FEDERAL WHISTLEBLOWER AND RETALIATION LAWS

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I. INTRODUCTION

A. Whistleblowing Versus Retaliation Claims 2
   1. Whistleblowing Claims 2
   2. Retaliation Claims 4

B. Federal Statutory Coverage 4
   1. Covered Employers 4
   2. Covered Employees 5

II. TYPES OF PROTECTED CONDUCT 6

A. Participation in Protected Activity 7
B. Opposition to Employer Practices 8
   1. Unreasonable Opposition 10
   2. Reasonable Opposition 12
   3. EEOC’s Analysis of Opposition Claims 12

III. ADVERSE EMPLOYMENT ACTION: ACTIONS THAT MATERIALLY AFFECT A TERM OR CONDITION OF EMPLOYMENT 13

IV. CAUSAL CONNECTION BETWEEN PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTION 16

A. Direct Evidence of Retaliation 17
B. Circumstantial Evidence of Retaliation 18
C. EEOC’s Analysis of Retaliatory Motive 20

V. REMEDIES AVAILABLE FOR RETALIATION 21

A. Injunctive Relief 21
B. Damages 22

VI. CONCLUSION 23
I. INTRODUCTION

In recent years, employers have been facing a growing number of claims involving retaliation or whistleblowing. The Equal Employment Opportunity Commission (“EEOC”), the governmental entity charged with the task of investigating federal claims of employment discrimination, investigates retaliation claims on a priority basis. EEOC Compliance Manual § 614.1. Retaliation and whistleblowing claims are particularly difficult to defend because the claimant need not show that he or she was a victim of actual unlawful discrimination. He or she need only show (1) that he or she complained about what he or she believed to be discriminatory conduct, and (2) an adverse employment action temporally connected to the complaint. This combination gives rise to a strong presumption, precluding early dismissal of a lawsuit. As a consequence, employers, managers and human resource personnel should familiarize themselves with federal and state retaliation and whistleblowing laws to avoid these claims, or at least to manage existing claims to minimize legal liability and financial exposure. Though each state has its own statutory and common law, this chapter will focus on federal law.

A. Whistleblowing Versus Retaliation Claims

1. Whistleblowing Claims

A “whistleblowing” claim arises when an employee reports illegal or unlawful conduct by a co-worker, employer, other person or company to a person in a position of authority, or publicizes such unlawful or illegal conduct, and suffers some adverse employment action. A commonly recognized whistleblowing scenario is where an employee reports a company’s illegal conduct, such as dumping chemicals into a river or burying radioactive waste in the desert, to the media or a government agency and then suffers an adverse employment action such as termination or ostracization.

In such a situation, federal employees are protected by the Whistleblower Protection Act. 5 U.S.C. § 1201. They may also be protected under the False Claims Act. 31 U.S.C. § 3730. There is, however, no single federal law prohibiting employers in general from retaliating against whistleblowers. There is instead a patchwork of statutes and regulations covering various areas of business and industry. The variegated nature and complexity of these statutes and regulations prevent a detailed discussion and is beyond the scope of this chapter.

These statutory regulations generally protect employees from discharge or discrimination if he or she files a complaint, initiates an agency investigation of an employer’s activities, or cooperates with the regulatory agency to enforce the regulations in that area of business or industry. See 82 Am. Jur. 2d Wrongful Discharge § 55 (1992). Each statute contains a distinct filing provision, statute of limitations, and judicial or administrative remedies. The type and scope of protected whistleblower conduct varies from statute to statute. Unless an employer is in a highly regulated industry or a public entity, it will not likely face a federal whistleblower claim. Employers are more likely to face a retaliation claim, which is discussed in the following section.

Many states have enacted their own laws to protect whistleblowers. State laws often have longer statutes of limitation than federal law and can encompass more conduct than the industry-specific federal statutes. Damages available under state laws may differ from federal law. Although state whistleblower statutes vary in substance and content, most require the employee to prove three basic elements: (1) protected activity; (2) adverse employment action because of the activity; and (3) a causal connection between the protected activity and the adverse employment action. J. Barber, Federal & State Whistleblower Laws – Emerging Issues for the Millennium: A Defense Perspective, ABA-Labor and Employment Law Section 1999 Mid-Year Meeting. Employers should consult state laws upon receiving a complaint for retaliation or whistleblowing to ensure state laws do not have different standards or procedures.

