency only could afford to have two officers patrolling the highway rather than the recommended four; this statement "was protected under the WPA as evidencing a substantial and specific danger to public health or safety").

Huffman v. Office of Personnel Mgmt., 263 F.3d 1341, 1348, 1350 (Fed. Cir. 2001) (Whistleblower Protection Act case; "[The Act] does not apply where an employee makes complaints to the employee's supervisor about the supervisor's own conduct."; "When an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a 'disclosure' of misconduct.").

DOD Whistleblower Protection Rule (adopting final regulations under the National Defense Authorization Act; 48 C.F.R. § 203.903 prohibits a contractor from discharging, demoting or otherwise discriminating against an employee for disclosing information the employee reasonably believes is evidence of "gross mismanagement of a DoD contract, a gross waste of DoD funds, a substantial and specific danger to public health or safety, or a violation of law related to a DoD contract (including the competition for or negotiation of a contract)"; an employee is protected under the rule if the disclosure is made to a member of Congress, a Senate or House committee representative, an inspector general, the Government Accountability Office, a Defense Department employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice; an aggrieved employee may file a complaint with the DOD's inspector general, who is responsible for making an initial determination; if the agency head denies relief, or fails to issue an order within 210 days of the employee's submission of a complaint, the complainant may file a lawsuit against the contractor in a federal district court, where the employee can seek "compensatory damages and other relief" in a jury trial; an inspector general determination concerning a complaint and an agency head's decision to deny relief to a complainant "shall be admissible in evidence." 48 C.F.R. § 203.906).

11. Patient Protection and Affordable Health Care Act.

a. Section 1558 of the new federal health care bill contains a retaliation provision protecting whistleblowers.

b. The law adds new section 18G to the Fair Labor Standards Act.

c. Employers may not take adverse action against an employee who:

(i) receives a tax credit or subsidy under the law;

(ii) reported, or is about to report, information to the employer, the federal government, or a state attorney general, about what "the employee reasonably believes to be a violation" of the new law;

(iii) testified, or is about to testify, in a proceeding concerning an alleged violation;

(iv) assisted, or is about to assist, in such a proceeding; or

(v) "objected to, or refused to participate in," any activity "reasonably believed" to violate this law.

d. Claims of retaliation are expected to be over protected activities based on:

(i) Denial of medical coverage based on preexisting conditions;

(ii) Discrimination based on an individual's receipt of insurance subsidies; and

(iii) An insurer's failure to rebate excess premiums.

e. The law incorporates by reference the complaint and remedial procedure of the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087(b).

(i) The burden of proof is plaintiff-friendly.

(a) Plaintiff must prove only that retaliation was "a contributing factor" to the adverse action.

(b) The employer then can prevail only by proving with "clear and convincing evidence" — defined as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain" — that the same adverse action would have occurred, anyway.

(ii) Although the statute requires administrative exhaustion, many claims likely will lead to jury trial.

(a) The plaintiff must file a claim with OSHA within 180 days of the adverse action.

(b) OSHA must investigate and may order preliminary relief, such as reinstatement.

(c) Either party can appeal OSHA's determination and obtain a *de novo* hearing before a Labor Department administrative law judge.

(d) Either party can appeal the ALJ's to the Labor Department's Administrative Review Board.

(e) The ARB's decision is reviewed in the U.S. court of appeals for the circuit in which the adverse action occurred.

(f) If, however, no final Labor Department decision issues within 210 days of the filing of the complaint or 90 days after OSHA's written determination — *i.e.*, in virtually any case — the complainant can remove the case to federal court for trial *de novo*. Either party then may request a jury trial.

(iii) Remedies include reinstatement, back pay with interest, "special damages" (likely meaning emotional distress, career damage, and loss of reputation), attorney's fees and costs (including expert fees).

(iv) "Rights, privileges, or remedies" under the statute cannot be waived by private agreement. Plaintiffs will contend that this language means that arbitration agreements are unenforceable.

f. The statute is effective immediately. However, the impact of the retaliation provision is likely to be gradual because some of the substantive provisions of the health care bill roll out over several years. In the short run, some practices that *will become* unlawful — and hence grounds for a whistleblower complaint — are *not yet* unlawful.

12. Energy Reorganization Act.

Vinnett v. Mitsubishi Power Sys., ARB Case No. 08-104, 2010 WL 3031377, at *7 (DOL Adm. Rev. Bd. 2010) (an engineer who alleges he was fired for reporting his concerns about safety practices and conditions

at a nuclear power plan is entitled to pursue a whistleblower retaliation claim under the Energy Reorganization Act even though monitoring and recording such problems was part of his job).

13. Surface Transportation Assistance Act.

Litt v. Republic Servs. of S. Nev., ARB No. 08-130, 2010 WL 3448544, at *4-5 (DOL Adm. Rev. Bd. 2010) (a truck driver who was fired after filing an OSHA complaint failed to show that his employer was aware that he had engaged in legally protected activity under the Surface Transportation Assistance Act; the complaint was anonymous; plaintiff revealed his OSHA activity to other employees, but that was not sufficient to overcome the credited testimony of managers that they had no idea who was responsible for the OSHA complaint).

14. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

This financial-services regulatory bill not only provides for whistleblower bounties; it also creates new retaliation proscriptions.

It protects from retaliation persons who (i) provide information to the SEC; (ii) testify or assist in any investigation or judicial or administrative action related to such information; or (iii) make disclosures required or protected under SOX or any law or rule subject to the SEC's jurisdiction.

Remedies include reinstatement, double back pay, interest, and compensation for litigation costs and fees.

The bill expands SOX's retaliation provision to include (i) subsidiaries and affiliates whose financial information is included in consolidated financial statements of the parent, and (ii) employees of credit or other rating agencies, such as Moody's, A.M. Best, or Standard & Poor's.

The amendments invalidate any pre-dispute arbitration agreement with respect to a SOX claim.

The bill amends the Commodity Exchange Act as well. A retaliation cause of action is provided, with remedies of reinstatement, back pay with interest, and compensation for costs and fees. This portion of the bill also prohibits enforcing pre-dispute arbitration agreements for claims arising under it.

The bill broadens the False Claims Act's retaliation provision to cover associational retaliation.

The bill creates a retaliation remedy for financial-services industry employees who are "about to," or do, provide information to their employer (even as part of their regular duties), the new Bureau of Consumer Financial Protection, or any other government authority information reasonably believed to violate Dodd-Frank's provisions concerning consumer protection, or if they testify in such a proceeding or refuse to participate in an activity reasonably believed to violate the law.

Remedies include reinstatement, back pay, compensatory damages, and litigation costs and fees.

For claims under this part of the law, plaintiffs must file with the Department of Labor. The proof burden is employee-friendly: retaliation need be only "a contributing factor." In mixed-motive cases the employer prevails only if it proves, with "clear and convincing evidence," that the employer would have taken the same adverse action in the absence of the retaliatory motive.

When an employer defeats a frivolous claim, its demand for attorney's fees is capped at $1,000.

15. ERISA.

Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 224-25 (3d Cir. 2010) (2-1 decision; ERISA's retaliation provision does not protect an employee's unsolicited, informal complaints about alleged ERISA violations; ERISA section 510 provides, in relevant part, that it is unlawful for an employer to retaliate against any person who has given information or has testified in an "inquiry or proceeding" relating to ERISA or certain other statutory provisions).

But cf. DeFelice v. Heritage Animal Hosp., Inc., ___ F. Supp. 2d ___, 2010 WL 3906147, at *2-3 (E.D. Mich. 2010) (denying summary judgment on plaintiff's ERISA claim that she was terminated for reporting to the county sheriff's office that her employer failed for seven months to make proper contributions to her retirement savings plan; rejecting contention that the mere act of complaining was not part of an "inquiry" that ERISA covers; the internal discussions sufficed).

16. National Labor Relations Act.

The NLRA generally is beyond the scope of this paper. A noteworthy development, however, is ne Region's effort to impose retaliation liability for an employee's use of social media. *American Medical Response*, No. 34-CA-12576, *complaint issued* Oct. 27, 2010 (issuing an NLRA

complaint when an employee was discharged, allegedly for posting on Facebook derogatory statements about her supervisor).

Build.com, *NLRB news release issued* Feb. 28, 2011 (former employee filed a charge with NLRB, alleging she was terminated in retaliation for posting comments about employer and possible state labor code violations on Facebook; NLRB approved a settlement between Build.com and former employee, whereby employer will have to post a notice for 60 days stating that "employees have the right to post comments about terms and conditions of employment on their social media pages, and that they will not be terminated or otherwise punished for such conduct"; commenting on the settlement, NLRB Regional Director Joseph Frankl said, "I am pleased … that the employer has recognized the rights of its employees to use social networking sites to comment about their working conditions.").

Hispanics United of Buffalo, Inc., No. 3-CA-27872, *Administrative Law Judge for NLRB decision issued* Sept. 2, 2011 (employer violated NLRA by firing five employees who engaged in protected concerted activity: complaining on Facebook – off-hours – about their working conditions).

But see Lee Enterprises, Inc. d/b/a Arizona Daily Star, No. 28-CA-23267, *NLRB Division of Advice advice memorandum issued* Apr. 21, 2011 (concluding that employer did not violate section 8(a)(1) by terminating employee for posting unprofessional tweet to a work-related Twitter account that did not involve protected concerted activity; among the various tweets alleged to have been made by the employee include: "You stay homicidal, Tucson, See Star Net for the bloody deets", "What?!?!? No overnight homicide? WTF? You're slacking Tuscon", and "I'd root for daily death if it always happened in close proximity to Gus Balon's").

JT's Porch Saloon & Eatery, LTD, No. 13-CA-46689, *NLRB Division of Advice advice memorandum issued* July 7, 2011 (employee was discharged after making a post to his Facebook page in which he stated he hadn't had a raise in five years, that he was doing the waitresses' work without tip, he also called the employer's customers "rednecks" and stated that he hoped they choked on glass as they drove home drunk; employee did not discuss his Facebook posting with any employees either before or after he wrote it and no co-workers responded to it; advice memorandum concluded that although the employee's post did relate to terms and conditions of his employment, it did not grow out of his prior conversation with a co-worker about tipping policy and that there was no evidence of concerted activity; advice memorandum noted that the employee was "merely responding to a question from his step-sister about how his evening at work went.").

Wal-Mart, No. No. 17-CA-25030, *NLRB Division of Advice advice memorandum issued* July 19, 2011 (employee was disciplined after a co-worker gave management a copy of an employee's profane comments on Facebook critical of local store management; advice memorandum concluded that employee's comments were more akin to mere griping, which is not protected, and that co-worker comments on the employee's Facebook page did not indicate that they viewed the comments in any other way; advice memorandum recommended dismissal of charge).

Martin House, No. 35-CA-12950, *NLRB Division of Advice advice memorandum issued* July 19, 2011 (employee was terminated due to her Facebook posts in which she joked about her client's illnesses; employee worked at a residential facility for homeless people with mental health issues; employer learned of employee's posts through a former client who was Facebook friends with employee; advice memorandum noted that there was no evidence of protected concerted activity because employee's posts did not mention any terms or conditions of employment and did not involve any co-workers; dismissal of the charge was recommended).

III. IS THERE A JUDICIALLY COGNIZABLE ADVERSE EMPLOYMENT ACTION?

A. The Alleged Retaliatory Act Generally Need Not Affect The Employee's Employment Conditions Or The Employee's Ability To Do His/Her Job.

Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) ("We conclude that the anti-retaliation provision [of Title VII] does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace."; the "adverse action" requirement of a Title VII discrimination case is more rigorous than in a retaliation case).

B. *De Minimis* Adverse Actions Are Not Cognizable, But The Supreme Court Has Overruled Prior Cases Requiring An "Ultimate" Or Substantial Adverse Action.

1. The Supreme Court has restated the test for proving an adverse action.

Burlington Northern, 548 U.S. at 57 ("We . . . conclude that the [retaliation] provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. . . . [T]hat means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."; here, a later-rescinded

suspension can be actionable, because by definition the employee did not know at the time of the suspension that it would be rescinded).

Justice Alito's opinion, concurring in the judgment, criticized the majority in several respects. First, he faulted the logic of the "deterrence" test. *Id.* at 78 ("A reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation; the costs of filing the charge, including possible retaliation, will have to be great to outweigh the benefits, such as preventing the continuation of the discrimination in the future and obtaining damages and other relief for past discrimination. Because the possibility of relatively severe retaliation will not easily dissuade this employee, the employer will be able to engage in relatively severe retaliation without incurring liability under § 704(a). On the other hand, an employee who is subjected to a much milder form of discrimination will be much more easily dissuaded. For this employee, the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge. These topsy-turvy results make no sense."). Second, Justice Alito noted that the majority's test, though purportedly objective and easy to apply, in fact had subjective and difficult-to-apply elements. *Id.* at 79 ("[T]he majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim."). Third, Justice Alito noted that the causation standard was "loose and unfamiliar." *Id.* ("[T]he majority's test asks whether an employer's retaliatory act '*well might have dissuaded* a reasonable worker from making or supporting a charge of discrimination.'") (emphasis in opinion of Alito, J.).

2. Subsequent court of appeals cases continue to scrutinize whether a cognizable adverse action exists.

Geleta v. Gray, 645 F.3d 408, 411-12 (D.C. Cir. 2011) (genuine issue of material fact as to whether employee's transfer was a materially adverse employment action, where jury could find that transfer resulted in employee losing supervisory responsibilities (previously supervised 20 employees to no employees) and narrower and less important programmatic responsibilities – employee went from overseeing a broad-based mental health unification project to a desk job where he spent his time clearing a bureaucratic backlog).

Davis v. Time Warner Cable of Southeastern Wis., L.P., 2011 U.S. App. LEXIS 13636, at *32-35 (7th Cir. 2011) (performance improvement plans

alone are not adverse employment actions; changes to compensation plan was not adverse employment action because employer changed the plan annually, the plan was developed and implemented around the same time that employee lodged his complaints, and the plan applied to the entirety of the inside sales team, even those who did not express any complaints of discrimination).

Vance v. Ball State Univ., 2011 U.S. App. LEXIS 11195, at *26-33 (7th Cir. 2011) (plaintiff's promotion from a part-time position to a full-time position, where she was assigned more menial tasks like cutting vegetables and refilling condiments but more complicated tasks like preparing complex dishes as well as provided a pay raise and benefits, was not materially adverse employment action; loss of overtime opportunities was not an adverse employment action because plaintiff could not identify any similarly situated individuals; employer's delivery of verbal warning based on a complaint from a co-worker was not a materially adverse employment action).

Silverman v. Bd. of Educ., 637 F.3d 729, 740-41 (7th Cir. 2011) (plaintiff, who was pregnant, was terminated after Board decided to eliminate one special education teaching position; Board's decision to subsequently offer plaintiff new position teaching autistic children, two months after she filed an EEOC charge, was not an adverse employment action because Board was under no obligation to rehire plaintiff for any position and she was already terminated; negative evaluations could constitute adverse employment actions, and non-renewal of employment contract certainly does, but plaintiff offered no evidence that her filing an EEOC charge caused those events).

Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 721 (2d Cir. 2010) (affirming summary judgment even though an African-American tax auditor resigned from her job after the company decided not to investigate her race discrimination complaints; "[A]n employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint.").

Morales-Vallellanes v. Potter, 605 F.3d 27, 36-40 (1st Cir. 2010) (vacating a $364,504 judgment; instances of alleged discrimination and/or retaliation did not significantly alter Morales' working conditions; even if the U.S. Postal Service selectively applied a breaks policy in favor of female employees, temporarily rotated him to window duty, gave his preferred back-room assignment to a female employee, and altered a job vacancy announcement, in retaliation for his prior workplace complaints, those are not adverse actions).

Goodman v. Nat'l Sec. Agency Inc., ___ F.3d ___, 2010 WL 3447727, at *4 (7th Cir. 2010) ("'[I]t is well established that unfulfilled threats that result in no material harm cannot be considered an adverse employment action under Title VII.'") (citation omitted; alteration in original).

Fanning v. Potter, 614 F.3d 845, 850-51 (8th Cir. 2010) (plaintiff was not discharged in retaliation for a prior discrimination claim; "By the time that Fanning's separation became effective on December 23, 2006, she had been on leave without pay for *over six years*, and her physician had advised at least four times that she was permanently and totally disabled and would never be able to return to work."; "There was an obvious legitimate, non-discriminatory reason for the administrative separation, and Fanning has not presented evidence to demonstrate that this reason was a pretext for unlawful retaliation."; the court also rejected plaintiff's theory that, in retaliation for the discrimination complaint, some of her benefits checks were delivered late; "We are not convinced that an objectively reasonable employee would find the occasional delay in receipt of less than two percent of her monthly income to be a serious hardship that would dissuade her from making a charge of discrimination.").

Jones v. Res-Care Inc., 613 F.3d 665, 671 (7th Cir. 2010) ("[T]his Court has previously held that 'unfair reprimands or negative performance evaluations, unaccompanied by some *tangible* job consequence, do not constitute adverse employment actions.'"; "However, Jones asserts that there was 'a palpable tension' at the time Jones received the adverse employment action . . . . This tension, she argues, combined with the corrective action, rose to the level of an adverse employment action."; "A plaintiff's subjective determination of tension in the workplace, without more, cannot constitute an adverse employment action absent a tangible job consequence.").

Johnson v. Weld County, 549 F.3d 1202, 1216-17 (10th Cir. 2010) (affirming summary judgment; plaintiff claimed the county violated Title VII by retaliating against her for her internal complaints about alleged sex and disability bias; she alleged that, after her complaints, she got "the cold shoulder," and that supervisors sat farther away from her at staff meetings, became too busy to answer her questions, and tried to avoid her; "these alleged snubs, though surely unpleasant and disturbing, are insufficient to support a claim of retaliation"; nor was it sufficient that she alleged that she was urged not to consult an attorney regarding alleged sex discrimination; "[M]erely suggesting on one occasion to an employee that she 'not get the lawyers involved' simply does not rise to the level of material adversity necessary to sustain a retaliation claim . . . .").

Littleton v. Pilot Travel Ctrs., LLC, 568 F.3d 641, 644 (8th Cir. 2009) (affirming summary judgment on retaliation claim; a correction notice was not an adverse job action; "Our post-*Burlington Northern* decisions have consistently held that, to be materially adverse, retaliation cannot be trivial; it must produce some 'injury or harm.'"; plaintiff's pay and hours were not affected, his responsibilities were unchanged, and he was not excluded from training or mentorship available to other employees).

Lucero v. Nettle Creek Sch. Dist., 566 F.3d 720, 729-30 (7th Cir. 2009) (a high school English teacher reassigned from teaching 12th grade to 7th grade had no retaliation claim because her reassignment with no loss of pay or benefits was not an adverse employment action).

Hunter v. Secretary of the Army, 565 F.3d 986, 996 (6th Cir. 2009) (an Army engineering technician failed to show retaliation; none of the alleged actions was sufficiently adverse; the alleged retaliation described by Hunter would not dissuade a reasonable employee from making a charge of discrimination; a supervisor's "single, isolated remark" during a meeting — that "any high school kid" could do Hunter's job — was insulting, but did not rise to the level of a materially adverse employment action).

Semsroth v. City of Wichita, 555 F.3d 1182, 1185-87 (10th Cir. 2009) (affirming summary judgment against three police officers who alleged they were retaliated against for suing for discrimination and harassment; none alleged a cognizable adverse action; the first received the assignment she wanted through a union grievance; the second did not obtain the assignment she preferred, but the one she got was not objectively inferior; the third objected to a fitness-for-duty exam to which she consented).

