

# **RETALIATION**

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.<sup>1</sup>

Title VII and other employment laws outlaw not only discrimination, but also retaliation for making complaints of discrimination or participating in investigations, lawsuits or other proceedings. While discrimination claims and retaliation claims are often times presented together, an employee can prevail on a retaliation claim even if the underlying claim of discrimination is without merit. Employers must be careful to distinguish discrimination from retaliation.

## **PRIMA FACIE CASE OF RETALIATION**

A prima facie case of retaliation is established by showing that the plaintiff engaged in protected activity and was subjected to an adverse employment action, and by presenting evidence from which an inference of a causal link between the two can be drawn. It is sufficient to show that the two are not wholly unrelated. An inference of a causal connection between a charge of discrimination and an adverse employment action may be drawn from the timing of the two events, but the inference, by itself, is not sufficient to avoid summary judgment for the defendant.

### **A. TITLE VII**

Title VII prohibits employment discrimination based on race, color, religion, sex and national origin as well as retaliation. In order to prove a prima facie case of retaliation prohibited by Title VII of the Civil Rights Act of 1964, the worker must establish that he or she engaged in activities in opposition to practices made unlawful by those statutes, such as complaining about discrimination covered by Title VII, or that the employee participated in a proceeding, and that the employee's activity was protected, that the employee suffered some sort of adverse employment action based on his or her treatment by the employer or labor union, and that there was a causal connection between the employee's opposition or participation and the adverse treatment. To establish the prima facie case of retaliation, the employee need not prove that the employer's practices were actually unlawful, only that the employee reasonably believed that the employer was engaged in unlawful employment practices. Secehrest v. Lear Siegler Services, Inc., 2007 WL 1186597 (M.D. Tenn. 2007).

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<sup>1</sup> In the last decade, the number of charges filed with the Equal Employment Opportunity Commission ("EEOC") alleging employment retaliation has continued to grow, increasing from 18198 in 1997 to 22,555 in 2007. Retaliation claims now represent around 30 percent of all charges filed with the EEOC.

In 2006, the United States Supreme Court announced a new standard for retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII") in Burlington Northern & Santa Fe Ry. v. White, 549 U.S. 53 (2006). According to the Court, employees who bring retaliation claims under Title VII no longer must prove they suffered an "ultimate employment decision" or "materially adverse change in the terms and conditions of employment," such as a discharge, demotion, or loss of pay, in order to state a claim. Rather, the Supreme Court ruled that Title VII prohibits more subtle forms of retaliation, which can include, depending on the factual circumstances, a change in schedule or even the failure to invite an employee to lunch. The Court held that an employee need only show that the alleged adverse action would dissuade the employee from making a charge of discrimination. The new standard is very broad and fact specific and will require a case-by-case analysis. Thus, it is more important than ever to review all personnel actions involving anyone who has reported suspected discrimination or harassment or participated in investigation of the same.

## **B. ADEA**

Under the ADEA, it is unlawful to discriminate or retaliate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government. The standard for establishing a prima facie case of retaliation under the ADEA is similar to Title VII. James v. Metropolitan Gov. of Nashville, 2007 WL 1786792 (6th Cir. 2007).

## **C. ADA / REHABILITATION ACT**

The ADA prohibits private employers, state and local governments, employment agencies and labor unions from discriminating and retaliating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act. The anti-retaliation provision of the Rehabilitation Act incorporates by reference § 12203(a) of the Americans with Disabilities Act which provides in relevant part that "[n]o person shall discriminate against an individual because such individual has opposed any act or practice made unlawful by this Act. To establish a prima facie case of retaliation in violation of the ADA, the plaintiff must first show that the employee is disabled as defined by the ADA, that the employee is qualified to perform the essential functions of the employee's job with or without reasonable accommodation, and that the employee suffered an adverse employment action due to the employee's disability. Hiler v. Brown, 177 F.3d 542 (6th Cir. 1999).

**D.    § 1983**

Section 1983 provides that anyone who, under color of state or local law, causes a person to be deprived of rights guaranteed by the U.S. Constitution, or federal law, is liable to that person.

To establish a claim for retaliation under 42 U.S.C. § 1983, a plaintiff must prove the following elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two-that is, the adverse action was motivated at least in part by the plaintiff's protected conduct. Sowards v. Loudon County, 203 F.3d 426, 431 (6th Cir. 2000).