2. **Retaliation Claims**

A “retaliation” claim arises when an employer takes adverse action against an employee because he or she complained of harassment or discrimination or participated in an investigation or proceeding involving harassment or discrimination. Most states have their own statutory or common law claims of retaliation, which can mirror the federal statutes. To assert a retaliation claim, the employee must show that (1) he or she engaged in an activity protected by the statute (e.g., opposed discrimination or participated in a statutory complaint process); (2) he or she suffered an adverse employment action (e.g., demotion, suspension, discharge, etc.); and (3) a causal connection between the protected activity and the adverse employment action. Hazel v. United States Postmaster Gen., 7 F.3d 1, 3 (1st Cir. 1993); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981).

**B. Federal Statutory Coverage**

1. **Covered Employers**

The employee must initially show that the federal statutes cover the at-issue employer. To be covered, an employer must have fifteen or more employees for “each working day for twenty or more calendar weeks in the current or previous year.” 42 U.S.C. §2000e. If the employer does not meet this criterion, it may not be sued even if the employee has a valid claim, which reflects Congress’ intent to protect small employers from retaliation claims. Again, employers should always consult state statutes or case law to ensure that they are not covered under those laws, which may have a lower or no employee threshold for coverage.

The employer charged with retaliation need not be the same employer whose allegedly discriminatory practices were opposed by the employee. If employer retaliates against an
employee for his or her conduct at another employer, the employee may have a valid claim. See Christopher v. Stouder Memorial Hosp., 936 F.2d 870, 877 (6th Cir.), cert. denied, 502 U.S. 1013 (1991) (holding that the defendant’s frequent references to plaintiff’s sex discrimination action against prior employer warranted inference that defendant’s refusal to hire was retaliatory). Even if the employee has left the job, he or she may have a claim if the former employer retaliates against him or her. Ruedlinger v. Jarrett, 106 F.3d 212, 214 (7th Cir. 1997).

Unlike the garden variety employment discrimination case which requires an employment relationship or at least an attempt to create one, current and former employers are exposed to retaliation claims.

2. **Covered Employees**

Any employee may assert a retaliation claim. That employee need not also allege that he or she suffered discrimination because of race, religion, sex, national origin, age or disability. A claim of retaliation alone is sufficient. Because the employee need not be a victim of discrimination to assert a retaliation claim, there is no requirement that the employee be a member of a protected group. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 279-80 (1976) (holding Title VII applied to all races, including Caucasians); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 386-88 (5th Cir. 1971) (holding Title VII applies to females and males). A Caucasian male who complains that his African-American female co-worker has been subject to a hostile work environment may have a claim if he suffers any adverse treatment for making the complaint or testifying as a witness. More importantly, the employee need not show that the complained of conduct was unlawful. The employee need only show that he or she had a reasonable, good faith belief that unlawful conduct had occurred.

§ 1140; Workforce Investment Act, 29 U.S.C. § 1974(g) or 29 U.S.C. § 2934(f).
Mesnick v. General Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992). Thus, even if the complaint is without merit, an employer may still be exposed to a retaliation claim if the complaining employee suffers an adverse employment action.

Federal law protects current employees as well as former employees. Womack v. Munson, 619 F.2d at 1296-97 (allowing a former employee to sue former employer after receiving a negative reference after filing an EEOC charge following his termination). Federal law also prohibits retaliation against anyone “so closely related to or associated with” a person exercising his or her statutory rights that the person would be discouraged from pursuing those rights. Thus, “third party reprisals – i.e., discrimination against one person because of a friend’s or relative’s protected activities” are unlawful. EEOC v. Ohio Edison Co., 7 F.3d 541, 544-45 (6th Cir. 1993) (holding an employer may not retaliate against an employee because his or her spouse filed an EEOC charge); see also Murphy v. Cadillac Rubber & Plastics, 946 F. Supp. 1108, 1117-18 (W.D.N.Y. 1996) (holding an employer could not retaliate against employee based on his wife’s protected activities).

II. TYPES OF PROTECTED CONDUCT

Congress has struck the balance in favor of the employee to afford him or her protection from invidious discrimination, by protecting his or her right to file charges and oppose discrimination. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969). Under the federal retaliation statute, employers may not take adverse actions against any individual because: (1) “he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing”; or (2) “he has opposed any practice made an unlawful employment practice by [the statute].” 42 U.S.C. § 2000e-3(a). Federal law creates
two possible avenues for a retaliation claim: the employee participated in protected activity or opposed unlawful practice. Each is discussed below.

A. **Participation in Protected Activity**

The participation clause (i.e., “because he has made a charge, testified, assisted, or participated in any manner”) provides “exceptionally broad protection” to employees, former employees, applicants, etc. Pettway v. American Cast Iron Pipe Co., 411 F.2d at 1006 n.18 (writing a letter to the EEOC criticizing the agency’s handling or determination of a complaint was considered protected participation).