Jackson v. United Parcel Service, Inc., 548 F.3d 1137, 1141-42 (8th Cir. 2008) (a suspension, promptly rescinded, is not an adverse action; ". . . UPS recognized its mistake, took corrective action, and reinstated Jackson with full back pay and no loss of seniority or any other employment benefit."; "rescinding a prior employment action will [not] *always* shield an employer from liability," however, because "such a broad rule would permit employers to escape Title VII liability merely by correcting their discriminatory acts after a significant amount of time has passed or only when litigation has been threatened") (emphasis in original).

Baloch v. Kempthorne, 550 F.3d 1191, 1199-200 (D.C. Cir. 2008) (affirming summary judgment; there was no adverse action; a sick leave restriction — requiring that a physician certify the problem and date of treatment each time Baloch submitted a leave request — was not an adverse action because the procedures never led him to forgo leave;

proposed 2-day and 30-day suspensions were not materially adverse actions because the suspensions were not actually served; a letter of counseling, letter of reprimand, and unsatisfactory performance review were not adverse actions, either; they contained no abusive language, but rather job-related constructive criticism; performance reviews typically constitute adverse actions only when attached to financial harms; instances of profanity-laden yelling, though "disproportionate," were mere "sporadic verbal altercations or disagreements [that] do not qualify as adverse actions for purposes of retaliation claims"; in any event, the defendant asserted legitimate, nondiscriminatory reasons for each act, and Baloch did not produce sufficient evidence that would discredit those reasons and show that the actions were retaliatory).

Recio v. Creighton Univ., 521 F.3d 934, 940-41 (8th Cir. 2008) (affirming summary judgment; shunning by faculty, alteration of teaching schedule, and failure to assign plaintiff to teach advanced classes amounted to no more than non-actionable petty slights which do not meet the significant harm standard; in any event, the six-month interval between protected activity and teaching assignments was not close enough to raise an inference of causation).

Nichols v. Southern Ill. Univ.-Edwardsville, 510 F.3d 772, 780-81, 786-87 (7th Cir. 2007) (being placed on paid administrative leave pending the results of a psychological examination does not constitute an adverse action; neither does an employer's assignment of an employee to a work location that is not the employee's preferred location, where the assignment does not affect the employee's salary, benefits, or opportunity for future advancement).

Richardson v. Comm'n on Human Rights, 532 F.3d 114, 122 (2d Cir. 2008) (an employer and its employees' union did not violate Title VII by agreeing on and complying with a provision in a collective bargaining agreement requiring employees to choose between arbitration of discrimination claims, or administrative and judicial remedies; the provision requiring the employee to choose between arbitration or administrative/judicial remedies to resolve her discrimination claims did not waive any of her Title VII rights; she "remained free to file a charge with the EEOC, as she did, and to pursue a Title VII action in federal court, as she has"; the contractual provision "is a rather sensible outcome," because it allows an employer to avoid devoting resources to defending itself both in arbitration and in court regarding the same dispute).

Roney v. Ill. Dep't of Transp., 474 F.3d 455, 461-62 (7th Cir. 2007) (holding that the following actions are not sufficiently adverse to establish a prima facie case of retaliation under *Burlington Northern*: assigning

plaintiff to inspect the performance of a dangerous job; refusing to create a performance plan for plaintiff; denying plaintiff the use of a state vehicle; denying plaintiff a merit raise after such raises were no longer regularly offered; threatening termination due to plaintiff's failure to complete an Economic Interest Statement; issuing an oral warning to plaintiff for screaming at his supervisor when asked about an absence; issuing a disciplinary report to plaintiff for falsifying his overtime records; truthfully reporting to the police that plaintiff was a former employee; denying unemployment benefits to plaintiff based on a state agency's finding that plaintiff voluntarily resigned).

Clegg v. Arkansas Dep't of Correction, 496 F.3d 922, 927-28 (8th Cir. 2007) (USERRA retaliation case; the following alleged actions would not dissuade a reasonable worker from engaging in protected activity: a performance evaluation lower than previous evaluations (but still rating performance as satisfactory), being assigned to remedial training, and contentious relations with co-workers; other actions, including employer's denial of permission for plaintiff to attend a training session, employer's failure to provide plaintiff with certain employment tools and with notice of new department policies, and employer's decision not to have plaintiff attend certain meetings immediately upon her return to work from active military service were remedied by the employer after plaintiff brought them to employer's attention, thereby negating any adverse affects plaintiff might otherwise have suffered).

Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 618-19 (8th Cir. 2007) (the employer's failure to stop a co-worker from performing occasional pranks such as placing trash in plaintiff's trailer or misloading plaintiff's trailer is not an adverse action; co-worker's conduct more closely resembles a "trivial harm").

Higgins v. Gonzales, 481 F.3d 578, 585-86 (8th Cir. 2007) (the court held that the following actions do not constitute an "adverse action": (1) a job reassignment that involves no reduction in salary, benefits, or prestige; (2) the denial of supervision, mentoring, and training, if such a denial does not negatively impact plaintiff's job performance; (3) denial of a request for training; (4) employer's maintenance of a file on plaintiff, if employer maintains similar files for all employees in plaintiff's position; (5) denial of a performance review if such a denial does not impact the terms and conditions of plaintiff's employment).

Patterson v. Johnson, 505 F.3d 1296, 1298 (D.C. Cir. 2007) ("interference with plaintiff's managerial prerogatives" is only an adverse action if it "impair[s] the plaintiff's job performance or prospects for advancement").

Wiley v. Glassman, 511 F.3d 151, 159 (D.C. Cir. 2007) (denial of paid administrative leave is not an adverse action where plaintiff could not show she was entitled to the leave in the first place; same for exclusion from a rotation; "[N]o reasonable jury could infer retaliation from the agency's decision to comply with existing law and agency agreements.").

Hirst v. Southeast Airlines, Inc., 2007 WL 352447, at *5-6 (U.S. Dep't of Lab. 2007) (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century retaliation case; although the employer acted hastily and retaliated against plaintiff by firing him after he refused to pilot a flight because he thought it would be against regulations to do so, no adverse action occurred because employer immediately reversed its decision to discharge plaintiff upon recognizing its mistake).

Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 19-20 (1st Cir. 2006) (delays in implementing plaintiff's accommodation requests do not constitute an adverse action; the defendant implemented some of the requested accommodations and delayed the implementation of others because of construction).

Szymanski v. County of Cook, 468 F.3d 1027, 1028-31 (7th Cir. 2006) (neither defendant's "fair" recommendation of plaintiff to prospective employers, nor his allusion to plaintiff's dismissal when speaking to an individual conducting a background check on plaintiff, constituted an adverse employment action under *Burlington Northern*).

McGowan v. City of Eufala, 472 F.3d 736, 743-44 (10th Cir. 2006) (defendant's denial of plaintiff's request for a shift change, comments directed at plaintiff's son and his girlfriend, and "petty criticism of [plaintiff's] work," did not comprise an adverse action under *Burlington Northern*).

Nair v. Nicholson, 464 F.3d 766, 768-70 (7th Cir. 2006) (no adverse action where plaintiff alleged she was harassed by her co-workers in retaliation for reporting citizenship-based harassment and discrimination, as citizenship is not a protected characteristic under Title VII; additionally, there was no evidence that plaintiff's employer negligently failed to prevent, or affirmatively directed, the alleged harassment).

Gross v. Akin Gump Strauss Hauer & Feld, 559 F. Supp. 2d 23, 32-33 (D.D.C. 2009) (granting summary judgment on age discrimination and retaliation claims; Akin Gump's pursuit of counterclaims against Gross for breach of his duty of loyalty and tortious interference with economic advantage does not amount to a "materially adverse" action).

Cooper v. Conn. Dep't of Corr., ___ F. Supp. 2d ___, 2010 U.S. Dist. LEXIS 111417, at *24-28 (D. Conn. 2010) (granting summary judgment; a paid leave of absence during an internal investigation is not a cognizable adverse action).

But cf. Mogenhan v. Napolitano, 613 F.3d 1162, 1166 (D.C. Cir. 2010) (reversing summary judgment in a disability retaliation case; plaintiff's manager posted her complaint on-line to ostracize her from other employees and brand her as a "troublemaker"; the manager also greatly increased her workload; "A reasonable employee might well be dissuaded from filing an EEO complaint if she thought her employer would retaliate by burying her in work.").

Tuli v. Brigham & Women's Hosp., 2011 U.S. App. LEXIS 18003, at *15-16 (1st Cir. 2011) (consequences of being ordered into counseling by the hospital--invasion of privacy, potential stigma, and possible impact on employment and licensing elsewhere--"might have dissuaded a reasonable worker from making or supporting a charge of discrimination"; "[o]bligatory counseling is not a typical adverse action but the impact here could be deemed sufficient by the jury if the action was prompted by a retaliatory motive.") (internal quotations omitted).

Benuzzi v. Bd. of Educ., 2011 U.S. App. LEXIS 14904, at *32-36 (7th Cir. 2011) (genuine issue of material fact as to whether employer providing "Notice of Disciplinary Action," which is first step towards formal disciplinary proceedings, and an hours restriction memorandum, which restricted plaintiff's access to school building, to plaintiff one day after plaintiff's own deposition in her discrimination case were materially adverse employment decisions; court noting that written warnings, standing alone, generally did not constitute materially adverse actions).

Rattigan v. Holder, 643 F.3d 975, 986-87 (D.C. Cir. 2011) (reasonable jury could find that FBI's Office of International Operations referral of plaintiff's name to FBI's Security Division for an investigation was an act of retaliation against him because he filed Title VII claims, as it created the possibility that plaintiff would face a stressful and potentially reputation-damaging investigation, and that the FBI may revoke his security clearance and terminate his employment).

Booker v. Massachusetts Dep't of Pub. Health, 612 F.3d 34, 43-44 (1st Cir. 2010) (affirming jury verdict for the employer; although the trial court used "awkward" language to explain plaintiff's burden of proving retaliation, it did not mislead jurors into believing she had to prove that the Massachusetts Department of Public Health deliberately punished her to discourage bias complaints by other employees; the jury instruction

defined "adverse action" as "reprisals intended to discourage other employees from complaining about unlawful practices or reprisals that might be perceived in that way by other employees looking at them reasonably"; the phrase was "awkward and created numerous potential issues" but it was part of a longer instruction that gave examples of materially adverse actions; reading the charge as a whole, the trial court informed jurors that they could find an employment action was adverse if a reasonable employee could have perceived it as such).

Pardo-Kronemann v. Donovan, 601 F.3d 599, 604-05 (D.C. Cir. 2010) (reversing summary judgment because a jury reasonably could find that a government agency's action in transferring an attorney advisor out of its general counsel's office into its international affairs office was adverse).

Leibowitz v. Cornell Univ., 584 F.3d 487, 499-500 (2d Cir. 2009) (the non-renewal of an employment contract constitutes an adverse action where renewal is sought).

Franklin v. Local 2 of the Sheet Metal Workers Int'l Ass'n, 565 F.3d 508, 520-21 (8th Cir. 2009) (reversing summary judgment against members who sued their labor union; the union had posted for public viewing its legal bills, which identified plaintiffs by name as persons alleging discrimination; the evidence showed a possible reasonable inference that the union knew that the posting of the plaintiffs' names would have a negative impact upon them; "Although Local 2's prior practice and obligation to disclose expenses may justify what Local 2 did, the degree of Local 2's disclosures raises credibility issues and a possible reasonable inference of retaliation.").

Davis v. Team Elec. Co., 520 F.3d 1080, 1090 (9th Cir. 2008) (plaintiff's allegations that she was instructed not to enter the trailer where her supervisor was located, and her claim that she was ignored by supervisors when he attempted to communicate with them, were more than "mere ostracism").

Billings v. City of Grafton, 515 F.3d 39, 55 (1st Cir. 2008) (the employer's interdepartmental transfer of plaintiff constituted an adverse action because the position to which plaintiff was transferred was less prestigious, required plaintiff to report to a lower-ranked supervisor, required plaintiff to pay union dues, and required plaintiff to punch a time card; additionally, other incidents, including employer's investigation and reprimand of plaintiff for opening a letter from her boss's attorney and charging plaintiff personal time for attending her deposition in this case constitute adverse actions; "While these measures might not have made a

dramatic impact on [plaintiff's] job, conduct need not relate to the terms and conditions of employment to give rise to a retaliation claim.").

McCoy v. Shreveport, 492 F.3d 551, 561 (5th Cir. 2007) (recognizing that placement of an employee on paid administrative leave could be an adverse action if it "carried with it both the stigma of the suspicion of wrong-doing and possibly emotional distress.").

Lewis v. City of Chicago, 496 F.3d 645, 651 (7th Cir. 2007) (reversing summary judgment; a jury could conclude that denial of an opportunity to earn overtime is an adverse action).

Gilbert v. Des Moines Area Cmty. Coll., 495 F.3d 906, 917-19 (8th Cir. 2007) (a demotion is an adverse employment action; however, a letter from a superior urging employee to improve his budget performance is not an adverse employment action, nor is assignment to a new cubicle that is less desirable than employee's previous office space).

Williams v. W.D. Sports N.M. Inc. d/b/a N.M. Scorpions, 497 F.3d 1079, 1090-91 (10th Cir. 2007) (combination of threats and actions by employer in reaction to plaintiff's pursuit of discrimination claims, including employer's threat that he would spread rumors about plaintiff's sexual conduct without regard to the truth of the rumors and employer's opposing plaintiff's unemployment benefits claims, constitutes adverse action).

Weber v. Battista, 494 F.3d 179, 184-86 (D.C. Cir. 2007) (negative performance evaluations can constitute adverse actions when they are closely linked to monetary performance awards).

Woodruff v. Peters, 482 F.3d 521, 528-29 (D.C. Cir. 2007) (employer's revocation of plaintiff's telecommuting accommodations and employer's refusal to reinstate plaintiff's earlier supervisory authority upon plaintiff's return to work after undergoing surgery constitute adverse actions).

Freitag v. Ayers, 468 F.3d 528, 543 n.6 (9th Cir. 2006) (plaintiff, a female prison guard, complained to her employer that she was subjected to a hostile environment by prison inmates; plaintiff's temporary removal from duty pending a psychiatric evaluation, as well as her employer's initiation of internal affairs investigations, "would be considered materially adverse by a reasonable employee").

Mickelson v. New York Life Ins. Co., 460 F.3d 1304, 1316 (10th Cir. 2006) (refusal of plaintiff's request to return to work on a part-time basis prior to the expiration of her FMLA leave constituted an adverse action under *Burlington Northern*; plaintiff's depression subsequently worsened, which permanently prevented her from returning to work).

Velikonja v. Gonzales, 466 F.3d 122, 124 (D.C. Cir. 2006) (reversing dismissal of plaintiff's retaliation claim and remanding for further consideration in light of *Burlington Northern*; plaintiff alleged "she was subject to a lengthy investigation, that she was prevented from receiving promotions during the pendency of the investigation, and that 'the FBI has placed a cloud over [her] career, which effectively prevents her from obtaining other career-enhancing assignments for which she is highly qualified'").

Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 206-11 (2d Cir. 2006) (reversing summary judgment; although plaintiff retained the same salary and benefits and job title, a reasonable jury could conclude that a change in reporting structure, decreased job responsibilities and direct reports could dissuade a reasonable person in plaintiff position from pursuing a claim of discrimination).

Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (the FBI's failure to investigate death threats against one of its agents was a cognizable adverse action, even though it was not employment-related).

Crawford v. Carroll, 529 F.3d 961, 972 (11th Cir. 2008) (a black university employee who alleged she was denied a merit pay increase because of race and unlawful retaliation may pursue claims under Title VII and the Civil Rights Act of 1871, even though the university subsequently granted her a retroactive pay raise; "To conclude otherwise would permit employers to escape Title VII liability by correcting their discriminatory and retaliatory acts after the fact.").

Ramos v. Hoyle, 2009 WL 2151305, at *9-10 (S.D. Fla. 2009) (an employer who answered a domestic housekeeper's lawsuit for minimum wage violations with "baseless" counterclaims accusing the former employee of child abuse engaged in unlawful retaliation under the FLSA).

C. The California Courts Apply A Somewhat Different Test.

Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1036 (2005) (an employee who refused to follow her employer's order to terminate a sales associate that the employer found insufficiently attractive presented sufficient evidence of an adverse action; the employee previously had been a highly rated employee, and after her refusal she was subjected to months of unwarranted and public criticism and faced implied threat of termination; the employer had contacts with subordinates that undermined her effectiveness as a manager and regulated how she oversaw her territory; an adverse employment action for FEHA retaliation purposes is one that "materially affects the terms and conditions of employment";

the Court rejected "the arguably broader 'deterrence' test," but emphasized that the "materiality" test is not to be read miserly).

Jones v. Lodge at Torrey Pines, 147 Cal. App. 4th 475, 499-500 (2007) (applying *Yanowitz* standard to hold that plaintiff suffered an adverse employment action; after plaintiff sent his superior a memorandum asking him to refrain from making unprofessional remarks, the superior "responded with a tirade" and "physically intimidated [plaintiff] by crumpling his memorandum and throwing it at him," then subjected plaintiff to a series of actions that threatened to derail his career, including issuance of a series of warning notices, writing a memorandum accusing plaintiff of deficient work performance, not speaking to plaintiff, and excluding plaintiff from weekly management meetings).

McRae v. Dep't of Corrections, 142 Cal. App. 4th 377, 386 (2006) (citing *Yanowitz* for the proposition that "[i]n California, an employee seeking recovery on a theory of unlawful discrimination or retaliation must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity"; applying that test to hold that plaintiff's supervisor's private memoranda to his files, a letter of instruction to plaintiff, an unimplemented suspension and a transfer to another facility did not constitute adverse actions).

Patten v. Grant Joint Union High Sch. Dist., 134 Cal. App. 4th 1378, 1387 (2005) (a triable issue of fact existed, precluding summary judgment for school district in principal's whistleblowing action, as to whether principal's transfer to a small magnet year-round school from a much larger, diverse school, constituted an "adverse employment action" because the magnet school did "not present the kinds of administrative challenges an up-and-coming principal wanting to make her mark would relish[,]" and transfer to year-round school would affect the principal's children; "[t]he 'materiality' test encompasses not only ultimate employment decisions, 'but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career.'"; "Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment."; "But the terms or conditions of employment 'must be interpreted liberally and with a reasonable appreciation of the realities of the workplace [to further the fundamental antidiscrimination purposes of the FEHA].'") (citing *Yanowitz*).

Pinero v. Specialty Rests. Corp., 130 Cal. App. 4th 635 (2005) (an employer's mere oral or written criticism of an employee does not meet the definition of an adverse employment action under the retaliation provision of the FEHA;

supervisors' criticism of employee's performance was work-related, and employee's job responsibilities, title, and all forms of compensation suffered no impact as a result of his employer's knowledge of his lawsuit).

Akers v. County of San Diego, 95 Cal. App. 4th 1441, 1456 (2002) (a negative performance review and counseling memorandum accusing the plaintiff of "incompetence," "dishonesty" and "insubordination" can be an adverse action because "an accusation of dishonesty against a prosecutor can be a career ender" and such actions could render the plaintiff "no longer promotable"; "Where an employer reacts to a discrimination complaint by eliminating a reasonable potential for promotion or materially delaying the promotion, there is a legally tenable basis for a jury to find the employer substantially and materially adversely affected the terms and conditions of the plaintiff's employment.") (internal citation marks omitted).

Birschtein v. New United Motor Mfg., Inc., 92 Cal. App. 4th 994, 1002 (2001) (genuine issue of material fact existed as to whether a male employee's apparent retaliatory acts of staring at female employee were sufficiently allied with his prior acts of sexual harassment to constitute continuing course of unlawful conduct; "What began as [male employee's] overt acts of sexual harassment (asking for dates, the 'eat you' remarks, his specifically sexual bathing fantasies) were later transmuted by plaintiff's reaction (her complaints to management about the offensive conduct) into an allegedly daily series of *retaliatory* acts — the prolonged campaign of staring at plaintiff — acts that were directly related to, indeed assertedly *grew out of*, the antecedent unlawful harassment.") (emphasis in original).

