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An Update on Harassment & Discrimination Retaliation in Employment Relations

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This paper provides an update of selected recent federal circuit court decisions involving retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., relating to sexual harassment and discrimination. Other handouts and presentations for this session address accommodation requirements and discrimination and retaliation under other laws. This handout does not purport to include all reported cases and is derived primarily from cases reported via FindLaw.com's labor and employment case law reporting service. For additional background information, a copy of this author's review of the 2006 United States Supreme Court decision in *Burlington Northern v. White*[1] is included in the IMLA Conference materials. (See *Harassment and Discrimination Retaliation: The U.S. Supreme Court Hits Back*, reprinted from New Hampshire Public Risk Management's Awareness in Action: The Journal of New Hampshire Public Risk Management.)

Failure to Use an Employer's Reporting and Remediation Policy.

Thornton v. Federal Express Corporation D/B/A Fedex Express
(No. 07-5116, 6th Cir., June 24, 2008)

Plaintiff, a former FedEx employee, was discharged when, after a 16-month leave of absence, she did not return to work, despite being notified of return-to-work opportunities. She had taken the leave of absence due to stress stemming from sexual harassment by her immediate supervisor. Plaintiff did not pursue the return-to-work opportunities because she continued to receive treatment for panic disorder and fibromyalgia from health care providers who she says had not released her to return to work.

Plaintiff commenced action in the Western District of Tennessee in 2005 charging FedEx with sex discrimination and retaliation in violation of federal and state civil rights laws, and with discrimination based on her disability in violation of the ADA. FedEx's motion for summary judgment on federal claims was granted by the district court (which declined to exercise supplemental jurisdiction over the state law claims). Plaintiff appealed to the 6th Circuit, proceeding *pro se.*

The circuit court upheld the district court, finding no error in the holding that plaintiff's *quid pro quo* sexual harassment claim under Title VII fails for lack of evidence that plaintiff suffered a tangible job detriment due to her rejection of sexual advances. The courier route change that precipitated plaintiff's request for a leave of absence, though personally inconvenient one day of the week, did not entail an increase in responsibilities or a demotion or loss of pay or benefits that would satisfy the "materially adverse change" element of such a claim. Moreover, the courier route change was hardly a *fait accompli*, but was a change in-progress, subject to continuing negotiation between plaintiff and management at the time she took her leave of absence.

As to the ADA claim, plaintiff failed to demonstrate that she suffered from a "disability," i.e., an impairment that substantially limits a major life activity. A disability determination by the Social Security Administration, even if substantiated, would not be controlling.

Plaintiff's Title VII retaliation claim was found to lack evidentiary support, as the mere fact that she was eventually terminated after having filed a complaint with the EEOC does not justify an inference that there is a causal connection between the two events.

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

The court's opinion, in effect, combines analysis of the retaliation issue with FedEx's harassment defense that Plaintiff failed to use the company's reporting and remediation policy. Plaintiff sought to justify her failure to earlier report her supervisor's misconduct by explaining that she feared retaliation. When she did report the harassment, she argued, FedEx responded by conducting only a superficial investigation. She contended she did not accept FedEx's accommodating return-to-work offers because she was physically unable to. Under these circumstances, she maintained her failure to take advantage of available preventive and corrective measures was reasonable.

However, "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth*[2] to alert the employer to the allegedly hostile environment." *Williams v. Missouri Dep't of Mental Health*, 407 F.3d 972, 977 (8th Cir. 2005) (quoting *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999)). See also *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001). Plaintiff did not demonstrate that she was under a "credible threat of retaliation" and her dissatisfaction with FedEx's investigation does not justify her rejection of the corrective action taken by FedEx, which was reasonably designed to eliminate the complained-of stressors in plaintiff's work. Finally, plaintiff's contention that she was unable to return to work prior to August 2004 falls far short of demonstrating that any continuing difficulties were caused by any inadequacy in FedEx's preventive or corrective measures.

Non-Discriminatory Factors as Governing Employment Action.
Hancock, v. Potter, Postmaster General of the United States Postal Service
(No. 07-1589, 7th Cir., June 24, 2008)
Plaintiff suffered a lumbar strain while on the job for the U.S. Postal Service. After a series of examinations to assess her ability to perform certain physical tasks of the job, she was given a new set of duties. She disagreed with her supervisors regarding whether her new tasks ran afoul of her physical restrictions. These disagreements ultimately formed the basis of her complaint in the district court alleging gender discrimination, disability discrimination, retaliation, and a hostile work environment.

[The protracted description of plaintiff's work history and injury claims is omitted.] Ultimately, she filed action premised upon six claims involving Title VII, the ADA and the ADEA: (1) her limited duty job restrictions were violated; (2) her request to be trained in a particular program was not honored in order to harass her and deny her an accommodation for her disability; (3) she was harassed and denied accommodation when presented with job offers; (4) her work hours were reduced; (5) she was given an unfavorable evaluation for the Associate Supervisor Program; and (6) injury compensation personnel withheld medical information in her worker's compensation cases. The district court granted USPS summary judgment in large part because plaintiff did not suffer an adverse employment action and could not identify a similarly situated employee.