**E.    FMLA**

FMLA prohibits an employer from discriminating or retaliating against an employee who has taken protected leave under the FMLA. Interestingly, the statute itself does not contain any prohibition against discrimination or retaliation. Instead, the FMLA makes it unlawful to "interfere" with, "restrain" or "deny" the exercise of or attempt to exercise, rights provided by the Act. To establish a prima facie case of retaliation under the Family and Medical Leave Act (FMLA), an employee must show that he or she engaged in activity protected under the FMLA, that the employee suffered an adverse employment action by the employer, and that a causal connection existed between the employee's action and the adverse employment action. Bryson v. Regis Corp., 498 F.3d 561 (6th Cir. 2007).

**F.    FLSA**

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. To establish a prima facie case of retaliation, an employee must prove that (1) he or she engaged in a protected activity under the FLSA; (2) his or her exercise of this right was known by the employer; (3) thereafter, the employer took an employment action adverse to her; and (4) there was a causal connection between the protected activity and the adverse employment action. Williams v. Gen. Motors Corp., 187 F.3d 553, 568 (6th Cir.1999).

**G.    IMMIGRATION / NATIONAL ORIGIN**

Under the Immigration Reform and Control Act (IRCA), employers with four or more employees are prohibited from discriminating on the basis of citizenship status, which occurs when adverse employment decisions are made based upon an individual's real or perceived citizenship or immigration status. Examples of citizenship status discrimination include employers who hire only U.S. citizens, or U.S. citizens and green card holders; employers who refuse to hire those granted asylum in the U.S. or

other refugees, because their employment authorization documents contain expiration dates; and employers who prefer to employ unauthorized workers or temporary visa holders, rather than U.S. citizens and other workers with employment authorization.<sup>2</sup>

## **H. PREGNANCY**

Discrimination and retaliation on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. The standard for establishing a prima facie case of retaliation for asserting a claim of pregnancy discrimination is the same as the standard for FMLA and Title VII retaliation. DeBoer v. Musashi Auto Parts, Inc., 124 Fed. Appx. 387 (6th Cir. 2005).

### **I. § 1981**

Section 1981 protects individuals from discrimination and retaliation based on race in making and enforcing contracts, participating in lawsuits, and giving evidence.

To establish a prima facie case of retaliation under § 1981 against an employer, an employee must show that after opposing the employer's discriminatory practice only he, and not any similarly situated employee who did not complain of discrimination, was subjected to materially adverse action even though he was performing his job in satisfactory manner.<sup>3</sup>

## **J. WORKERS' COMPENSATION (see your state's workers' compensation law)**

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<sup>2</sup> Consider this intriguing problem – Recently, the nation's largest supplier of chicken was raided by immigration agents. Agents detained 100 workers who were illegal immigrants. The company avoided civil and criminal prosecution by helping Federal investigators identify those immigrants, most if not all of whom were previously e-verified (a Federal program that is supposed to confirm that workers are U.S. Citizens) as legal citizens.

While this company was spared from prosecution, some are not. This situation creates a legal Catch-22 because employers expose themselves to liability no matter how they treat people of different national origins. If an employer questions the immigration status of a potential employee or terminates an employee when it suspects that he or she is here illegally, the employer may face problems with discrimination and subsequent retaliation. If the employer does nothing, then it might find itself facing civil or criminal charges for employing illegals.

<sup>3</sup> Section 1981 does not contain explicit language authorizing retaliation claims. However, since Congress enacted the Civil Rights Act of 1991, and expanded the coverage of Section 1981, most federal courts have interpreted Section 1981 to allow such claims. In oral arguments in Humphries v. CBOCS West, Inc., 474 F.3d 387 (7th Cir. 2007) held in February of 2008, Chief Justice Roberts and Justice Kennedy asked pointed questions of the employee's counsel, indicating their concern with the lack of explicit language in Section 1981 authorizing a claim for retaliation. This has caused some observers to speculate that the Court will reverse the trend of allowing Section 1981 retaliation claims. A ruling from the Court is expected soon.

In order to establish a cause of action for discharge in retaliation for asserting a workers' compensation claim, a plaintiff must plead and prove the following elements: (1) The plaintiff was an employee of the defendant at the time of the injury; (2) the plaintiff made a claim against the defendant for workers' compensation benefits; (3) the defendant terminated the plaintiff's employment; and (4) the claim for workers' compensation benefits was a substantial factor in the [defendant's] motivation to terminate the [plaintiff's] employment. Anderson v. Standard Register Co., 857 S.W.2d 555, 558 (Tenn.1993).

