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Retaliation: The Final Frontier

RETALIATION: THE FINAL FRONTIER[1]

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I. INTRODUCTION

College and universities regularly train faculty and staff to know their rights provided by federal, state, and local laws as well as institutional policies that prohibit discrimination based on a protected classification. In the current cultural climate, our communities have (perhaps) an unprecedented awareness of what is unlawful with respect to discrimination based on sex, race, color, religion, national origin, ancestry, gender expression/identity, genetic information, disability, marital status, military status, veteran status, pregnancy, or any other protected characteristics.

This cultural shift towards a more inclusive and equitable community is not complete. When deciding whether to file an internal discrimination complaint, employees often raise concerns that doing so will result in a negative review, a sideways glance when entering the room, or an inability to request a letter of recommendation when looking for a new position.

In general, and as discussed in more detail below, courts have not found these types of actions to be legally actionable. Employees, however, perceive this type of behavior to be retaliatory and often request anonymity, delay filing a report, or do not want management to move forward with a formal investigation.

Properly identifying retaliation and providing practical guidelines to both employees and management is critical as we continue to address concerns of perceived retaliation and prevent legally recognized retaliation. Directly addressing this challenge, particularly in situations where there is a continuing employment relationship, can help to avoid polarized reactions where managers either find themselves accused of retaliation every time an employee does not like a decision or attempt to avoid additional conflict or discomfort by taking a "Do Not Touch" approach after a complaint has been filed.

An inability to address these concerns internally can lead to frustration and disillusionment. Often this frustration prompts an employee to file an external complaint with the EEOC or state administrative agency. This is reflected in the EEOC statistics where retaliation complaints continue to surpass all other categories of EEOC charges filed.[2] In addition, more state legislatures are attempting to address this concern by expanding protections and legal recourse for employees who report a violation or suspected violation law or public policy. In this way, retaliation and

[2] The EEOC Enforcement Guidance on Retaliation and Related Issues states, "the percentage of EEOC private sector and state and local government charges alleging retaliation has essentially doubled since 1998. Retaliation is now the most frequently alleged basis of discrimination in all sectors." The EEOC Enforcement Guidance on Retaliation and Related Issues is available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm. EEOC charge statistics are available at https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

whistleblower complaints also provide a significant challenge from a risk management perspective.

This outline is intended to help provide additional clarity and practical guidance to identify and prevent illegal retaliation while continuing to promote cultural change within college and university communities by providing:

- an overview of federal law and EEOC guidance that define retaliation,
- a summary of recent retaliation cases impacting higher education,
- a survey of state whistleblower laws, and
- a checklist for conducting an inventory of non-retaliation policy provisions and processes on your campus that are designed to prevent and address retaliation.

II. Illegal Activities

Title VII prohibits retaliation against any individual who opposes discrimination within an institution, most often by filing an internal complaint or grievance, or files an external charge with the EEOC or participates in the EEOC's administrative process. Section 704(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has ***opposed*** any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or ***participated*** in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). Courts have established three elements of a retaliation claim and require a plaintiff to show that she:

- engaged in protected activity;
- suffered a materially adverse employment action; and
- that there is a causal link between the protected activity and the materially adverse action.

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

A. Protected Activity

The protected activity element requires that the employee show they engaged in some form of activity that is protected by statute or otherwise protected by public policy. The EEOC's definition of protected activity includes "participating" in an official EEO-type process or "opposing" discrimination/unlawful conduct. These two protected activities are referred to as the participation clause and the opposition clause.

Participation in an EEO process refers specifically to raising a claim, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the EEO laws. Participation requires some contact with a legal or administrative process, either as a party or

witness. Whereas, the opposition clause applies if an individual explicitly or implicitly communicates his or her belief that the matter complained of is, or could become, harassment or discrimination. Interpreted broadly, opposition could consist of virtually any communication or expressive conduct by an employee that asserts a good faith belief or opposition that the employer is violating a particular law or discriminating. *Crawford v. Metro Gov;t of Nashville & Davidson Cty.,* 555 U.S. 271, 276 (2009*).* The manner of the opposition must be reasonable, and the opposition must be based on a reasonable, good faith belief that the conduct opposed is, or could become, unlawful. Whether an employee's opposition is reasonable is determined by a balancing test that weighs the purpose of the statute and the need to protect individuals asserting their rights against the employer's legitimate demands for loyalty, cooperation in pursuit of a productive work environment. *Rollins v. State of Fla. Dep't of Law Enf't*, 868 F.2d 397, 401 (11th Cir. 1989).

Depending on the facts, the same conduct may qualify for protection as both participation and opposition. For this reason, many courts do not distinguish between the clauses when determining whether an employee has alleged protected activity. The distinction is relevant, however, when there is a question regarding the reasonableness of the employee's belief that the underlying conduct was unlawful. Protection under the participation clause is quite broad for employees who commence or otherwise participate in an EEOC investigation, administrative proceeding, or lawsuit. Whereas, protection under the opposition clause, while broader in the range of covered activity, it is more limited in application since it requires a reasonable, good faith belief that the law has been violated.

Examples of protected activity:

- Filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
- Communicating with a supervisor or manager about employment discrimination, including harassment
- Answering questions during an employer investigation of alleged harassment
- Refusing to follow an order that would result in discrimination
- Resisting sexual advances, or intervening to protect others
- Requesting accommodation of a disability or for a religious practice
- Asking managers or co-workers about salary information to uncover potentially discriminatory wages

See EEOC Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016), pg. 5 &8, available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

B. Adverse Action

The adverse action element of a retaliation claim has been defined very broadly by the EEOC to include any "adverse treatment that is reasonably likely to deter protected activity." However, the

federal district courts have not consistently embraced this definition and have created various burdens and standards.

The most common standards were articulated in *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006). In *Burlington,* the Supreme Court found that the adverse element of a retaliation claim can be based on employer acts that are sufficiently material to deter protected activity. The court held that an employee demonstrating an adverse action has the burden to "show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 67. The *Burlington* court also characterized the "ultimate employment decision" standard, limiting retaliatory conduct to acts like "hiring, granting leave, discharging, promoting, and compensating." *Id.* at 60. So, conduct that meets the adverse action criteria for a prima facie case of discrimination will almost always be sufficient to meet the retaliation adverse action standard.

Examples of adverse action:

- Reprimand the employee or give a performance evaluation that is lower than it should be
- Transfer the employee to a less desirable position
- Engage in verbal or physical abuse
- Threaten to make, or actually make, reports to authorities (such as reporting immigration status or contacting police)
- Increased scrutiny
- Spread false rumors, treat a family member negatively (for example, cancel a contract with the person's spouse)
- Make the person's work more difficult (for example, punishing an employee for an EEO complaint by purposefully changing his work schedule to conflict with family responsibilities)
- Elimination of voluntary overtime
- Revealing identity of whistleblower
- Suspension with pay
- Unfavorable employment reference
- Failure to investigate harassment
- Failure to promote

Examples that do <u>not</u> equate to adverse action:

- Two-day suspension
- Reduced workload
- Failure to nominate for paid time off awards
- Negative employment reference

- Lateral transfer
- Reprimand

See EOC Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016), pg. 13-14, available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

C. Causation

Causation is the final element in a retaliation claim and must be found in order for the claim to rise to the level of unlawful retaliation. Specifically, there must be a causal connection between the material adverse action and the individual's protected activity. Depending on the statute at issue, courts and the EEOC apply different tests to determine causation—typically the "but for test" or the "substantial motivating factor" test. Because there are differences in the application of this element in state and federal jurisdictions, it is key to identify specific types of claims at issue and the jurisdiction to determine how causation will be determined in a particular case.
In many instances, courts and the EEOC apply a "but for" causation test—particularly when statutory language prohibits retaliation because of protected activities. This test requires the employee to prove it is more likely than not that but for a retaliatory motive, the employer would not have taken the adverse actions. *University of Texas Southwest Medical Center v. Nasser,* 570 U.S. 338 (2013).

Certain state and local statues require courts to apply a motivating factor causation test (instead of the "but for" test). *See* Kevin J. Koai, Judicial Federalism and Causation in State Employment Discrimination Statutes, 119 Colum. L. Rev. 3 (2019). This standard only requires an employee to prove that a retaliation for engaged in or opposing protected activity was a substantial motivating factor in the adverse employment action. The substantial motivating factor test is considered to be a lower threshold.

Examples of evidence that can be used to demonstrate causation:

- Written or oral statement by the employer showing bias or retaliation was the reason for the action
- Temporal connection between the protected activity and the adverse action
- Different treatment of the employee who engaged in protected activity from similarly situated employees who did not engage in protected activity
- Inconsistent or shifting explanations of the reason for the adverse action
- Other evidence the employer's explanation is not believable and is a pretext for retaliation

See EOC Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016), pg. 17, available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

D. Relevant Case Law

The retaliation case law in connection with universities and faculties is vast and varies by jurisdiction. A list of cases, compiled from 2015-2020, is displayed in a chart found in Appendix C. The chart gives a detailed description of the case, the type of claim, and the jurisdiction it was heard in. The chart covers the important cases within each circuit relating to retaliation.