The Circuit Court found that her gender discrimination complaint failed, as the employer's actions were premised upon finding <u>some</u> work that she could perform within the restrictions set for her, and that reductions in her schedule were due to lack of work of the type she could

[2] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); see also *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) which, combined, constitute the *Ellerth/Faragher* affirmative defense doctrine.

perform. Noting that she failed to identify a single individual or instance in which an individual was treated differently, her gender claim failed. Her ADA claim failed, as she did not meet the base requirement of showing that any of her major life activities were affected by her injury.

To prevail on her retaliation claim, plaintiff had to prove that USPS took an adverse action against her because she opposed a practice that Title VII forbids. While acknowledging that her request for entry into the management program was denied due to her filing grievances claiming harassment from management, the denial also was based on co-workers' statements that she was not doing her job. Plaintiff argued that within one month of complaining about discriminatory treatment, she was denied entry to the program. However, that was not consistent with the facts and timeline of action, as she was given negative evaluations months before she complained of harassment or filed EEO complaints. In addition, the comment regarding filing of grievances referred not to plaintiff's complaint of discrimination, but the filing of grievances as reflecting a "very negative attitude towards management." As an example, one of the prior grievance complaints asserted that her supervisor was "disrespectful towards her." There was no evidence, or even an allegation, that this disrespect was fueled by a discriminatory animus. Plaintiff's attempt to utilize the burden-shifting approach in harassment and retaliation cases similarly failed as she had to show that "(1) after lodging a complaint about discrimination, (2) only [she], and not otherwise similarly situated employees who did not complain, was (3) subjected to an adverse employment action even though (4) [she] was performing [her] job in a satisfactory manner."[3] Here, USPS amply justified its actions based on nondiscriminatory factors.

Election-of-Remedies Provision in a Collective Bargaining Agreement (CBA).
Richardson v. Commission on Human Rights & Opportunities, Office of Policy & Management, et als.
(No. 06-0474-cv, 2nd Cir., July 7, 2008)
The EEOC had ruled that an election-of-remedies CBA clause ran counter to Title VII, while Connecticut's Commission on Human Rights and Opportunities (CHRO) held a contrary view. In this case, the second circuit concluded that the law governing contracts that purport to release or waive Title VII rights is independent of the law governing employer actions taken in retaliation for, and intended to deter, employee opposition to unlawful employment practices, including the filing of charges with the EEOC or its state analogues.

In very summary fashion, this case involved an African-American woman, employed by the state of Connecticut for more than fifteen years and her termination and subsequent efforts to arbitrate that action. In 2000, plaintiff transferred from the Connecticut Office of Policy and Management (OPM) to the CHRO as a fiscal administrative officer. Shortly thereafter, she had a series of vituperative interactions with her immediate supervisor at CHRO. After airing her grievances internally on several occasions, plaintiff filed a charge with CHRO, which was not only her employer, but also the state analogue to the EEOC. Plaintiff alleged both disparate treatment and retaliation by her supervisor.

Plaintiff amended her CHRO charge to further allege that a second CHRO employee, who supervised both plaintiff and her immediate supervisor, had retaliated against her for complaining about her immediate supervisor. Eventually, that higher supervisor terminated plaintiff's employment with CHRO. Plaintiff then sought the assistance of her union in grieving her dismissal, but she also amended her CHRO charge, adding an allegation that she had been terminated "for the purpose of retaliating against [her]." After discovering that plaintiff had amended her complaint against CHRO to include an allegation of race discrimination regarding

[3] Citing *Kampmier v. Emeritus Corp*., 472 F.3d 930 (7th Cir. 2007).

her termination, the union withdrew its appeal of her grievance, asserting that "complaints of unlawful discrimination filed with CHRO are not subject to arbitration under the union contract." Connecticut is a state where state complaints are cross-filed with the EEOC, so the federal agency became involved and determined that the CBA election-of-remedy clause that violated Title VII.

After lengthy administrative proceedings, the matter ended up in federal district court which dismissed the Title VII retaliation claim against CHRO, finding that CHRO had "a legitimate non-discriminatory reason for the alleged retaliation, 'namely insubordination, poor performance, and violence in the workplace.'" The district court held that the CBA did not violate federal law and thus could not give rise to an inference that management and the union, by enforcing the terms of the [agreement], were motivated by a discriminatory animus.

The circuit court reviewed the history of Title VII's multi-step, distinct dual enforcement mechanisms, each triggered by the same cause: filing an EEOC charge by the employee. To dissuade employers from interfering with this important procedural step, Congress, in the anti-retaliation provision, explicitly forbade discrimination against an employee (1) who has opposed any practice made unlawful by Title VII or (2) who has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.

A second deterrent against such employer action, crafted by judicial decision, requires that any release or waiver of Title VII, including a CBA as opposed to an individually bargained employment contract, "not waive covered workers' rights to a judicial forum for causes of action created by Congress." Both this so-called "*Gardner-Denver* doctrine"[4] and the express anti-retaliation provision of Title VII are meant to prevent discrimination and contribute to doing so by ensuring "unfettered access to statutory remedial mechanisms,"[5] and for this reason, the second circuit has construed them both quite broadly.

Here, though, the court noted that while both the anti-retaliation provision and the *Gardner-Denver* doctrine seek to assure that the EEOC's ability to investigate and select cases from a broad sample of claims,[6] "each works in a different way. Broadly speaking, the anti-retaliation provision protects employees from particular acts of discrimination that are retaliatory. Indeed, the anti-retaliation provision forbids only 'discrimination.'" The *Gardner-Denver* doctrine, by contrast, protects employees from certain kinds of company policies that violate Title VII. The court then analyzed the election-of-remedies provision in this case, finding that it violated neither the *Gardner-Denver* doctrine nor the anti-retaliation provision of Title VII. The CBA thus passed muster as plaintiff 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. She did not prospectively waive any of her Title VII rights, nor did her union do so on her behalf.

