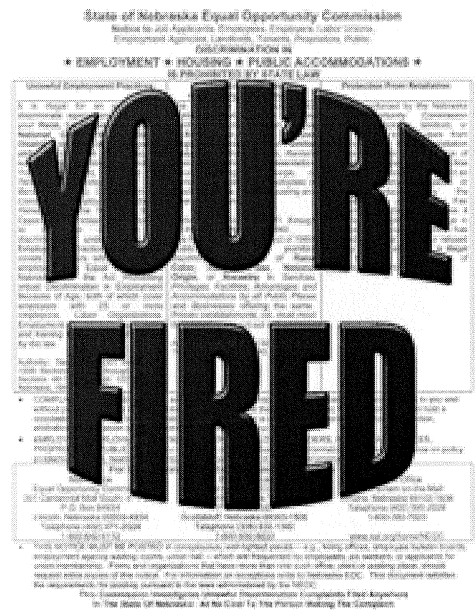


The Basics of a Retaliation Claim in Employment Actions

by Melanie Whittamore-Mantzios



Dee Kotla, a computer technician, was awarded a \$2,100,000 verdict against her former employer, Lawrence Livermore Laboratory, in Alameda County Superior Court in Oakland, CA on March 23, 2005, in a retrial of a retaliation claim. The jury had awarded Kotla \$1,000,000 in the first trial. Kotla, a 13-year employee of the lab, had engaged in protected activity by providing favorable testimony for a co-worker on a discrimination claim. Kotla was subsequently terminated in 1997. Kotla admitted during her testimony that she had used her work computer to do work for a friend and that she had made \$4.30 in personal phone calls from her office phone. The lab contended they had a zero tolerance policy for such offenses. However, Kotla's attorneys were able to show that when similar allegations were brought against other employees, they were given verbal warnings or a five-day suspension. Kotla was awarded \$127,000 for lost wages

and benefits and \$2,000,000 for non-economic damages.¹ Kotla's case is evidence of the real danger retaliation claims pose to employers.

This article is intended to give you the basics of a retaliation claim. In your practice you may be asked to defend an employer who has been accused of a retaliatory employment action or to represent an employee who has been the victim of retaliation. Retaliation claims are usually more dangerous for employers than the unfair or discriminatory treatment claims because the employee does not have to prove the underlying claim to be successful on a claim for retaliation. In the fiscal years of 2003/2004, retaliation complaints represented a third of the charges filed with the Equal Employment Opportunity Commission (EEOC), and approximately a fifth of the charges filed with the Nebraska Equal Opportunity Commission (NEOC).²

Both federal and state statutes prohibit retaliatory conduct after an employee has engaged in protected activity. Such claims may be brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §1981 of the Civil Rights Act of 1866 (race only); the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), the Fair Labors Standards Act ("FLSA"); the Equal Pay Act ("EPA") the Nebraska Fair Employment Practices Act ("NFEPa"), and the Act Prohibiting Unjust Discrimination Because of Age (APUDBA).³ On March 29, 2005, in *Jackson v. Birmingham Board of Education*, 2005 WL 701076, the U.S. Supreme Court held that there is also a private cause of action for retaliation under Title IX of the Education Amendments of 1972.⁴ Nebraska also recognizes that an at-will employee

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S. Trent for their help with this article.

may claim damages for wrongful discharge when the motivation for the termination contravenes public policy.⁵ Additionally, if you represent a governmental entity or an employer who is accused of conspiring with a governmental entity, such employers are also subject to retaliation claims under the Civil Rights Act, 42 U.S.C. § 1983.⁶

Preliminary Questions

Initial questions to be answered when you become involved with a retaliation case are whether the court has jurisdiction; whether the jurisdictional prerequisites have been met; and whether the claim is barred by the statute of limitations. If the employer involved in your case employs less than 15 employees, many of the federal and state laws will not apply. For instance, Title VII, the ADA, and the NFEPA only applies to employers with 15 employees or more; the ADEA only applies to employers with 20 employees or more; the APUDEBA only applies to employers with 25 or more employees; and the FMLA only applies to employers with 50 employees or more.⁷ The public policy exception in Nebraska and 42 U.S.C. §1981 apply to all employers regardless of the number of employees.