**K. WHISTLEBLOWER (False Claims Act; State Public Protection Act or the equivalent; and Corporate and Criminal Fraud Accountability Act)**

In 1986, Congress added anti-retaliation protections to the False Claims Act. These provisions, which did not exist previously, are contained in 31 U.S.C. Sec. 3730(h): To establish a Sec. 3730(h) retaliatory discharge claim, the whistleblower must engage in conduct protected by the False Claims Act. Second, the courts require a showing that the defendant have some notice of the protected conduct that the whistleblower was either taking action in furtherance of a qui tam action or assisting in an investigation or actions brought by the Government. Finally, the whistleblower must show that the termination was in retaliation for the protected activities.

For a plaintiff to prevail on a claim of retaliatory discharge under the Public Protection Act of Tennessee codified as Tenn. Code Ann. § 50-1-304, the plaintiff must establish: (1) his status as an employee of the defendant employer; (2) his refusal to participate in, or remain silent about, "illegal activities" as defined under the Act; (3) his termination; and (4) an exclusive causal relationship between his refusal to participate in or remain silent about illegal activities and his termination. "Illegal activities" means activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.

Under the provisions of the Corporate and Criminal Fraud Accountability Act of 2002 ("Sarbanes-Oxley Act"), the whistleblower provision set forth in § 806(a)(codified at 18 U.S.C. § 1514(A)) is designed to protect employees from retaliatory employment actions.<sup>4</sup> 18 U.S.C. § 1514(A) is designed to protect employees who provide information, cause information to be provided, or assist in an investigation into conduct which the employee reasonably believes to constitute a violation of any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders.

A key provision of the whistleblower provision is that for the employee to gain protection he or she must disclose the information to a federal regulatory or law

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<sup>4</sup> 18 U.S.C. § 1514(A), (a). 18 U.S.C. § 1514(A) is designed to protect employees who provide information, cause information to be provided, or assist in an investigation into conduct which the employee reasonably believes to constitute a violation of any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders.

enforcement agency; a member of Congress or a committee of Congress; or a person with supervisory authority over the employee, which would include any person working for the employer who has the authority to investigate, discover, or terminate misconduct.<sup>5</sup>

If in response to such action on the part of the employee the employer discharges, demotes, suspends, threatens, harasses, or in any other way discriminates against an employee in the terms and conditions of the employment, or engages in any such conduct that could well dissuade a reasonable worker from making or supporting a charge of discrimination, then adverse action that is causally connected to the protected activity has occurred.

So if an employee is able to establish that “(1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action,”<sup>6</sup> a *prima facie* case has been established; and it will be incumbent upon the employer to “demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected behavior or conduct.”<sup>7</sup>

**L. TENNESSEE HUMAN RIGHTS ACT (see your State’s Human Rights Act or equivalent)**

In order to state a *prima facie* case of retaliation under the THRA, an employee must demonstrate: 1) that she engaged in activity protected by the THRA; 2) that the exercise of her protected rights was known to the defendant; 3) that the defendant thereafter took a materially adverse action against her; and 4) there was a causal connection between the protected activity and the materially adverse action. An analysis of claims under the THRA is the same as under Title VII of the Federal Civil Rights Act. Campbell v. Florida Steel Corp., 919 S.W.2d 26 (Tenn. 1996).

**M. COMMON LAW**

The elements of a typical common-law retaliatory discharge claim are: (1) that an employment-at-will relationship existed; (2) that the employee was discharged; (3) that the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and (4) that a substantial factor in the employer's decision to discharge the employee was the

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<sup>5</sup> 18 U.S.C. § 1514(A)(a)(1)(A)-(C).

<sup>6</sup> Collins v. Beazer Homes, Inc., 334 F.Supp. 2d at 1375 (N.D. Ga. 2004).

<sup>7</sup> 29 CFR § 1980.104(c). The employer has 20 days from receipt of notice of the complaint to provide a position statement and supporting evidence or request a meeting with the assistant secretary to present its position. Id.

employee's exercise of protected rights or compliance with clear public policy. Crews v. Buckman Laboratories Intern., Inc., 78 S.W.3d 852 (Tenn. 2002).

#### **N. ERISA (section 510).**

Under ERISA § 510, it is “unlawful for any person to discharge ... or discriminate against a participant or beneficiary for (1) exercising any right to which he [or she] is entitled under the provisions of an employee benefit plan ... or for (2) the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ... .”

Under this statutory provision, retaliation can come in two forms: (1) where adverse action is taken because a participant avails herself of an ERISA right; and (2) where adverse action is taken as an interference with the attainment of a right under ERISA.

In order to prevail on a retaliation claim under ERISA § 510, the participant must show that the employer had specific intent to violate ERISA. When there is no direct evidence of an employer's motivation, a burden shifting approach is applied to determine whether a claimant has established a *prima facie* case of retaliation.

To do so, the participant must establish the following: (1) that she was engaged in activity that ERISA protects; (2) that she suffered an adverse employment action; and (3) that a causal link exists between her protected activity and the employer's adverse action.