Timeliness: Link Between Complaint and Employment Action.
Heaton v. The Weitz Company, Inc.
(Nos. 07-2851/07-3030, 8th Cir., July 24, 2008)
Plaintiff, a man of partial Hispanic descent, became a journeyman ironworker in 1992, and in 2000 became a member of an ironworkers union. In October, 2000, he began working for defendant as a journeyman ironworker. He was progressively promoted to foreman, general foreman, and finally superintendent ironworker in January, 2003. He reported directly to

[4] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).
[5] *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).
[6] *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

Novy, a company vice-president. In March or April, 2003, a union superintendent allegedly instructed some union members to make racial comments to plaintiff.

Plaintiff complained to the person in the Human Resources Department, who had attended training on anti-discrimination laws, and was listed as the contact person for making discrimination complaints. He requested that his supervisor (Novy) not be informed about the complaint because he believed that Novy and the union superintendent were friends outside of work and attended the same church, and Novy was very defensive of the superintendent. Plaintiff said he worried about retaliation by losing his promotion or his job. Despite that request, the complaint was assigned to Novy for action.

Novy said he had not known of plaintiff's racial background. But in response to plaintiff's question as to whether that mattered, Novy said nothing. About a week later, Novy told plaintiff that he concluded the union superintendent did make racially offensive comments and, though he hated to let the superintendent go, offered him a demotion or early retirement. He chose early retirement.

A few weeks later, plaintiff and a project manager discussed unloading equipment off trucks at a job site for Quaker Oats. After some disagreement, they agreed that a crew composed of ironworkers and millwrights should unload the trucks the next day. The next day another argument about who was to unload the trucks occurred, during which the manager used a racial term. Such a "jurisdictional dispute" about job functions rarely led to termination, but when Novy learned of this dispute, without waiting to hear plaintiff's side of the disagreement, informed plaintiff he was terminated because the project manager wanted him fired and because plaintiff was "acting like a ***ing union steward." Plaintiff had never been in trouble before at the company. When plaintiff asked if he was being fired due to his earlier complaint, Novy immediately revoked the termination and gave plaintiff "a second chance." He was told he would not be allowed to work on projects with the manager until he apologized. Plaintiff did apologize and was again assigned to a job with the manager.

On another assignment at the Quaker Oats plant, the manager, without advance warning, removed two of plaintiff's crew, for reasons that appeared suspect at the least. The removal of these two crew members caused plaintiff to fall behind schedule. After completing the Quaker Oats job, he was supposed to begin working on a project at General Mills, but Novy assigned the job to another person. When asked about that action, Novy told plaintiff he was being demoted to journeyman, or he could choose to be laid off. In reply to plaintiff's question as to why he was being demoted, Novy said, "Things are catching up to you."

Plaintiff chose a layoff over demotion for job protection purposes, but was required to turn in his company truck, tools and cell phone, even though other superintendents typically retained these items while temporarily laid off. Other superintendents continued to work, even as a slower period ensued, even if the assignments were just doing "busywork," and they also were kept working at odd jobs in warehouses. Plaintiff complained to the HR department, stating he felt he was being retaliated against because of his discrimination complaint. When told that HR had been informed that he had declined work offers three or four times, he said this was not true and rhetorically asked, "Why did Novy have me return my truck if this is true?"

Although plaintiff had been offered only a multiple-level demotion, and a journeyman position provided little job security because journeymen were the first to be terminated, HR did not look into the matter further because, "In [her] opinion, it was work, so [she] didn't get into what kind of work it was." HR also ignored the fact that, if a superintendent like plaintiff was laid off, the

employee would normally come back to work after the layoff at the same superintendent level. After being offered work as a journeyman, management level positions opened up, but plaintiff was not offered those positions.

Plaintiff sued his employer alleging retaliation in violation of Title VII. A jury awarded $137,070.44 on the retaliation claim in compensatory damages, including an award of $73,320.00 for emotional distress, and also awarded $25,000.00 in punitive damages. The employer moved for judgment as a matter of law pursuant Rule 50. The district court denied the motion and awarded attorney's fees.

On appeal, the employer argued there was insufficient evidence for a reasonable jury to find any causal connection between the discrimination complaint and either the decision to lay plaintiff off or not to reinstate him as a superintendent. The employer cited *Sims v. Sauer-Sundstrand Co.*, 130 F.3d 341 (8th Cir., 1997) for the proposition that "the passage of time between events does not by itself foreclose a claim of retaliation; rather, it weakens the inference of retaliation that arises when a retaliatory act occurs shortly after a complaint." In *Sims*, more than one year passed between the time of the protected activity and the time of the alleged retaliation, virtually no other evidence of a causal connection existed, and the claim was based upon little more than speculation that the adverse employment action was related to the protected activity

The circuit court characterized this argument as essentially asking it to determine that the evidence failed to *strongly* demonstrate causation. While six months did elapse between the time of the discrimination complaint and the time of the lay-off, all was not well during this six-month period. Thus, "(a)lthough the temporal proximity between the protected activity and the alleged retaliatory act must generally be "very close," the "employee may attempt to shorten the gap between [the] protected activity and the adverse action by showing that shortly after the employee engaged in the protected activity, the employer took escalating adverse and retaliatory action." Since sufficient evidence existed that would permit a jury to reasonably find retaliation, the employer's appeal was denied. [The circuit court's discussion of punitive damages, emotional distress and attorney's fees is not reviewed here.]