III. STATE LAW WHISTLEBLOWER PROTECTIONS

Beginning in the 1980s, "the focus of whistleblower protection shifted from the federal arena to the states." Elletta Sangrey Callahan and Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 Am. Bus. L.J. 99, 105 (2000). As discussed herein, state whistleblower protections are generally established through a combination of anti-retaliation statutes, false claims act statutes, and the common law.

A. Types of Protection for Whistleblowers Under State Law

i. Anti-Retaliation Statutes

Each of the 50 states, and the District of Columbia, has enacted some level of statutory whistleblower protection in the form of anti-retaliation laws. *See* Sangrey and Dworkin, 38 Am. Bus. L.J. at 107. Many state anti-retaliation statutes require that an employee make a report or disclosure in good faith. *See* Minn. Stat. § 181.932 (defining "good faith" to exclude statements or disclosures that are knowingly false or made with reckless disregard of the truth); Miss. Code § 25-9-171(j) (defining "whistleblower" to mean an employee who has, in good faith, provided information to a state investigative body or who is believed to have done so). However, the provisions of these anti-retaliation statutes vary greatly by state in a number of different ways, as follows:

- By type of employer covered: Some states' statutory schemes do not establish a blanket protection covering both public and private employees, and instead protect only public employees who report wrongdoing. *See, e.g.*, Wis. Stat. § 230.90; Wyo. Stat. Ann. § 9-11-103. Other states broadly protect employees of both public and private employers. *See, e.g.*, Minn. Stat. § 181.932.

- By the class of actionable adverse action: State anti-retaliation statutes generally prohibit employers from certain decisions using an employee's whistleblower activity as a factor in the decision making. State statutes generally identify the types of decisions that employers are prohibited from making using whistleblower activity. *See, e.g.*, Wash. Rev. Code. 42.40.050 (including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations in list of actionable items).

- By the class of employee who makes a report: Some statutes establish whistleblower protection for specific employees who complain about highly specific types of employer conduct. For example, Wisconsin prohibits retaliation against healthcare employees who report illegal conduct or medical malpractice that poses a risk to health or safety. Wis. Stat. § 146.997(3); *see also* N.Y. Lab. Law § 741 (protecting employees who disclose or threaten to disclose improper quality of patient care from discharge or discrimination under certain circumstances).

- By type of violation reported: Some states require that a report implicate a substantial and specific danger to the public health or safety. *See, e.g.*, N.Y. Lab. Law § 740. Other statutes broadly apply to alleged violations of common law, any state or federal statute, rule, or regulation. *See* Minn. Stat. § 181.932, subd. 1(1).

- By the identity of who must receive the employee's complaint: Some states require that a whistleblower first make an internal report of suspected violations of law before non-retaliation provisions protect whistleblowing. *See, e.g.*, Ohio Stat. § 4113.52(A)(1)(a) (requiring an employee to make an oral report of conduct believed to be criminal and likely to cause an imminent harm to persons or a hazard to a supervisor before making a written report to certain outside entities at least 24 hours later); Colo. Rev. Stat. § 50.5-103 (requiring an employee make a "good-faith effort to provide his or her supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure"). Other states apply a case-by-case consideration of the circumstances at issue to determine whether a whistleblower is required to make a report to someone other than the alleged wrongdoer. *See, e.g.*, *Haynes v. Formac Stables, Inc.*, 463 S.W.3d 34, 41 (Tenn. 2015) (holding that a whistleblower must expose "wrongful conduct of the employer in furtherance of the public interest, which may require reporting to an outside agency" in certain circumstances); Ak. Stat. §§ 39.90.100 (requiring that an employee "report[] to a public body" or be "about to report to a public body" to obtain protection of anti-retaliation statute); Fla. Stat. § 112.3187 (6) (stating information "must be disclosed to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act" in order to be protected). Other states protect employees who report internally or to an outside government agency. *See, e.g.*, Minn. Stat. § 181.932, subd. 1(1) ("the employee, […] in good faith, reports a violation, suspected violation, or planned violation of any federal or state or common law or rule […] to an employer or to any governmental body or law enforcement official").

- By the format of the report: Some states require an employee to follow a specific format and include certain contents in a report. *See* Ariz. Rev. Stat. § 38-352(B) (requiring a disclosure alleging violation of law, mismanagement, gross waste of moneys, or abuse of authority be made in writing and contain the date of disclosure, name of the employee

making the disclosure, the nature of the alleged conduct, and the date or date range of the alleged conduct, if possible).

- By the enforcement mechanism: Some states require employees to exhaust administrative remedies under state law before commencing a civil lawsuit. *See, e.g.*, Wyo. Stat. Ann. § 9-11-103. Other states have established an administrative enforcement option for aggrieved employees alleging whistleblower retaliation claims. *See* N.D. Cent. Code Ann. § 34-01-20(4) (authorizing the North Dakota Department of Labor and Human Rights to "receive complaints of violations" of the state whistleblower statute to attempt voluntary compliance "through informal advice, negotiation, or conciliation"). Other states authorize the commencement of a civil lawsuit without any prerequisite that administrative remedies be exhausted. *See, e.g.*, N.J. Stat. Ann. § 34:19-5; Mon. Code Ann. 39-2-911(2) (requiring an employee to exhaust any appeal rights under an employer's written internal procedures before commencing a lawsuit).

- By the requirement that employers give notice of whistleblower protections: A limited number of states require employers to provide employees with notice of state law provisions that protect whistleblowers. *See, e.g.*, Cal. Lab. Code § 1102.8(a) (requiring employers to "prominently display" a posting identifying employees' "rights and responsibilities" under California whistleblower statute); Mich. Comp. Laws Ann. § 15.368 (requiring an employer to "post notices and use other appropriate means" to inform employees of their rights under the Michigan Whistleblowers' Protection Act); Del. Code § 1707 (same under Delaware law).[3]

- By the identity of party to be sued: A limited number of jurisdictions, including the District of Columbia, expressly authorize retaliation claims against employees, supervisors, or officials in their personal capacity. *See, e.g.*, D.C. Code § 1-615.54.

- By relief available under the statute: Reinstatement, restoration of seniority rights, and back pay are common features of statutes authorizing civil actions. *See, e.g.*, D.C. Code § 1-615.54. The vast majority of statutes authorizing civil lawsuits for whistleblower retaliation include fee-shifting provisions requiring defendants to pay a plaintiff's reasonable attorney fees and costs if the plaintiff prevails. *See, e.g.*, La. Rev. Stat. § 23:968(B)(2); Tex. Gov. Code § 554.003(a)(4); *but see* Ariz. Rev. Stat. § 38-532(K) (limiting awards attorney's fees for seeking injunctive relief to $10,000). Officers or

[3] State government websites generally post example posters for posting. *See* Maine Dep't of Labor Bureau of Labor Standards, Whistleblower's Protection Act poster, available at: (https://www.maine.gov/labor/docs/2019/laborlaws/whistleblowerprotection112019.pdf); California Division of Labor Standards Enforcement Whistleblowers Are Protected poster, available at https://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf; Michigan Occupational Safety and Health Administration (MIOSHA) Michigan Whistleblowers' Protection Act poster, available at: https://www.michigan.gov/documents/cis/wsh_whistleblowers_203828_7.pdf.

employees of certain state government agencies may be suspended without pay, separated from their positions, or disqualified from further service find a violation of whistleblower protections. *See, e.g.*, Kan. Stat. § 75-2973(f); Okla. § 74-840-2.5(F). Some statutes include criminal penalties for individuals or corporations found to violate prohibitions under anti-retaliation statutes. *See, e.g.*, Cal. Lab. Code § 1103 (making violation of whistleblower retaliation provisions a misdemeanor punishable by imprisonment not to exceed one year and/or a fine not to exceed $1,000 for an individual or $5,000 for a corporation).

The vast majority of states also have statutes prohibiting retaliation against individuals who complain about suspected violations of specific statutes, such as complaints about protected-class discrimination or harassment in violation of state anti-discrimination and human rights statutes, violations of state wage and hour statutes, and violations of laws regulating state occupational safety and health standards. *See, e.g.*, Mo. Rev. Stat. § 213.070(2) (prohibiting retaliation against persons for opposing practices prohibited by the Missouri Human Rights Act); Kan. Stat. Ann. § 44-1009(4) (prohibiting retaliation against employees opposing practices prohibited by the Kansas Act Against Discrimination); Minn. Stat. § 182.669 (prohibiting discrimination against an employee who has exercised any right under the Minnesota Occupational Safety and Health Act); Ariz. Rev. Stat. 23-364(B) (prohibiting retaliation against anyone asserting rights, assisting another for asserting rights, or informing another about their rights under the Arizona Minimum Wage Act).

ii. State-Level False Claims Act Statutes

Other statutes are aimed at encouraging whistleblowing by providing financial incentives to individuals who report fraudulent use of state funds. For example, a number of states have adopted false claims laws under which whistleblowers can file qui tam lawsuits for fraud involving a variety of state-funded programs. *See, e.g.*, Minn. Stat. § 15C.01, *et seq.*; Nev. Rev. Stat. ch. 357; R.I. Gen Laws § 9-1.1-1, *et seq.*[4] Other states limit qui tam lawsuits to fraud involving Medicaid or state healthcare funds. *See, e.g.*, Colo. Rev. Stat. Ann. § 25.5-4-303.5, *et seq.* While these statutes incentivize individuals to report fraudulent use of state funds, they also universally prohibit retaliation. *See, e.g.*, Ak. Stat. § 09.58.070; Colo. Rev. Stat. Ann. § 25.5-4-306(7); Conn. Gen. Stat. § 4-284; 6 Del. Code § 1208; Minn. Stat. § 15C.145. The retaliation prohibitions under false claims laws protect employees, contractors, or agents who further a state-law qui tam lawsuit or who take steps to stop violations of a state false claims act statute. Retaliation is broadly defined to include discharge, demotion, suspension, threats, harassment, or discrimination in the terms and conditions of employment.