Thomas v. Dep't of Corr., 77 Cal. App. 4th 507, 510-12 (2000) (pre-*Yanowitz* case; court held that plaintiff's claims did not allege an adverse employment action; plaintiff alleged retaliation consisting of (1) refusal to allow medical treatment for two separate medical conditions occurring at work; (2) intimidation of employees whose depositions she sought in connection with her judicial proceeding; (3) improper docking of pay despite medical excuse; (4) undeserved negative performance evaluation; (5) unwarranted interference with her appointment to supervisory committee; (6) series of undeserved negative job evaluations which resulted in punitive job change and negative reports in her personnel file; and (7) failure of department to deliver her check on timely basis for her shift differential and for overtime; "Even if we broadly interpret the definition of adverse employment action based upon the sweeping provisions of the California Fair Employment and Housing Act . . . we do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events [or were] not accompanied by facts which evidence both a substantial and detrimental effect on her employment.").

D. Special Kinds Of Retaliation.

1. Retaliatory harassment claims.

Hicks v. Baines, 593 F.3d 159, 170 (2d Cir. 2010) ("[W]orkplace sabotage and punitive scheduling claims, if believed by a jury, constitute 'adverse employment actions' for purposes of the third element of plaintiffs' *prima facie* case.").

Noviello v. City of Boston, 398 F.3d 76, 90 (1st Cir. 2005) (creation and perpetuation of sufficiently severe or pervasive hostile work environment that is tolerated by employer can constitute a retaliatory adverse employment action; that conclusion is compelled by statutory text and comports with congressional intent, and such "interpretation of the statutory text is shared by the EEOC, which finds the lack of any qualifier on the term 'discriminate' in the anti-retaliation context to evince a purpose to 'prohibit *any* discrimination that is reasonably likely to deter protected activity'").

Hunt v. State of Missouri, 297 F.3d 735, 744 (8th Cir. 2002) (evidence was sufficient to support the jury's finding that plaintiffs had suffered adverse employment action where "plaintiffs' complaints . . . were not met with any meaningful support, but were instead answered with threats to their well-being, threats of termination, efforts to obstruct their work, additional unnecessary and unreasonable job requirements, and general harassment").

Gregory v. Daly, 243 F.3d 687, 701 (2d Cir. 2001) (same standards apply in determining whether retaliatory harassment constitutes an adverse employment action as in assessing whether harassment imposed because sex works an actionable alteration in employment terms and conditions).

Morris v. Oldham County Fiscal Court, 201 F.3d 784, 788-89 (6th Cir. 2000) (reversing summary judgment for employer; under principles laid out by *Faragher* and *Ellerth*, a retaliatory harassment claim is actionable where supervisors severely or pervasively harass employees in response to prior complaints about sexual harassment).

Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000) ("Harassment is obviously actionable when based on race and gender. Harassment as retaliation for engaging in protected activity should be no different — it is the paradigm of 'adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'") (citation omitted).

Richardson v. N.Y. State Dep't of Corr. Servs., 180 F.3d 426, 446-47 (2d Cir. 1999) (former employee stated claim for retaliatory harassment where employer took no action to discipline co-workers for harassing conduct; "unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action" sufficient to support Title VII retaliation claim where harassment creates a "materially adverse change" in the terms and conditions of plaintiff's employment).

Birschtein v. New United Motor Mfg., Inc., 92 Cal. App. 4th 994, 1002 (2001) ("prolonged campaign of staring" raised triable issue of retaliatory harassment precluding summary judgment).

But cf. Jones v. Res-Care Inc., 613 F.3d 665, 671 (7th Cir. 2010) ("[T]his Court has previously held that 'unfair reprimands or negative performance evaluations, unaccompanied by some *tangible* job consequence, do not constitute adverse employment actions.'"; "However, Jones asserts that there was 'a palpable tension' at the time Jones received the adverse employment action . . . . This tension, she argues, combined with the corrective action, rose to the level of an adverse employment action."; "A plaintiff's subjective determination of tension in the workplace, without more, cannot constitute an adverse employment action absent a tangible job consequence.").

Gagnon v. Sprint Corp., 284 F.3d 839, 850 (8th Cir. 2002) ("[Plaintiff] failed to establish that the alleged ostracism by [his supervisor] and co-workers rose to the level of actionable retaliation. [Plaintiff's] testimony reflects that [his supervisor] ignored him and that it became difficult for him to function as a member of her team, but provides no evidence that this behavior had any impact on his job title, salary, benefits, or any other material aspect of his employment.") (pre-*Burlington Northern* decision).

Stutler v. Ill. Dep't of Corr., 263 F.3d 698, 704 (7th Cir. 2001) (even though supervisor did not act appropriately and environment was unpleasant, court found no retaliatory harassment where supervisor's behavior was too petty and tepid to constitute a material change in the employee's terms and conditions of employment, as supervisor's threats never materialized or resulted in any material harm to employee) (pre-*Burlington Northern* decision).

2. Co-worker retaliation.

Jensen v. Potter, 435 F.3d 444, 449 (3d Cir. 2006) (a hostile work environment is an adverse employment action for purposes of the retaliation provisions of Title VII; plaintiff alleged she was harassed because she filed a sexual harassment complaint against a supervisor, who

was then discharged, and her co-workers allegedly resented the discharge, creating a hostile work environment, about which the postal service did nothing for 19 months).

Fielder v. UAL Corp., 218 F.3d 973, 985 (9th Cir. 2000) (conduct by non-supervisor or non-managerial co-workers may constitute actionable retaliation by employer; "Title VII's protection against retaliatory discrimination extends to employer liability for co-worker retaliation that rises to the level of an adverse employment action."; plaintiff alleged that after complaining about sexual harassment, employees shunned her, refused to answer her questions, tampered with her property, and sought to have plaintiff disciplined for escorting her mother onto airplane while she was on sick leave), *vacated and remanded on other grounds*, 536 U.S. 919 (2002).

But cf. Hernandez v. Yellow Transp., Inc., 641 F.3d 118, 130 (5th Cir. 2011) (co-worker harassment, including name-calling, physical intimidation, false accusations, vandalization of plaintiff's belongings, verbal threats, and observing violence and illegal behavior, cannot be imputed to employer under a retaliation theory because harassment was perpetuated by ordinary employees and not in furtherance of employer's business).

Birschtein v. New United Motor Mfg., Inc., 92 Cal. App. 4th 994, 1002 (2001) (managerial failure to intervene raised triable issue of fact precluding summary judgment).

3. Constructive discharge.

Chapin v. Fort-Rohr Motors Inc., ___ F.3d ___, 2010 WL 3447734, at *2-6 (7th Cir. 2010) (affirming summary judgment on retaliation claim even though the manager told plaintiff, "You aren't going to work here until you get [an EEOC charge] reversed. Period."; later, however, the company sent several letters asking plaintiff if he wanted to continue to work, and stating that he still had a position; there was no constructive discharge; while Chapin might have had "ample reason to believe his termination to be imminent" after the manager's statement, the threat of discharge never was carried out; "Fort-Rohr made efforts to have Chapin return to work, explained that Chapin's employment was not terminated, and expressed a desire to keep Chapin on as an employee. At that point, Chapin's decision not to return to work was his own . . . .").

Helton v. Southland Racing Corp., ___ F.3d ___, 2010 U.S. App. LEXIS 709, at *11-14, 16-19 (5th Cir. 2010) (2-1 decision affirming summary judgment; plaintiff resigned from her job at a racetrack after her boss tried

to implicate plaintiff in a theft; the majority treated plaintiff's claim as based solely on a constructive discharge allegation which failed because she could not establish constructive discharge; the third judge agreed on the constructive discharge issue, but argued that the retaliation claim still was valid, because an accusation of theft might dissuade a reasonable worker from making or supporting a discrimination charge).

Barone v. United Airlines Inc., 2009 U.S. App. LEXIS 26524, at *43 (10th Cir. 2009) (reversing summary judgment; a reasonable jury could find the "choice" the employer presented to plaintiff — resign from her manager's job in Denver or take a part-time hourly job in California — amounted to an adverse action; Barone contended United effectively forced her to resign because she was uncovering discriminatory payroll practices; "[T]he 'choice' between resignation and a compound removal from management, demotion to part-time status, and transfer to a distant state was effectively no choice at all.").

United States ex rel. Howard v. Urban Inv. Trust Inc., ___ F. Supp. 2d ___, 2010 WL 148643, at *3-6 (N.D. Ill. 2010) (finding a triable question of constructive discharge after an accounting employee told a supervisor that she had reported fraud to the government; plaintiff alleged that she was harassed into quitting her job).

IV. WHAT ARE THE RECURRING PROOF ISSUES IN RETALIATION CASES?

A. Prior Knowledge Of The Plaintiff's Protected Activity Is Essential.

1. One cannot retaliate based on that which is unknown.

Rivera-Colon v. Mills, 635 F.3d 9, 12-13 (1st Cir. 2011) (employee failed to establish that her reassignment and termination were in retaliation for both her anonymous complaint and a formal charge she filed with the EEOC, when she failed to prove that supervisors who suspended her were aware of her anonymous complaint of sexual harassment and gender discrimination, and when the reassignment and termination were done under a generally applicable policy that covered a large number of employees).

Talavera v. Shah, 638 F.3d 303, 313 (D.C. Cir. 2011) (close temporal proximity—eight days—between protected activity and adverse employment decision was not sufficient to establish a finding of retaliation, as plaintiff did not provide sufficient evidence that manager was aware of her filing an EEO complaint).

Alford v. Martin & Gass Inc., ___ Fed. Appx. ___, 2010 WL 3010785, at *7 (4th Cir. 2010) (affirming summary judgment in a retaliatory harassment case even though the African-American plaintiff experienced "threatening behavior" from co-workers after plaintiff filed an internal complaint over the placement of a noose in the workplace and other racist behavior; "Unfortunately for Alford, even assuming that the alleged retaliatory harassment was sufficiently severe to be actionable, there is no basis for imputing liability for such harassment to M&G and Angler. . . . [because] Alford has conceded that he never reported the harassment to M&G or Angler, and he has not otherwise shown that either defendant was aware of it.").

Cf. Loudermilk v. Best Pallet Co., LLC, 636 F.3d 312, 314-15 (7th Cir. 2011) (evidence of retaliation found where supervisor allegedly told African-American employee to put his complaint that he was being treated differently than Hispanic co-workers in writing, employee handed supervisor a note the next day, and then supervisor fired employee on the spot, even if supervisor denied looking at the note).

Drake-Sims v. Burlington Coat Factory Warehouse, 330 Fed. Appx. 795, 804 (11th Cir. 2009) (affirming summary judgment; although plaintiff was fired just one week after she filed her discrimination lawsuit, she failed to rebut a regional manager's testimony that he was unaware of her lawsuit at the time he made the decision to terminate her; other managers may have been aware of her case, but their knowledge could not be imputed to the regional manager).

Nagle v. Village of Calumet Park, 554 F.3d 1106, 1121-22 (7th Cir. 2009) (affirming summary judgment; a police officer did not present adequate evidence to show he was retaliated against for filing charges with the Equal Employment Opportunity Commission; he could not prove that the police chief knew about his EEOC charge before suspending him the following month).

Petersen v. Utah Dep't of Corr., 301 F.3d 1182, 1189 (10th Cir. 2002) (employer's action against employee cannot be "because of" that employee's protected opposition, unless the employer knows employee has engaged in protected opposition), *cert. denied*, 537 U.S. 1197 (2003).

Strickland v. Water Works & Sewer Bd., 239 F.3d 1199, 1207-08 (11th Cir. 2001) (employee failed to establish that employer fired him for engaging in protected activity; the short time lapse between his leave and Board's decision to fire him did not satisfy causality element in case where "unrebutted evidence [is] that the decision maker did not have knowledge that the employee [had engaged, or was attempting to engage,]

in protected conduct") (citation and internal quotation marks omitted; alterations in original).

Chaney v. New Orleans Pub. Facility Mgmt., Inc., 179 F.3d 164, 169 (5th Cir. 1999) (former employee did not present sufficient evidence of causation where evidence did not establish that any of the supervisors responsible for the former employee's discharge knew about the employee's protected activity at time of discharge).

Sanchez v. Denver Public Schools, 164 F.3d 527, 533-34 (10th Cir. 1998) (plaintiff did not establish a causal connection between her discrimination claim and her nonplacement in a teaching position; there was no evidence that individual who failed to place plaintiff had any knowledge of plaintiff's discrimination claim; plaintiff failed to establish *prima facie* case of retaliation).

Causey v. Balog, 162 F.3d 795, 803-04 (4th Cir. 1998) (plaintiff, claiming retaliation for filing an age discrimination charge, had no *prima facie* case where he presented no evidence that the supervisor responsible for termination decision knew of his complaint).

Smith v. Riceland Foods, Inc., 151 F.3d 813, 818 (8th Cir. 1998) (one plaintiff alleged that he was discharged for assisting in another plaintiff's filing of discrimination charge; there was no triable question of retaliation because plaintiffs had not presented any evidence upon which jury could have found that employer knew that one plaintiff had helped the other plaintiff file charge).

Gleason v. Mesirow Fin., Inc., 118 F.3d 1134, 1146-47 (7th Cir. 1997) (employee's concession that she did not raise subject of sexual harassment to anyone in authority prior to her termination was fatal to her retaliation claim).

Bartlik v. U.S. Dep't of Labor, 73 F.3d 100, 102 (6th Cir. 1996) (there was no evidence that plaintiff's employer knew that he had made complaints about safety, so logically the decision not to rehire plaintiff could not have been retaliatory).

Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 268 (5th Cir. 1994) (plaintiff failed to make out *prima facie* case of retaliation because she could produce no evidence that the decisionmaker was aware of the underlying dispute; plaintiff's only evidence consisted of her "own self-serving generalized testimony stating her subjective belief" that retaliation occurred).

Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 85 (1st Cir. 2006) (affirming summary judgment notwithstanding relatively close temporal proximity between an internal sexual harassment complaint and later discharge; the person who made the discharge decision had no knowledge of the prior complaint).

Mulhall v. Ashcroft, 287 F.3d 543, 552 (6th Cir. 2002) (no reasonable factfinder could infer retaliation where decisionmakers "testified they did not know of [plaintiff's] protected activity when they took the adverse employment action," and plaintiff "failed to produce any evidence, direct or circumstantial, to rebut these denials").

Brochu v. City of Riviera Beach, 304 F.3d 1144, 1156 (11th Cir. 2002) (plaintiff's transfer was announced one day after his critical deposition testimony against employer in another employee's reverse discrimination action; court reversed denial of judgment as matter of law and found no retaliation because the decisionmaker "did not contemporaneously know about the deposition").

Mato v. Baldauf, 267 F.3d 444, 450-52 (5th Cir. 2001) (plaintiff could not demonstrate that she was terminated in retaliation for assisting co-workers in filing sexual harassment complaints when plaintiff presented no evidence that the employee who made the ultimate decision to change qualifications of her job so that she would no longer be qualified had any knowledge of plaintiff's protected activity).

Alexander v. Wis. Dep't of Health & Family Servs., 263 F.3d 673, 688 (7th Cir. 2001) (even though plaintiff was suspended one day after he filed a complaint with personnel commission, none of the actors involved in plaintiff's suspension had any knowledge of his complaint; this prevents any inference to be drawn from the timing of his suspension and eventual termination).

Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000) (to establish a causal connection, the decisionmaker's knowledge of protected conduct at time of adverse employment action is necessary; temporal proximity alone is insufficient to create a genuine issue of fact as to causal connection where there is unrebutted evidence that the decisionmaker did not have knowledge that the employee engaged in protected conduct).

Fenton v. HiSAN, Inc., 174 F.3d 827, 831-32 (6th Cir. 1999) (affirming summary judgment for employer on plaintiff's Title VII retaliation claim; plaintiff could not show that those individuals responsible for the adverse

action were aware of plaintiff's earlier sexual harassment complaint at time they made their decisions).

Raney v. Vinson Guard Serv. Inc., 120 F.3d 1192, 1197 (11th Cir. 1997) (affirming summary judgment; plaintiff presented no evidence that one decisionmaker had any knowledge of her threat to sue for discrimination and failed to show that the other alleged decisionmaker had any authority to terminate her).

Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 260 (8th Cir. 1996) (supervisors who perpetrated alleged indignities upon plaintiff were not even aware of plaintiff's EEOC charge).

2. But knowledge can be imputed to the decisionmaker in some circumstances.

Henry v. Wyeth Pharms. Inc., 616 F.3d 134, 148 (2d Cir. 2010) (reversing in part a defense verdict; the trial court erroneously instructed a jury that proof of personal knowledge of alleged protected activity is needed to establish causation on a retaliation claim; "A causal connection is sufficiently demonstrated if the agent who decides to impose the adverse action but is ignorant of the plaintiff's protected activity acts pursuant to *encouragement* by a superior (who has knowledge) to disfavor the plaintiff.").

Williams v. W.D. Sports N.M. Inc. d/b/a N.M. Scorpions, 497 F.3d 1079, 1092 (10th Cir. 2007) (the employer's knowledge of plaintiff's charge could be inferred from evidence showing that one of plaintiff's former co-workers called her to tell her that the employer was making allegations against her and that employer's attorney had been in the office interviewing other employees about plaintiff's charge).

Hernandez v. SpaceLabs Med., Inc., 343 F.3d 1107, 1116 (9th Cir. 2003) (reversing summary judgment; although decisionmaker averred that he was unaware of the protected activity, the circumstantial evidence was such that a jury could have inferred otherwise).

Medina v. Ramsey Steel Co., 238 F.3d 674, 684 (5th Cir. 2001) (discharged employee satisfied causal link requirement of *prima facie* case by demonstrating that employer official who discharged him was the same official who had sent employer's response to state agency with which employee had filed charge).

Gordon v. New York City Bd. of Educ., 232 F.3d 111, 117 (2d Cir. 2000) (there can be retaliation even if agent denies direct knowledge of plaintiff's protected activities, if "the jury finds that the circumstances

evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit[ly] upon the orders of a superior who has the requisite knowledge"; district court erred when it charged jury that agents had to know of protected activity).

Donlon v. Group Health Inc., 2001 WL 111220, at *3 (S.D.N.Y. 2001) (plaintiff need show only that employer had general corporate knowledge that he engaged in protected activity; requisite corporate knowledge met when supervisor, who at minimum approved discharge decision, knew that employee had engaged in protected activity).

But see Hill v. Potter, ___ F.3d ___, 2010 U.S. App. LEXIS 18096, at *9-10 (7th Cir. 2010) (no retaliation even though plaintiff's supervisor, Kavanaugh, told workers' compensation authorities that he believed plaintiff was fabricating her injuries, and plaintiff lost benefits; "We find that the cat's paw theory has no application here" because, although Kavanaugh wrote to the workers' compensation authorities and may have harbored retaliatory intent, there was no proof his letter had any — "let alone dispositive" — influence).

Poer v. Astrue, 606 F.3d 433, 440 (7th Cir. 2010) (affirming summary judgment even though plaintiff's testimony on behalf of black co-workers may have caused his supervisor to retaliate by giving "false information" to the administrative law judge in charge of making a selection among promotion candidates; the misstatement was not shown to have affected the decision).

3. Although evidence of prior knowledge is *necessary*, it alone is not *sufficient* to establish retaliation.

Gibson v. Old Town Trolley Tours, 160 F.3d 177, 182 (4th Cir. 1998) (decisionmaker's knowledge of plaintiff's race and age discrimination complaint did not establish retaliation absent evidence that plaintiff's "complaint in some way triggered" supervisor's failure to complete employment reference form as requested).