The most obvious forms of “participation” are filing a formal EEOC charge or lawsuit against the employer. Womack v. Munson, 619 F.2d at 1297. If the employee initiates a formal proceeding, an employer who takes adverse employment action against him or her for that conduct risks significant exposure in a retaliation claim.2 “Participation” also includes testifying or gathering evidence in anticipation of a lawsuit. Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1570 (2d Cir. 1989) (finding protected activity in attempting to gather evidence for a future lawsuit). Internal complaints or letters are not generally found to be covered by the participation clause, but may be covered by the opposition clause which is discussed in the next section. Booker v. Brown & Williamson, 879 F.2d 1304, 1313 (6th Cir. 1989).

It is irrelevant whether the complaint is actually valid, reasonable, or even timely. Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994). Access is protected. Administrative and judicial mechanisms determine the truth, falsity, frivolousness or maliciousness of a complaint or charge. Abramson v. University of Hawaii, 594 F.2d 202, 21 (9th Cir. 1979). Thus, even if the EEOC rejects the charge of discrimination, the filing of the complaint is protected. Sias v. City
Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978). Nor may an employer discipline an employee for false or malicious statements made about the employer during that participation. Pettway v. American Cast Iron Pipe, 411 F.2d at 1007.

The employee, however, is not provided complete protection merely because he or she filed a complaint or charge of discrimination against the employer. The employee must still perform his or her job duties, follow work rules and avoid insubordinate conduct. Brown v. Ralston Purina Co., 557 F.2d 570, 472 (5th Cir. 1977); Booker v. Brown & Williamson, supra, at 1313-13. If the employee refuses to work or follow the rules, an employer is not required to accept such conduct and may discipline or terminate the employee. However, the employer can anticipate that the employee will assert that such discipline was in retaliation for his or her protected participation.

B. **Opposition to Employer Practices**

Unlike the participation clause which is relatively easy to recognize – *e.g.*, the filing of a complaint, the opposition clause is more difficult to recognize and manage. It is important to understand that not all opposition conduct is protected. Rosser v. Laborers’ Int. Union, 616 F.2d 221, 223 (5th Cir.), cert. denied, 449 U.S. 886 (1980). In fact, federal courts have generally granted less protection for employee opposition than participation. Booker v. Brown & Williamson Tobacco, supra at 1312. Whether the employee is engaging in protected opposition or is simply insubordinate is the issue. This distinction determines the fate of the claim.

Opposition to employer activity deemed illegal under Title VII would be covered (as long as the opposition was reasonable which is discussed later). Manoharan v. Columbia University College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988). Even if the employer’s

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2 If the employer is a public entity, the employee may also have a claim for violation of his or her First Amendment
conduct did not violate Title VII, opposition may still be protected if the employee had a reasonable and good faith belief that the employer’s activity violated federal law. Parker v. Baltimore & O.R. Co., 652 F.2d 1012, 1020 (D.C. Cir. 1981); Monteiro v. Poole Silver Co., 615 F.2d 4, 8 (1st Cir. 1980). Federal law allows the employee to assert both a discrimination claim and a retaliation claim and the fact that the discrimination claim lacks merit does not preclude the employee for arguing retaliation as a result of his assertion of the invalid discrimination claims. Wentz v. Maryland Casualty Co., 869 F.2d 1153, 1155 (8th Cir. 1989); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 385 (10th Cir. 1984).

Therein lies the danger with a retaliation claim: an employee may be opposing what is in fact lawful employer behavior yet may still have a claim. In that case, an employee may refuse to obey an instruction because he or she believes the instruction is discriminatory. If the employee believes in good faith that the practice being opposed is unlawful and there is a reasonable basis for reaching that conclusion, the reasonable opposition is protected. Jennings v. Tinley Park Community Consol. School Dist. No. 146, 864 F.2d 1368, 1382 (7th Cir. 1988). The protection from a malicious or frivolous claim is the employee must establish a good faith, reasonable belief. Parker v. Baltimore & O.R. Co., 652 F.2d at 1020. This is not an elevated burden. Holland v. Jefferson Nat. Life Insurance Co., 883 F.2d 1307, 1314 (7th Cir. 1989).