There are no administrative exhaustion requirements for EPA; 42 U.S.C. 1983; 42 U.S.C. § 1981; and the public policy exception. There are administrative exhaustion requirements for Title VII, the ADA, the ADEA, the NFEPA, and the APUDEBA. The employee must file a charge of discrimination with the EEOC and/or the NEOC before proceeding to court. Such a charge needs to be filed within 300 days of the alleged retaliatory conduct.⁸ Under the ADEA, the employee cannot file a complaint in court until 60 days have passed from when the charge was filed; for APUDEBA it is 30 days.⁹ An employee may request a right to sue letter from the EEOC 180 days after a charge has been filed if no action has been taken by the EEOC for claims brought under Title VII and the ADA. An action must be filed in court within 90 days of when a right to sue letter has been issued by the EEOC under Title VII and the ADA.¹⁰ A right to sue letter has been determined to be a condition precedent that can be cured after an action has been initiated in court. *Jones v. American State Bank*, 857 F.2d 494, 499-500 (8th Cir. 1988). A NFEPA complainant may file a claim in court at any time prior to dismissal of the charge by the NEOC.¹¹ The NFEPA complainant has ninety (90) days of the last action taken by the NEOC to file an action in court, whether it is a final order after hearing; a finding of reasonable or no reasonable cause; or another administrative action which ends the NEOC's involvement in the case.¹²

If a charge of discrimination filed with the EEOC and/or the NEOC is required, it is important to verify that the employee has exhausted the administrative process as to the

retaliation claim. The employee's failure to appropriately exhaust administrative remedies for retaliation is fatal to the retaliation claim. *Watson v. O'Neill*, 365 F.3d 609, 614 (8th Cir. 2004). For example, it is possible that an employee may not have amended the initial charge of discrimination to include retaliation.

If all the statutory requirements have been met, then the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), burden-shifting framework is applied to determine if a retaliation claim exists. The burden is initially upon the employee to prove a *prima facie* case. The *prima facie* elements of a retaliation claim are: 1) the employee engaged in protected activity; 2) the employee suffered an adverse employment action; and 3) a causal connection exists between the protected activity and the adverse employment action.¹³ Once the employee has met the burden of proving a *prima facie* case, the burden shifts to the employer. The employer must come forward with a legitimate, non-retaliatory reason for the adverse employment action. If this is done, the burden shifts back to the employee to prove that the reasons given by the employer are a pretext for retaliation. *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034-45 (8th Cir. 2005).

Prima Facie Case of Retaliation

A. Protected Activity—Protected activity is broken down into two categories, participation (“participation clause”) and opposition to unlawful conduct (“opposition clause”).¹⁴ “Participation” typically involves making a complaint or providing evidence during an investigation or at the hearing or trial of a complaint of unlawful activity. Filing an EEOC charge is the most common participation activity. While a plaintiff does not have to prove the validity of the underlying claim, a plaintiff must still show a reasonable belief that there was a violation of the law in question for such activity to be protected.

“Opposition” includes any activity opposing an unlawful employment practice. Such activity can include making complaints, formally or informally. However, the employee must reasonably believe that the complained of conduct violated the law. In *Clark County School District v. Breeden*, 532 U.S. 268 (2001), the Court found that Breeden could not have believed her complaint about one-time comments of a sexual nature amounted to sexual harassment. In *Galdieri-Ambrosini v National Realty and Development Corp.*, 136 F.3d 276 (7th Cir. 1998), the court found that a female employee who refused to work on a male supervisor's personal business and was fired could not reasonably believe that it was sex discrimination.



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If the employees' complaints are simply that they have been mistreated or have suffered unfair treatment without relating such complaints to a statutory basis, they are generally not enough to trigger opposition coverage. *Genosky v. Minnesota*, 244 F.3d 989 (8th Cir. 2001).¹⁴ Opposition must be connected to an employment practice. For instance, a teacher's opposition to his principal's actions in complying with a desegregation order was not statutorily protected opposition to an unlawful employment practice. *Evans v. Kansas City, MO.*, 65 F.3d 98, 101 (8th Cir. 1995). The employee must be clearly speaking out on the unlawful conduct in such a manner as to put the employer on notice that the employee is engaging in protected activity.¹⁵

NFEPA provides for broader protection than participation and opposition to discriminatory employment practices based upon race, color, religion, sex, disability, or national origin. NFEPA also protects an employee from retaliatory conduct when an employee has opposed any unlawful practice or refused to carry out any unlawful action under federal or state law.¹⁶ In order for the protection to be provided, the opposition must be to unlawful conduct of the employer. In *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53 (2003), the court found that an employee who complained about co-employees' illegal conduct was not protected because it was not illegal conduct of the employer.