Mesnick v. Gen. Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991) (summary judgment affirmed; "[K]nowledge on an employer's part . . . cannot itself be sufficient to take a retaliation case to the jury.").

B. Temporal Proximity Between The Allegedly Protected Activity And The Claimed Adverse Action Almost Always Is Essential.

1. The law reflects two common sense propositions.

a. Time heals all wounds.

b. Retaliators retaliate; they do not forbear.

Coutu v. Martin County Bd. of County Comm'rs, 47 F.3d 1068, 1074 (11th Cir. 1995) (judgment for employer on retaliation claim; "Had [defendants] wished to terminate [plaintiff] because of her efforts to 'stop discrimination,' they had ample opportunity and reason to do so long before [plaintiff's actual termination].").

2. A substantial lapse of time between an employee's protected activity and the alleged adverse employment action may negate an inference of retaliation.

a. The easiest case: A very long time gap.

Raggs v. Miss. Power & Light Co., 278 F.3d 463, 471 (5th Cir. 2002) (seven-year time lapse between plaintiff's EEOC claim and his termination, and an intervening positive evaluation that he received, undermined any causal connection between those two events).

Albrechtsen v. Bd. of Regents, 309 F.3d 433, 437-38 (7th Cir. 2002) (seven-year gap between alleged protected activity and adverse action was "too farfetched to be the basis of a money judgment"; "We do not know of any case in which a court has found . . . that action so long deferred after the provocation, despite the possibility of immediate retaliation . . . could be deemed a

consequence of that provocation. To the contrary, we regularly sustain summary judgments based on the view that a year's gap between the act and the supposed consequence shows that a causal relation is too unlikely to support a decision by the preponderance of the evidence.").

Lalvani v. Cook County, 269 F.3d 785, 790-91 (7th Cir. 2001) (former employee could not show a causal connection between his filing of discrimination charge and his termination seven years later in reduction in force, even though a hearing at which his managers were called to testify regarding his charge occurred a year and a half before he was terminated).

Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. 1998) (14-year gap is too long to satisfy causation element of *prima facie* case).

Chavez v. City of Arvada, 88 F.3d 861, 866 (10th Cir. 1996) (10-year gap between plaintiff's filing of EEOC charge and plaintiff's failure to achieve promotion is too long to support an inference of retaliation; indeed, absent strong evidence to contrary, retaliatory inference cannot be drawn where there is more than three-year gap between protected activity and adverse employment decision).

EEOC v. Cherry-Burrell Corp., 35 F.3d 356, 359 (8th Cir. 1994) (plaintiff was laid off from her job seven years after she filed charge of discrimination; "passage of seven years blunts any inference" of retaliation).

But cf. McGuire v. City of Springfield, 280 F.3d 794, 796 (7th Cir. 2002) (11-year gap between plaintiff's discrimination charge and her release from a training program did not preclude finding of causation; "Passage of time was not necessarily a sign of forbearance. . . . Instead, the delay reflects molasses in the administrative process. Because [the state agency] took a decade to issue its order [requiring defendant to place plaintiff in the training program], [defendant] had no earlier opportunity to remove [plaintiff] from the training program.").

Fabela v. Socorro Indep. Sch. Dist., 329 F.3d 409, 416 (5th Cir. 2003) (a reasonable jury could find that termination was in retaliation for filing EEOC charge 6½ years before, where decisionmaker responded to question of why employee was terminated by stating that employee was "problem employee" and pointed to the EEOC charge as unsubstantiated).

Moore v. Vital Prods., 641 F.3d 253, 258 (7th Cir. 2011) (plaintiff did not engage in a protected activity prior to being terminated where plaintiff filed EEOC charge ten months *after* he claimed he was discharged).

b. The more typical cases: gaps of one to three years normally are too long.

Tyler v. Univ. of Ark. Bd. of Trs., 628 F.3d 980, 986-87 (8th Cir. 2011) (plaintiff's *prima facie* case fails because he cannot establish causal nexus between his 2004 charge against the University, alleging he was discriminated against based on race, and the University's decision not to hire him as the Director of Recruitment for Diversity in 2007; noting "[g]iven the length of the intervening delay and absence of other evidence of causation, [plaintiff] cannot rely on temporal proximity to establish a causal nexus.").

Everroad v. Scott Truck Sys. Inc., 604 F.3d 471, 478 n.2 & 481 (7th Cir. 2010) (affirming summary judgment on a retaliation claim by an employee fired for insubordination; a year had passed after plaintiff's complaint about discriminatory remarks; plaintiff claimed a reasonable jury could find she was not insubordinate, but the decisive question was whether management genuinely believed she was).

Lee v. Kansas City S. Ry., 574 F.3d 253, 258 (5th Cir. 2009) (affirming summary judgment on FMLA retaliation claim; evidence supported Lee's contention that the employer maintained a "last supper" list of employees whose frequent absences flagged them as candidates for firing or at least reprimand, but he did not present evidence that his name was on such a list; Lee stopped taking intermittent FMLA leave almost a year before the triggering incident, and there was no additional evidence to suggest "a causal nexus" between his FMLA leave and termination).

Wells v. SCI Mgmt., L.P., 469 F.3d 697, 702 (8th Cir. 2006) (plaintiff's claim fails for lack of evidence of a causal connection; 34 month gap between plaintiff's filing of a charge and her termination is too long a gap to raise an inference of retaliatory motive).

Wallace v. Sparks Health Sys., 415 F.3d 853, 860 (8th Cir. 2005) (employer's mild criticism of employee, who was discharged in company-wide reduction-in-force nearly a year after he had settled

his discrimination claim, on an otherwise-commendable annual evaluation, and comments by supervisor after an EEOC mediation, which resulted in a settlement, that employee should stop causing trouble, are insufficient to establish a causal connection between his discharge and protected activity; the temporal gap between protected activity and adverse employment action is too long).

Henderson v. Ford Motor Co., 403 F.3d 1026, 1036 (8th Cir. 2005) (employee on medical leave, who was discharged in September 1999 after failing to report for examination by employer's plant physician, and whose last protected activity was in spring of 1997, cannot establish a *prima facie* case of retaliation; background evidence of discrimination can be used to support a timely claim, including a bench trial in 1991 that resulted in successful claims of sexual harassment and discriminatory and retaliatory discharge; plaintiff's long and contentious history with the employer does not eliminate her burden to show a causal relationship between protected activity and the adverse action, which here were too separated in time to raise any inference of retaliation).

McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1124-25 (9th Cir. 2004) (year-and-one-half period between protected activity and adverse employment action alone did not establish causal connection, and employee's failure to offer any other evidence that he was terminated because he filed charge of discrimination with EEOC prevented him from establishing even a *prima facie* case of retaliation).

Dressler v. Daniel, 315 F.3d 75, 80-81 (1st Cir. 2003) (affirming summary judgment because "no reasonable trier of fact could conclude, by a preponderance of the evidence, that the [purported retaliator's] 1999 complaints to the police were caused by [plaintiff's] 1997 sexual harassment charge," especially here where plaintiff and purported harasser engaged in consensual, sexual relationship for more than year of the two-year period) (internal quotations omitted).

Bishop v. Bell Atl. Corp., 299 F.3d 53, 60 (1st Cir. 2002) (no causal connection between plaintiff's protected conduct and his suspension, where suspension "was imposed thirty months after the first charge, twenty-four months after the second, and twelve months after the third").

Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002) (affirming summary judgment for employer; "A nearly 18-month lapse between protected activity and an adverse action is simply too long, by itself, to give rise to an inference of causation.").

Wells v. Unisource Worldwide Inc., 289 F.3d 1001, 1008 (7th Cir. 2002) (plaintiff failed to establish causal link where she was transferred to another state two years after she filed EEOC charge; "the hint of causation weakens as the time between the protected expression and the adverse action increases and the plaintiff must offer additional proof of a causal nexus"; here plaintiff failed to offer any such evidence).

Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1051 (8th Cir. 2002) (plaintiff failed to prove causal connection; "Here, the gap between protected activity and adverse employment action is measured in years, not months. In light of this, there is not an adequate causal connection between the protected activity and the denial of promotions as a matter of law.").

Chaney v. New Orleans Pub. Facility Mgmt., Inc., 179 F.3d 164, 169 (5th Cir. 1999) (former employee did not present sufficient evidence of causation where he was discharged two years after submitting an affidavit in former supervisor's Title VII action).

Johnson v. Zema Sys. Corp., 170 F.3d 734, 746 (7th Cir. 1999) (three-year gap between plaintiff's protected activity and his termination is insufficient to establish causal connection necessary to prevail on Title VII retaliation claim; summary judgment for employer affirmed).

Maniccia v. Brown, 171 F.3d 1364, 1369-70 (11th Cir. 1999) (affirming summary judgment for employer on retaliation claim where plaintiff alleged she was transferred 15 months after filing a sexual harassment grievance and terminated six months after that; "Far from demonstrating a pattern of retaliatory activity, these two employment actions were isolated events that had no temporal relationship to [plaintiff's] protected activity.").

Dowe v. Total Action Against Poverty, 145 F.3d 653, 657 (4th Cir. 1998) (affirming summary judgment; there was a three-year time gap between plaintiff's EEOC charge and the adverse employment action; "[E]vidence that the alleged adverse action occurred shortly after the employer became aware of the protected activity is

sufficient to satisfy the less onerous burden of making a *prima facie* case of causation. We believe the opposite to be equally true. A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action . . . negates any inference that a causal connection exists between the two . . . . [W]ere this not the case, an employee could guarantee his job security simply by filing a frivolous complaint with the EEOC on his first day of work. Title VII was not enacted to guarantee tenure in the work place.") (citations omitted).

Sweeney v. West, 149 F.3d 550, 557 (7th Cir. 1998) (plaintiff failed to prove even a *prima facie* case because nearly three years had passed between plaintiff's complaint and alleged retaliation).

Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) (affirming summary judgment for employer; 13-month interval between charge and termination is too long to establish causation absent other evidence of retaliation).

Krouse v. Am. Sterilizer Co., 126 F.3d 494, 504 (3d Cir. 1997) (although passage of time is not always evidence of lack of retaliatory animus, in this case passage of 19 months — with no evidence of "intervening antagonism" — was conclusive in determining that there was no causal connection).

Sims v. Sauer-Sundstrand Co., 130 F.3d 341, 344 (8th Cir. 1997) (two-year span between complaint and no-rehire decision "weakened" plaintiff's case).

Johnson v. Univ. of Wis.-Eau Claire, 70 F.3d 469, 480 (7th Cir. 1995) (although plaintiff offered numerous examples of allegedly "bad things happening to a good person" — including pay reduction, performance evaluation based on incomplete file, and completion of performance evaluation shortly after giving notice that there would be no evaluation done — the 20-month time lapse between plaintiff's protected activity and adverse employment actions was "counter-evidence of any causal connection").

Candelaria v. EG&G Energy Measurements, Inc., 33 F.3d 1259, 1262 (10th Cir. 1994) (because more than three years had passed between plaintiff's protected activity and first alleged adverse employment action, court found no evidence of retaliation; "No such inference [of retaliatory motive] can be made where the relevant charges preceded the employer's adverse action by as much as three years.").

c. The close cases: even gaps of a matter of months can negate any inference of causal connection.

Fercello v. Ramsey Cnty., 612 F.3d 1069, 1079-80 (8th Cir. 2010) (affirming summary judgment; plaintiff failed to connect the allegedly false performance reviews to her harassment complaint, in part because six months elapsed between the two events).

Turner v. The Saloon, Ltd., 595 F.3d 679, 687-88 (7th Cir. 2010) (finding a triable question of harassment, but affirming summary judgment on a retaliation claim; plaintiff claimed that his discharge was retaliation for complaining to management about alleged harassment and/or his filing of disability discrimination charges; he could not establish retaliation, however, because he could not show a causal connection between his complaints and his discharge 10 months later; the time lapse simply was too long to permit a reasonable inference of retaliation, particularly because in the meantime he had received multiple reprimands and one suspension).

Stewart v. Independent Sch. Dist. No. 196, 481 F.3d 1034, 1044 (8th Cir. 2007) (six-month gap between plaintiff's EEOC charge and the alleged adverse actions was too long to infer causation).

Tomanovich v. City of Indianapolis, 457 F.3d 656, 665 (7th Cir. 2006) (four months between plaintiff's EEOC complaint and his termination was too long to establish a causal connection).

Shanklin v. Fitzgerald, 397 F.3d 596, 604 (8th Cir. 2005) (upholding summary judgment for the employer because there was no evidence of causal nexus between plaintiff's filing of discrimination charge with EEOC and her discharge approximately 10 months later; "With this lengthy delay, any causal nexus inference tends to evaporate."), *cert. denied*, 546 U.S. 1066 (2005).

Manatt v. Bank of Am., 339 F.3d 792, 802 (9th Cir. 2003) (no retaliation inferred when approximately nine months lapsed between the date of complaint and alleged adverse decision).

Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002) ("[T]he interval of two months between the complaint and [plaintiff's] termination so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff's] favor on the matter of causal link.").

Franzoni v. Hartmarx Corp., 300 F.3d 767, 773 (7th Cir. 2002) (plaintiff failed to establish *prima facie* case of retaliation where he was terminated six months after he filed EEOC charge; "six months is too long to establish a causal link without more").

Filipovic v. K&R Express Sys., Inc., 176 F.3d 390, 398-99 (7th Cir. 1999) (affirming summary judgment; plaintiff could not establish causal connection between his filing of EEOC charge and his termination because there was a four-month gap between the two).

Adusumilli v. City of Chicago, 164 F.3d 353, 363 (7th Cir. 1998) (eight-month gap between plaintiff's sexual harassment complaint and termination was insufficient where plaintiff presented no evidence of pretext and employer produced record of poor performance).

Hite v. Biomet, Inc., 53 F. Supp. 2d 1013, 1019 (N.D. Ind. 1999) (granting employer summary judgment on plaintiff's FMLA retaliation claim; "Plaintiff's termination occurred 10 weeks after her protected leave ended, after her employer generously provided her additional leave benefits, and after [she failed] to report to work or provide Biomet with a continuing medical certification which would have permitted her even more leave time. These factors, in addition to the substantial time lapse between the protected activity and the adverse employment action, are counter-evidence of any causal connection.") (citations and internal quotation marks omitted).

Parkins v. Civil Constr. of Ill., Inc., 163 F.3d 1027, 1039 (7th Cir. 1998) (finding no *prima facie* showing of causal connection between employee's complaint of sexual harassment in August and subsequent layoff in November of same year).

Mesnick v. Gen. Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991) (summary judgment affirmed; "[T]he sequence of events [nine months between protected activity and adverse employment action] in this case suggests the absence of a causal connection between the statutorily protected conduct and the adverse employment action, not the converse.").

Sanders v. Culinary Workers Union Local No. 226, 804 F. Supp. 86, 100-01 (D. Nev. 1992) (five-month lapse between employee's protected activity and discharge was "sufficient time to negate" inference that discharge was retaliatory), *aff'd*, 5 F.3d 539 (9th Cir. 1993).

Meredith v. Beech Aircraft Corp., 1992 WL 190675, at *7 (D. Kan. 1992) (granting summary judgment for employer on employee's retaliation claims; four-month delay between protected activity and adverse employment decision is too long for finding of causation), *aff'd in relevant part*, 18 F.3d 890 (10th Cir. 1994).

But cf. Phelan v. Cook County, 463 F.3d 773, 788 (7th Cir. 2006) (a reasonable factfinder could find that a three-month gap between plaintiff's attorney's first contacting employer regarding alleged sexual harassment of plaintiff and employer's initiation of the process to terminate plaintiff raised an inference of discriminatory retaliation).

EEOC v. Air Liquide USA LLC, ___ F. Supp. 2d ___, 2010 WL 774165, at *9 (S.D. Tex. 2010) (the temporal proximity between Ferrel's harassment complaint and Air Liquide's decision to terminate her was sufficient to provide a causal link between the two events; although Ferrel was not fired until December 2006, more than four months after her Title VII protected activity, the "real decision" may have been made in the few weeks immediately following her harassment claim).

d. At least one case holds that it is the plaintiff's burden to establish temporal proximity with some precision.

Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 73 (D. Me. 1998) (plaintiff's inability to identify dates of his alleged safety complaints negated charges of retaliation), *vacated in part on other grounds*, 194 F.3d 252 (1st Cir. 1999).

e. Proper measurement of the time period.

Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (20-month period between filing of charge and action taken does not, by itself, suggest any causality; the proper measurement of the time period runs from the filing of the EEOC charge, not the right-to-sue letter).

Gladysiewski v. Allegheny Energy, ___ Fed. Appx. ___, 2010 U.S. App. LEXIS 19527, at *7 (3d Cir. 2010) (no retaliation despite temporal proximity between the dismissal of plaintiff's administrative charges and his discharge; "Although there is certainly some 'proximity' between the dismissal of his lawsuit and his termination, we typically measure temporal proximity from the date of filing rather than from the date a lawsuit is resolved,

since the 'protected activity' in which a litigant engaged is the filing of a complaint, not its dimsissal by a court."; "In this case, over two years passed between Gladysiewski's filing of his administrative complaint and his termination, a period that is too long to constitute temporal proximity.") (internal citation omitted).

3. However, where there is a pattern (or atmosphere) of hostility or animosity in the workplace, a substantial lapse of time may fail to dispel the retaliatory inference.

Bell v. Clackamas County, 341 F.3d 858, 866 (9th Cir. 2003) (temporal proximity, between complaints of inappropriate racial comments and alleged adverse employment actions, coupled with contemporaneous evidence of expressed displeasure with plaintiff's complaints and angry glares at plaintiff, provided "strong circumstantial evidence of retaliation").

Farrell v. Planters LifeSavers Co., 206 F.3d 271, 281 (3d Cir. 2000) (reversing summary judgment; "[T]he type of evidence that can be considered probative of a causal link . . . is not limited to timing and demonstrative proof, such as actual antagonistic conduct or animus. Rather, [causation can be inferred from] other evidence gleaned from the record as a whole. . . . '[I]t is important to emphasize that it is causation, not temporal proximity [or evidence of antagonism], that is an element of plaintiff's *prima facie* case, and temporal proximity [or antagonism] merely provides an evidentiary basis for which an inference can be drawn.'") (some alteration in original).

Woodson v. Scott Paper Co., 109 F.3d 913, 920-21 (3d Cir. 1996) (two-year period between plaintiff's complaint and plaintiff's termination is not conclusive proof that retaliation did not motivate plaintiff's discharge; the "pattern of antagonism" in the meantime could lead to finding of retaliation; plaintiff showed that he was arguably set up to fail in his position, that he had been exposed to at least one incident of racial harassment, and that at one point he was asked to drop his complaint by the same employee who was later involved in the ranking process through which plaintiff was terminated).

Hunt-Golliday v. Metro. Water Reclamation Dist., 104 F.3d 1004, 1014 (7th Cir. 1997) (reversing summary judgment; there was a "pattern of criticism and animosity" by plaintiff's supervisors that began shortly after she complained of discrimination).

Harrison v. Metro. Gov't of Nashville, 80 F.3d 1107, 1119 (6th Cir. 1996) (period of at most 15 months between filing of charge and plaintiff's

termination was not too long to defeat causal connection; here, temporal connection was bolstered by evidence that three employees feared retaliation because they testified at plaintiff's hearing, and plaintiff's supervisor made repeated comments that suggested he would not hesitate to run employees out of the department; evidence of "atmosphere in which the plaintiff's activities were scrutinized more carefully than those of comparably situated employees, both black and white," although insufficient to make out case of harassment, supported the district court's finding of retaliation).

EEOC GUIDELINES, vol. 2, § 8-II.E.2 (even if time period between protected activity and adverse action is long, employee still may establish retaliation claim if there is other evidence that raises inference of retaliation, such as frequent comments about protected activity during that period).