On the other hand, if the practices being opposed are not illegal and one could not reasonably believe that the employer had acted illegally, the conduct is not protected. Holden v. Owens-Illinois, Inc., 793 F.2d 745, 751-53 (6th Cir.), cert. denied, 479 U.S. 1008 (1986) (holding an EEO officer’s aggressive attempts to implement an affirmative action plan at work was not protected because Title VII does not mandate affirmative action). Opposition to a co-
worker’s racist remark was not protected because there was no reasonable basis to believe that the employer was responsible for the remark. Little v. United Technologies, 103 F.3d 956, 959-960 (11th Cir. 1997). An employee’s complaint about working on her supervisor’s personal matters did not give rise to a retaliation claim because her complaint was not in opposition to discrimination or harassment – just poor management practices which are not protected. Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 292 (2d Cir. 1998).

1. **Unreasonable Opposition**

An employee may oppose perceived or actual unlawful employment practices only in a reasonable manner. An employer may discipline an employee if his or her opposition is unreasonable. The reasonableness test represents a balance between an employee’s right to oppose unlawful (or reasonably perceived to be unlawful) employer activities and an employer’s need for a stable and productive work environment. Wrighten v. Metropolitan Hospitals, Inc., 326 F.2d 1346, 1355 (9th Cir. 1984). An employee’s unreasonable conduct may be the only defense to a retaliation claim after adverse employment action has been taken.

Generally, an employee may not violate legitimate orders and rules, disrupt the work environment or interfere with the attainment of the employer’s goals in his or her opposition. Unt v. Aero Space Corp., 765 F.2d 1440, 1446 (9th Cir. 1985). While violations of workplace rules or regulations and refusal to follow orders considered discriminatory may constitute reasonable opposition, an absolute refusal to work because of alleged discrimination is not protected. Hazel v. United States Postmaster Gen., 7 F.3d at 4-5. Trespass and violent behavior, such as illegal “stall-ins” that block access to the premises, or work stoppages that violate collective bargaining contracts or federal labor law are not protected and are grounds for termination. Green v. McDonnell Douglas Corp., 411 U.S. 792, 803-804 (1973). Making false
or malicious public statements, maligning the product of the employer and disrupting the work of other employees are not protected. *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230-34 (1st Cir. 1976) (holding plaintiff may not “damage the basic goals and interests” of the employer who “has a legitimate interest in seeing its employees perform their work well.”). Using work time to advance a political agenda is not protected. *Id.*

“Disloyalty” is not a basis for finding employee opposition unprotected, for almost every form of employee opposition is in some sense disloyal. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983). However, courts have found that the following activities were not protected: searching and photocopying confidential documents for an age discrimination claim and showing them to co-workers (*O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1996)); making an overwhelming number of complaints based on unsupported allegations, antagonizing supervisor and co-workers and bypassing the chain of command in bringing the complaint (*Rollins v. Florida Dep’t of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989)); and badgering a subordinate employee to give a witness statement in support of an EEOC charge and attempting to coerce her to change her statement (*Jackson v. St. Joseph State Hospital*, 840 F.2d 1387, 1980-91 (8th Cir.), cert. denied, 488 U.S. 892 (1988)).

Generally, if an employee’s protests seriously negatively impact his or her job performance, he or she will not be protected. *Coutu v. Martin County Bd. of County Comm’rs*, 47 F.3d 1068, 1074-75 (11th Cir. 1995) (finding no retaliation where plaintiff was criticized by her supervisor, not because she was opposing discrimination, but because she was spending an inordinate amount of time in “employee advocacy” activities and was not completing other aspects of her job). In other words, opposition to perceived discrimination is not a license to neglect one’s job duties.
2. **Reasonable Opposition**

Federal law does protect employee opposition that is lawful and reasonable. As discussed above, a determination of what is “reasonable” requires a balancing of the rights of the employee against the employer’s right to a stable and productive work environment. Because the manner in which the employee responded to perceived unlawful conduct may be the sole issue determined by the court or jury at trial, an employer must be prudent in how it disciplines an employee for any opposition conduct.

Reasonable, legally-protected opposition has been found to include threatening to file a charge or other formal complaint alleging discrimination; complaining about alleged discrimination against oneself or others; writing a letter to employer’s customers complaining about inadequacies of employer’s affirmative action program; refusing to obey an order because of a reasonable belief that it is discriminatory; requesting reasonable accommodation or religious accommodation; verbally objecting to supervisors; circulating petitions, picketing or striking; publishing advertisements or making public statements or criticisms about the employer. See, e.g., EEOC v. Crown Zellerbach Corp., 720 F.2d at 1012-14; Payne v. McLemore’s Wholesale & Retail Stores, 654 F.2d 1130, 1136-37 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); Summer v. U.S. Postal Service, 899 F.2d 203, 209 (2nd Cir. 1990). Glenon v. Wayne State University, 664 F. Supp. 1082, 1092 n.5 (E.D. Mich. 1987).