Direct and Indirect Method of Proof: Employee Record & Progressive Discipline.
Caskey v. Colgate-Palmolive Company and Hill's Pet Nutrition, Incorporated
(No. 06-2919, 7th Cir. , July 24, 2008)
Caskey began work as a technician at Hill's Indiana plant in 1995. A primary duty involved operating an extruder, heavy machinery that pushed unprocessed dog food through a grinder and then sliced the food into smaller pieces known as "kibbles."

Hill's provided paid leave for illness for its employees under FMLA. Because of this and other paid time-off programs, employees did not have "sick days." If an employee's absence did not qualify as Family Medical Leave (FML) or another form of protected leave, it was recorded as an unexcused absence. Employees with an absenteeism rate in excess of 2.12% in one calendar year were subject to discipline. Employee work performance issues were addressed through the Individual Improvement Process (IIP) which included a multi-tiered discipline system: (1) formal coaching; (2) performance agreement; (3) decision-making leave ("DML"); and (4) "deselection" or termination.

Caskey used FML multiple times during 2000, 2002, and 2003. She also had unexcused absences that did not qualify as FML. As a result, she was placed in formal coaching, IIP stage 1, in 2001. In February 2003, she moved into performance agreement, IIP stage 2, due to her absenteeism rate above 3%.

On February 21, 2003, Caskey slipped and fell while operating the extruder, injuring her wrist. Hill's investigatory team reported that the incident occurred because Caskey was standing on the "at-risk" side of the extruder and thus behaved unsafely. Caskey claimed that the standard operating procedure for the extruder at the time of her injury did not include an "at-risk" side of the extruder and that she fell because the floor was slippery and littered with product.

Caskey did not return to work for her next two scheduled shifts. A few weeks later, during her shift, over 50,000 pounds of reject product were produced on the plant line producing kibble and 20,000 pounds of defective kibble were bagged in the packaging area before being discovered. Caskey's responsibilities included quality control checks on that plant line. Based on these two incidents, on March 12, 2003, Hill's placed Caskey on decision-making leave, IIP stage 3.

An employee in DML stage must sign a letter of recommitment, have no absences, and use no emergency vacation time for the duration of the agreement. In April 2003, Caskey violated her recommitment letter by requesting vacation time on less than 48 hours' notice. Hill's decided not to terminate her at that point. Later in the month, she saw her family doctor for depression-related symptoms and the physician recommended that she take time off from work. She requested and received FML from April 24 to May 12, 2003. After her physician released her for work, she returned to work on May 12. She then took a birthday holiday on May 16 and vacation time on May 17 and 18. On May 20, she saw an employment assistance counselor regarding depression. The counselor, like her treating physician, did not impose any work restrictions. The following day, Caskey called a teammate and said she was "sick" and was going to miss work for the following two days. She did not report to work on May 21, 22, and 27. Caskey received no medical treatment for these absences. (Her next visit to a physician occurred in August 2003 for an unrelated condition.) On May 29, Hill's sent Caskey a letter stating that she had "self-terminated" by not reporting to work on those three days.

Caskey filed a charge with the EEOC on July 10, 2003, and her complaint against Hill's and Colgate on July 28, 2004, asserting (1) interference with her right to medical leave under FMLA, (2) discrimination because of her sex in violation of Title VII, and (3) retaliation against her for exercising her rights under FMLA, Title VII, and Indiana law. The district court granted summary judgment for the defendants, finding that plaintiff's discipline was lawful and her termination resulted from three unexcused absences from work.

After disposing of plaintiff's appeal on FMLA interference (no evidence that the May 2003 absences qualified for FMLA leave) and her sex discrimination claim (no substantial evidence that male employees were treated differently[7]), the court addressed her retaliation claims. Under both FMLA and Title VII, retaliation claims are addressed similarly. Under the direct method, a plaintiff must present evidence of (1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007). Under the indirect method, an employee must establish a *prima facie* case by proving that she (1) engaged in a statutorily protected activity; (2) met her employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated employees who did not engage in statutorily protected activity. *Nichols v. Southern Illinois University-Edwardsville*, 510 F.3d 772 (7th Cir. 2007). Once the *prima facie* case is established, the burden shifts to the employer to produce a non-discriminatory reason for its action; if the employer meets this burden, the burden shifts back

[7] This claim was analyzed under the indirect proof framework using the familiar burden-shifting method under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

to the employee to demonstrate that the proffered reason is pretextual. *Id*. at 785. Under the direct method, Caskey satisfied the first two elements: engaging in protected activity[8] and she suffered an adverse employment action (though she did not clearly indicate whether the relevant "action" was the second-stage IIP or her termination). Ultimately, however, it did not matter whether discipline or termination qualified as the adverse action, because she failed to present enough evidence on the third element: connecting her protected activity to her discipline or termination.