[4] Black's Law Dictionary defines a qui tam action as "an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution."

iii. Common Law Public Policy Exceptions to the At-Will-Employment Doctrine

Absent a limitation under statute or contract, employment relationships are generally terminable at will. Beginning in 1959, courts began to recognize a public policy exception to the at-will employment doctrine for employees when the termination would violate a clear mandate of public policy. *See Petermann v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 344 P.2d 184,189-90 (Cal. Ct. App. 1959) (holding that a terminated employee alleged a cognizable claim of wrongful discharge where he alleged he was terminated based on his refusal to commit perjury in testifying falsely before a legislative committee); *see also Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 166 (S.D. 2001) ("It is repugnant to public policy to expect an employee to commit [criminal or unlawful] acts in order to save his job."); *Walt's Drive-A-Way Svc., Inc. v. Powell*, 638 N.E.2d 857, 858 (Ind. Ct. App. 1994) (establishing a claim under state law for an employee subject to retaliation for refusal to commit an act made illegal by federal law).

Other states have adopted a public policy exception allowing employees to maintain a wrongful discharge claim when they allege they were discharged for reporting a violation of state or federal law. *See Northport Health Svcs., Inc. v. Owens*, 158 S.W.3d 164, 174 (Ark. 2004) (citations omitted); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (holding that a quality control director and operations manager for producer of frozen foods alleged cause of action in tort for wrongful discharge where he was terminated after objecting to employer's failure to comply with Food, Drug, and Cosmetics Act); *but see Dray v. New Market Poultry Prods., Inc.*, 518 S.E.2d 312 (Va. 1999) (declining to recognize common-law "whistleblower retaliatory discharge claim" as exception to employment-at-will doctrine).

B. Trends in Whistleblower Statutes

The general trend in state legislation is to broaden protection for whistleblowers by reducing the burden an employee must meet to establish a claim, expanding the scope of what disclosures are considered protected activity, lengthening statutes of limitations for whistleblower retaliation claims, and increasing employers' responsibility to notify employees of their rights under whistleblower statutes.

- **New York**: In 2019, New York lawmakers introduced identical bills expanding protections for whistleblowers in the Assembly and Senate. *See* Assembly Bill A7384, 2019-2020 Legis. Sess. (2019); S.B. S3683, 2019-2020 Sess. (2019). Versions of the legislation have been introduced each legislative session since 2013. The proposed amendments are designed to "significantly expand the protections afforded to employees under New York law and increase the potential liability to employers." Lloyd B. Chinn and Pinchos (Pinny Goldberg), *Expansive Amendments to N.Y. Whistleblower Protection Law Introduced*, The Nat'l Law

Review (May 17, 2019), available at https://www.natlawreview.com/article/expansive-amendments-to-new-york-whistleblower-protection-law-introduced. In lieu of the requirement that an employee show he or she complained of an actual violation of law, the proposed legislation requires that employees show that they "in good faith reasonably believe[] that an illegal business activity has occurred or will occur, based on information that the employee in good faith reasonably believes to be true." *Id.* (emendation in original); *see also Coyle v. Coll. of Westchester, Inc.*, 87 N.Y.S.3d 242, 244 (N.Y. App. Div. 2018) (holding that a plaintiff in a whistleblower retaliation case must prove "that an actual violation of law, rule, or regulation occurred) (interpreting N.Y. Labor Law § 740). The legislation also replaces a "but-for" causation standard, requiring employees show that his or her actions were "a motivating factor for the retaliatory action." *See* Assembly Bill 7384, sec. 3. The proposed legislation also expands the remedies available to whistleblowers to include front pay, economic, and extends the statute of limitations from one year to two years. The legislation also includes a requirement that employers post notice informing employees of their rights under the whistleblower law.

- **Ohio**: In 2019, Ohio lawmakers introduced amendments to Ohio's Whistleblower Act, which establishes protections for classified and unclassified employees in the state civil service. *See* Revise whistleblower protection laws, H.B. 238, 133d Gen. Assembly (2019).[5] The proposed amendment expands the scope of suspected unlawful action that may be considered protected activity under Ohio law. The proposed broadened categories of protected activity include reports of: acts of any person to aid, abet, incite, compel, or coerce the doing of any act that violates state or federal statute, rule, or regulation, or to obstruct or prevent compliance with state or federal statute, rule, or regulation; acts that constitute fraud against the state; misappropriation of state or federal resources; acts posing a risk to the health and safety of the public or other employees; acts constituting waste of state or federal funds, abuse of authority, or gross mismanagement of a program. The proposed amendment also eliminates the requirement that reports be submitted in writing, as well as expands the individuals and entities to whom the employee may make a protected report. The proposed amendment also expands the statute of limitations from 180 days to one year.

- **Minnesota**: Before 2013, Minnesota law required whistleblower plaintiffs to show that they acted with the purpose of exposing an illegality. In 2013, the Minnesota Legislature defined the phrase "good faith" to exclude "statements or disclosures"

[5] The full text of the proposed amendment to Ohio's Whistleblower Act is available at: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-238.

that are knowingly false or in reckless disregard of the truth. In 2017, the Minnesota Supreme Court held that the amendment to the definition of "good faith" eliminated the judicially-created requirement that a whistleblower act to expose an illegality. By eliminating the requirement that employees adduce evidence that they acted with a specific purpose, the Minnesota Supreme Court held that the Minnesota Legislature's amendment broadened the scope of activity that is protected under Minnesota's whistleblower statute.

- **Missouri**: In 2017, Missouri passed the Whistleblower Protection Act, Mo. Rev. Stat. § 285.575. The statute creates a private right of action for actual damages where: 1) for employees subject to adverse action for reporting an unlawful act of his or her employer to the proper employees, reported an employer's misconduct that violates a clear mandate of public policy (as defined by constitutional provision, statute, or regulation), or refusing to carry out an unlawful directive. *Id.*, subd. 2(4). Employees must show that the protected activity "actually played a role in the adverse decision or action and had a determinative influence on the adverse decision or action." *Id.*, subd. 2(5). The statute is intended to stop any expansion of exceptions to the employment-at-will doctrine. *Id.*, subd. 3. The statute authorizes recovery of back pay, reimbursement of medical bills directly related to a violation, and double damages if the employee shows that the conduct was "outrageous because of the employer's evil motive or reckless indifference to the rights of others" by clear and convincing evidence. *Id.*, subd. 7.

*Please refer to the Appendix A for a list of state whistleblower statutes and refer to Appendix B for state false claims act statutes.

IV. BEST PRACTICES

Lack of clarity between what is illegal retaliation and what may be unacceptable or unprofessional conduct creates additional frustration for employees and management as we continue to work towards cultural change within college and university communities.
Conducting an inventory of all non-retaliation provisions contained in your employment policies would be helpful to determine if language can be updated to provide greater clarity. College and university policies most likely to contain non-retaliation provisions include:

- EEO Policy
- FMLA Policy
- ADA Policy
- FLSA Policy
- Parental Leave Policy
- Military Leave Policy
- Ombudsperson's Statement
- Harassment Policy

- Sexual Misconduct Policy
- Hotline or Whistleblower Policy
- Non-Retaliation Policy
- Research Misconduct Policy
- Faculty Handbook
- Code of Conduct
- Policy on Reporting Concerns of Misconduct
- Nepotism Policy/Relationship Policy
- Grievance Policy
- Peer Review Policy
- Environmental Health and Safety Policy

When colleges or universities review the non-retaliation provisions contained in traditional employment policies or look to create a stand-alone non-retaliation policy, it is recommended that the policy contain clear definitions (and perhaps even examples) of what constitutes adverse action, misconduct, good faith participation, and retaliation.[6] Clear definitions and training, for faculty, staff, and supervisors can help to raise awareness of the internal resources available, manage expectations with respect to internal processes and protections, and continue to impact behavioral and cultural changes on college and university campuses.