Porter v. Cal. Dep't of Corr., 419 F.3d 885, 895-896 (9th Cir. 2005) ("Although a lack of temporal proximity may make it more difficult to show causation, circumstantial evidence of a pattern of antagonism following the protected conduct can also give rise to the inference. . . . [A] specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic."; there was a retaliatory explanation for the delay between plaintiff's alleged protected activities and the claimed adverse actions, because the alleged retaliator "was not in a position to retaliate until after he became the Personnel Assignment Sergeant" and plaintiff offered other evidence to support the inference of a retaliatory motive) (citations and internal quotation marks omitted).

Fabela v. Socorro Indep. Sch. Dist., 329 F.3d 409, 416 (5th Cir. 2003) (employee established causal connection by presenting direct evidence that she was fired in part as result of unsubstantiated sexual harassment charge that she had filed six years earlier).

Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997) ("It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's *prima facie* case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.") (citation omitted).

4. Very close temporal proximity of course is damaging — and (given a showing of employer knowledge) often is held sufficient to establish the causal connection element of the *prima facie* case.

Dawson v. Entek Int'l, 630 F.3d 928, 937 (9th Cir. 2011) (district court erred in granting summary judgment to defendant on employee's retaliation claim when employee's termination occurred two days after he complained about the sexual orientation discrimination he was experiencing to human resources).

Mathews v. Denver Newspaper Agency LLP, 2011 U.S. App. LEXIS 11454, at *30-31 (10th Cir. 2011) (employer's argument that casual connection cannot be established because employee's correspondence with his supervisors, in which he complains management made personnel decisions based on improper consideration of race and ethnicity, was not received by employer until after employee had been placed on paid administrative leave was not persuasive when employee had communicated his suspicions of discriminatory decision-making to his supervisors via email a few weeks before he was placed on administrative leave, and when he sent a complaint letter to employer before being demoted and prior to any indication that employer had already decided to demote employee).

Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 525 (6th Cir. 2008) ("In those limited number of cases — like the one at bar — where an employer fires an employee immediately after learning of a protected activity, we can infer a causal connection between the two actions, even if [plaintiff] had not presented other evidence of retaliation.").

Pantoja v. American NTN Bearing Mfg. Co., 495 F.3d 840, 850 (7th Cir. 2007) (reviving plaintiff's relation claims in part because the reasonable factfinder could infer causation from the passage of only one day between decisionmaker's learning about plaintiff's EEOC complaint and managers' decision to terminate plaintiff).

Woodruff v. Peters, 482 F.3d 521, 529 (D.C. Cir. 2007) (less than one month separated plaintiff's protected activity and the adverse employment action; "a reasonable finder of fact could infer causation in that area without more").

Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1122 (8th Cir. 2006) (finding a triable question, even though there was an undisputed need to eliminate jobs, in part because only 15 days elapsed between plaintiff's harassment complaint and the layoff decision).

Haas v. Kelly Servs., Inc., 409 F.3d 1030, 1037 (8th Cir. 2005) (reversing summary judgment for employer based on the temporal proximity between her protected activity of complaining to her employer about age discrimination beginning on February 8 and her discharge on February 25).

Fasold v. Justice, 409 F.3d 178, 189-90 (3d Cir. 2005) (former detective in county district attorney's office made out *prima facie* case that denial of his grievance of his discharge was in retaliation for his allegation of age discrimination, where temporal proximity — less than three months — between complaints and denial of grievance provides evidentiary basis for inference of retaliation, and the district attorney specifically questioned the detective regarding discrimination claims during a grievance procedure, mentioned claims in his denial letter, and conceded that detective's complaint had "irritated" him and caused him to view the detective as suspect).

Little v. Windermere Relocation Inc., 301 F.3d 958, 969 (9th Cir. 2002) (female employee's evidence that her salary was reduced within minutes after she reported to employer's president that she had been raped by a potential client provides circumstantial evidence of retaliation sufficient to create a *prima facie* case).

Shannon v. BellSouth Telecommc'ns, Inc., 292 F.3d 712, 717 (11th Cir. 2002) (plaintiff was denied overtime "immediately" after his grievance meeting; "[s]uch close temporal proximity is sufficient for a reasonable jury to infer causation").

Evans v. City of Houston, 246 F.3d 344, 356 (5th Cir. 2001) (plaintiff was recommended for demotion five days after she appeared to testify at hearing on co-worker's claim of racial discrimination; court found that "the close temporal proximity between [plaintiff's] appearance at [her] co-worker's grievance hearing and her demotion, coupled with the lack of any documentary evidence dated before her appearance or demotion that would tend to support a theory of disciplinary problems, plus [plaintiff's] evidence in the form of memoranda written by [plaintiff's supervisor] that tend to refute [supervisor's] own justifications for the demotion, all give rise to a conflict of substantial evidence on the ultimate issue of whether the [defendant] wrongfully demoted [plaintiff] in retaliation for her appearance at her co-worker's grievance hearing") (emphasis in original).

King v. Preferred Tech. Group, 166 F.3d 887, 893 (7th Cir. 1999) (plaintiff, discharged one day after returning from FMLA leave, established a causal connection between exercise of rights and discharge).

Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998) (finding *prima facie* case where plaintiff was discharged less than two months after she filed an internal complaint of sexual harassment and 10 days following her complaint to New York Division of Human Rights).

Berman v. Orkin Exterminating Co., 160 F.3d 697, 702 (11th Cir. 1998) (several-month time period between plaintiff's EEOC filing and two involuntary transfers was sufficient to establish *prima facie* case of retaliation).

EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998) (retaliation found where protected conduct and termination occurred within hours of each other; a "short interlude permits an inference of causation").

McClendon v. Ind. Sugars, Inc., 108 F.3d 789, 796-97 (7th Cir. 1997) (sequence of events over two- or three-day period between employee's filing of complaint and his discharge established *prima facie* case of retaliation).

Kim v. Nash Finch Co., 123 F.3d 1046, 1061 (8th Cir. 1997) (period of days between plaintiff's complaint and adverse employment action is sufficient to prove causal link between complaint and adverse action).

Johnson v. City of Fort Wayne, 91 F.3d 922, 939 (7th Cir. 1996) (short time period between protected conduct and adverse employment action — in this case, two weeks — raises "[a] reasonable inference of retaliation").

LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 774 (D. Neb. 1999) (denying summary judgment on Title VII retaliation claim; "[T]he plaintiff has established a reasonable inference that requisite causal link exists between protected activity, his formal charge of discrimination, and the defendant's subsequent adverse employment action, his constructive discharge. The fact that both occurred within a[n] eleven day span is enough to sneak by this motion for summary judgment.").

Dudley v. Augusta Sch. Dep't, 23 F. Supp. 2d 85, 93 (D. Me. 1998) (demotion same day that plaintiff reported allegations of sexual misconduct to police supported "inference of causal connection").

5. But close temporal proximity alone may not be enough to show pretext.

Amrhein v. Health Care Serv. Corp., 546 F.3d 854, 859 (7th Cir. 2008) (2-1 decision) ("temporal proximity" between a threat to file a discrimination charge and termination is insufficient alone to raise a triable issue; ambiguous statements by decisionmakers about the plaintiff

and her threat were "far too speculative" to warrant trial; dissenting judge would have required mixed-motive analysis of the case).

Pinkerton v. Colo. Dep't of Transp., 563 F.3d 1052, 1066 (10th Cir. 2009) (affirming summary judgment even though plaintiff was discharged about a month after she filed her EEO complaint and "only one week after the complaint was verified"; "temporal proximity alone is not sufficient to defeat summary judgment"; "We agree that Title VII protects all employees from discrimination, notwithstanding the quality of the employee's job performance."; but an employer is entitled to raise defenses, "including that the termination was justified by the employee's under-performance).

Cole v. Illinois, 562 F.3d 812, 815-16 (7th Cir. 2009) (affirming summary judgment even though plaintiff was discharged six weeks after taking FMLA leave; "[T]here is nothing Cole can point to that reasonably suggests that her termination was motivated by anything other than her refusal to accept [a performance] improvement plan."; the "most onerous aspect" of the proposed plan was that Cole submit to her supervisors daily and weekly work schedules; "Although the task of preparing daily plans would necessitate some extra work, this requirement is not so oppressive that a reasonable employee would be discouraged from taking FMLA leave.").

Strong v. University Health Care Sys. d/b/a Tulane Univ. Hosp. and Clinic, 482 F.3d 802, 808 (5th Cir. 2007) (three and a half month time span between complaints and termination were "solid evidence" of retaliation; however, "temporal proximity alone is insufficient to prove 'but-for' causation").

Freeman v. Ace Tel. Ass'n, 467 F.3d 695, 697-98 (8th Cir. 2006) (plaintiff relies on evidence he engaged in alleged protected activity less than one month before he was discharged to prove causation; however, plaintiff failed to prove causation: "a short interval between a plaintiff's protected activity and an adverse employment action may occasionally raise an inference of causation . . . [but] in general, more than a temporal connection is required", further, "the presence of intervening events undermines any causal inference that a reasonable person might otherwise have drawn from temporal proximity").

Metzler v. Federal Home Loan Bank of Topeka a/k/a FHL Bank Topeka, 464 F.3d 1164, 1171-72 (10th Cir. 2006) (a plaintiff may rely solely on temporal proximity evidence to prove causation "if the termination is *very closely* connected in time to the protected activity"; here, the passage of four to six weeks between protected activity and complaint qualifies;

however, the Tenth Circuit "has refused to allow even 'very close' temporal proximity to operate as a proxy for the evidentiary requirement that the plaintiff demonstrate *pretext*"; plaintiffs "must . . . present evidence of temporal proximity *plus* circumstantial evidence of retaliatory motive") (emphasis in original).

Zaffuto v. City of Hammond, 308 F.3d 485, 493-94 (5th Cir. 2002) ("The record contains nothing connecting the allegedly protected activity and the alleged retaliation, save for the fact that they both occurred in the fall of 1999. . . . In absence of any evidence connecting [plaintiff's] being identified as a witness [in his co-worker's sexual harassment case] and his suspension, we conclude that [plaintiff] has failed to raise a genuine issue of material fact as to the issue of causation.") (footnote omitted).

Raggs v. Miss. Power & Light Co., 278 F.3d 463, 471 (5th Cir. 2002) (plaintiff sued his former employer five months prior to employer's refusal to rehire plaintiff; "[T]he mere fact that some adverse action is taken *after* employee engages in some protected activity will not *always* be enough for a *prima facie* case. . . . Other than the five month time period, [plaintiff] presented no evidence of retaliation.").

Lewis v. Holsum of Fort Wayne, Inc., 278 F.3d 706, 711 (7th Cir. 2002) (affirming summary judgment for employer; a three-month interval between protected activity and discharge, "without more, [was] insufficient to make out a *prima facie* case of retaliation").

Longstreet v. Ill. Dep't of Corr., 276 F.3d 379, 384 (7th Cir. 2002) ("[Plaintiff's] only evidence of a [causal] connection is the timing; the transfer occurred 4 months after the second complaint. This is insufficient.").

Gagnon v. Sprint Corp., 284 F.3d 839, 851 (8th Cir. 2002) (finding no causal connection between plaintiff's EEOC charge and his subsequent written reminder and failure to receive a pay increase, even though the written reminder was issued one month after defendant filed its response to plaintiff's EEOC claim; "'[G]enerally, more than a temporal connection . . . is required to present a genuine issue on retaliation.'") (citation omitted; alterations in original).

Hysten v. Burlington N. & Santa Fe Ry. Co., 296 F.3d 1177, 1184 (10th Cir. 2002) ("Having examined plaintiff's circumstantial evidence in its totality, . . . we cannot say the [three-month gap] between plaintiff's filing of his complaint and the challenged employment consequence permits an inference of causation.") (citation omitted).

Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C., 277 F.3d 882, 895, 889 (7th Cir. 2001) (plaintiff, female former partner at law firm, was terminated two months after she complained that "there is a ruling class at the firm and a ruled class and all the women in the firm are in the ruled class"; plaintiff presented no evidence of a causal connection between her complaint and her termination; court stated that she needed "more than a coincidence of timing to create a reasonable inference of retaliation").

Curd v. Hank's Disc. Fine Furniture, Inc., 272 F.3d 1039, 1042 (8th Cir. 2001) (court found that the female employee who was discharged 37 days after she sent an e-mail to the store supervisor complaining about allegedly sexually harassing activity did not engage in protected activity, and "In the alternative . . . [plaintiff did not meet] the causation requirement based on the time lapse between the E-mail and her discharge, and the lack of other evidence linking the two.").

Strouss v. Mich. Dep't of Corr., 250 F.3d 336, 344 (6th Cir. 2001) ("In light of . . . compelling and uncontested evidence of defendant's swift response to [plaintiff's] sexual harassment complaint, temporal proximity alone is not sufficient to raise an inference of a causal connection between her complaint and the transfer.").

Contreras v. Suncast Corp., 237 F.3d 756, 765 (7th Cir. 2001) (no causal connection established where plaintiff was terminated one month after filing EEOC charge; "[Plaintiff] has presented nothing more than temporal proximity in support of his causal connection argument. 'Timing may be an important clue to causation, but does not eliminate the need to show causation . . . . [A]bsent other evidence of retaliation, a temporal relation is insufficient evidence to survive summary judgment.'") (citations omitted).

Nguyen v. City of Cleveland, 229 F.3d 559, 566-67 (6th Cir. 2000) (court affirmed summary judgment on retaliation claim where employee alleged that city denied him promotions and proper pay increases within few months of filing claims of discrimination with EEOC; temporal proximity, in absence of other evidence of causation, is not sufficient to raise inference of causal link).

Sauzek v. Exxon Coal USA, Inc., 202 F.3d 913, 920 (7th Cir. 2000) (three-month gap between plaintiffs' filing of administrative age complaints and adverse employment action did not establish *prima facie* case of retaliation where plaintiffs presented no evidence connecting employer's decisions with filing of charges; "Speculation based on suspicious timing alone, however, does not support a reasonable inference of retaliation; instead,

plaintiffs must produce facts which somehow tie the adverse decision to the plaintiffs' protected actions. The mere fact that one event preceded another does nothing to prove that the first event caused the second.") (citations omitted).

Feltmann v. Sieben, 108 F.3d 970, 977 (8th Cir. 1997) (six-month gap between plaintiff's complaint and plaintiff's termination was "by itself insufficient to support a claim of causal connection").

Bartlik v. United States Dep't of Labor, 73 F.3d 100, 103 n.7 (6th Cir. 1996) ("[Plaintiff] was simply not rehired following the expiration of his contract. Holding temporal proximity *by itself* to be sufficient to make a *prima facie* case on these facts is not justified.").

Zhuang v. Datacard Corp., 414 F.3d 849, 856-57 (8th Cir. 2005) (upholding summary judgment for employer because temporal proximity between employee's April 8 filing of EEOC charge and May 2 e-mail allegedly disclosing decision to terminate employee did not, by itself, establish causation element of employee's retaliation claim; termination was part of company-wide layoffs resulting from financial constraints and also was based on individual performance issues; although at least one supervisor involved in layoff decisions was aware of the EEOC charge, there was no evidence of retaliatory animus).

Perez v. Region 20 Educ. Serv. Ctr., 307 F.3d 318, 325 (5th Cir. 2002) ("[T]iming can constitute evidence of a causal connection between a protected activity and termination," but "[plaintiff's] claim nonetheless fails because he has not provided evidence to refute the [defendant's] proffered explanation for his discharge . . . . [Plaintiff] provides no evidence that challenges the accuracy of his performance review. Merely disagreeing with an employer's negative performance assessment is insufficient to show pretext.").

Weigel v. Baptist Hosp. Of E. Tenn., 302 F.3d 367, 381 (6th Cir. 2002) (finding *prima facie* case of retaliation where key decisionmakers rejected plaintiff's application for rehire shortly after they became aware of plaintiff's previous complaints of age discrimination, but nevertheless affirming summary judgment; plaintiff failed to show that employer's nondiscriminatory explanation for decision was pretextual).

Cruz v. McAllister Bros., Inc., 52 F. Supp. 2d 269, 287 (D.P.R. 1999) (two-day gap between plaintiff's request for ADA accommodation and the employer's decision to place him on leave is insufficient to support an ADA retaliation claim where the employer offered evidence that plaintiff

was unable to perform functions of his position and plaintiff failed to counter with other evidence of pretext).

Stevens v. St. Louis Univ. Med. Ctr., 97 F.3d 268, 272 (8th Cir. 1996) (affirming summary judgment; temporal proximity was sufficient to establish *prima facie* case, but it did not rise to level required to prove pretext).

Knickerbocker v. City of Stockton, 81 F.3d 907, 912 (9th Cir. 1996) (close timing between events can support inference of retaliation in some cases, but it is not enough to show pretext in this case, especially given plaintiff's improper conduct).

Jones v. Handi Medical Supply Inc., ___ F. Supp. 2d ___, 2009 WL 5030773, at *3 (D. Minn. 2009) (granting summary judgment; a sales director who alleged that he was demoted by a medical supply firm as soon as he returned to work from a military leave of absence did not present sufficient evidence of an unlawful motive to get to trial; the coincidence of timing was not enough, even though plaintiff's prior job evaluations had been good; when plaintiff was on leave, his supervisor took over the sales director's duties and discovered performance deficiencies that previously had been unknown).

C. Performance Criticism Helps Dispel Any Retaliatory Inference And Provides A Legitimate Reason For The Alleged Adverse Action.

1. Where the culminating event — *e.g.*, a discharge — is the last step in a process that began *before* the protected activity, an inference of retaliation may be dispelled.

Leitgen v. Franciscan Skemp Healthcare, Inc., 630 F.3d 668, 675-77 (7th Cir. 2011) (although hospital began preparing for employee's termination a few days after employee expressed concerns to hospital's secretary of the compensation committee about hospital's pay scheme being discriminatory based on gender, employee failed to establish causal relationship between this meeting and employer's decision to terminate her where the meeting was not the first instance in which employee complained about compensation system—without adverse action being taken against her—where hospital's chair and employee's supervisor discussed disciplining employee before the meeting, and where employee attended disciplinary meetings and received oral warnings about her performance).

Long v. Teachers' Ret. Sys. of Ill., ___ F.3d ___, 2009 WL 3400955, at *9 (7th Cir. 2009) (a state retirement system employee fired for alleged poor

job performance about five months after she began taking intermittent leave under the Family and Medical Leave Act has no FMLA retaliation claim; warnings about her performance predated the FMLA leave).

Strong v. University Health Care Sys. d/b/a Tulane Univ. Hosp. and Clinic, 482 F.3d 802, 807 (5th Cir. 2007) (plaintiff was fired after a "last straw" incident that followed fourteen previously documented incidents; court found plaintiff failed to show her termination was retaliatory).

Carrington v. Des Moines, 481 F.3d 1046, 1051 (8th Cir. 2007) (court found that plaintiff consistently engaged in protected activity after his supervisors disciplined him or notified him they were investigating an incident of poor job performance; plaintiff ultimately was fired, and the court found this was a result of poor job performance, not retaliation; the court frowned on what it viewed as plaintiff's attempts to insulate himself from discipline by complaining about "harassment" and "retaliation": "complaining of discrimination in response to a charge of workplace misconduct is an abuse of the anti-retaliation remedy").

Shafer v. Army & Air Force Exch. Serv., 376 F.3d 386, 397 (5th Cir. 2004) (even though "[employer's] ultimate decision . . . to assign [plaintiff] a mediocre performance rating in her annual review occurred [several months] *after* he had been made aware of her EEO filings, that decision appears to be based in large part on the disciplinary record [plaintiff] had compiled *prior* to the time that [employer] became aware of her protected activities") (emphasis in original).

Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 95 (2d Cir. 2001) ("Where . . . gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.").