Evidence showing that protected activity motivated an employer's s action under the direct method of proof may be shown through "direct evidence" or "circumstantial evidence."[9] Direct evidence is evidence "which (if believed by the trier of fact) will prove the fact in question without reliance upon inference or presumption," which typically involves an admission by the decision-maker regarding the retaliatory intent. Circumstantial evidence "allows the trier of fact to *infer* intentional discrimination by the decision-maker," typically through a longer chain of inferences. Caskey presented no direct evidence of causal connection for either FMLA or Title VII purposes and only insufficient circumstantial evidence that Hill's had a pattern of terminating female employees who opposed sex discrimination and sex harassment, noting the termination of Isaacs and two other female employees who supported Isaacs.

As to the indirect method of proof, Caskey did not present a similarly situated employee that was treated more favorably. Moreover, she did not meet the legitimate expectations of her employer based on her progress through the disciplinary process to the final stage, not following the explicit agreement under the recommitment letter to have no absences and use no emergency vacation time, and not following proper procedures for giving notice of any intended time off.

Post-Employment Comments as Potential Retaliation.
Matthews v. Wisconsin Energy Corporation Incorporated
(Nos. 07-1780, 07-2824, 7th Cir. , July 7, 2008)
The issues in this case concern post-employment relationships, with plaintiff claiming that defendant breached a settlement agreement and retaliated against her for filing a discrimination lawsuit by giving several prejudicial job references following her departure from the company.

Plaintiff began work for defendant in 1980 and soon became a "commercial service representative." After an unfortunate workplace injury in 1996 (a disgruntled customer attacked her), plaintiff took a leave of absence. A number of things happened during the leave that put the parties at odds:

- Plaintiff was a member of a class action alleging that defendant had redlined the customers in the area where she lived;
- She disputed a claimed shortage in her pension fund;
- She filed a discrimination claim against defendant, a dispute the parties eventually settled.

Matthews never returned to work for defendant, and in April 1999, they executed their first Separation Agreement. Plaintiff did not immediately seek another job, but instead earned a college degree. Shortly before earning her degree in 2003, she began to apply for jobs with local

[8] In addition to her FMLA protection, Caskey also engaged in activity protected by Title VII as she supported the discrimination complaints of a co-worker who filed a charge of sex discrimination with the EEOC in July 2002.
[9] The court at this point remarked as to the "understandable" confusion of the parties in analyzing the direct *method* of proof with direct *evidence* of retaliatory or discriminatory intent.

companies thatsought employment references from defendant. That's when the troubles, and this case, began. As part of the 1999 Separation Agreement, defendant agreed to provide employment references for Matthews as the need arose. Dissatisfied with the responses that defendant provided, plaintiff filed suit in 2003. In her complaint, she alleged both violations of the 1999 separation agreement and intentional interference with prospective contractual relations. The parties soon settled the dispute, and a new settlement agreement was forthcoming in December 2003. The Agreement required Wisconsin Energy to provide an employment reference for Matthews and also contained an attorney-fees provision in the event of a future lawsuit. Whether defendant complied with the settlement and whether its actions retaliated against plaintiff were the bases for a district court action that was resolved by granting the employer's motion for summary judgment.

On appeal, the seventh circuit's opinion analyzes the lengthy and complicated factual history involving plaintiff's requests for references and defendant's responses, both affirming and reversing portions of the lower court's rulings. As to the retaliation complaint, plaintiff claimed that the substance of Wisconsin Energy's responses to reference requests was meant as retaliation for her prior EEOC complaints and discrimination lawsuit. The district court granted Wisconsin Energy's motion for summary judgment, reasoning that Matthews had failed to show retaliation.

Title VII prohibits an employer from retaliating against its employees for "oppos[ing]" discrimination, 42 U.S.C. § 2000e-3(a), and this ban extends to acts of retaliation against former employees, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The logic is that an employee would be less likely to engage in statutorily protected activity, like suing for discrimination, if the employer could exact some sort of revenge outside of the workplace or when the employee changed jobs.[10] Title VII eliminates these disincentives by giving former employees a cause of action when they've suffered a retaliatory adverse employment action. The court then restated the direct and indirect proof methodologies as stated in seventh circuit cases.[11]

As stated in *Burlington Northern*,[12] an "adverse employment action" is an employment action that is likely to "dissuade a reasonable worker from making or supporting a charge of discrimination." In the context of negative employment references, the seventh circuit had defined this to mean "the dissemination of false reference information that a prospective employer would view as material to its hiring decision." [13]

In *Szymanski*, the plaintiff had failed to prove that her former employer ever gave her a negative reference. The vast majority of the information concerning her employment was objectively truthful. Those statements that bordered on the subjective were not negative to the point that they constituted an "adverse" action. In this case, a number of the purported acts of retaliation similarly failed because they were not "adverse." In statements made to one prospective employer, defendant did not provide any false information. While defendant initially had denied that plaintiff worked there, it rapidly corrected that error and the error was attributed to recordkeeping problems associated with the defendant's reorganization. Defendant also reported her job title incorrectly, but that, too, was due to the organizational change, and the job responsibilities were similar and her last position was correctly described.

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[10] *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).
[11] *Metzger v. Illinois State Police*, 519 F.3d 677 (7th Cir. 2008); *Stone v. City of Indianapolis*, 281 F.3d 748 (7th Cir. 2003).
[12] Supra at 68.
[13] *Szymanski v. County of Cook*, 468 F.3d 1027 (7th Cir. 2006).

As to communications with another company, plaintiff presented no evidence that the communication concerned prospective employment.