The public policy exception to the employment-at-will doctrine has been recognized to provide protection for individuals who have refused to take a polygraph exam, *Ambroz v. Cornhusker Square Limited*, 226 Neb. 899, 416 N.W.2d 510 (1987); individuals who file workers compensation claims, *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003); and employees who refuse to violate the criminal laws of the state, *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb. App. 263, 558 N.W.2d 825 (1997). However, the public policy exemption was found not to provide protection to employees who filed claims under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232, *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001); or to an employee who did not have a reasonable belief that his employer violated a criminal statute when he reported his employer to the Attorney General's Office for odometer fraud, *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988).

A governmental employee is also protected from retaliatory action for exercising his or her First Amendment rights by 42 U.S.C. § 1983. *Pickering v. Bd of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The speech or writing must be on a matter of public concern which is determined by the content, form, and context of the speech as revealed by the

whole record. *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). This could include speaking out against any type of discriminatory conduct, but it would not include a personal grievance. *Cygan v. Wis. Dept. of Corr.*, 388 F.3d 1092, 1099 (7th Cir. 2004). The government-employer may still restrict the speech if it can prove "that the interest of the public employee as a citizen commenting on the matter is outweighed by the interest of the state, as employer, in promoting effective and efficient public service." *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002).

B. Adverse Employment Action—There is disagreement among the courts as to what qualifies as an "adverse employment action." The Eighth Circuit Court of Appeals requires the employment action result in a "material employment disadvantage," such as termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects. *Duncan v. Delta Consol. Indus.*, 371 F.3d 1020, 1026 (8th Cir. 2004). Some circuits have adopted the standard set out in the EEOC Compliance Manual, Section 8 on Retaliation, which includes more significant retaliatory treatment that is reasonably likely to deter protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1242 (9th Cir. 2000). Some circuits have recognized hostile work environment as being an adverse employment action. *Richardson v. NY Dept. of Corr. Serv.*, 180 F.3d 426 (2nd Cir. 1999); *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000); and *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005). Shunning by co-workers without a change in the terms and conditions of employment is not an adverse employment action. *Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878 (7th Cir. 1998). Most jurisdictions are in agreement that termination, denial of promotion, suspension, or a reduction in pay or benefits qualify as adverse employment actions.

The fact that an employee may be unhappy or disappointed about some employment decision does not make the decision an adverse employment action. The following employment actions do not constitute adverse employment actions:

1. A performance improvement plan. *Givens v. Cingular Wireless*, 396 F.3d 998 (8th Cir. 2005);
2. Documentation of performance problems and failure to get an invitation to an activity outside of work. *Horn v. University of Minnesota*, 362 F.3d 1042, 1046 (8th Cir. 2004);
3. A reporter's denial of an audition; different treatment than other reporters; being scheduled for more work; and less important assignments. *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1028 (8th Cir. 2004);
4. Co-worker ostracism did not rise to the level of adverse employment action when the co-worker's behavior was not

caused by the employer. *Scusa v. Nestle USA Co., Inc.*, 181 F.3d 958 (8th Cir. 1999); and

5. Reassignment of an employee to another work station without any loss in pay, benefits, or seniority. *Flannery v. TransWorld Airlines, Inc.*, 160 F.3d 425 (8th Cir. 1998).

If the employer has a grievance procedure or appeal procedure in place for adverse employment actions, the employee must exhaust such procedures to establish an adverse employment action. For example, when the employee failed to exhaust all appeals available for the denial of tenure, there was no adverse employment action, even though the appeal would likely have been futile. *Okrublik v. University of Arkansas*, 395 F.3d 872, 880–81 (8th Cir. 2005). Also, when a professor had initially been denied tenure, but was able to obtain tenure through the grievance procedure, there was no adverse employment action. *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 545–46 (6th Cir. 1999).