Hervey v. County of Koochiching, 527 F.3d 711, 722-23 (8th Cir. 2008) (affirming summary judgment for employer in case involving temporal proximity between plaintiff's discrimination complaint because plaintiff had been accused of insubordination before she notified the employer of her protected activity; insubordinate employees may not insulate themselves from discipline by claiming discrimination before employer takes action), *cert. denied*, 129 S. Ct. 1003 (2009).

Amrhein v. Healthcare Services Corp., 546 F.3d 854, 859 (7th Cir. 2008) (concluding that temporal proximity was insufficient to create a factual issue where, prior to telling her supervisors of her intention to file an EEOC charge, plaintiff had several times been insubordinate and violated company policy; prior violations of company policy eclipsed any

inference that plaintiff's intention to go to the EEOC caused the adverse action).

Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769-70 (2d Cir. 1998) (discharge was nonretaliatory where employer showed that plaintiff had history of rudeness towards clients and co-workers and this history had been subject of a negative performance evaluation).

Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 511-12 (7th Cir. 1998) (upholding summary judgment; five months had passed between plaintiff's complaint and alleged adverse employment action; moreover, employer had begun documenting plaintiff's performance problems long before she made her complaint).

Workman v. Frito-Lay, Inc., 165 F.3d 460, 470 (6th Cir. 1999) (concurring opinion) (even though plaintiff was terminated one month after she filed EEO charge, dismissal of retaliation claim affirmed; when plaintiff filed her EEOC charge, plaintiff already knew that her employer would not allow her to return to work or offer reasonable accommodation; because her employer's position concerning her ability to return to work remained essentially same before and after she filed EEOC charge, there was no evidence that plaintiff suffered any adverse action as result of having filed EEOC charge).

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 16 (1st Cir. 1997) (plaintiff was disciplined and warned of discharge if his performance did not improve; that warning was given before plaintiff requested disability accommodation; although his termination followed soon after his accommodation request, temporal proximity alone was not enough to sustain an inference of retaliation; such "narrow focus ignores the larger sequence of events and also the larger truth").

Jackson v. Delta Special Sch. Dist., 86 F.3d 1489, 1494 (8th Cir. 1996) (affirming judgment as a matter of law notwithstanding close temporal proximity and damaging direct evidence; employer had been building a record of insubordinate activity long before plaintiff's EEOC complaint).

Cf. Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1122 (8th Cir. 2006) ("[A] reasonable jury could find support for an inference of retaliation based on the *lack of evidence* to show that supervisors had considered Ms. Wallace's termination before her report of harassment.") (emphasis added).

But see Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 761 (8th Cir. 2004) (a jury could reasonably conclude that the employer's stated reason

for firing plaintiff was pretextual; "[A]lthough there are documents and testimony produced immediately before or after [plaintiff's] termination, [plaintiff] had no extensive disciplinary record, despite [employer's] claim that it had problems with [plaintiff] from the beginning. [Employer] contends it demoted [plaintiff] during his employment, but [plaintiff] asserts he merely assumed the tasks of a subordinate in addition to his usual duties after the subordinate's termination. Because [plaintiff] consistently received raises during his employment indicating more than satisfactory performance, and the record indicates no change in his job title, we give [plaintiff] the benefit of the inference on this issue. A reasonable jury could infer [that employer] tried to paper [plaintiff's] file to justify his termination.") (citations and internal quotation marks omitted).

Dotson v. Pfizer Inc., 558 F.3d 284, 297 (4th Cir. 2009) (affirming plaintiff's verdict for FMLA-leave retaliation; the jury could have found retaliatory animus because Pfizer supervisors knew in advance that plaintiff planned to do what Pfizer purportedly discharged him for doing — giving free samples of Pfizer product to the orphanage from which he adopted a child — and no Pfizer supervisor tried to stop Dotson from doing so; moreover, "none of the Pfizer employees who knew in advance about Dotson's plan to donate the [drug] . . . was disciplined for failing to stop him."), *cert. denied*, 78 U.S.L.W. 3049 (2009)

2. Adverse actions "in the works" at the time of protected activity are not retaliatory.

Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 272 (2001) (employer's transfer of employee one month after learning of employee's suit does not demonstrate a causal connection where the employer was contemplating transfer before learning of the suit; "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.").

Scruggs v. Garst Seed Co., 587 F.3d 832, 838-39 (7th Cir. 2009) (affirming summary judgment in a case involving a layoff and subsequent decision not to rehire; the layoff case failed because the company made its decision to eliminate research technician positions before plaintiff filed her first EEOC charge; the rehire case failed because the company hired a more-qualified candidate; "Pretext includes 'more than just faulty reasoning or mistaken judgment on the part of the employer; it is a "lie, specifically a phony reason for some action."'"; "If the employer honestly

believed the reason it proffers for its employment decision, the reason was not pretextual.") (citation omitted).

Griffith v. City of Des Moines, 387 F.3d 733, 738 (8th Cir. 2004) (plaintiff's complaints of discrimination, which were lodged days after receiving notices of pre-disciplinary hearings that led to three disciplines, "did not without more raise a retaliation bar to the proposed discipline because the anti-discrimination statutes do not insulate an employee from discipline for violating the employer's rules or disrupting the workplace").

Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1201 (11th Cir. 2001) (city employee whose job performance evaluations plummeted after she ended a consensual sexual relationship with a city official failed to make *prima facie* case of retaliation; "Even assuming . . . [she] suffered an adverse employment action, any protected expression on her part occurred only after the commencement of the adverse employment actions of which she complain[ed]").

Leonard v. E. Ill. Univ., 606 F.3d 428, 431-32 (7th Cir. 2010) (affirming summary judgment; plaintiff was an outspoken critic of the "Chief Illiniwek" mascot used by the University of Illinois; he failed to show that he was denied a promotion in retaliation for complaining about two interviewers' wearing shirts with the "Chief" logo; Leonard had been interviewed and denied promotions several times before, so the decision not to promote him in 2005 was not suspicious).

Lewis v. District of Columbia, 2009 WL 2920878, at *11 (D.D.C. 2009) (granting summary judgment on retaliation claim even though plaintiff prevailed on her discrimination claim; some of the adverse actions at issue preceded her discrimination complaint, so there is no causation; the adverse actions that occurred later — her nonselection for promotion — occurred two months after her discrimination complaint, but by then she already had been rejected for promotion three times already, so no inference of retaliation was plausible).

Rost v. Pfizer Inc., 2009 WL 3097231, at *4-5 (S.D.N.Y. 2009) (a former drug company executive who alleged that he was fired in retaliation for disclosing improper practices by a company his employer acquired failed to raise a triable question even though he was discharged shortly after his *qui tam* case because public; the company had been in the process of eliminating his job before it knew plaintiff was a *qui tam* relator; the company concluded that plaintiff would have to be released 18 days before he did anything that could comprise protected activity).

Shafer v. Army & Air Force Exch. Serv., 376 F.3d 386, 397 (5th Cir. 2004) (even though the "[employer's] ultimate decision . . . to assign [plaintiff] a mediocre performance rating in her annual review occurred [several months] *after* he had been made aware of her EEO filings, that decision appears to be based in large part on the disciplinary record [plaintiff] had compiled *prior* to the time that [employer] became aware of her protected activities") (emphasis in original).

But cf. Benders v. Bellows & Bellows, 515 F.3d 757, 763-64 (7th Cir. 2008) (reversing summary judgment; plaintiff had five-year affair with the husband of a husband-and-wife legal partnership; she was told by the husband that his wife and another partner were campaigning to oust plaintiff, and that she should begin looking for another job; nine months later, she was told she would have to leave the firm in approximately five weeks; shortly thereafter, plaintiff filed an EEOC race and age discrimination charge; two months later, just after the firm filed its position statement with the EEOC, the husband told her that because she had filed an "awful EEOC charge" he would not consider severance, and one week later she was discharged; the summary judgment on the harassment claim was properly granted, because the sexual relationship was consensual; however, the retaliation claim survived; she was terminated shortly after filing the EEOC charge, and the earlier notification of intention to terminate is not the same thing as a termination).

Compare Coons v. Sec'y of U.S. Dep't of Treasury, 383 F.3d 879, 887-88 (9th Cir. 2004) (Internal Revenue Service's proffered reasons for employee's demotion were legitimate, not a pretext for retaliation, because the IRS presented ample evidence that employee misused government computers, accessed sex-related sites on them, and lied in a subsequent investigation of that misuse; court found it important that "although the misuse occurred two years before the demotion, the investigation of that misuse concluded shortly before the IRS made the decision to demote [plaintiff]") *and Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236, 1242-43 (11th Cir. 2010) (company did not violate the FMLA by demoting a female vice president on her return from maternity leave; the employer proved the demotion was based on performance issues unrelated to the protected leave; the court rejected as "legally incorrect" and "logically unsound" plaintiff's argument that because the company discovered some of her alleged performance deficiencies while she was on leave, the company's decision to demote her was "caused" by her leave and therefore violated the FMLA; the company showed it demoted plaintiff because of subordinates' complaints about her managerial style and performance deficiencies discovered while another manager filled in during her leave) *with Garrett v. AtlantiCare Health Sys., Inc.*, 2009 U.S.

Dist. LEXIS 97547, at *15-17, 20, 23 (D. N.J. 2009) (denying summary judgment; plaintiff was discharged six weeks after taking FMLA leave; plaintiff had 10 years of experience and prior satisfactory evaluations; defendant contended that it acted based on performance lapses that had occurred long before; a triable question existed on the proffered defense that plaintiff's performance deficiencies were not discovered until she went on leave).

3. Where the case for the adverse action is compelling, retaliation normally will not be found.

Hoyle v. Freightliner, LLC, 2011 U.S. App. LEXIS 6628, at *35-37 (4th Cir. 2011) (although plaintiff established prima facie evidence of causation because her reassignment from mechanic's job to janitorial duties occurred shortly after she complained of co-worker misconduct, summary judgment was affirmed for the defendant because plaintiff could not establish pretext, where her reassignment was temporary and motivated by a lack of other work, and her termination was motivated by plaintiff's violation of "last chance agreement.")

Fanning v. Potter, 614 F.3d 845, 850-51 (8th Cir. 2010) (plaintiff was not discharged in retaliation for a prior discrimination claim; "By the time that Fanning's separation became effective on December 23, 2006, she had been on leave without pay for *over six years*, and her physician had advised at least four times that she was permanently and totally disabled and would never be able to return to work."; "There was an obvious legitimate, non-discriminatory reason for the administrative separation, and Fanning has not presented evidence to demonstrate that this reason was a pretext for unlawful retaliation."; the court also rejected plaintiff's theory that, in retaliation for the discrimination complaint, some of her benefits checks were delivered late; "We are not convinced that an objectively reasonable employee would find the occasional delay in receipt of less than two percent of her monthly income to be a serious hardship that would dissuade her from making a charge of discrimination.").

O'Neal v. City of Chicago, 588 F.3d 406, 410 (7th Cir. 2009) (a police sergeant who was transferred 10 times after she sued the Chicago Police Department failed to establish her retaliation claim; she failed to rebut the department's assertion that she was borderline insubordinate, had a confrontational attitude, and put an undercover officer in jeopardy by conducting street operations poorly).

Burkhart v. Am. Railcar Indus., Inc., 603 F.3d 472, 477-78 (8th Cir. 2010) (affirming summary judgment; plaintiff was fired for inventory errors that

cost her company thousands of dollars seven months after she complained about alleged sexual harassment; a supervisor other than the alleged harasser imposed the suspension that led to Burkhart's discharge; the court rejected plaintiff's argument that the company's failure to suspend or terminate her for earlier job-related errors suggested retaliatory intent in the company's suspension and termination decisions; "The 2006 inventory mistake resulting in her termination was arguably [plaintiff's] worst and costliest error.").

D. Employer Surveillance, Observation And Note-Taking Sometimes Give Rise To A Claim.

1. Many cases hold that it is wise, not unlawful, to take steps to compile proof that will be useful in the event of an employment dispute.

Russell v. Univ. of Toledo, 537 F.3d 596, 605-09 (6th Cir. 2008) (affirming summary judgment on race and retaliation claims; plaintiff, an insubordinate nurse, had a long history of misconduct; she was not similarly situated to Caucasian co-workers, who each had engaged in only a single incident of misconduct; the doctors with whom she worked were aware that she had filed an EEOC charge and were told to bring any performance problems to the attention of the doctor responding to the charge; this simply was progressive discipline that employer used to correct numerous incidents of misconduct).

Higgins v. Gonzales, 481 F.3d 578, 583 (8th Cir. 2007) (plaintiff alleged that her supervisor kept a "shadow file," in which she documented plaintiff's progress, kept samples of her work product, and "papered" the file with complaints against plaintiff; court found that supervisor kept files on all employees under her supervision and, even if plaintiff's file was different from the others or was the only one supervisor had kept, plaintiff suffered no adverse consequence from supervisor's keeping of the file, therefore this allegation could not support plaintiff's retaliation claim).

Karpel v. Inova Health Sys. Servs., 134 F.3d 1222, 1228 (4th Cir. 1998) (plaintiff claimed that discriminatory intent should be inferred from employer's attempt to "build up a file" on her; plaintiff failed to even establish *prima facie* case because she could not show that employer's alleged recording of her deficiencies was racially or retaliatorily motivated or that she was written up differently from other similarly situated employees).

Fuentes v. Perskie, 32 F.3d 759, 766 (3d Cir. 1994) ("[D]ocumentation of the reasons for rejecting an applicant is insufficient, in and of itself, to give rise to a reasonable inference of discriminatory motive."; "Given the

frequency of employment discrimination suits, an employer which documents its reasons for taking adverse employment actions can often be more suitably described as sensible than as devious.").

Villanueva-Batista v. Doral Fin. Corp., 2009 WL 4936396, at *1 (1st Cir. 2009) (affirming summary judgment even though plaintiff was discharged after filing suit for unpaid bonuses and commissions; plaintiff was discharged because of her history of violating company regulations and her refusal to cooperate with its internal investigation; no inference of retaliation could be drawn from an e-mail from the HR department to a supervisor advising him to "remember that the actions with [her] [had to] be reviewed since there is an ongoing complaint").

Smith v. Union Oil Co., 17 FEP 960, 988 (N.D. Cal. 1977) (plaintiff alleged that employer was "building a file" on her in retaliation for having complained about alleged unlawful employment practices; this was in no sense retaliatory, but merely "prudent assemblage of documentation with respect to an employee who had brought charges against the company").

Cf. Elam v. Regions Fin. Corp., 601 F.3d 873, 878 (8th Cir. 2010) (discrimination case; affirming summary judgment even though one supervisor referred to plaintiff as "pregnant" and another supervisor used the phrase "(pregnant girl) teller" in a note to Human Resources; "Reference to protected status 'without reflecting bias is not direct evidence of discrimination.'"; "[C]oncern over the rights of a protected employee 'should be regarded as a natural reaction to the ever-present threat of litigation attendant upon terminating [a protected] employee,' not evidence of discrimination.") (citation omitted; second alteration in original).

But see Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1284 (9th Cir. 2001) (plaintiff's declining performance evaluations did not sufficiently rebut an inference of retaliation, because "an unwarranted reduction in performance review scores can constitute evidence of pretext in retaliation cases"), *cert. dismissed*, 537 U.S. 1098 (2003).

2. In certain circumstances, employers may be permitted to conduct surveillance of their employees — but such actions risk an inference of retaliation if the surveillance is targeted at the plaintiff.

Hamilton v. Gen. Elec. Co., 556 F.3d 438, 436 (6th Cir. 2009) (2-1 decision reversing summary judgment; "We hold that [the] temporal proximity of less than three months combined with the assertion that GE increased its scrutiny of Hamilton's work only after the EEOC complaint was filed are sufficient to establish the causation element of a prima facie

case of retaliatory termination."; that plaintiff was on a "Last Chance Agreement," and that GE forbore from discharge earlier, does not eliminate the triable question; "Were we to adopt GE's position, any employer could insulate itself from a charge of retaliatory termination by staging an incident to display its purported 'favorable treatment' and then waiting for a second opportunity to terminate the employee.").

Upshaw v. Ford Motor Co., 576 F.3d 576, 588-89 (6th Cir. 2009) (2-1 decision reversing summary judgment; plaintiff was subjected to "heightened scrutiny" soon after she filed her first EEOC charges; given the combination of close temporary proximity and the heightened scrutiny, she raised an inference of a causal connection).

Anderson v. Davila, 125 F.3d 148, 161-63 (3d Cir. 1997) (heavy surveillance following complaint of racial discrimination supported a possible claim of retaliation under 42 U.S.C. § 1983).

Montalvo v. U.S. Postal Serv., 1996 WL 935448, at *2 (2d Cir. 1996) (affirming summary judgment when plaintiff allegedly was kept under strict surveillance in retaliation for having filed numerous employment discrimination complaints, because plaintiff's misbehavior required especially close attention, and the employer presented evidence that close monitoring of employees was a routine practice).

EEOC GUIDELINES, vol. 2, § 8-II.B.3 ("[M]anager asked two employees to keep [charging party] under surveillance and report back on his activities. The surveillance constitutes an 'adverse action' that is likely to deter protected activity, and is unlawful if it was conducted because of the [charging party's] protected activity.").

E. The Identity Of The Decisionmaker Is Critical.

1. An inference of retaliation is negated where the plaintiff's evidence of retaliatory motive is directed at a nondecisionmaker, even where the decisionmaker may have had knowledge of the protected conduct.

Cobbs v. Bluemercury, Inc., 2010 U.S. Dist. LEXIS 114256, at *16 (D.D.C. 2010) (although three company executives had harassed plaintiff about her need to attend physical therapy, there was no triable question of FMLA retaliation when she was selected for layoff; the company had voluntarily extended medical leave to plaintiff for 10 months before she met the one-year employment eligibility requirement for leave under the FMLA and D.C. Family and Medical Leave Act, so it would make little sense to find the company accommodated Cobbs's need for leave for almost a year but fired her because she formally required leave under the FMLA; the

persons who made the derogatory remarks were not decisionmakers; "[W]hatever animus Cobbs's other supervisors may have had, these individuals did not influence the even-handed evaluation which led to Cobbs's termination.").

Darchak v. Chicago Bd. of Educ., 580 F.3d 622, 630 (7th Cir. 2009) (a board of education is not liable for alleged retaliation by a school principal in response to plaintiff's complaints that the principal was violating the No Child Left Behind Act; the principal did not have final authority over the nonrenewal of plaintiff's contract).

Dorsey v. Morgan Stanley, 507 F.3d 624, 627-28 (7th Cir. 2007) (plaintiff's retaliation claim failed because she could not provide any evidence beyond mere speculation that her manager, who was the only individual at the company who had a retaliatory motive against her, influenced the decision to demote her).

Bryant v. Compass Group USA Inc., 413 F.3d 471, 478-79 (5th Cir. 2005) (granting judgment as matter of law for the employer, because the plaintiff cook cannot show that the food-service contractor's explanation — that it discharged him shortly after he filed EEOC charge for taking an envelope from a gift table at a function at which he was working — is pretextual; plaintiff alleged that there was a conspiracy to frame him among three Hispanic employees who reported the theft to employer to get him discharged and that management knew, or should have known, about this framing; none of these individuals were official decisionmakers, none of them had authority to discharge him, none of the employees who allegedly conspired against him knew of his EEOC charge; the official decisionmakers were not involved in the conspiracy, and the decisionmakers relied on a police officer's report that the cook admitted to theft in deciding to discharge him), *cert. denied*, 546 U.S. 1090 (2006).