Plaintiff had also retained a consultant to assist in obtaining employment, and that individual requested information about plaintiff from a highly placed official in the HR department which raised some questions as to why the information was being requested. The request ended up, unusually, in the office of the in-house counsel who had participated in the earlier settlements. That attorney discussed plaintiff's employment history beyond the usual practice of reciting dates of employment and similar objective information, and asked questions of the consultant regarding plaintiff's receipt of Social Security disability benefits. The attorney later indicated she did so in the belief that the consultant was looking into matters such as whether plaintiff was "gaming" the system. Information provided as to the plaintiff's prior litigation history was objectively true, so that disclosure was not adverse. In addition, plaintiff did not demonstrate that the attorney's questions regarding her Social Security benefits constituted a negative employment reference. Her questions regarding Social Security arose based on the consultant's job, which was to place workers receiving Social Security with employers. Further, the attorney did not link this "suspicion," such as it was, to plaintiff's previous performance at Wisconsin Energy or to other incidents of her employment. Notably, after this conversation, defendant sent along a reference that complied with its policies and that was objectively neutral. The consultant's impression, after responding to the attorney's questions about his relationship to plaintiff, is too undefined to have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

Finally, in context, the attorney's questions followed naturally from the details surrounding the consultant's request for information. If there was a basis for the consultant's view that the comments were negative, conveying such a suspicion may have been uncalled for; but such an interpersonal slight does not constitute an adverse employment action in the context of this conversation. Because showing an "adverse employment action" is a necessary condition under either the direct or indirect methods of proof, plaintiff's claim of retaliation failed.

Materiality of Retaliatory Conduct.
Aryain v. Wal-Mart Stores Texas LP
(No. 07-20552, 5th Cir. July 8, 2008)
In February 2005, Wal-Mart hired plaintiff as a cashier in the Tire Lube Express Department ("TLE"). Almost immediately thereafter, she began to suffer unwelcome sexual comments and advances from Hayes, her superior in TLE. Some of these comments occurred on a regular basis over her four-month tenure in the department. Hayes also propositioned Aryain for a date almost daily. Other sexual comments occurred with less frequency but were markedly more severe. At some time between the beginning of Hayes's harassing conduct and June 23, plaintiff complained to a TLE supervisor (Coker) regarding Hayes. Also, at some point between March and June 20, 2005, another employee complained to two different assistant managers regarding sexually suggestive statements Hayes made to her. Wal-Mart did not respond to that employee's complaints until August 2005 when an assistant manager asked her to provide a written statement. On June 20, Hayes yelled at plaintiff during work. She responded by leaving for the day. After leaving work, plaintiff explained to her parents about Hayes's conduct, including his sexually-charged comments over the previous four months. Her father called the store manager to complain about Hayes's conduct. The manager told him that Wal-Mart would respond. On June 21, plaintiff met with the manager and an assistant manager who supervised the infant department. In this meeting, plaintiff explained the details of her harassment complaint against Hayes, providing the manager with a list of the comments made by Hayes. The manger interviewed Hayes and a number of other associates and managers that Aryain identified as possibly having information to support her allegations. Around June 25, the manager concluded

her investigation and determined that the harassment complaint could not be substantiated. She met with plaintiff that same day to let her know that Wal-Mart could not pursue any disciplinary action against Hayes based on the sexual harassment allegations.

Shortly after this meeting, plaintiff's father phone phoned the manager requesting that plaintiff be transferred from TLE and Hayes. In response, the manager met plaintiff again and transferred her to the infant department. After the transfer, plaintiff's superiors, the manager and assistant manger who investigated the complaint against Hayes, subjected her to the following:

- On one hot day, she was required to break down clothing racks and move them to the back of the store. While completing this job, plaintiff's back hurt and she felt sick from the heat, but she was told to "get the job done" and her request for a break was denied.
- Both superiors watched her on a security camera while she loaded a disassembled clothing rack into a bin behind the store to make sure she loaded the rack "nice and neat."
- Plaintiff was prevented on other occasions from taking requested breaks.
- On another occasion, the manager knocked a load of clothes out of plaintiff's arms when she was struggling to handle the load.
- Both superiors would look angrily at plaintiff, laugh at her, and talk negatively about her.
- On a few occasions, the manager made plaintiff wait outside her office for long periods of time while plaintiff waited to speak with her.
- Finally, on July 13 or 14, plaintiff discovered that she was not included on the work schedule for the week of July 16.

On July 15, plaintiff resigned with a letter that indicated she felt Wal-Mart had responded ineffectively to her complaints about Hayes, that her superiors treated her poorly after her transfer to the infant department, and that she had been left off the schedule because Wal-Mart was trying to force her to resign. Based on the above facts, plaintiff brought Title VII claims alleging sexual harassment, constructive discharge, and retaliation. The district court granted summary judgment in favor of Wal-Mart as to all claims.

On review, the circuit court found that plaintiff met her burden in making a *prima facie* case of supervisor hostile environment harassment, but ruled that summary judgment against plaintiff's constructive discharge claim was properly granted. It also ruled that summary judgment was improperly granted on the question of the *Ellerth-Faragher* affirmative defense (existence and availability of policy of prevention and remedy and plaintiff's failure to report or seek remedy). The circuit court then moved on to the retaliation claim.

Wal-Mart did not dispute that plaintiff engaged in protected activity under Title VII when she lodged her formal complaint regarding Hayes's alleged sexual harassment (element of 1 of retaliation).