Retaliatory conduct can be found to occur after an employee has left employment. If an employee receives adverse job references post-employment it can be an adverse employment action. *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997). The employee does not have to prove that they did not get the job because of the bad job reference. *Hillig v. Rumsfield*, 381 F.3d 1028 (9th Cir. 2004). The fact that employees who did not engage in protected activity received a job reference and the employee who did engage in protected activity did not was sufficient to prove an adverse employment action. *Wilson v. L. B. Foster*, 123 F.3d 746 (3rd Cir. 1997).

C. Causal Connection—The courts have rejected a “*post hoc ergo propter hoc*” reasoning to show a causal connection; in other words, because an adverse employment action follows protected activity, retaliation must have occurred. *Hasan v. U.S. Dept. of Labor*, 2005 WL 578791 (7th Cir. 2005). The two important elements for finding a causal connection are: (1) that the decision-maker has prior knowledge that the employee engaged in protected activity, and (2) the temporal proximity between the protected activity and the adverse employment action. Retaliation is an intentional act, so in order to retaliate, the decision-maker has to be aware of the protected activity. *Smith v. Riceland Foods, Inc.*, 151 F.3d 818 (8th Cir. 1998) and 42 U.S.C. §2000e-3(a).

Temporal proximity alone will rarely be enough to establish a causal connection, unless the adverse employment action took place right away. The closer in time the protected activity is to the adverse employment action, the more likely the court will find a causal connection. In *Scott v. County of Ramsey*, 180 F.3d 918 (8th Cir. 1999), a causal connection was found when the adverse employment action began within two weeks of Scott’s participation in an investigation of a

sexual harassment complaint. However, if the retaliation claim is weak, the more time that has passed between the protected activity and the adverse employment action, the less likely the court will be to find a causal connection. *Kipp v. Missouri Highway and Transp. Comm.*, 280 F.3d 893 (8th Cir. 2002). Seven to twenty months between the protected activity and the adverse employment action have been found to be too much time to prove a causal connection. *Grey v. City of Oak Grove*, 396 F.3d 1031 (8th Cir. 2005); *Shanklin v. Fitzgerald*, 397 F.3d 596, 604 (8th Cir. 2004); and *Clark County School District v. Breeden*, 532 U.S. 268, 121 S.Ct. 2264, 149 L.Ed.2d 509 (2001).

Legitimate Non-Retaliatory Reason for Employment Action

The employer has the opportunity to prove that there was a legitimate non-retaliatory reason for the adverse employment action after the complainant has made a *prima facie* case for retaliation. An employer may show the employment decision was legitimate with evidence of the employee’s disciplinary or employment record before the protected activity. An employee cannot obtain protection from appropriate disciplinary action by engaging in protected activity. In *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004), the court noted that Griffith had filed a charge of discrimination a day after receiving notice of a predisciplinary hearing related to three separate charges that had been filed against him. “His post-hoc complaints did not without more raise a retaliation bar to the proposed discipline because ‘the anti-discrimination statutes do not insulate an employee from discipline for violating the employer’s rules or disrupting the workplace.’” *Griffith*, 387 F.3d at 738 *citing to Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir.) (en banc) *cert. denied* 529 U.S. 818 (1999).¹⁷ In *Erenberg v. Methodist Hospital*, 357 F.3d 787 (8th Cir. 2004), the court found that Erenberg, who had been disciplined several times before the protected activity and after, could not prove retaliation when she was terminated some two months after the protected activity.

Pretext


The employee may come back and prove that the reason given by the employer for the adverse employment action is a pretext and that retaliation is the motivating factor for the adverse employment action. *Crossley v. Georgia Pacific Corp.*, 355 F.3d 1112, 1113 (8th Cir. 2000). One method of proving pretext is for an employee to show that similarly situated employees, who did not engage in protected activity, were not similarly disciplined and that the employee was performing their job in a satisfactory manner, such as in the *Kotla* case



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referenced in the first paragraph, above. *See also, Hasan v. U.S. Dept. of Labor*, 2005 WL 578791 (7th Cir. 2005). Another means for the employee to prove pretext is for the employee to show a stellar employment record prior to the protected activity. The employer's change of explanations over time for the adverse employment action can also be evidence of pretext. *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827, 835 (8th Cir. 2002).