V. APPENDICES

Appendix A

State Whistleblower Statutes

Alabama	Ala. Code §§ 25-8-57; 36-26A-1, *et seq.*
Alaska	A.S. 39.90.100 to .150
Arkansas	Ark. Code Ann. §§ 21-1-603 to 21-1-608
Arizona	Ariz. Rev. Stat. § 39.532
California	Cal. Lab. Code § 1102.5 to 1105
Colorado	Colo. Rev. Stat. §§ 24-50.5-101, 24-114-102
Connecticut	Conn. Gen. Stat. §§ 4-61dd, 33-1336, 4-37j
Delaware	19 Del. Code § 1703; 29 Del. Code § 5115

[6] The University of Minnesota's policy library contains a good example of a stand-alone non-retaliation policy. *See* https://policy.umn.edu/operations/retaliation.

District of Columbia	D.C. Law § 1-615.51, *et seq.*
Florida	Fla. Stat. §§ 448.101 and 448.102; 112.3187
Georgia	Ga. Code § 45-1-4
Hawaii	Hawai'i Rev. Stat. Ann. § 378-62
Idaho	Idaho Code §§ 6-2101 to 6-2109
Illinois	740 Ill. Comp. Stat. Ann. 174/15; 740 Ill. Comp. Stat. Ann. 174/20
Indiana	Ind. Stat. Ann. § 22-5-3-3
Iowa	Iowa Code § 70A.28
Kansas	Kan. Stat. § 75-2973
Kentucky	Ky. Rev. Stat. § 61.101, *et seq.*
Louisiana	La. Rev. Stat. §§ 23:968, 30.2027, 42:1169
Maine	26 Me. Rev. Stat. Ann. §§ 831 to 840
Massachusetts	Mass. Gen. Laws, ch. 149, § 185
Michigan	Mich. Comp. Laws Ann. § 15.362, *et seq.*
Minnesota	Minn. Stat. § 181.932
Mississippi	Miss. Code § 25-9-171
Missouri	Mo. Rev. Stat. §§ 105.055, 285.575
Montana	Mont. Code Ann. 39-2-901, *et seq.*
Nebraska	Neb. Rev. Stat. § 81-2701, *et seq.*
Nevada	Nev. Rev. Stat. § 281.611
New Hampshire	N.H. Rev. Stat. Ann. §§ 275-E:1-E:9
New Jersey	N.J. Stat. Ann. §§ 34:19-1 to 34:19-14
New Mexico	N.M. Stat. Ann. §§ 10-16C-1 to -6

New York	N.Y. Lab. Law §§ 740-741
North Dakota	N.D.C.C. § 34-01-20
Ohio	Ohio Rev. Code § 4113.52
Oklahoma	Okla. Stat. § 74-840-2.5
Oregon	Or. Rev. Stat. §§ 659A.199 to 659A.236
Pennsylvania	43 P.S. Labor § 1421, *et seq.*
Rhode Island	R.I. Gen. Laws §§ 28-50-1 to 28-50-9
South Carolina	S.C. Code, tit. 8, ch. 27
South Dakota	S.D. Codified Laws 3-6D-22
Tennessee	Tenn. Code § 50-1-304
Texas	Tex. Gov. Code § 551.001, *et seq.*
Utah	Utah Code, Title 67, ch. 21
Virginia	Va. Code § 2.2-3010.1
Washington	Wash. Rev. Code § 42.40.010, *et seq.*
West Virginia	W.V. Code § 6C-1-1, *et seq.*
Wisconsin	Wisc. Stat. Ann. § 230.83

Appendix B

State False Claims Act Statutes

California	Cal. Gov. Code 12650, *et seq.*
Colorado	Colo. Rev. Stat. Ann. § 25.5-4-306
Connecticut	Conn. Gen. Stat. § 4-284
Delaware	6 Del. Code § 1208, *et seq.*

District of Columbia	D.C. Law § 2-381.01, *et seq.*
Florida	Fla. Stat. § 68.083, *et seq.*
Georgia	Ga. Code Ann. § 49-4-168, *et seq.*
Hawaii	Haw. Rev. Stat. § 661-30
Illinois	740 ILCS 175/1, *et seq.*
Indiana	Ind. Stat. Ann. 5-11-5.7-1, *et seq.*
Iowa	Iowa Code § 685.1, *et seq.*
Louisiana	La. Rev. Stat. § 437.1
Massachusetts	Mass. Gen Laws, ch. 12 § 5, *et seq.*
Michigan	Mich. Comp. Laws Ann. § 400.062, *et seq.*
Minnesota	Minn. Stat. § 15C.01, *et seq.*
Montana	Mont. Code Ann. 17-8-401, *et seq.*
Nevada	Nev. Rev. Stat. § 357.010, *et seq.*
New Hampshire	N.H. Rev. Stat. Ann. § 167:61-b, *et seq.*
New Jersey	N.J. Stat. Ann. § 2A:32C-1, *et seq.*
New Mexico	N.M. Stat. Ann. § 27-14-1, *et seq.*
New York	N.Y. Fin. Law § 187
Oklahoma	Okla. Stat. § 5053, *et seq.*
Rhode Island	R.I. Gen. Laws § 9-1.1-1, *et seq.*
Tennessee	Tenn. Code § 4-18-101, *et seq.*
Texas	Tex. Hum. Resources Code § 36.001, *et seq.*
Vermont	Vt. Stat. Ann. § 630, *et seq.*
Virginia	Va. Code § 8.01-216.1, *et seq.*
Washington	Wash. Rev. Code 74.66.005, *et seq.*

Appendix C

Survey of Cases Brought by Faculty Alleging Retaliation 2015-2020

Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holding(s)	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
1	2018	1st Cir.	Carlson v. Univ. of New England, 899 F.3d 36 (1st Cir. 2018)	SJ Appeal	Adverse Action; Causation	When a transfer to a different post is the alleged AA, have to show that it is a disruptive (and negative) change to the P's conditions of employment. Generally, voluntary transfers don't qualify, but here P has sufficiently raised questions of whether or not she was materially misled to accept this position based on being told that it would allow her greater opportunities before entering the position and being given objectively worse opportunities. P can beat SJ on that. But, no real evidence to show that the minimal salary raises were unwarranted, or even to give the court the information necessary to make that conclusion itself.	Faculty	Internally reporting that her Department chair had harassed her	Transfer to a different position under false pretenses; annual salary increases that were much lower than average.	Title VII
1	2016	DMA	Nwaubani v. Grossman, 199 F. Supp. 3d 367 (D. Mass. 2016), aff'd, No. 16-2105, 2017 WL 3973915 (1st Cir. June 21, 2017)	Judgment	Causation	First Amendment claims are somewhat different than TVII: Must show that you are engaging in constitutionally-protected activity; that retaliation was a "substantial factor or a motivating factor"; and that Ds would not have taken that action but for P's conduct [3 appears to override 2.] Ds have shown that they refused to perform annual reviews because P had not submitted paperwork required by his contract for the review to take place. Further, P has not given any evidence of "substantial factor" beyond conclusory statements. Given a long history of warnings for his poor performance that stretched before his first complaint, but-for isn't clear either.	University	Internal complaints related to race and national origin discrimination; Filed complaints with DOE and state body; filed this lawsuit	Refusal to perform annual reviews; Termination	First Amendment (through 42 USC 1983)
2	2019	EDNY	De Figueroa v. New York, 403 F. Supp. 3d 133 (E.D.N.Y. 2019)	12(b)(6) Motion	Protected Activity; Adverse Action; Causation	Reporting in good faith violations of the FMLA is protected activity. Under FMLA, a P also has to show that they were qualified for the position; we have no reason to think she wasn't. Denial of raises and promotions are definitely materially adverse actions. While some of the alleged actions fall outside our 3-month rule of thumb for causation, at least one is within it so causation is satisfied.	Faculty	Complaining in good faith of acts P believed to be unlawful under the FMLA	Failure to promote; denial of discretionary raise	FMLA
2	2019	NDNY	Wiley v. Plattsburgh, 407 F. Supp. 3d 119 (N.D.N.Y. 2019)	12(b)(1) and 12(b)(6) Motions	Causation	In the 2nd Circuit, timeframe can be very persuasive evidence of causation. Here, he was removed from campus less than a month after complaining to the President and terminated less than two months after filing a claim with the EEOC. It at least surpasses the standard of a 12(b)(6).	Faculty	Complaining to University President about discrimination and suggesting that he might take legal action; filing race and sex discrimination claim with the EEOC	Removal from campus; termination wthout explanation	Title VII; Title IX; First amendment (via 1983)

2	2018	WDNY	Popat v. Levy, 328 F. Supp. 3d 106 (W.D.N.Y. 2018)	12(b)(6) Motion	Didn't reach merits	Claims not precluded by failure to mention D in EEOC complaint because identity of interest is determined in this court later in the process than the 12(b)(6) stage.	Faculty	Complaining internally about sex and race discrimination	hostile work environment; termination 10 days after reporting the discrimination.	Title VII; 42 USC s. 1981; 1983

Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holdings	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
2	2017	EDNY	Keles v. Yearwood, 254 F. Supp. 3d 466 (E.D.N.Y. 2017)	12(b)(6) Motion	Causation	The University showed evidence that they didn't know about P's EEOC charge until after they had made the decision to rescind his appointment. AA can't be before PA.	University	filing age discrimination complaint with EEOC	Rescission of appointment	ADEA
2	2017	SDNY	Novio v. New York Acad. of Art, 286 F. Supp. 3d 566 (S.D.N.Y. 2017)	12(b)(6) Motion	Protected Activity; Adverse Action; Causation	Explicitly says that filing the lawsuit was PA. Otherwise, hand-waves a lot of the analysis but ultimately finds that all three elements (which it listed in the opinion) were met.	Faculty	Filing lawsuit against the school and holding company	Cut off from university announcements; cut off from alumni association emails; refusals to write references	Title IX
3	2017	3d Cir.	Carvalho-Grevious v. Delaware State Univ., 851 F.3d 249 (3d Cir. 2017)	SJ Appeal	Causation	P need only raise inference that protected activity was likely reason for adverse action. But-for cause not necessary. Thus, dispute as to a material fact existed to withstand SJ.	Faculty	Reporting race/gender discrimination	negative performance eval; change from renewable to terminable contract; termination.	Title VII; 42 USC s. 1981
3	2016	MDPA	Summy-Long v. Pennsylvania State Univ., 226 F. Supp. 3d 371 (M.D. Pa. 2016), aff'd, 715 F. App'x 179 (3d Cir. 2017)	SJ Motion	Adverse Action; Causation	Decreasing lab space is not enough for an Adverse Action, as we have held before. Also, P seems to have inadvertently admitted that the decrease in the size of her lab was because she switched departments, not because of retaliation or discrimination.	University	Reporting gender discrimination	Decrease in size of her lab as a biomedical researcher	Title VII
4	2020	MDNC	June Cho v. Duke Univ., No. 1:18CV288, 2020 WL 353617 (M.D.N.C. Jan. 21, 2020)	SJ Motion	Protected Activity	Protected Activities have to be reasonably related to the behavior Title VII is trying to limit, both objectively and subjectively. Cho may have believed that her grievance was related to Title VII, but since it had nothing to do with allegations of discrimination based on any protected characteristic, it was not objectively related to what Title VII forbids. Therefore, no matter how close in time the purported PA and AA were, or how materially adverse the AA is, there's no Title VII retaliation here.	University	Filing a grievance against her supervisor	Notice of non-renewal within days of the grievance; University adopting IRB's recommendation that P be removed as PI of a project; termination of R01 grant.	Title VII

4	2019	DMD	Danial v. Morgan State Univ., No. CV CCB-17- 959, 2019 WL 6064900 (D. Md. Nov. 15, 2019)	12(b)(6) Motion	Adverse Action; Causation	First: refusal to offer a position is not enough for an AA under the normal test. // Second: causation not established, relying entirely on the timeframe and there was a 7-month and 19- month gap between the alleged AAs and the PA. // Third: even more of a gap and no evidence of retaliation beyond P's conclusory allegations. Also, the University has shown that he was consistently given low marks on his applications for a lack of service and lack of collegiality.	University	First: complained about racial discrimination to Dean //Second and Third: filed an EEOC charge for racial discrimination.	First: refusal to offer part-time position to contract faculty.//Second: failure to hire for full-time contract positions two years in a row. // Third: failure to hire for summer programs in 2015, 2016, 2017	Title VII
4	2017	4th Cir.	Stennis v. Bowie State Univ., 716 F. App'x 164 (4th Cir. 2017)	12(b)(6) Appeal	Protected Activity	In the 4th Cir, as in many others, participating in an internal investigation of discrimination that isn't connected to an EEOC proceeding does not constitute a Protected Activity.	University	Investigating claims by students that a Department Chair was discriminating against them.	Denial of Tenure; hostile work environment	Title VII

Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holding(s)	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
4	2017	EDVA	Adler v. Va. Commonwealth Univ., 259 F. Supp. 3d 395 (E.D. Va. 2017), aff'd sub nom. Adler v. Virginia Commonwealth Univ., 709 F. App'x 189 (4th Cir. 2018)	SJ Motion	Causation	The university has shown that they fired him for failing to comply with a university-wide policy designed to help the university comply with a new FDA regulation regarding human subjects in clinical trials. His record does show that he was told about this several times, and there is a long paper-trail of notes that he has not complied despite being given multiple warnings and chances to do so. AAs 1-3 at right were all because they had terminated him, not anything to do with his age.	University	(1) Filing a grievance; (2) Filing a charge with EEOC; (3) Filing amended charge with EEOC; (4) generally opposing and reporting age discrimination at the university.	(1) Pulled NIH Funding; (2) Dismissed grievance; (3)prevented from participating in IRB; (4) Termination	ADEA
4	2016	EDVA	Spencer v. Virginia State Univ., 224 F. Supp. 3d 449 (E.D. Va. 2016)	12(b)(6) Motion	Causation	2 years is far too long to beat a 12(b)(6) by temporal proximity alone. Need to show retaliatory animus instead, and has not been able to do that. Hasn't been subjected to anything above petty slights [seems like severity of the alleged retaliation can double-dip as proof of animus?]	University	Serving as chair of "Gender Equity Task Force" at the university, that highlighted several areas of improvement regarding wage discrimination.	denied a requested wage increase to equalize her pay in ine with EPA/Title VII, two years later.	Title VII; Equal Pay Act
4	2015	EDNC	Al-Deen v. Trustees of Univ. of N. Carolina, Wilmington, 102 F. Supp. 3d 758 (E.D.N.C. 2015)	12(b)(6) Motion	Protected Activity; Adverse Action	Filing an EEOC charge is protected activity, of course; blocking students from registering for P's classes and closing her out of the process of voting for colleagues for reappointment are sufficiently adverse actions. Especially where the changes happened "shortly after" she filed her charge with the EEOC, she's stated a claim.	Faculty	Filing charge of religion/national origin discrimination with EEOC	Students could not register for her classes; she was not allowed to participate in choosing colleagues for reappointment as usual	Title VII
5	2018	WDLA	Aguillard v. Louisiana Coll., 341 F. Supp. 3d 642 (W.D. La. 2018)	Partial SJ Motion	Didn't reach merits	Discrimination and Retaliation claims barred by exemption for religious educational institutions that offer education directed towards the propagation of a particular religion.	University	Filed an internal "fear of workplace violence" complaint against another employee for allegedly threatening P's life based on his religious belief (Southern Baptist)	Reassignment of job functions; attempt to force him to resign; isolated him among peers; intimidation and theft of personal property; changed the locks to his office and locked him out without explanation or notice	Title VII
5	2017	5th Cir.	Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll., 850 F.3d 731 (5th Cir. 2017), as revised (Mar. 13, 2017)	SJ Appeal	Causation	In "discrete acts" retaliation claim, if P seeks to establish causation by the timeline alone, the adverse action must be "very close in time" to the protected activity. Here, the gap was three years, which was far too long to establish causation just by the temporal proximity of the events.	University	Filing lawsuit alleging sex discrimination, among other claims	harassment by supervisor	Title VII

5	2016	MDLA	Herster v. Bd. of Supervisors of Louisiana State Univ., 221 F. Supp. 3d 791 (M.D. La. 2016), aff'd in part, 887 F.3d 177 (5th Cir. 2018)	SJ Motion	Didn't reach merits	P didn't adequately plead retaliation. Nothing in her complaint would have given the Ds any notice that she was including retaliation. Adopts the Ds' arguments assuming arguendo that P did adequately plead.	University	Taking FMLA leave	Removal from all teaching capacity; "removing nearly all of her duties"	FMLA

Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holding(s)	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
5	2015	MDLA	Mitchell v. Univ. of Louisiana Sys., 154 F. Supp. 3d 364 (M.D. La. 2015)	SJ Motion	Adverse Action; Causation	Transfers can be materially Adverse Actions, and the D's reliance on the fact that on paper, P's job is the same is not sufficient to beat SJ. However, Ds offered convincing, irrefuted evidence that the door was being locked by accident, and that once P's lack of access was brought up with the person who locked it, he offered to give her a key and try to do better about not locking it by mistake. The rest of the actions were just "petty slights," not AAs. Temporally, the AA took place only two months from her most recent EEOC charge, so that's enough to beat SJ on causation.	Faculty, mostly	Filing several EEOC and internal complaints	Transferring the P to a different position; locking P out of an office she needs to access for her job; many inquiries about her job functions; Ccing the VP of the school on one request; Transfer to different location.	ADEA
5	2015	SDMS	Gentry v. Jackson State Univ., 161 F. Supp. 3d 418 (S.D. Miss. 2015)	12(b)(6) Motion	Adverse Action; Causation	Without more information about their content, P saying that she began receiving "letters about her performance" after filing her EEOC charge is not enough to intimate an Adverse Action. Removal from position as Coordinator of a Master's Program likely is, but there is an eighteen month gap between the PA and AA. P requested leave to amend if we find her complaint deficient, so we will grant her that leave in lieu of dismissal.	University on merits	Filing an EEOC complaint for sex discrimination	Receiving written warnings about performance; removed from position as coordinator of a program	Title VII
5	2015	SDMS	Canon v. Bd. of Trustees of State Institutions of Higher Learning of Mississippi, 133 F. Supp. 3d 865 (S.D. Miss. 2015)	12(b)(6) Motion	Didn't reach merits	P did not name the defendant in his EEOC charge and the D was not sufficiently similar to the party named, so P had not exhausted his remedies.	University	Filing EEOC complaint for wage discrimination, age discrimination, and retaliation	Non-renewal	Title VII
5	2015	WDLA	Strong v. Grambling State Univ., 159 F. Supp. 3d 697 (W.D. La.), aff'd, 614 F. App'x 776 (5th Cir. 2015)	SJ Motion	Causation	Reduction was reflected in a formal budget plan and affected several other Department heads as well as P. P did not show that these other Department heads had joined him or were also being singled out, so it's clear that it's not about P's actions.	University	Internal grievance for not getting cash prize associated with award he was given; publicly criticizing the University	Reduction from 12-month to 10-month employee	Title VII
6	2017	SDOH	Storrs v. Univ. of Cincinnati, 271 F. Supp. 3d 910 (S.D. Ohio 2017)	SJ Motion	Causation	PA must be the "likely reason" of the AA to defeat SJ. The history of poor performance reviews and concerns voiced to P about her sparse publication record predated her taking leave or complaining about sex discrimination, so University has well disputed that this was a pretextual denial.	University	Title VII: Complaint to EEOC regarding sex discrimination. FMLA: taking the leave.	Both: Denial of re- appointment	Title VII; FMLA