3. **EEOC’s Analysis of Opposition Claims**

The EEOC’s Compliance Manual provides investigators with a list of questions to ask to determine whether an employee engaged in reasonable protected activity. To protect from unlawful activity and to defend a retaliation claim, the employer should consider those same
questions upon receipt of a complaint or when deciding whether to discipline or take other adverse action. They are as follows:

- Did the employee actually oppose discrimination?
- Did the employee explicitly or implicitly communicate his or her reasonable belief that the employer’s activity constituted unlawful discrimination or harassment?
- If the employee’s protest was broad or ambiguous, would that protest reasonably have been interpreted as opposition to such unlawful discrimination or harassment?
- Did someone closely associated with the employee oppose discrimination or harassment?
- Was the manner of the employee’s opposition reasonable?
- Was the manner of the employee’s opposition so disruptive that it significantly interfered with the employer’s legitimate business concerns?
- Did the employee have a reasonable and good faith belief that the opposed employment practice violated anti-discrimination or harassment laws?
- Did the employee participate in the statutory complaint process?
- Did the employee or someone closely associated file a charge, or testify, assist, or participate in any manner in an investigation, proceeding, hearing or lawsuit?

EEOC Compliance Manual.

In answering these questions before disciplining or terminating an employee, the employer can better position itself to avoid a retaliation claim and ensure that it is complying with the federal retaliation laws or at least be ready to respond to an EEOC investigation of a retaliation claim.

III. ADVERSE EMPLOYMENT ACTION: ACTIONS THAT MATERIALLY AFFECT A TERM OR CONDITION OF EMPLOYMENT

Although an employee may have engaged in protected opposition or participation conduct, there is no claim for retaliation unless he or she suffers an adverse employment action. The employee must prove that he or she suffered an adverse employment action “because of” the protected conduct. Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997)
(holding that a supervisor’s instruction to ignore or spy on a complaining employee was not adverse employment action). The alleged adverse action must affect a term or condition of employment. Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding a lateral transfer with the same pay and benefits and similar job duties is not a cognizable adverse employment action); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir.), cert. denied, 522 U.S. 932 (1997) (holding that retaliation does not concern employment decisions that have only “tangential effects” on employment).

An employer can anticipate a retaliation claim if an employee has any change in the terms and conditions of employment after filing a complaint or asserting that he or she was a victim of discrimination. Whether that is true depends if the alleged adverse action is an “ultimate” employment decision. Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995). The most obvious types are denial of promotion, refusal to hire, denial of job benefits, reducing compensation, demotion, suspension or discharge. Others include transfers to undesirable locations, threats, reprimands, negative performance evaluations, harassment, refusal to process a grievance, extended probation, abnormal work assignments, etc. Collins v. Illinois, 830 F.2d 692, 702-04 (7th Cir. 1987); Wyatt v. City of Boston, 35 F.3d at 15-16.

Courts have also held that suspending or limiting access to an internal grievance procedure may also constitute an adverse action. EEOC v. Board of Governors of State Colleges & Universities, 957 F.2d 424, 431 (7th Cir. 1992), cert. denied, 506 U.S. 906 (1992) (holding that termination of the grievance process after the employee had filed an EEOC charge constituted an adverse employment action in retaliation); Johnson v. Palma, 931 F.2d 203, 208 (2d Cir. 1991) (holding union’s refusal to proceed with plaintiff’s grievance after he had filed race discrimination complaint with state agency established a prima facie case of retaliation).
The lesson is that any action that materially and adversely affects an employee taken in response to a complaint may constitute retaliation. This is true even if the employer’s actions are taken with the employee’s best intentions in mind, *i.e.*, transferring a complaining employee to a new location or shift and away from the objectionable co-worker or supervisor that lead to the complaint. Such actions focus on the complainant as opposed to the alleged bad actor and may lead to an additional complaint of retaliation. Nonetheless, not all actions are “adverse employment actions” after a complaint has been made. Temporary transfers may not be “adverse” if the employee retains his or her salary and benefits. *Miller v. Aluminum Co. of American*, 679 F. Supp. 495, 504-05 (W.D. Pa.), aff’d, 856 F.2d 184 (3rd Cir. 1988).