Hall v. Gary Cmty. Sch. Corp., 298 F.3d 672, 676 (7th Cir. 2002) (affirming judgment as matter of law on plaintiff's retaliation claim despite plaintiff's evidence that another employee said to him, "you've got to stop making waves and filing charges. That's why they're transferring you — that's why you have been transferred so many times"; court explained that "[a] statement made by an employee not in authority does not carry any weight unless the plaintiff can show that the employee somehow influenced the decision"; "Because [plaintiff] provided no evidence that [the employee who made the statement] was involved in any way with the decision to discharge him, . . . the statement does not provide evidence that the real reason for his discharge was retaliation.").

Walden v. Georgia-Pacific Corp., 126 F.3d 506, 515 (3d Cir. 1997) (plaintiffs attempted to use remarks by nondecisionmakers to show employer bias; court held that statements made by employees who were not decisionmakers could not fairly be attributed to the actual decisionmaker, where no evidence of his retaliatory animus was proffered).

Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997) (plaintiff failed to show a causal connection between her complaints and her ultimate termination; plaintiff had evidence of discriminatory animus of her immediate superior, but she could not show that the decisionmaker in her termination — a higher-level manager — was in any way affected by her complaints about her immediate supervisor; this was not a case where "the employer simply acted as the 'cat's paw' of the subordinate"; "[W]hen the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant.").

Oates v. Discovery Zone, 116 F.3d 1161, 1172-73 (7th Cir. 1997) (plaintiff complained about a supervisor's failure to remove a derogatory cartoon from workplace; later, the supervisor relayed information to a higher-level manager about plaintiff's absenteeism and poor performance; that manager decided to discharge plaintiff, but there was no evidence that the supervisor relayed any negative information to the manager before the manager made the discharge decision).

Feltmann v. Sieben, 108 F.3d 970, 976 (8th Cir. 1997) (where there is no evidence that the decisionmaker holds unlawful animus, plaintiff has failed to show a causal relationship sufficient to raise a triable question).

2. Even where a "tainted" person had input into an adverse decision such as discharge, a retaliatory inference can be dispelled where an untainted person conducted an independent investigation into the circumstances before finalizing the adverse decision.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 805-06 (9th Cir. 2009) (a final decisionmaker's wholly independent, legitimate decision to terminate an employee can insulate a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired; the presumably biased supervisor's involvement was so minimal as to negate any inference that the investigation and final decision were made other than independently and without bias; emphasizing that "the relevant question is whether the presumptively biased supervisor improperly influenced the subsequent investigation or the decision to terminate").

Sherrod v. Am. Airlines, Inc., 132 F.3d 1112, 1122 (5th Cir. 1998) (ADA and ADEA case; causal link between protected activity and allegedly retaliatory act "can be severed if there is evidence that the ultimate decisionmaker did not merely 'rubber stamp' the recommendation of the employee with knowledge of the protected activity, but conducted an independent investigation into the circumstances surrounding the employee's termination").

Jackson v. Mo. Pac. R.R. Co., 803 F.2d 401, 407 (8th Cir. 1986) (reversing district court's finding of retaliation; even though the discharge occurred five months after filing of lawsuit, plaintiff was terminated after an investigation by someone who did not know that plaintiff had filed the lawsuit; that third person determined that plaintiff's negligence caused a train derailment).

Kearney v. Town of Wareham, 316 F.3d 18, 19, 23 (1st Cir. 2002) (affirming summary judgment for employer in mixed-motive case applying "but for" standard; "[T]he FLSA does not constrain an employer who, despite harboring animosity toward the FLSA suitor, makes employment decisions on other grounds — and does so with due deliberation and objectivity."; significant to the court's decision were procedural safeguards taken by the employer, including (1) internal investigation which included polygraph tests constructed and administered by fully accredited independent examiner, and (2) a hearing conducted by independent hearing officer in which plaintiff was represented by counsel and had ample opportunity to both introduce evidence and to cross-examine adverse witnesses).

Furline v. Morrison, 953 A.2d 344, 350-51 (D.C. Ct. App. 2008) (an independent investigation of the suspension of an emergency care registrar removed any taint on the suspension left by her allegedly biased supervisor; even if the supervisor's recommendation was vindictive or discriminatory, "the review process ensured that Morrison was disciplined solely for the legitimate reason given").

3. Where, however, the decisionmaker relies on facts supplied by a tainted person, liability may be found.

Kodish v. Oakbrook Terrace Fire Prot. Dist., 604 F.3d 490, 509 (7th Cir. 2010) (reversing summary judgment on a firefighter's claim that he was forced to resign because he expressed pro-union views; there was evidence the Fire Chief had objected to plaintiff's views; the Chief was not the decisionmaker, but the district board relief on the Chief's presentation in deciding to terminate plaintiff; "It is a plausible inference, if not the sole

inference, that [the Chief] exerted a singular influence on the evidence presented to the Board . . . .").

Bryson v. Regis Corp., 498 F.3d 561, 572-74 (6th Cir. 2007) (finding summary judgment improper where plaintiff raised a genuine issue of material fact as to whether the decisionmaker in her termination relied upon evidence provided by plaintiff's biased supervisor).

Poland v. Chertoff, 494 F.3d 1174, 1182-84 (9th Cir. 2007) (a biased subordinate employee asked the Customs Service to undertake an independent administrative inquiry of plaintiff's performance in retaliation for plaintiff's filing of EEO complaints; although the Customs Service's inquiry could have proceeded in a neutral, nonretaliatory manner, the Customs Service relied upon and considered the following, all provided to it by the biased subordinate: a lengthy memo outlining alleged acts of malfeasance by plaintiff; a list of witnesses to contact; and notes from another employee on plaintiff's performance; the biased subordinate "framed and influenced" the inquiry into plaintiff's performance, therefore the decision to transfer her was not independent).

Reeves v. Safeway Stores, Inc., 121 Cal. App. 4th 95, 113-16 (2004) (an employer may be held liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, even though the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is made by a manager with no knowledge that the worker has engaged in protected activities; the supervisor's retaliatory motive must be shown to have been an actuating, but-for cause of the dismissal, making the manager and the intermediate investigator who effected the termination the tools or "cat's paws" for the supervisor, that is, instrumentalities by which the supervisor's retaliatory animus was carried into effect to plaintiff's injury; here, the supervisor unduly influenced how the investigation was conducted and the termination decision was made).

McKenna v. City of Philadelphia, 2011 U.S. App. LEXIS 17199, at *21-25 (3d Cir. 2011) (employer did not demonstrate that its internal disciplinary review hearing severed the casual connection between a supervisor's retaliatory animus and the employer's ultimate employment decision to terminate the employee).

Rogers v. City of Chicago, 320 F.3d 748, 754 (7th Cir. 2003) ("if there were competent evidence that the Personnel Division had acted as [supervisor's] 'cat's-paw' and rubber-stamped his recommendation, we would consider [supervisor] to be the decisionmaker").

David v. Caterpillar, Inc., 324 F.3d 851, 861 (7th Cir. 2003) ("[R]etaliatory motive of a 'nondecisionmaker,' may be imputed to the company where the 'nondecisionmaker' influenced the employment decision by concealing relevant information from, or feeding false information to, the ultimate decisionmaker.").

Gierlinger v. Gleason, 160 F.3d 858, 872-73 (2d Cir. 1998) (supervisor liable if his recommendations and actions proximately led to plaintiff's ultimate discharge and were "substantially motivated" by retaliatory animus).

Long v. Eastfield Coll., 88 F.3d 300, 308-09 (5th Cir. 1996) (error to grant summary judgment based on college president's nondiscriminatory motive, where trier of fact could find that president "rubber stamp[ed]" supervisors' retaliatory recommendations to discharge plaintiffs for supposed misconduct).

Bergene v. Salt River Project Agric. Imp. & Power, 272 F.3d 1136, 1141 (9th Cir. 2001) (court found evidence of retaliation when plaintiff's former supervisor told plaintiff she would not get foreman position if she held out for too much money in settlement negotiations for her pregnancy-discrimination claim; although that former supervisor was not the decisionmaker, there was evidence that he played an influential role in the selection process; "Even if a manager was not the ultimate decisionmaker, that manager's retaliatory motive may be imputed to the company if the manager was involved in the hiring decision.").

Hernandez v. SpaceLabs Med., Inc., 343 F.3d 1107, 1116 (9th Cir. 2003) (reversing summary judgment for the employer even though the supervisor who supplied the factual basis for discharge testified that he was unaware that plaintiff was one who reported harassment; circumstantial evidence could have led him to suspect that it was plaintiff; summary judgment is only appropriate if "no rational fact-finder could conclude that [the] action was discriminatory [or retaliatory]").

Gee v. Principi, 289 F.3d 342, 347-48 (5th Cir. 2002) (reversing summary judgment for employer; court found triable issue as to whether decisionmaker was improperly influenced by hostile comments about plaintiff from employee whom plaintiff had accused of sexual harassment two years earlier and a director who knew about her complaint).

F. Intervening "Nice Things" Performed By The Employer Often Dispel Any Inference Of Retaliation.

Fercello v. Ramsey Cnty., 612 F.3d 1069, 1083 (8th Cir. 2010) (affirming summary judgment; plaintiff could not show that she was given negative performance evaluations and a "functional demotion" in retaliation for complaining of a supervisor's alleged sexual harassment; "the record shows that the County sought to accommodate Fercello at nearly every turn"; rather than trying to force Fercello's resignation, the county showed that it tried to accommodate her by giving her extra time off, offering her an alternative schedule, and trying to resolve her complaints about her workload).

Gaujacq v. EDF Inc., 601 F.3d 565, 578 (D.C. Cir. 2010) (affirming summary judgment even though the defendant's chief operating officer told her, "Your career is dead in EDF if you file the [EEO] claim."; the company previously had treated plaintiff favorably, "first by extending her contract by a year, then by negotiating with her to find a way to allow her to stay in Washington D.C., and finally by creating a vice president's position for her"; "In this context — given all that the company had done for her — [the COO's] statement appears less a threat than an expression of exasperation over Gaujacq's ongoing antics. . . . No reasonable employee who received as much accommodation as did Gaujacq could construe [the COO's] statement as an unlawful retaliatory threat.").

Manatt v. Bank of Am., 339 F.3d 792, 802 (9th Cir. 2003) (no retaliation found when bank gave plaintiff a pay raise and selected her for a prestigious assignment between the time of plaintiff's complaint and the decision not to transfer her).

Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 323 (3d Cir. 2000) (no retaliation found where employer held plaintiff's position open for full 26 weeks of disability leave before she was terminated).

Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1248 (8th Cir. 1998) (plaintiff alleged that she was constructively discharged in retaliation for having filed a sexual harassment complaint against employer; court found that there was insufficient evidence to support the claim because the company had taken corrective action on plaintiff's prior harassment complaint, had given plaintiff favorable performance review in the interim, and had tried to prevent plaintiff from resigning from her job).

Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1329 (11th Cir. 1998) (plaintiff's ADA retaliation claim involving the employer's failure to accommodate his alleged back injury was negated by evidence that management gave him special assistance with heavy lifting, and that co-workers "gave him help every time he requested it").

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 17 (1st Cir. 1997) (plaintiff claimed that employer retaliated against him after he requested reasonable accommodation, but the employer granted plaintiff's accommodation request;

"[E]vidence that an employer willingly granted an employee's request for an accommodation, though by no means dispositive of the matter, tends to militate against making an inference of retaliation in a case like this one.").

Brady v. Houston Indep. Sch. Dist., 113 F.3d 1419, 1424 (5th Cir. 1997) (plaintiff alleged that she was retaliated against (given a job with reduced responsibilities) for disclosing her employer's illegal conduct; yet, during 18-month period between plaintiff's whistleblowing and employer's alleged retaliation, plaintiff received positive evaluations and was twice recommended for promotion; this chronology was "utterly inconsistent with an inference of retaliation" because there was no reason why the employer that was allegedly harboring retaliatory motive against plaintiff would take affirmative steps to secure a promotion for her).

EEOC v. TJX Cos. d/b/a Marshalls, 2009 WL 159741, at *8 (E.D.N.C. 2009) (finding a triable question of sexual harassment but granting summary judgment on a retaliation claim; two years elapsed between her harassment complaint and her discharge; moreover, plaintiff received a promotion and a pay raise after she complained about Johnson's conduct, which "negates any inference of a causal connection between her protected activity and her termination").

But see Crowe v. ADT Sec. Servs., 2011 U.S. App. LEXIS 8434, at *22-23 (10th Cir. 2011) (rejecting plaintiff's argument that ADT's prior leniency with employee's inappropriate behavior raises an inference of pretext; "ADT's prior leniency with Mr. Crowe, without more, does not constitute evidence from which a reasonable jury could conclude that firing Mr. Crowe based on his long history of alleged inappropriate behavior was pretextual.")

G. Burden Of Producing Evidence And Proof.

1. The employer must articulate a legitimate, non-retaliatory reason for its actions.

a. Insubordination, *e.g.*, *Windross v. Barton Protective Servs. Inc.*, 586 F.3d 98, 104 (1st Cir. 2009) (affirming summary judgment in a discrimination case; plaintiff was discharged after refusing to meet with a human resources manager; "It was not up to Windross to decide if and when to meet with Ordman, and Windross does not deny that he twice refused Ordman's orders to speak with her."; "When Windross refused to meet with Ordman for a second time, the company was justified in terminating Windross."); *Russell v. Univ. of Toledo*, 537 F.3d 596, 605-09 (6th Cir. 2008) (affirming summary judgment on race and retaliation claims; plaintiff, an insubordinate nurse, had a long history of misconduct; she was not similarly situated to Caucasian co-workers, who each

had engaged in only a single incident of misconduct; the doctors with whom she worked were aware that she had filed an EEOC charge and were told to bring any performance problems to the attention of the doctor responding to the charge; this simply was progressive discipline that employer used to correct numerous incidents of misconduct); *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1495 (11th Cir. 1989) ("insubordination, not discrimination, was the reason for the discharge"); *Pulley v. KPMG Consulting, Inc.*, 348 F. Supp. 2d 388, 397 (D. Md. 2004) ("The sword of an EEOC complaint cannot be used as a shield to protect an employee from the consequences of inappropriate behavior that is incontrovertibly below the reasonable expectations of his employer."). *But cf. Scarbrough v. Board of Trs. Fla. A&M Univ.*, 504 F.3d 1220, 1222 (11th Cir. 2007) (plaintiff was fired for "unnecessarily disruptive" behavior — that is, involving campus police in his complaints that he was being sexually harassed by his supervisor; plaintiff's insubordinate behavior was "inextricably intertwined with his attempt to protect himself from harassment and retaliatory threats of physical violence," so such behavior "cannot constitute a legitimate non-discriminatory basis for termination").

b. Refusal to perform assigned work, *e.g.*, *Green v. Franklin Nat'l Bank*, 459 F.3d 903, 916 (8th Cir. 2006) (failing to report for work after a requested leave was denied); *Pulley v. KPMG Consulting, Inc.*, 348 F. Supp. 2d 388, 397 (D. Md. 2004) (employee only finished 3 out of 13 tasks assigned to him); *Mack v. County of Cook*, 827 F. Supp. 1381, 1386-87 (N.D. Ill. 1993) ("[Plaintiff], however, omits any mention of the fact that between the time she filed her EEOC complaint and the date she was fired she refused to operate the switchboard as requested on three separate occasions by her supervisor. This intervening breach of her employment duties renders the temporal period between the EEOC complaint and her termination insufficient to infer a causal connection between the two events.").

c. Falsifying information, *e.g.*, *Morgan v. City of Jasper*, 959 F.2d 1542, 1548 (11th Cir. 1992) (employer's explanation that employee was suspended for falsifying information on her employment application concerning her reasons for leaving her previous employment, rather than because employee filed wage discrimination claim with EEOC, was not mere pretext; employee's alleged explanation during job interview of circumstances surrounding discharge from her previous job was untrue).

d. Poor relationships with other employees, *e.g.*, *Purrington v. Univ. of Utah*, 996 F.2d 1025, 1032 (10th Cir. 1993) (multiple sources of conflict with prior director in addition to protected accusation of sexual harassment); *Butler v. United States Dep't of Agric.*, 826 F.2d 409, 411 (5th Cir. 1987) (harassment of co-worker).

e. Violence directed toward a co-worker, *e.g.*, *Morgan v. Mass. Gen. Hosp.*, 901 F.2d 186, 194-95 (1st Cir. 1990) (assault on the co-worker); *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir. 1986) (assaulting another employee in parking lot after previously being warned that such action would result in termination).

f. Poor work performance, *e.g.*, *Chen v. Dow Chem. Co.*, 580 F.3d 394, 402 (6th Cir. 2009) (affirming summary judgment on discrimination and retaliation claims; "[T]he evidence overwhelmingly supports Dow's claim that it terminated Chen for performance-related reasons"); *Soto v. Core-Mark Int'l*, 521 F.3d 837, 841-42 (8th Cir. 2008) (even though plaintiff disputed the fact that he had been asleep on the job, employer's good faith belief that plaintiff had been asleep was sufficient to show that employer had a legitimate, nonretaliatory reason for firing him); *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598-600 (6th Cir. 2007) (employer provided a legitimate, nonretaliatory reason for disciplining plaintiff (placing her on paid administrative leave and putting her on a 90-day performance plan); other employees had filed complaints regarding plaintiff's performance); *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 689 (7th Cir. 2007) (employer had legitimate, nonretaliatory reason for plaintiff's suspension and subsequent termination; plaintiff's "co-workers were complaining about her, her supervisors believed she was violating the company's electronics use policy and she was failing to meet her work goals"); *Erenberg v. Methodist Hosp.*, 357 F.3d 787, 793 (8th Cir. 2004) (the employer "has presented evidence that [the plaintiff] was consistently disciplined for the same performance and attendance issues throughout her employment, both before her complaint and after"); *King v. Rumsfeld*, 328 F.3d 145, 151 (4th Cir. 2003) (teacher cursed and belittled his students); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir. 1985) ("well documented performance deficiencies"); *Pulley v. KPMG Consulting, Inc.*, 348 F. Supp. 2d 388, 397 (D. Md. 2004) (plaintiff failed to complete his projects in a timely manner); *Batchelor v. Merck & Co.*, 2008 WL 5191426, at *11 (N.D. Ind. Dec. 10, 2008) (a female employee's comments that she wanted to start a family entitled her to protection under the Pregnancy Discrimination Act;

here, however, even when the evidence was considered in the light most favorable to her, she "failed to show that she was performing her duties satisfactorily"; granting summary judgment as a result).

g. Lack of job qualifications, *e.g.*, *Nilsson v. City of Mesa*, 503 F.3d 947, 954-55 (9th Cir. 2007) (plaintiff failed a psychological evaluation, the passage of which was a condition of her employment); *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 878 (6th Cir. 1991) ("[I]t was error for the trial court not to make an explicit finding that [the plaintiff] was qualified [for the position sought] before concluding that she was the victim of discrimination."); *Harris v. Lyng*, 717 F. Supp. 870, 873 (D.D.C. 1989) (plaintiff lacked sufficient rank to qualify for promotion).

h. Existence of more qualified applicants, *e.g.*, *Cichon v. Exelon Generation Co., L.L.C.*, 401 F.3d 803, 813 (7th Cir. 2005) (other candidate for job was more qualified); *Carter v. George Washington Univ.*, 387 F.3d 872, 881 (D.C. Cir. 2004) (an employee applying for promotion failed to meet the minimum objective criteria for the director of development position because employee's résumé indicated no expertise in fund-raising and little experience with university corporate and foundation relations, while the candidate who received the position had at least nine years of extensive and intensive fund-raising experience); *Long v. Laramie County Cmty. College Dist.*, 840 F.2d 743, 749 (10th Cir. 1988) (more qualified and highly trained instructors were available); *Hall v. Forest River, Inc.*, 536 F.3d 615, 619-20 (7th Cir. 2008) (insufficient evidence connected a sexual harassment complaint and later failure to promote; plaintiff had more experience than the successful candidate, but experience is not necessarily determinative of qualifications).

i. Departmental reorganization, *e.g.*, *Burrows v. Chemed Corp.*, 743 F.2d 612, 617 (8th Cir. 1984) ("The redesignation of [the plaintiff's] position title was part of the overall reorganization of the quality control division, a reorganization motivated by valid management reasons."). *But see Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003) (rejecting employer's proffered legitimate, non-retaliatory reason that plaintiff was terminated because of restructure where evidence showed that the only persons laid off as result of the restructure were women who complained of gender discrimination).

j. Unprotected forms of activity, *e.g.*, *Jennings v. Tinley Park Cmty. Consol. Sch. Dist. No. 146*, 864 F.2d 1368, 1375 (7th Cir. 1988)

(employee improperly refused to inform employee's supervisor about salary survey before delivering survey to school board, even though the employee believed that present salary schedule was discriminatory).

k. Employer's good faith reliance upon a settlement agreement, *e.g. Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1265-67 (10th Cir. 2007) (plaintiff signed a settlement agreement with employer in which plaintiff waived any entitlement to re-employment or reinstatement; employer relied on that agreement in refusing to offer plaintiff a sales agent contract several years later; the employer's reliance on the settlement agreement (even if incorrect in such reliance) was a legitimate, non-retaliatory reason for employer's actions).

l. Employer's good faith interpretation of a company policy or collective bargaining agreement, *e.g. Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 714-15 (6th Cir. 2007) (the employer's reasonable reliance on the fact that plaintiff had missed three days of work and had therefore violated the company's three-day, no-call, no-show policy was sufficient to defeat plaintiff's pretext argument; that plaintiff had only missed two days of work and therefore had not in fact violated the company policy is of no consequence so long as employer's mistake was "reasonably based on particularized facts"); *McCoy v. Maytag Corp.*, 495 F.3d 515, 523-24 (7th Cir. 2007) (applying federal frameworks to plaintiff's retaliation claim under Illinois law; the employer's good faith (even if incorrect) interpretation of its collective bargaining agreement as requiring employees on medical leave of absence to provide it with status reports regarding their medical condition every 30 days was a legitimate, nonretaliatory reason for discharging plaintiff for his failure to provide such status updates).

m. Employee debt, *e.g,. EEOC v. C.R. Eng., Inc.*, 2011 U.S. App. LEXIS 8971, at *65-67 (10th Cir. 2011) (employer offered legitimate, non-discriminatory reason for reporting employee's debt to a collection agency when it demonstrated that employee "genuinely owed" the debt to employer; employee failed to show employer's decision was pretext for discrimination where employer told employee that it would pursue collection through all legal channels including collection agencies *before* employee filed complaint with EEOC).