6	2016	EDMI	Kubik v. Cent. Michigan Univ. Bd. of Trustees, 221 F. Supp. 3d 885 (E.D. Mich. 2016), aff'd, 717 F. App'x 577 (6th Cir. 2017)	SJ Motion	Causation	In the 6th Circuit, P must allege that the retaliatory motive was a but-for cause of the adverse action. Here, they had several legitimate reasons to deny her reappointment (she was drastically under-publishing for someone on the tenure track), so no but-for cause established. Further, it is not even enough for P to prove that she should have been re-appointed; she needs to prove that retaliation was the reason she was not.	University	Filing complaints with EEOC and internal Institutional Equity Office for sex- and pregnancy-based discrimination	Denial of Tenure/Non-renewal	Title VII

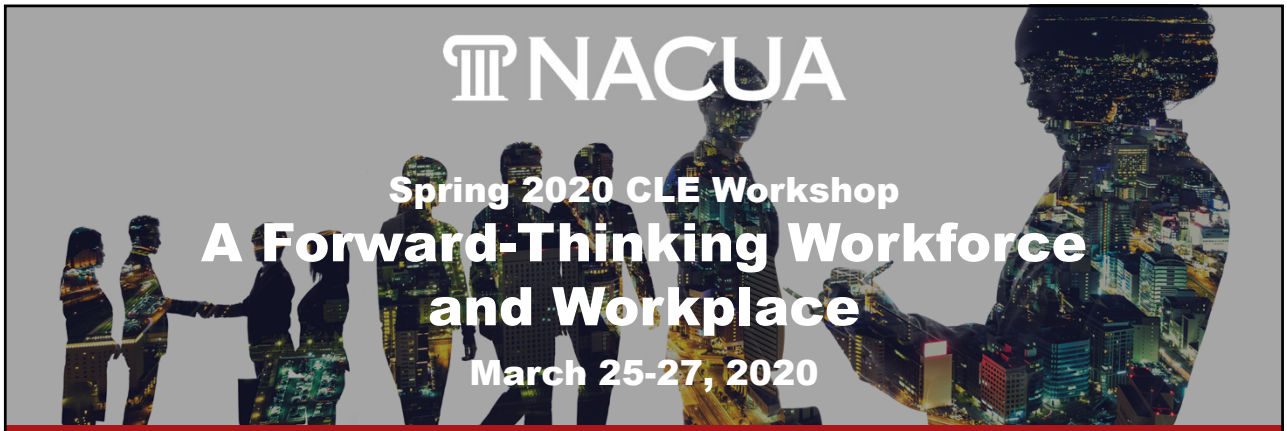
Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holding(s)	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
7	2018	CDIL	Wozniak v. Adesida, 368 F. Supp. 3d 1217 (C.D. Ill. 2018), aff'd, 932 F.3d 1008 (7th Cir. 2019)	SJ Motion	Public Concern;	P had, in the process of a "quixotic" investigation into why he did not receive a "Teacher of the Year" award, published information about a student's emotional state and other information to a broad audience. That was not a subject of public concern, so this was not a covered activity for purposes of First Amendment retaliation.	University	Speaking out about how he was denied the teacher of the year award.	Termination	First Amendment (through 42 USC 1983)
7	2016	7th Cir.	Hatcher v. Bd. of Trustees of S. Illinois Univ., 829 F.3d 531 (7th Cir. 2016), overruled on other grounds by Ortiz v. Werner Enterprises, Inc., 834 F.3d 760 (7th Cir. 2016)	12(b)(6) Appeal	Protected Activity; Adverse Action; Causation; 1A	No reason to have dismissed P's Title VII retaliation claim. Filing a charge with EEOC is well within protected activity, denial of tenure is an adverse action, and they were close enough in time (a little over a month) that causation is plausible. MTD is a low hurdle to clear, especially since Title VII is not subject to a heightened pleading standard. Regarding First Amendment claims, must show that you were speaking as a citizen and not an employee, and being mistaken in believing you are a mandatory reporter of sexual harassment not enough. Held for Faculty on TVII; for Univ. on 1A	Mixed	Assisting a graduate student to report alleged sexual harassment; Filing discrimination charge with EEOC against University.	Denial of Tenure	Title VII; First Amendment (through 42 USC s. 1983)
7	2016	NDIN	Whipple v. Taylor Univ., Inc., 162 F. Supp. 3d 815 (N.D. Ind. 2016)	SJ Motion	Adverse Action; Causation	Denial of Tenure is an adverse action; Here, it's enough that the events were relatively close together and the AA was after the PA, with a basic argument explaining this timing, P has met the standard to defeat an SJ.	Faculty	Filing an EEOC charge for race discrimination; filing an internal grievance for the same.	Denial of Tenure	Title VII
7	2016	WDWI	Burton v. Bd. of Regents of the Univ. of Wisconsin Sys., 171 F. Supp. 3d 830 (W.D. Wis. 2016), aff'd sub nom. Burton v. Bd. of Regents of Univ. of Wisconsin Sys., 851 F.3d 690 (7th Cir. 2017)	SJ Motion	Adverse Action; Causation	General personal tension, public criticism, or unfriendliness by a supervisor is not an Adverse Action for purposes of retaliation. A disciplinary complaint can be, but P has not shown sufficient causation. That an adverse action was taken which was not supported by any reasonable rationale does not guarantee that it was a pretext for retaliation. Further, intervening positive actions taken by the alleged retaliator towards the P undercuts the allegation.	University	Advocating for a student who filed sexual harassment complaint against a fellow professor; charge filed with WI Equal Rights Division; charge filed with EEOC.	general lack of collegiality; disciplinary complaint against P	Title VII; Title IX
7	2015	7th Cir.	Barr v. Bd. of Trustees of W. Illinois Univ., 796 F.3d 837 (7th Cir. 2015)	12(c) Appeal	Didn't reach merits	Filed two suits alleging retaliation, failed to prosecute the first and was dismissed with prejudice. Failed to appeal this erroneous decision and thus was barred by res judicata from this second suit.	University	Complaint about alleged failure to hire a professor (not P) based on his race	Non-renewal	Title VII

7	2015	7th Cir.	Packer v. Trustees of Indiana Univ. Sch. of Med., 800 F.3d 843 (7th Cir. 2015)	SJ Appeal	Causation	Not enough discussion in her SJ memo to fully flesh out causation, and just pointing to the proximity in time between the two events is rarely if ever enough in 7th Cir.	University	Filed internal complaints and external EEOC charge based on alleged sex discrimination	Termination	Title VII

Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holding(s)	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
7	2015	7th Cir.	Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524, 795 F.3d 698 (7th Cir. 2015)	SJ Appeal	Causation	P provides no evidence of which employee or employees made the decision to fire him; P did not establish that any of the potential decision- makers knew of his EEOC complaint; and even if they did, they provided evidence that he was hired by mistake after being put on the school's no-hire list after being fired before from a different department at the school. Regarding pretext, the reasons for termination don't have to be right, they just have to be honest.	University	Filing EEOC complaint alleging age and disability discrimination	terminated a few weeks later	ADA; ADEA
7	2015	EDWI	Al-Hasan v. Milwaukee Sch. of Eng'g, 156 F. Supp. 3d 930 (E.D. Wis. 2015)	SJ Motion	Causation	P has failed to show retaliatory motive on the part of a professor who was not even on the search committee for the position for which P was not chosen. Intimating to HR that the prof thought plaintiff's EEOC complaint lacked merit did not mean that he intended to retaliate against him.	University	Filing EEOC complaint for race/religion/national origin discrimination	not promoted to full faculty, remained as an adjunct.	Title VII
8	2019	MOSC (State)	Kader v. Bd. of Regents of Harris-Stowe State Univ., 565 S.W.3d 182 (Mo. 2019)	Jury Instruction Appeal	Adverse Action	Without a showing that appealing the visa denial would have been successful, no way to prove adverse impact against P and thus no way to ensure that this alleged AA was legally sufficient to prove retaliation. Therefore, because we do not know on what theory the jury below decided this was retaliation, we must order a new trial.	University (though new trial may still hold for P)	Complaining internally about race-, religion- and national origin-based discrimination	Jury given many options: (1) D not responding to a request for more information to support a visa petition for P; (2) D not appealing the denial of that visa; (3) D not renewing P's employment contract; (4) D denying P a work leave of absence; or (5) D opposing P's application for unemployment benefits.	MO Human Rights Act (similar framework to Title VII)
8	2015	DNE	Knapp v. Ruser, 145 F. Supp. 3d 846 (D. Neb. 2015)	SJ Motion	Adverse Action	The alleged AAs are just "petty slights," certainly not anything that would reasonably discourage someone from coming forward to report pay discrimination.	University	Reporting the issue of pay inequality in the university between men and women in the college's legal clinics.	a general coldness and difficulty in interacting with her supervisor	Title VII
10	2019	10th Cir.	Singh v. Cordle, 936 F.3d 1022 (10th Cir. 2019)	SJ Appeal	Causation	no evidence that the Ds knew about his discrimination complaints at all; this disposes his 1A and Title VII claims. He tried to plead this for the first time in his brief to this court, but that's too late.	University	Submitting discrimination complaints to state discrimination body	Removal from teaching assignments; being locked out of his office	Title VII; First Amendment (through 42 USC s. 1983)

Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holding(s)	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
10	2015	DCO	McGowan v. Bd. of Trustees for Metro. State Univ. of Denver, 114 F. Supp. 3d 1129 (D. Colo. 2015), aff'd sub nom. McGowan v. Bd. of Trustees of Metro. State Univ. of Denver, 645 F. App'x 667 (10th Cir. 2016)	SJ Motion	Protected Activity; Causation	Re: Title VII, unclear whether either of the alleged PAs had anything to do with discrimination. It seems that the issue she was having with her supervisors was not based on race or gender, or any other protected characteristic. Further, unclear whether the supervisors learned of her complaint of harassment at the EEO Office. Re: FMLA, most of the alleged retaliation takes place before she makes her FMLA request, so it can't be retaliation. Further, almost all AAs she identifies are "petty slights."	University	Complaining about a hostile work environment in a rebuttal to a poor performance evaluation, and making a complaint of harassment to the university's EEO Office.	A meeting and email from her supervisor that highlight issues with her performance.	Title VII; FMLA
11	2018	MDAL	Herron-Williams v. Alabama State Univ., 287 F. Supp. 3d 1299 (M.D. Ala. 2018)	SJ Motion	Protected Activity; Causation	Two separate claims: in first, Protesting unlawful discrimination is a protected activity under Title VII, but the P has to show that they have a good faith belief that the D was actually engaged in unlawful employment practices and that their suspicion is objectively reasonable. P has not shown any evidence of objective reasonableness. In second, the Ds have established that they were not interested in renewing her before she filed the EEOC charge.	University	First: Wrote an email complaining about racial and sex discrimination. // Second: filed an EEOC charge for sex, race, age discrimination, and retaliation	First: Pay cut to the tune of $20k. // Second: non-renewal.	Title VII
11	2015	MDFL	Eginton v. Fla. State Univ., 111 F. Supp. 3d 1263 (M.D. Fla. 2015)	SJ Motion	Adverse Action; Causation	These alleged AAs are really just "petty slights" that wouldn't discourage someone from complaining about discrimination. Further, P has not established causation because her work was not reassigned but rather a new hire began teaching similar subjects to her. This was a suggestion by the alleged harasser, but the suggestion was made before she ever wrote her letter.	University	Writing a letter to administration about sex discrimination by supervisor and asking that it be treated as a formal complaint.	Ostracism; general hostility; reassignment of 1/4 of her work	Title VII
11	2015	SDFL	Jolibois v. Fla. Int'l Univ. Bd. of Trustees, 92 F. Supp. 3d 1239 (S.D. Fla. 2015), aff'd, 654 F. App'x 461 (11th Cir. 2016)	SJ Motion	Causation	P alleged that he was suspended and then terminated as retaliation for his charge. He leaned almost entirely on the little over one month between his filing and suspension. However, the University has shown that he was required to develop a Performance Improvement Plan for routinely failing to meet expectations (even before his charge), then he was suspended for failing to submit the PIP after several extensions, then he was terminated for still failing to submit the PIP. P has offered no evidence that this was pretext. Therefore, no reasonable juror could conclude this was connected.	University	Filing an EEOC charge for race and national origin discrimination	Suspension without pay; termination	Title VII

Circuit	Year	Court	Case Citation	Posture	Issue(s)	Holding(s)	Held For	Alleged Protected Activity	Alleged Adverse Action(s)	Authorities
11	2015	SDFL	Liu v. Univ. of Miami, 138 F. Supp. 3d 1360 (S.D. Fla. 2015), aff'd sub nom. Wen Liu v. Univ. of Miami Sch. of Med., 693 F. App'x 793 (11th Cir. 2017)	SJ Motion (Magistrate)	Causation	P did not check the retaliation box on the EEOC charge, nor did she provide any facts that intimate an allegation of retaliation. Since it was not considered by EEOC, no right to sue on that issue. But, we will consider this on the merits anyway and say that there is no causation because the alleged adverse action happened almost a year before the protected activity (she was notified of the termination roughly a year before taking FMLA; her termination date was pushed back to allow her to continue to have health coverage). If AA is before PA, no retaliation as a matter of law.	University	Requesting FMLA leave.	Termination	Title VII
DC	2018	DDC	Robinson v. Howard Univ., Inc., 335 F. Supp. 3d 13 (D.D.C. 2018), aff'd sub nom. Robinson v. Wutoh, 788 F. App'x 738 (D.C. Cir. 2019)	12(b)(6) Appeal	Causation	The AAs occurred before he sent anything to the organization, so no causation there. Further, school policy says decisions of the Provost are unappealable by the faculty member, so there's no reason to suspect that retaliation was the motive.	University	protesting sex discrimination; sending details to a nonprofit organization	Being reprimanded by Department; denial of appeal	Title IX
DC	2015	DDC	Badwal v. Bd. of Trustees of Univ. of D.C., 139 F. Supp. 3d 295 (D.D.C. 2015)	12(b)(6) Motion	Protected Activity; Adverse Action; Causation	In terms of FMLA, applying for the leave is a PA. Of course, termination is an AA. He was apparently never told that his FMLA was approved or that he was on it, so their failure to notify did not give them an appropriate reason to terminate him. At the 12(b)(6) stage, temporal proximity can get you through dismissal for causation. The PA and AA are separated by about two months, less than the three- to four-month benchmark we've used before.	Faculty	Filling out paperwork and applying for FMLA leave.	Termination for failing to come back from FMLA leave	FMLA



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Spring 2020 CLE Workshop

A Forward-Thinking Workforce and Workplace

March 25-27, 2020

RETALIATION: THE FINAL FRONTIER

Kate S. Hendricks, *Duke University*, Durham, NC
Kathryn M. Nash, *Lathrop GPM LLP*, Minneapolis, MN
Danielle T. Uy, *Saint Louis University*, St. Louis, MO

Session Overview

- Identify key components of a retaliation claim
- Discuss common scenarios in the academe, challenging power dynamics, and tools to mitigate risk of retaliation
- Explore ways to impact cultural change, encourage reporting, and create supportive structures within your institution
- Anticipate what's next: an overview of trending state whistleblower laws

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Elements of Retaliation Claim

Plaintiff must show:

1. They engaged in a protected activity
2. They suffered a material adverse employment action
3. A causal link between the protected activity and the materially adverse action

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

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Protected Activity: Participation Clause

- Requires some contact with a legal or administrative process (party or witness)
- Examples:
  - Raising a claim
  - Testifying
  - Assisting or participating in an investigation, proceeding, or hearing under EEO laws

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Protected Activity: Opposition Clause

- Applies if an employee explicitly or implicitly communicates a belief that the matter complained of is, or could become, harassment or discrimination
- Manner of opposition must be based on a reasonable, good-faith belief that the conduct opposed is or could become unlawful
- Reasonableness is determined by a balancing test against the employer's legitimate demands for loyalty/cooperation in pursuit of a productive work environment

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Examples of Protected Activity

- Filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
- Communicating with a supervisor or manager about employment discrimination, including harassment
- Answering questions during an employer investigation of alleged harassment
- Refusing to follow an order that would result in discrimination
- Resisting sexual advances, or intervening to protect others
- Requesting accommodation of a disability or for a religious practice
- Asking managers or co-workers about salary information to uncover potentially discriminatory wages

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Adverse action

- Any adverse treatment that is reasonably likely to deter protected activity
- The "ultimate employment decision" standard limits retaliatory conduct to acts like hiring, granting leave, discharging, promoting, and compensating
- Examples of adverse action:
  - Transfers to a less desirable position, threats about reporting, verbal/physical abuse, spreading false rumors
- Examples that do not equate to an adverse action:
  - Reduced workload, negative employment reference, lateral transfers

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Causation

- There must be a causal connection between the material adverse action and the employee's protected activity
- "But for" test (used by EEOC) requires the employee to prove it is more likely than not that but for a retaliatory motive, the employer would not have taken the adverse action
- Examples of evidence that can demonstrate causation:
  - Written or oral statement by the employer showing bias or retaliation was the reason for the action
  - Temporal connection between the protected activity and adverse action
  - Different treatment of the employee who engaged in protected activity from similarly situated employees who did not engage in protected activity
  - Inconsistent or shifting explanations of the reason for the adverse action

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Case Scenario – Retaliation

Navigating the Retaliation Minefield

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Report to Department Chair

Ashley, a student, tells the Department Chair that she's deeply troubled by something that one of her professors did but that she isn't comfortable sharing it unless the Department Chair can promise that it won't get back to the professor that she is the one who reported him. The Department Chair agrees to keep the student's identity confidential. Ashley then shows the Department Chair a recent Facebook post by Professor Jones.