Nor is the questioning an individual about his or her retaliation claim or investigating underlying facts about that claim actionable. *Burrows v. Chemed Corp.*, 567 F. Supp. 978, 986-87 (E.D. Mo. 1983), aff’d, 743 F.2d 612 (8th Cir. 1984). Employers *should* investigate if an employee files a complaint. To protect itself, the employer should advise any witnesses that it only seeks facts and reassure them that they will not be retaliated against for providing information. Employers should be careful to conduct these investigations in a non-intimidating manner so that the employees will not later assert that they suffered adverse employment action for participating in the investigation.

Adverse actions undertaken *after* the employment relationship has terminated, such as negative job references, can also be challenged. Unfavorable statements to a potential employer may constitute adverse action if the statements were made because the ex-employee had opposed unlawful conduct or filed a charge of discrimination while employed. *EEOC v. L.B. Foster, Co.*, 123 F.3d 746, 753-56 (3d Cir. 1997), cert. denied, 522 U.S. 1147 (1998); *Ruedlinger v. Jarrett*, 106 F.3d 212, 214 (7th Cir. 1997). An employer may give a negative job reference about an
individual who engaged in protected activity as long as the reference was not based on a retaliatory motive. Truth should serve as a defense. If a retaliatory motive is shown, however, any acts an employer takes to interfere with an individual’s prospects for employment may be unlawful, regardless of whether they cause the prospective employer to refrain from hiring the individual. Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997). As the Third Circuit stated, “[a]n employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result.” EEOC v. L.B. Foster, 123 F.3d at 754. The fact that the reference did not affect the individual’s job prospects will affect the amount of recoverable damages, not liability.

IV. CAUSAL CONNECTION BETWEEN PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTION

Proof of an adverse employment action is not by itself sufficient to make a viable retaliation claim. A claimant must show that the employer took an adverse action because he or she had engaged in protected activity, i.e., retaliatory motive was the reason for the adverse employment action. Sumner v. United Postal Service, 899 F.2d 203, 208-09 (2nd Cir. 1990). There must be a causal connection between the protected activity and the adverse employment action. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978); Kipp v. Missouri Highway & Transportation 280 F.3d 893, 896 (8th Cir. 2002).

An employee proves retaliation like any other form of discrimination, i.e., he or she: (1) engaged in protected conduct, (2) suffered an adverse employment action, and (3) there is a causal connection between his or her protected conduct and the employer’s adverse employment action. EEOC v. Ohio Edison Co., 7 F.3d at 543; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).
The first two elements – protected conduct and adverse employment action – have been discussed above in detail. The third element is discussed in this section. It can be shown through direct or circumstantial evidence.

A. **Direct Evidence of Retaliation**

Direct evidence is any written or verbal statement by the employer that it took the adverse employment action because the employee engaged in a protected activity. Such direct evidence, while rare, includes written or oral statements by the employer that on its face demonstrate a bias toward the employee because of the protected activity, along with evidence linking that bias to the adverse employment action. *Brooks v. Fonda-Fultonville Cent. School*, 938 F. Supp. 1094, 1105 (N.D.N.Y. 1996). A link may be shown if the statement was made by the decision-maker at the time of the adverse action. See, e.g., *Christopher v. Stouder Memorial Hosp.*, 936 F.2d at 878-79 (doctor’s statements and memo about a nurse’s former sex discrimination lawsuit was direct evidence at retaliation in a credentiality case).

Once an employee presents by direct evidence that the adverse action was motivated in whole or in part by his or her protected participation or opposition to unlawful conduct, the employee should prevail. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246-47 (1989). This outcome can be averted only if the employer proves by a preponderance of the evidence that it would have made the same decision absent any retaliatory motive. *Tanca v. Nordberg*, 98 F.3d 680, 682-84 (1st Cir.), cert. denied, 520 U.S. 1119 (1996) (holding that the 1991 Amendment to the Civil Rights Act did not amend the federal retaliation statute).

Direct “smoking gun” evidence is rarely found and reflects a general increase in sensitivity in employee-employer relations. However, in retaliation cases, supervisors can exhibit less sensitivity and are more likely to comment that the employee’s conduct played a role
in the adverse employment action. See Grant v. Hazelett Strip-Casting, 880 F.2d at 1570 (reversing trial court because supervisor admitted that the employee was fired because he was trying to assemble evidence of age discrimination). Therefore, management, supervisors and human resource specialists should be circumspect in their discussions and documentation in response to opposition or participation conduct to avoid laying the foundation for a direct evidence case. Such cases are extremely difficult to defend.