To establish that she suffered an adverse employment action (element 2) plaintiff pointed to the same conduct she claimed in her constructive discharge claim [managers changed their attitude towards her after she complained against Hayes and subjected her to negative treatment, her undesired transfer to the infants department, her superiors making her do harder work in the infant department, and being left off the work schedule for the week of July 16 in retaliation for her bringing the complaint against Hayes.] The court then referenced the *Burlington Northern* holding that a retaliation claim may rest on an action that "a reasonable employee would have found . . . [to be] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." In particular, the

court noted that the Supreme Court said the materiality requirement reflects the importance of separating "significant from trivial harms."

With this standard in mind, it looked at the incidents of retaliatory conduct alleged by plaintiff and found that the treatment by her managers did not rise to the level of material adversity. Instead they fell into the category of "petty slights, minor annoyances, and simple lack of good manners" that employees regularly encounter in the workplace, and which the Supreme Court recognized are not actionable retaliatory conduct.[14] As to the transfer to the infant department, her duties were somewhat different and involved less customer interaction. However, there was no evidence that the sales associate job was viewed as more arduous or less prestigious. Plaintiff's deposition testimony indicated that she would have preferred to have been transferred to the lawn and garden department, sporting goods, or a front-end cashier's job. However, her subjective preference for a different position cannot make her transfer to the infant department a materially adverse action and she admitted that she did not view the transfer as a demotion; nor did it involve a pay cut. She also testified that she was not embarrassed about being transferred to the infant department. While a lateral reassignment to a position with equal pay could amount to a materially adverse action in some circumstances, the Court felt it could not find that this transfer (an action taken at the request of plaintiff's father) would dissuade a reasonable employee in her circumstances from making or supporting a discrimination charge.

Plaintiff next pointed to specific actions taken by her supervisors after the transfer that she contended would dissuade a reasonable employee from complaining about sexual harassment. Again, she referred to her assignment breaking down clothing racks. Despite the fact that plaintiff had never seen a female employee break down the clothing racks, her testimony does not rebut the deposition testimony of the managers indicating that they (both female employees) had broken down clothing racks before. One manager also stated that breaking down clothing racks was a job done by everyone in the store, from managers down to sales associates. Moreover, the job description for an infant sales associate indicates that employees must be able to "constantly" pick up, lift, and carry supplies "up to 20 pounds without assistance and over 20 pounds with team lifting." Finally, Aryain admitted that she was assigned to carry out the task along with another female sales associate in the infant department. This single assignment would not have dissuaded a reasonable employee from making or supporting a charge of discrimination.

Next, plaintiff repeated her complaint about her undesirable break schedule, which was found, as a matter of law, not to rise to the level of material adversity. An employee in her position (entry-level retail job) reasonably could expect to have some break requests denied by a supervisor and such denials amount to nothing more than the "petty slights" or "minor annoyances" that all employees face from time to time.

Finally, plaintiff argued that an issue of fact exists as to whether Wal-Mart's leaving her off the work schedule for July 16 constituted a materially adverse action. Plaintiff's appellate brief contended that her exclusion from the work schedule was materially adverse because it deprived her of compensation and sent a message that she was no longer wanted at Wal-Mart. But, even assuming that plaintiff had established her *prima facie* case, the claim ultimately failed because Wal-Mart produced a legitimate, nonretaliatory reason for the scheduling error. Wal-Mart contended that her being left off the schedule resulted from an inadvertent mix-up as follows. Computers automatically generated employee schedules with overall responsibility for each

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[14] Citing *White*, 548 U.S. at 68 and *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (noting that Title VII does not set forth a "general civility code for the American workplace.")

department's schedule held by an assistant manager. When plaintiff changed to the infant department, her job code was not changed to coincide with the change in department. In her deposition, the manager indicated that a change in job code would have automatically reduced plaintiff's hourly wage. Seeking to avoid the wage reduction, she left plaintiff under a TLE job code despite her transfer. The week of Aryan's transfer was the week that the schedules for July 16 were being created. Depositions indicated that incorrect assumptions were made as to who was responsible for plaintiff's schedule. Both of the responsible employees testified that they did not realize plaintiff's lack of a work schedule until she resigned.

Thus, according to Wal-Mart, it was the confusion resulting from the mismatch between her job code and her actual position, rather than retaliation, which led to plaintiff being excluded from the work schedule for the week of July 16. Based on that deposition testimony, Wal-Mart satisfied its burden of producing a legitimate, non-retaliatory reason for plaintiff being left off of the work schedule. Because Wal-Mart satisfied its burden, plaintiff must show that a material issue of fact existed as to whether Wal-Mart's explanation was pretextual. To establish pretext, plaintiff pointed to the person responsible for scheduling in TLE knowing about her complaint about Hayes, and the temporal proximity between her complaint and the scheduling error. However, temporal proximity, standing alone, is insufficient to establish an issue of fact as to pretext after an employer has provided a nonretaliatory reason. *See Strong v. Univ. Healthcare Sys., LLC*, 482 F.3d 802 (5th Cir. 2007).

Plaintiff also pointed to her other allegations of retaliation, but a plaintiff cannot prove pretext simply by re-raising her otherwise non-actionable allegations of retaliation, as such an argument offers no more than the plaintiff's subjective belief that the defendant acted in a retaliatory manner on multiple occasions.