Conclusion

If you represent an employer or an employee in an employment retaliation case, verify that the jurisdictional prerequisites have been met and then work through the burden-shifting framework set out in the case law. Structure your discovery requests and deposition questions so that you can ascertain the employee/employer relationship before and after the protected activity. Also, explore the motives of the employee for engaging in protected activity and the motives of the decision-maker for the adverse employment decision. Consider filing a motion for summary judgment if the employee or employer is unable to carry their burden of proof. 

Endnotes

- ¹ *San Jose Mercury News*, "Fired Livermore Lab Worker Awarded \$2.1 Million" March 24, 2005.
- ² www.eeoc.gov/stats.charges.html and NEOC 2003/2004 Annual Report, www.neoc.ne.gov/reports/anulrpt%2003-04.doc
- ³ Title VII, 42 U.S.C. § 2000e-3(a); ADEA, 29 U.S.C. § 623(d); ADA, 42 U.S.C. § 12203(a); FMLA, 29 U.S.C. § 2615(b); FLSA, 29 U.S.C. § 215(a)(3); EPA, 29 U.S.C. § 206(d); NFEPA, Neb. Rev. Stat. § 48-1114 (2004); and APUDEBA, Neb. Rev. Stat. § 48-1004(3)(2004).
- ⁴ 20 U.S.C. § 1681(a). Rodrick Jackson, the coach for the girl's basketball team, had complained to his supervisors that the girl's basketball team was not receiving equal funding and equal

access to athletic equipment. He alleged that his supervisors' negative work evaluations of him and his removal as the coach was retaliation for his complaints. The Court found "[r]etaliatio[n] against a person who speaks out against sex discrimination is intentional 'discrimination' on the basis of sex' within the statute's meaning."

- ⁵ *Ambroz v. Cornhusker Square Limited*, 226 Neb. 899, 416 N.W.2d 510 (1987). Mark A. Fahleson, "The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?" 72 Neb. L. Rev. 956.
- ⁶ *Dossett v. First State Bank*, 2005 WL 443813 (8th Cir. 2005) citing to *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) and *Tower v. Glover*, 467 U.S. 914, 920, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984) ("[A]n otherwise private person acts 'under color' of state law when engaged in a conspiracy with state officials to deprive another of federal rights.>").
- ⁷ 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A); Neb. Rev. Stat. § 48-1102(2)(2004); 29 U.S.C. § 630(b); Neb. Rev. Stat. § 48-1002(2) (2004) and 29 U.S.C. § 2611(4)(A)(i). Note that the FMLA does not apply if the employer does not have 50 employees working within a 75-mile radius. 29 U.S.C. § 2611(2)(B)(ii). *Humenny v. Genex Corp., Inc.* 390 F.3d 901 (6th Cir. 2004).
- ⁸ 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(2); 42 U.S.C. § 122117(a); Neb. Rev. Stat. § 48-1118(2)(2004).
- ⁹ 29 U.S.C. § 626(d) and Neb. Rev. Stat. § 48-1008 (2004).
- ¹⁰ 42 U.S.C. § 2000e-5(f)(1).
- ¹¹ Neb. Rev. Stat. § 48-1118(4) (2004). The complainant must have suffered physical, emotional, or financial harm to do so.
- ¹² Neb. Rev. Stat. § 48-1120.01 (2004).
- ¹³ *Okrublik v. University of Arkansas*, 395 F.3d 872, 878 (8th Cir. 2005).
- ¹⁴ 42 U.S.C. § 2000e-3(a); Neb. Rev. Stat. § 48-1114 (2004).
- ¹⁵ If the protest is broad or ambiguous it may not be interpreted by the employer as opposition to unlawful discrimination.. "EEOC Guidelines on Investigating, Analyzing Retaliation Claims," EEOC Compliance Manual, Vol. 2, § 8 (May 20, 1998), www.eeoc.gov/policy/docs/retal.html.
- ¹⁶ Neb. Rev. Stat. § 48-1114(3) (2004).
- ¹⁷ Kiel was a deaf employee who after requesting a TDD insulted his supervisor and had an angry outburst. Kiel was terminated for insubordination. The court found the termination was found to be legitimate and non-retaliatory.