B. **Circumstantial Evidence of Retaliation**

The alternative and the most common method to show retaliatory motive is through circumstantial or indirect evidence. Simmons v. Camden County Bd. of Education, 757 F.2d 1187, 1189 (11th Cir.), cert. denied, 474 U.S. 981 (1985). Evidence that gives rise to “an inference of retaliatory motive” is sufficient to establish the casual link. Kipp v. Missouri Highway, 280 F.3d at 897. The inferential link may be shown by evidence that (1) the adverse action occurred shortly after the protected activity, and (2) the person who undertook the adverse action was aware of the complainant’s protected activity before taking the action. Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

The sequence of events is the primary factor. Holland v. Jefferson Nat. Life Insurance Co., 883 F.2d at 1315. A short period between the conduct and adverse action may create an inference of discrimination. Wyatt v. City of Boston, 35 F.3d at 16. And, as a gap arises between the conduct and adverse action, an employee will have great difficulty creating an inference of retaliation. An inference of retaliation may still arise if there is additional evidence of retaliation. See, e.g., Shirley v. Chrysler First, Inc., 970 F.2d 39, 42-43 (5th Cir. 1992) (14-month interval between the filing of charge and termination did not insulate employer because plaintiff terminated two months after the EEOC dismissed charge).
Courts have recognized that a “mere coincidence of timing” without more evidence cannot give rise to our inference of retaliatory motive. Nelson v. J.C. Penny Co., 75 F.3d 343, 346-47 (8th Cir.), cert denied, 519 U.S. 813 (1996). The employee must also show that the decision-maker was aware of his or her opposition conduct or participation in a proceeding before taking the adverse action. Dowe v. Total Action Against Poverty, 145 F.3d 653; 657 (4th Cir. 1998) (holding that decisionmaker knowledge was “absolutely necessary” to establish a retaliation claim). Because the decision-maker must know of the conduct and understand that it relates to unlawful discrimination, generalized complaints about unfair treatment without more specificity do not satisfy this requirement. EEOC v. Shoney’s, Inc., 536 F. Supp. 875, 877-78 (N.D. Ala. 1982). An employee cannot avoid an adverse employment action by merely filing a complaint. Mesnick v. General Electric Co., 950 F.3d at 828-29 (holding that a disgruntled employee with a long history of insubordination and poor performance could not inhibit a well-deserved discharge by filing an EEOC charge of discrimination).

Once an inference of retaliation is raised and the employer must then articulate a non-retaliatory reason for the adverse employment action. Smith v. Singer Co., 650 F.2d 214, 217 (9th Cir. 1981); Hazel v. U.S. Postmaster General, 7 F.3d at 3. Without a reason, the employer will be liable. Common reasons offered are poor job performance, inadequate qualifications for the position sought, violation of work rules, insubordination, absences, and, with regard to negative job references, truthfulness of the information in the reference. Miller v. Vesta, Inc., 946 F. Supp. 697, 713 (E.D. Wis. 1996) (concluding that the employer produced unrebuted evidence employee was discharged because of her excessive absenteeism). Unreasonable opposition conduct will also serve as a legitimate, non-discriminatory reason. See, Hochstadt v. Worcester Foundation, 545 F.2d at 23-34.
Even if the employer produces evidence of a legitimate, nondiscriminatory reason for the adverse action, a violation may still be found if this reason was a mere pretext to retaliation. *Hossaini v. Western Mo. Medical Ctr.*, 97 F.3d 1085, 1088 (8th Cir. 1996) In litigation, an employer can invariably anticipate that the employee will assert that the reason was a mere pretext to discriminate. Employees can show pretext where an employer treats the complaining employee differently from similarly-situated employees, the explanation is not credible or lacks evidentiary support, his or her written performance evaluations were positive before the at-issue conduct, etc. *See, e.g.*, *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991). The possible ways for an employee to attack an employer’s articulated reason for the adverse action are limitless and emphasize the necessity to ensure that the articulated reasons are factual.

Pretext can also be shown if the employer subjected the employee’s work performance to heightened scrutiny after engaging in the protected activity. *Hossaini*, 97 F.3d at 1088-90 (summary judgment was inappropriate where a reasonable person could infer that defendant’s explanation for plaintiff’s discharge was pretextual given that defendant launched investigation into improper conduct shortly after she engaged in protected activity). Thus, once a complaint or charge of discrimination is made, an employer should proceed cautiously to ensure that its treatment does not appear to be retaliatory.