2. Some courts require the plaintiff to respond with comparative evidence.

Caskey v. Colgate-Palmolive Co., 535 F.3d 585, 594 (7th Cir.) (plaintiff supported a co-worker's sexual harassment claim; plaintiff, the alleged harassee, and two other female employees who supported the claim were terminated; this alleged "pattern" is insufficient to create an inference of a causal connection; summary judgment granted because plaintiff has not "presented a similarly situated employee that was treated more favorably"), *cert. denied*, 129 S. Ct. 738 (2008).

3. Some courts require the employee to rebut each of the employer's proffered legitimate, nonretaliatory reasons for taking adverse action against the employee to survive a motion for summary judgment.

Crawford v. City of Fairburn, 482 F.3d 1305, 1308-09 (11th Cir.), (employer produced evidence that plaintiff was terminated for five legitimate, nondiscriminatory reasons; plaintiff's failure to rebut each of the five reasons resulted in the failure of plaintiff's retaliation claim), *cert. denied*, 128 S. Ct. 495 (2007).

Wallace v. Methodist Hosp. Sys., 271 F.3d 212, 220 (5th Cir. 2001) ("The plaintiff must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates.").

4. Other courts do not require the employee to rebut each and every one of the employer's proffered reasons for taking adverse action against the employee, at least under certain circumstances.

Tyler v. RE/MAX Mountain States, 232 F. 3d 808, 814 (10th Cir. 2000) ("[A]s a general rule, an employee must proffer evidence that shows each of the employer's justifications are pretextual . . . However, like other circuits, we are unwilling to apply that rule . . . rigidly . . . recognizing that when the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility.").

Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995) (there are two types of situations in which evidence rebutting only one (or some) of an employer's proffered reasons may be sufficient: "cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are . . . intertwined, or the pretextual character of one of them is . . . fishy and suspicious . . . .").

Smith v. Chrysler Corp., 155 F.3d 799, 809 (6th Cir. 1998) (adopting the Seventh Circuit's "intertwined" or "suspicious" standard for cases in which the employee may rebut only one or some of an employer's proffered reasons).

Fuentes v. Perskie, 32 F.3d 759, 764 n.7 (3d Cir. 1994) ("We do not hold that, to avoid summary judgment, the plaintiff must cast doubt on each proffered reason in a vacuum. If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder. That is because the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining the remaining rationales in particular is available.").

5. Courts will not find retaliation based on speculation.

Malone v. Lockheed Martin Corp., 610 F.3d 16, 23 (1st Cir. 2010) (granting JMOL on appeal following a $2 million plaintiff's verdict; plaintiff's claim was that he was demoted for reporting to superiors that two of his subordinates were suspected of accepting improper gifts of tools from a government employee; however, "Malone offered no evidence of causation other than pure speculation."; Malone's attendance problems had been at issue for at least two years before his report of the gifts).

6. Pretext may be found when the employer states inconsistent reasons for its decision.

Eades v. Brookdale Senior Living Inc., ___ Fed. Appx. ___, 2010 U.S. App. LEXIS 19755, at *13 (6th Cir. 2010) (reversing summary judgment where the employer's stated reasons for discharge changed from its EEOC response, to its position in the trial court, and still again on appeal; "'An employer's changing rationale for making an adverse employment decision can be evidence of pretext.'"; "'Shifting justifications over time call the credibility of those justifications into question.'") (citations omitted).

Porter v. Shah, 606 F.3d 809, 817 (D.C. Cir. 2010) (finding a triable question of retaliation; the successful female candidate had 34 years' experience in human resources management and more supervisory experience than plaintiff; however, her high school education fell short of the job's stated minimum requirement of a bachelor's degree, and plaintiff had two master's degrees in relevant fields; a jury rationally could find that the employer's disregard of the minimum educational requirement signals pretext).

7. Pretext may be found where objective evidence, such as prior favorable performance evaluations, contradicts the employer's stated reason for the adverse action.

Goelzer v. Sheboygan County, 604 F.3d 987, 996 (7th Cir. 2010) (reversing summary judgment where plaintiff was fired after she repeatedly took FMLA leave; the defendant county contended that an official wanted to replace plaintiff with an employee who had a more sophisticated skill set, but the employee raised factual disputes about the genuineness of the assertion; a jury could question the decisionmaker's alleged concerns about plaintiff's skill and performance in light of his giving the employee a number of positive evaluations).

DeFreitas v. Horizon Inv. Mgmt. Corp., 577 F.3d 1151, 1160-61 (10th Cir. 2009) (a female vice president for a property management firm, fired while on medical leave for a hysterectomy, raised a jury issue under the FMLA; she was fired with no prior warning a day after she informed the company president she would need a full six weeks of leave; although the company argued that she was fired for job performance issues, the suspicious timing, plaintiff's evidence of uniformly positive performance appraisals, and the company's failure to follow its own progressive discipline policy, all would support a reasonable jury in finding that her termination was related to her FMLA-protected leave).

8. Evidentiary issues.

Smith v. Hy-Vee Inc., ___ F.3d ___, 2010 U.S. App. LEXIS 21002, at *13 (8th Cir. 2010) (2-1 decision affirming a defense verdict in a case alleging retaliation for a complaint about sexual harassment; the lower court did not err in excluding excluded evidence of the specific instances of alleged harassment about which plaintiff had complained; the trial court had determined that "the relevance of the details of the harassment that occurred was only marginal while its potential for unfair prejudice to [defendant] was large").

V. THE ANALYSIS OF MIXED-MOTIVE CASES IS UNCLEAR

A. Background.

The Civil Rights Act of 1991 modified the mixed-motive test enunciated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under section 107 of the 1991 Act, 42 U.S.C. § 2000e-5(g)(2)(B), even when an employer carries its burden of proving that — despite a discriminatory motivation — it would have made the same adverse decision for legitimate, nondiscriminatory reasons, the plaintiff still

is entitled (but is limited) to declaratory relief, injunctive relief (not including hiring, reinstatement or promotion), attorneys' fees, and costs.

B. Statutory Language.

Whether section 107 of the Civil Rights Act of 1991 applies to retaliation claims remains unresolved. By its express terms, the provision applies only to proven violations of section 703(m) of Title VII, which states that:

> [A]n unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin* was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). Retaliation claims are not mentioned.

C. Conflicting Court Rulings.

1. The First, Third, and Seventh Circuits have interpreted Section 107 of the Civil Rights Act of 1991 as inapplicable to retaliation claims.

McNutt v. Bd. of Trustees, 141 F.3d 706, 709 (7th Cir. 1998) ("but for" standard applies in retaliation cases, and the mixed-motive amendment contained in Civil Rights Act of 1991 is not applicable; jury here had found that same job assignments would have been made to plaintiff for legitimate reasons, without any retaliatory motive; although plaintiff in trial court had obtained injunction and attorneys' fees, both forms of relief were vacated because court found that they were not properly awarded in retaliation case where "but for" test was not met).

Tanca v. Nordberg, 98 F.3d 680, 684 (1st Cir. 1996) (provision of Civil Rights Act of 1991 authorizing finding of liability and limited relief in "mixed-motive" cases does not apply to claims of retaliation under Title VII; statutory language refers only to race, color, religion, sex and national origin; no intent to apply it to retaliation cases can be inferred).

Woodson v. Scott Paper Co., 109 F.3d 913, 932-33 (3d Cir. 1996) (same; granting new trial because trial court had abused its discretion in failing to instruct jury that improper motive must have had determinative effect on discharge decision; it was error to instruct jury that employer could be held liable for retaliation if it found that retaliation was only a motivating factor).

Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997) ("Under *Woodson*, the 'motivating factor' standard of § 107 of the 1991 Act does not apply to retaliation claims.").

Metoyer v. Screen Actors Guild Inc., 504 F.3d 919, 934 (9th Cir. 2007) ("In *Stegall v. Citadel Broadcasting Company*, we applied the mixed-motive defense to liability in a Title VII retaliation case. 350 F.3d 1061, 1062, 1068 (9th Cir. 2004).").

But see Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 893-94 (7th Cir. 1996) (earlier Seventh Circuit case applying, without analysis, mixed-motive theory to plaintiff's retaliation claim).

2. Other circuits, sometimes without discussion or analysis, have permitted plaintiffs to bring retaliation claims under the mixed-motive doctrine.

Smith v. Xerox Corp., 2010 WL 1141674, at *6 (5th Cir. 2010) (2-1 decision affirming in relevant part a plaintiff's retaliation verdict; the evidence properly was analyzed under the mixed-motive theory; the mixed-motive analysis set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), continues to govern in Title VII retaliation cases; rejecting the employer's argument that *Gross v. FBL Fin. Servs. Inc.*, 129 S. Ct. 2343 (2009), an ADEA case, changed Title VII law).

Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 553 n.8 (4th Cir. 1999) (applying mixed-motive analysis in Title VII retaliation case; "Because we are unable to fathom any plausible reason for holding otherwise, we expressly join our sister circuits in holding that the mixed-motive proof scheme is available to a Title VII plaintiff in order to prove a retaliation claim under § 704 if the plaintiff can establish the necessary evidentiary threshold.").

Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 553 (10th Cir. 1999) (applying mixed-motive analysis to Title VII race discrimination and retaliation case).

Gierlinger v. Gleason, 160 F.3d 858, 868 (2d Cir. 1998) (using mixed-motive analysis to evaluate female state police trooper's sex harassment and retaliation claims; "[T]he plaintiff's burden is to show that the impermissible factor was a 'substantial' or 'motivating factor' in her adverse treatment. She is not required to show that the impermissible factor dwarfed all other factors.") (citations omitted).

Thomas v. NFL Players Ass'n, 131 F.3d 198, 206 (D.C. Cir. 1997) (without discussion, applying mixed-motive doctrine to retaliation case; employer argued that because it had terminated other employees at same time who had not engaged in protected conduct, it would have done same

with employee in question; court rejected this reasoning, refusing to allow employer to "mask" its retaliatory motives by firing multiple employees).

Stratton v. Dep't for the Aging, 132 F.3d 869, 878 (2d Cir. 1997) (plaintiff claiming retaliation may satisfy intent prong of her case "by using a 'mixed motives' analysis or by proving 'pretext' under the three-step analysis first enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)") (citations and footnote omitted) (dictum).

3. The practical effect is significant, because juries almost always will presume that at least some small measure of retaliatory intent exists.

D. Summary Judgment In Mixed-Motive Cases.

Van Horn v. Best Buy Stores LP, 526 F.3d 1144, 1148 (8th Cir. 2008) (affirming summary judgment; a former manager could not show that her reports of sexual harassment were a "determinative factor" rather than a "motivating factor" in her termination; "the *Price Waterhouse* standard does not apply to retaliation claims"; "To make out a retaliation claim, the plaintiff must show that the protected conduct was a 'determinative — not merely motivating — factor' in the employer's adverse employment decision.") (citation omitted).

Antonetti v. Abbott Labs., 563 F.3d 587, 593 (7th Cir. 2009) (affirming summary judgment in case alleging discharge for sex discrimination complaints; "In this case, even if Abbott was partially motivated by Nadiger's complaints in its termination decision, it would have fired Nadiger without such motivation."; "Abbott terminated Antonetti, Fuhrer, and Gloria for time care fraud, and Nadiger makes no attempt to, nor can she, distinguish herself from those employees . . . ."; "Therefore, Abbott had a legitimate and independent justification for terminating Nadiger, would have terminated her even without any retaliatory motive, and is entitled to summary judgment.").

E. Mixed-Motive Analysis Under Other Statutes.

Serwatka v. Rockwell Automation Inc., 591 F.3d 957, 962 (7th Cir. 2010) (a plaintiff alleging she was fired because of a perceived disability in violation of the Americans with Disabilities Act may not recover based on a "mixed motive" theory; since the ADA contains no express language establishing employer liability in mixed-motive cases and does not incorporate the 1991 Civil Rights Act's provision on employers' liability for mixed-motive decisions under Title VII, the Seventh Circuit said it must conclude that Congress did not intend such a theory of recovery under the ADA).

Wadhwa v. Dep't of Veterans Affairs, 353 Fed. Appx. 435, 2009 WL 3856660, at *2-3 (Fed. Cir. 2009) (substantial evidence supported the Merit System Protection Board's decision that, although plaintiff had shown that whistleblowing was a contributing factor to the agency's decision to reassign him, the evidence also showed that the VA would have reassigned plaintiff even if he had not engaged in any protected conduct).

Metoyer v. Screen Actors Guild Inc., 504 F.3d 919, 934 (9th Cir. 2007) ("a mixed-motive defense to liability is available for a retaliation claim brought under § 1981").

Jones v. Potter, 488 F.3d 397, 409 (6th Cir. 2007) (the mixed-motive doctrine is not applicable under the Rehabilitation Act: "In several other employment-discrimination contexts . . . a plaintiff can prevail by showing mixed motive . . . . But that is not enough under the Rehabilitation Act, which, unlike Title VII, requires [plaintiff] to prove that he was fired 'solely by reason of . . . his disability.'").

Hunter v. Valley View Local Schs., 579 F.3d 688, 694 (6th Cir. 2009) (plaintiff may litigate a mixed-motive case under the Family and Medical Leave Act; the school superintendent testified that she placed Hunter on involuntary leave both because of her permanent medical restrictions and her "excessive absenteeism," including Hunter's FMLA leaves; "[t]his constitutes direct evidence of impermissible motive"; it is up to the district court "to decide whether, despite the direct evidence of retaliatory motive, Valley View would have taken the same action against Hunter").

Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 333 (5th Cir. 2005) (a mixed-motive analysis can be applied to FMLA retaliation claims, "in cases in which the employee concedes that discrimination was not the sole reason for her discharge, but argues that discrimination was a motivating factor in her termination").

Lewis v. YMCA, 53 F. Supp. 2d 1253, 1260 (N.D. Ala. 1999) (mixed-motive provisions of Civil Rights Act of 1991 do not apply to discrimination or

retaliation claims under ADEA; such claims are governed by Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)), *aff'd*, 208 F.3d 1303 (11th Cir. 2000).

Thomas v. Denny's, Inc., 111 F.3d 1506, 1511-12 (10th Cir. 1997) (employee in § 1981 race discrimination/retaliation case was entitled to mixed-motive jury instruction).

Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1316 (E.D. Pa. 1994) (plaintiff, an attorney with HIV, brought retaliation claim under ADA; employer countered that plaintiff was terminated for legitimate reasons; court without discussion applied § 107 of Civil Rights Act of 1991, and allowed plaintiff to proceed to jury under mixed-motive theory).

VI. CLASS ACTION ISSUES

A. Most Cases Hold That Retaliation Claims Are Ill-Suited For Class Treatment.

Hohider v. United Parcel Service, Inc., 243 F.R.D. 147, 222 (W.D. Pa. 2007) ("With respect to the retaliation claims alleged by plaintiffs, the court finds that the commonality requirement cannot be met. . . . Myriad individual issues prevent certification of the pattern-or-position retaliation claim alluded to by plaintiffs in this case. With respect to these claims, individual issues, not common issues, control . . . ."), *rev'd on other grounds*, 574 F.3d 169 (3d Cir. 2009).

Butler v. Illinois Bell Telephone Co., 2008 WL 474367, at *6 (N.D. Ill. 2008) ("Ordinarily retaliation claims are not suitable for class certification.").

Selwood v. Va. Mennonite Ret. Cmty., Inc., 2004 WL 1946379, at *3 (W.D. Va. 2004) ("Retaliation claims 'are generally personal in nature. They do not lend themselves readily to class treatment since they usually involve facts and circumstances unique to the claim of the person against whom retaliation is directed.'") (citation omitted).

Elkins v. American Showa, Inc., 219 F.R.D. 414, 425 (S.D. Ohio 2002) ("Plaintiffs' retaliation claims are even less conducive [than discrimination claims] to class-wide adjudication based on a lack of commonality among such claims. . . . Defendant is entitled to establish as to each plaintiff a legitimate reason for any adverse action taken against that plaintiff, and each plaintiff must then have the opportunity to establish that the reason offered is pretextual.").

Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 676 (N.D. Ga. 2001) ("[T]he court finds that Plaintiffs have failed to demonstrate commonality or typicality with respect to their retaliation claims. As with their hostile

environment claims, Plaintiffs' claims of retaliation are fact-intensive and require a showing of intentional discrimination.").

Sheehan v. Purolator, Inc., 103 F.R.D. 641, 654 (E.D.N.Y. 1984) ("[C]laims of retaliatory treatment, which require proof of highly individualized facts, generally do not present suitable issues for class actions.").

Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 486, 511 (E.D. Ark. 1980) ("Plaintiffs' . . . [allegation of] retaliatory selection . . . is clearly not a class issue. Indeed, preoccupation with peculiar retaliatory wrongs allegedly done to one may well make such persons an inadequate representative of the class.") (citations omitted).

B. A Few Cases Are *Contra*.

Holsey v. Armour & Co., 743 F.2d 199, 216-17 (4th Cir. 1984) ("We cannot accept Armour's contention that harassment and retaliation claims are not susceptible of class treatment because they are too individualized. The plaintiffs established a general practice of retaliation against employees who opposed discriminatory practices or exercised rights protected under Title VII, in violation of § 704(a).").

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