Lastly, plaintiff argued that Wal-Mart's failure to invite her back to work after discovering its "inadvertent" scheduling error calls into question Wal-Mart's non-retaliatory reason for the scheduling error. Her claim that Wal-Mart should have asked her to come back to work after learning of the scheduling error does little to undermine the credibility of Wal-Mart's legitimate explanation for why the scheduling error occurred in the first place. While plaintiff may have preferred for Wal-Mart immediately to respond to the allegations in her resignation letter to clear up any misunderstanding, Wal-Mart cannot be penalized for failing to correct what it perceived as her misconceptions or to convince her of its proper motive prior to litigation. Because Wal-Mart put forth a legitimate explanation for her absence from the July 16 schedule, and because plaintiff had not submitted sufficient evidence that this reason was pretextual, her retaliation claim was found to fail as a matter of law.

Timing and Nature of Alleged Retaliation.
O'Brien and Peterson v. Department of Agriculture, Mike Johanns, Secretary
(No. 07-2274, 8th Cir., July 16, 2008)
Peterson served as Human Resources Officer for the Natural Resources Conservation Service (NRCS) in Little Rock, Arkansas. Her immediate supervisor, Manuel, was a white employee. Peterson's second line supervisor was Trice, the State Conservationist for Arkansas and the chief NRCS official in the state, and an African-American. Peterson supervised O'Brien, a Human Resources Specialist, whose position entailed rating and ranking job applicants, including utilizing the Delegated Examining Unit ("DEU") to rank applicants from outside the Agency.

In 2003, O'Brien was undergoing chemotherapy following several cancer surgeries. Trice did not respond to O'Brien's request to work from home in May 2003. Trice approved O'Brien's second request in September 2003. On October 9, 2003, Trice held a meeting in which he informed

O'Brien of what Trice perceived to be deficiencies with the list O'Brien issued of the best qualified candidates for two secretarial positions. O'Brien testified that Trice was upset that a friend of his, an African-American, was not on the list of rated applicants. During the meeting, both Trice and O'Brien raised their voices, and O'Brien was reduced to tears. On October 15, 2003, O'Brien filed an informal complaint of discrimination with EEOC. Peterson provided a supportive statement. Trice was aware of this. O'Brien lodged a formal EEOC complaint on December 2, 2003.

Following Appellants' EEOC activity, Trice scrutinized Appellants' travel documents arising out of a training session they attended in San Diego, California, and issued a memorandum stating that they had acted improperly in relation to their travel vouchers; did not allow Peterson to serve as acting state administrative officer though Manuel had designated her to do so; suspended O'Brien's DEU authority; sent partial files concerning the secretarial applicants to regional and national headquarters to be reviewed; did not allow O'Brien to attend a training session in Texas; failed to respond to Peterson's request to work from home in a sufficient manner; denied O'Brien a performance award; discussed suspending them; and attempted to institute disciplinary action against them.

In addition to these discrete events, Appellants state, without specificity, that Trice: interfered with their work on a daily to weekly basis; embarrassed, isolated, and ostracized them; closely scrutinized and criticized their work; and increased their workload.

O'Brien filed a second EEOC complaint on May 29, 2004. Peterson filed an EEOC complaint on July 14, 2004. On April 30, 2005, Peterson retired; she was replaced by a white employee. On June 13, 2006, Appellants filed action against USDA under Title VII, claiming hostile work environment based on race discrimination and retaliation. Peterson also alleged constructive discharge.

The district court granted the USDA's motion for summary judgment on all claims. The court determined that Appellants failed to: (1) satisfy the "affecting a term, condition, or privilege of employment" element of a prima facie case of hostile work environment and (2) show a prima facie case of retaliation because they had not proffered evidence that Trice's treatment of them was materially adverse. The court also concluded that Peterson's constructive discharge claim failed as a matter of law because the record did not contain evidence suggesting: (1) the requisite objectively intolerable working conditions or (2) that Trice intentionally created the conditions in an effort to cause Peterson to quit. The plaintiffs appealed.

The 8th circuit affirmed the lower court action on the hostile work environment claim noting that, make a *prima facie* showing of such a claim, plaintiffs must demonstrate, among other things, that the harassment affected a term, condition, or privilege of employment. That required offering facts that show the harassment to have been sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment as viewed objectively by a reasonable person. Plaintiffs contended that the district court failed to consider the totality of the circumstances and examined instead only a few instances of Trice's alleged harassment. While hostile work environment claims are assessed based on the totality of the circumstances, appellants were seen to be arguing that the sheer number of alleged instances of harassment must equate to a racially hostile work environment. Frequency of alleged harassment is but one of the relevant factors in determining whether it was sufficiently severe or pervasive. Also to be considered are its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Characterizing the nature of plaintiff's affidavits as hyperbolic and conclusory, the court said the allegations may be distilled to verbal harassment and increased scrutiny.

As to retaliation, Appellants urged that there was evidence, in the form of affidavits of NRCS employees, that Trice treated people who engaged in protected activity differently than those who had not. In order to establish a prima facie case of retaliation, a plaintiff must produce evidence that the alleged retaliation was such that a reasonable employee would have found the challenged action materially adverse. The court noted that Trice's conduct at the October 9, 2003, meeting preceded Appellants' EEOC complaints that led to this case, and, therefore, could not constitute retaliation for those complaints. Furthermore, the remaining allegations, viewed as a whole, did not satisfy the "significant harm" standard imposed by the materially adverse element.