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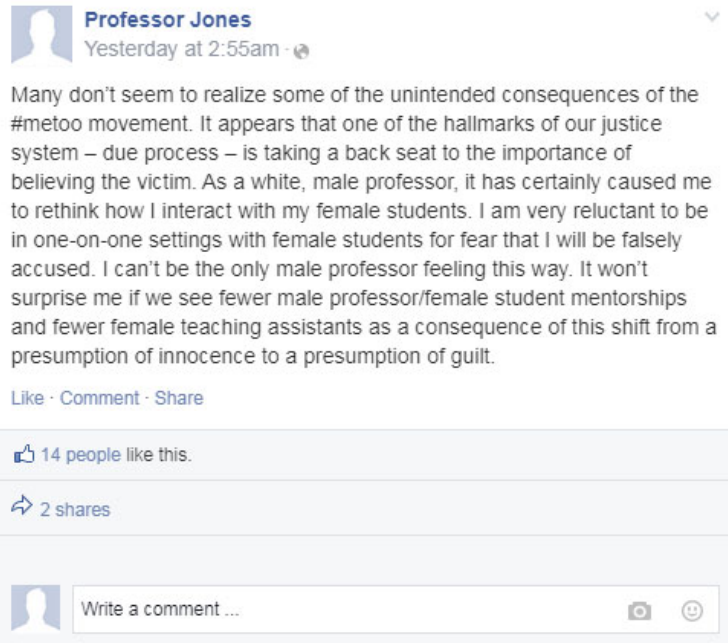

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The Conversation Continues

The Department Chair thanks Ashley for bringing this to her attention and tells her that she'll take care of it.

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Department Chair Emails Professor Jones

The Department Chair immediately emails Professor Jones:

I just finished a meeting with one of your female students in which she made me aware of your recent social media post. You need to be more thoughtful about what you post on social media, especially when you are friends with some of your students. This is discriminatory to our female students and will not be tolerated. Please let me know your availability to meet with me to discuss next steps.

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Department Chair Emails Dean

Student Ashley Smith complained to me about a recent Facebook post by Professor Jones in which he says that he won't mentor female students or hire them to be his teaching assistant. This is outrageous. I've already reached out to him to set up a meeting to discuss this. He has become a real problem. He does not show up prepared to department meetings, students complain that he is not in his office during office hours published on his syllabi, and he regularly berates his TAs. If he doesn't get with the program, I think we should start talking with him about his retirement plans. This could certainly make our decision about whose position to eliminate a much easier decision. I'll let you know how our conversation goes.

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Dean Forwards Email to the General Counsel

Can we please discuss? I need some help with the next steps.

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E-Mail from the Dean to General Counsel

Hi,

After we talked, I went to the faculty member and reviewed this with him as a "teachable" moment. We looked at the social media post and I was diplomatic – I told him I knew he did not intend this, but that this might be perceived the wrong way. Given our values of inclusion and diversity, we want to avoid perception that he might disfavor women for mentoring opportunities.

He said he understood, and he later posted an apology on his social media page.

I thought we had a productive conversation, and this matter was resolved.

Then, the next day, I learned from another faculty member that he has gone around telling people that the Department Chair and I are harassing him and accusing me of age discrimination. What do I do now?

****

COUNSEL ADVICE?

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E-Mail from Dean to General Counsel

I know we haven't had a chance to talk about my last e-mail, but wanted to add that the Director of Undergraduate Studies has come to me. Professor Jones cornered Ashley and asked her if she complained to me. Apparently she is the only female student who is his friend on Facebook. She was terrified and said he berated her. She is now fearful that this will affect her grades. She is upset because apparently the Chair told her that her complaint would stay confidential.

Let's catch up soon – this seems to be mushrooming.

****

COUNSEL ADVICE?

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E-Mail from Dean to General Counsel

I took your advice and contacted the university's equity office and told them that a faculty member had complained that he was being discriminated against based on his age. They said they would contact him, inform him of our non-discrimination policy and investigate his complaint.

Then I contacted the faculty member and told him that it had come to my attention that he was complaining of discrimination and harassment. I told him that he had every right to pursue a complaint and the appropriate channel was the university's equity office. I also raised with him that he has to be mindful of retaliation and should not contact any individuals, whether students or employees, and ask them if they complained about the social media post. While I tried to protect the student and not identify her, he immediately realized his interaction with the student had come to my attention. He told me that the student had falsely accused him of sexual harassment and was trying to manipulate him to get a better grade. He said the student should be brought before the student conduct board for false and malicious allegations. He also said that there was no way I could be fair to him, and he needed to report to someone else.

Help!!

****

COUNSEL ADVICE??

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Ashley Files Discrimination and Retaliation Complaint

The Dean learns from HR that Ashley filed a complaint of discrimination and retaliation. The complaint states that after she reported Professor Jones's Facebook post, he started picking on her in class and has given her nothing higher than a C on her last three assignments. After receiving the complaint, the Dean realizes that she never followed up to address Ashley's retaliation concerns.

Now what?

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E-Mail from the Dean to General Counsel

Hi – me again. I know you had a lot to think about from our last call.

I need to let you know the latest: I got a call from the equity office and they said that Professor Jones contacted them and they told him they would investigate his complaint. He told them not to bother and that he had already been to the EEOC to file a complaint that he has been discriminated against based on his age.

We need to do something. His attitude isn't improving, and students aren't getting the support that they need to be successful. I know what you're going to ask. No. It's not documented, but everyone knows what he's like! Enrollment in his courses is suffering because the word is out about how tough he is to deal with.

That said, the department is in major turmoil. Students, parents and other faculty members are upset at the disruption. Professor Jones can no longer function effectively in this department. I had a conversation with the Chair. Professor Jones's contract expires at the end of this year, and the Chair wants to tell him that his contract will not be renewed. We need to cut some costs, and eliminating his position saves money, but does not impact course availability for students since other faculty members also teach Professor Jones's courses.

In the meantime, we have no choice but to remove him from teaching. We also really don't want him coming around the department. I know we will have to pay him.

If you have advice, I am all ears, but letting you know we have no choice if we want to keep this department from imploding.

****

COUNSEL ADVICE?

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E-Mail from the Dean to General Counsel

SOS!

As we discussed, Professor Jones was informed that he was being relieved of his teaching duties effective immediately and that his contract would not be renewed for the fall 2020 semester.

I just learned that Professor Jones amended his EEOC charge to include a retaliation claim. I don't understand – we're still paying him and he said he was ready to retire!

Things were calming down, but now it seems like things are going from bad to worse. What should I do? Any advice on interacting with the faculty member since he is still around?

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General Counsel E-Mail to Outside Counsel

Thanks for agreeing to defend us in this case. I am mainly worried about the retaliation claim. I know that the critical elements are: (1) the employee engaged in a protected activity (2) the employee suffered an adverse employment action and (3) there must be a causal link between the protected activity and the adverse action.

Do you think we have a basis for filing a motion to dismiss the retaliation claim?

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Takeaways and Best Practices

- Address allegations of discrimination and harassment pro-actively
- Protection of Students, Employees from Retaliatory Actions by Supervisors, Faculty
- Document legitimate, non-discriminatory reasons for any actions taken regarding faculty member's employment conditions, change of duties, salary, etc.
- HR training of supervisor/personnel who interact with individual who has engaged in protected activity

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Promoting Cultural Change

- Encourage Reporting
- Consider Creating a Stand-Alone Retaliation Policy
- Informal Resolution Options
- Peer to Peer Intervention

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Anticipating What's Next: Trends in State Whistleblower Laws

- General trend to broaden protection for whistleblowers
- Examples of Legislation
  - Reducing burden an employee must meet to establish a claim
  - Expanding scope of disclosures constituting protected activity
  - Lengthening statute of limitations
  - Increasing employer notification obligations

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