While proximity in time is a factor that the courts consider in determining whether there was a causal connection between the exercise of the right, which is an application for benefits, and an adverse employment action, “there is a consensus that proximity alone generally will not suffice where the adverse action occurs more than a few months ... after the protected conduct.” (Hamilton v. Starcom Mediavest Group, 2008 U.S. App. Lexis 7764 (6<sup>th</sup> Cir. E.D. Mich., April 11, 2008).

### **DEFENSES**

The following defenses are available to employers involved in retaliation lawsuits:

- 1) There is no evidence any adverse action resulted from the employee's opposition or participation.
- 2) The employer was unaware of the employee's protected activities.
- 3) The employer would have taken the adverse action in any event, for a wholly legitimate reason.
- 4) The employee's claim does not state a cause of action for retaliation.

- 5) Policy, procedure, and internal investigation.
- 6) Failure to exhaust administrative remedies.
- 7) Statute of limitations.

### **DAMAGES**

The "relief" or remedies available for employment discrimination and retaliation, whether caused by intentional acts or by practices that have a discriminatory effect, may include:

back pay,

hiring,

promotion,

reinstatement,

front pay,

reasonable accommodation, or

other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

Remedies also may include payment of:

attorneys' fees,

expert witness fees, and

court costs.

In Title VII cases, compensatory damages of up to \$300,000 for emotional and physical distress, as well as harm to reputation, plus any out-of-pocket compensatory damages, as well as attorneys fees, are awardable to federal employees in race, color, sex, national origin, religion and disability discrimination, as well as in retaliation cases based upon those types of underlying categories of discrimination. Punitive damages are also available.<sup>8</sup> This cap does not apply to back or to front pay.

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<sup>8</sup> Large jury awards and out-of-court settlements illustrate the potential exposure that employers face from retaliation lawsuits. A California jury awarded \$19.1 million in damages to a female college basketball coach who claimed she was discriminated against because of her gender and that her employer retaliated when she complained about the discrimination. Similarly, a jury in New Jersey awarded over \$9 million to a female human resource professional who proved she was denied a promotion because of her gender and later terminated in retaliation for bringing a discrimination lawsuit. In New York, a female employee at a financial services company was awarded \$2.54 million by a jury even though the jury found the employer was not liable for discrimination; instead, the jury

While compensatory and punitive damages are not available under the Equal Pay Act and ADEA, employees can recover "liquidated" damages (a doubling of wage/economic losses) if they establish a "willful" violation of their statutory rights.

Pursuant to the Seventh Circuit's decision in Kramer v. Banc of America Securities, 355 F.3d 961 (7<sup>th</sup> Cir. 2004), compensatory and punitive damages are not allowed in a claim for ADA retaliation under a plain reading of the statute. The Seventh Circuit also found that an ADA retaliation plaintiff has no right to a jury trial as only equitable relief is available. The United States Supreme declined to review this decision. The district courts that have addressed the question are split. Compare Sink v. Wal-Mart Stores, 147 F.Supp.2d 1085, 1100-01 (2001) (compensatory and punitive damages are not available for retaliatory discharge claim), Boe v. AlliedSignal Inc., 131 F.Supp.2d 1197, 1202-03 (2001) (same), and Brown v. City of Lee's Summit, 1999 WL 827768, \*2-\*4 (W.D.Mo.1999) (same), with Lovejoy-Wilson v. Noco Motor Fuels, Inc., 242 F.Supp.2d. 236, 240-41 (W.D.N.Y.2003) (compensatory and punitive damages are available), Rhoads v. FDIC, 2002 WL 31755427, \*1-\*2 (D.Md.2002) (same), and Ostrach v. Regents of the University of California, 957 F.Supp. 196, 200-01 (E.D.Cal.1997) (same). The Second, Eighth and Tenth Circuits have affirmed jury verdicts where compensatory and punitive damages had been awarded on ADA retaliation claims. See Salitros v. Chrysler Corp., 306 F.3d 562, 570 (8th Cir.2002); Muller v. Costello, 187 F.3d 298, 314 (2d Cir.1999); E.E.O.C. v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir.1999). These decisions focused on whether there was sufficient evidence to award compensatory and punitive damages, but none examined the legal question of whether such damages were authorized for an ADA retaliation claim.

Damages for discrimination and retaliation due to immigrant status include back pay (for lost wages), reinstatement or reinstatement. Penalties may also be imposed for discrimination. Penalties range between \$275 and \$2,200 for each victim for the first offense, \$2,200 to \$5,500 for the second offense, and \$3,300 to \$11,000 for the third offense. Fines for document abuse range from \$110 to \$1,100 for each victim.

In some states, employees may recover *unlimited punitive damage awards* if they are retaliated against after complaining about an employer's violation of state human rights laws or public policy.

Under the whistleblower provision in 31 U.S.C. § 3730(h), the plaintiff is entitled to reinstatement with seniority, double back pay, interest, special damages sustained as a result of discriminatory treatment, and attorneys fees and costs.

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awarded damages on the plaintiff's retaliation claim In yet another case, a health insurance company in Florida paid \$1.8 million to settle EEOC charges alleging that a male employee was sexually harassed by a male supervisor and then disciplined and denied stock options and other benefits in retaliation for reporting the harassment. Furthermore, in 1991 13,000 pregnant workers collected \$66 million in a "class action" lawsuit.

In an action for a wrongful discharge resulting from an illegal retaliatory motive or otherwise in violation of public policy, punitive damages are generally recoverable, provided that the employer's conduct is willful, wanton, or malicious. There is, however, authority to the effect that punitive damages are not recoverable under such circumstances.

Punitive damages are likewise generally recoverable in an action for a discharge in retaliation for the exercise of rights under workers' compensation laws, provided that the employer's conduct is willful, wanton, or malicious.

### **BEST PRACTICES**

Supervisors and employees must not retaliate against the employee who complains about discrimination. In fact, employers should strive to create an environment where employees can express their concerns about potential problems and participate in investigations without fear of retaliation. This is especially important in light of the lower burden for employees to show retaliation created by the Court in Burlington.

Retaliation claims can be very difficult to defend. Employers should always give careful consideration to any employment action that could be considered adverse, especially if that action is directed towards an employee who recently engaged in protected activity. Consider the following as a means to avoid retaliation claims:

1. Make sure your employee handbook includes a policy prohibiting retaliation.
2. Ensure consistent administration of policies prohibiting retaliation. In this regard, have a credible and organized complaint procedure.
3. Conduct supervisor and management training on harassment, discrimination and retaliation.
4. Make sure that any employee discipline has nothing to do with complaints of harassment, discrimination or retaliation.
5. Respond promptly to any claims of discrimination in an effort to head off any claims of retaliation.
6. Periodically talk with the complaining employee to determine if anyone has retaliated against them. If performance is an issue for the employee, be sure to bring this to the attention of the employee and make sure to document your conversations.
7. Reassure the complaining employee that he or she will suffer no retaliation. Further assure the employee that the complaint is being taken seriously and that you will conduct a discreet investigation.

8. Thank the employee for the information that he or she provides. This will go a long way in making the employee feel comfortable about what he or she has reported. After all, employers want working environments free of discrimination.
9. Ask that the complaining employee report any continuing violations or events he or she may consider retaliation.
10. Keep confidential any complaints that you receive. The fewer people who know about a complaint, the smaller the chances are that someone will retaliate against the complainer. If necessary for investigation purposes, make sure that you tell only the people who absolutely need to know. If it is necessary to tell others about the complaint, explain to them what retaliation is and tell them that it will not be tolerated.
11. Carefully document and monitor adverse actions and the non-discriminatory reasons for them.
12. Be sensitive to an employee's complaints of possible retaliation, no matter how trivial the incident may seem.
13. Make a conscious effort to keep the employee informed about the on-going investigation into the underlying complaint of discrimination.
14. When an employee has lodged a formal complaint of discrimination, keep a close watch on distribution of assignments, staff scheduling, approval of requests for time off, and conducting performance and salary reviews.
15. Before taking any potentially adverse action against an employee who has complained of discrimination, supervisors should engage their human resource experts and counsel regarding the proposed course of action.
16. Employers should take extra precaution whenever they alter the terms and conditions of employment of an employee who has complained of discrimination or has made a claim to the EEOC or filed a formal lawsuit, particularly where the change is made relatively close in time to the complaint, charge or lawsuit. Courts are now required to consider the intangible differences between positions, such as prestige and desirability.

Merely maintaining an employee's pay rate and benefit structure will not be a complete defense to Title VII retaliation claims. If the action taken by the employer is likely to discourage a reasonable employee from making a claim to the EEOC, then the employer may be found to have violated Title VII.

What the Supreme Court has termed "trivial harms" will not rise to the level of an actionable claim. Trivial harms include personality conflicts with other employees, perceived and actual favoritism or snubbing, and "sporadic" abusive language

such as gender related jokes and gender related teasing. These so-called trivial harms, while they are not appropriate, are part of the common workplace environment and were not the types of behavior that Title VII was designed to prohibit according to the Court.

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