C. **EEOC’s Analysis of Retaliatory Motive.**

To determine whether there is a causal connection between the employee’s protected conduct and the adverse employment action, the EEOC Compliance Manual advises its investigators to ask the following questions:

- Is there direct evidence that retaliation was a motive for the adverse action?
- Does the decision-maker admit that he or she undertook the adverse action because of the employee’s protected activity?
• Did the employer express bias against the employee based on the protected activity?
• If so, is there evidence connecting that statement of bias to the adverse action?
• Is there circumstantial evidence that retaliation was the true reason for the adverse employment action?
• Has the employer produced evidence of a legitimate, nondiscriminatory reason for the adverse employment action?
• Is the employer’s explanation a pretext designed to hide retaliation?
• Did the employer treat similarly-situated employees who did not engage in protected activity differently from the employee alleging retaliation?
• Did the employer subject the employee to heightened scrutiny after he or she engaged in protected activity?

EEOC Compliance Manual. Employers can anticipate that, if an employee files a retaliation charge, the EEOC will be asking these questions and seeking documentary evidence in its investigation. Therefore, it would be prudent to review these questions when presented with a claim of retaliation.

V. REMEDIES AVAILABLE FOR RETALIATION

A. Injunctive Relief

Generally, parties must first participate in the litigation process to judgment before any relief is granted. However, in certain rare cases, an employee may be restored to his or her job after filing a complaint of retaliation. Temporary injunctive relief may be obtained before final disposition when a preliminary investigation indicates that prompt judicial action is necessary to stop retaliation before it occurs or continues. Abernathy v. Walgreen Co., 836 F. Supp. 817, 820-21 (M.D. Fla. 1992). Such relief is appropriate if there is a substantial likelihood that the challenged action will be found to constitute unlawful retaliation and if the employer’s financial hardships are not irreparable and employee’s harms accompanying a job loss are irreparable. EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984).
A temporary injunction also is appropriate if the employer’s alleged retaliation will likely cause irreparable harm to the EEOC’s ability to investigate the charging party’s original charge of discrimination. The EEOC believes that retaliation discourages others from providing testimony or from filing additional charges based on the same or other alleged unlawful acts. 

Garcia v. Lawn, 805 F.2d 1400, 1405-06 (9th Cir. 1986) (finding irreparable harm in chilling effect of retaliation on other employee’s willingness to exercise their rights or testify for plaintiff). Although rare and difficult to establish, the EEOC and plaintiffs are now aggressively seeking relief such as immediate job restoration pending resolution of the complaint. Upon receipt of a charge of discrimination or a complaint, employers should be prepared to rebut any demand for injunctive relief.

Even if the employer is successful in preventing injunctive relief at the beginning of a case, the court may later order reinstatement (or hiring) after trial. Reinstatement is an alternative remedy available in lieu of front pay in a retaliation case. McClure v. Mexia Independent School Dist., 750 F.2d 396, 398 (5th Cir. 1985).

B. Damages

If successful, an employee may recover compensatory damages (lost wages and front pay), emotional distress damages, attorneys’ fees and costs, and, in certain cases, punitive damages for unlawful retaliation. 42 U.S.C. § 1981a. To recover damages, the employee must produce competent evidence that the claimed harm is causally related to the employer’s illegal retaliation. Eiland v. Westinghouse Electric Corp., 58 F.2d 176, 181 (5th Cir. 1995).

Backpay is lost wages, anticipated raises and benefits from the date of the adverse employment action until judgment. Ablemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975). Front pay is an alternative to reinstatement when the job no longer exists or the
employee-employer relationship has been irreparably damaged. Brooks v. Fonda-Futtonville, 938 F. Supp. at 1108. As to emotional distress damages, the employee may recover for loss of sleep, alienation from family members and friends, loss of reputation, mental anguish, loss of enjoyment of life, loss of health, depression, paranoia, high blood pressure, pain, etc. Salinas v. Rubin, 126 F. Supp. 2d 1026, 1029 (S.D. Tex. 2001). The only limitation on recovery is the federal statutory cap. Title VII limits damage recovery depending on the size of the employer. An employee may not recovery more than $300,000 if the employer has over 500 employees. 42 U.S.C. § 1981a. This limit applies only to the federal claims, and if the employee has state law claims, he or she will not be limited by the federal statutory cap.

Punitive damages are often recovered in retaliation claims because retaliation constitutes a practice undertaken “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” Jin Ku Kim v. Nash Finch Co., 123 F.3d 1046, 1066-67 (8th Cir. 1997) (finding reckless indifference to plaintiff’s rights was supported by evidence of retaliation and concluding that, although $7 million award for punitive damages was excessive, district court’s lowered award of $300,000 was not). With such monetary exposure, employers should strive to prevent, resolve or neutralize retaliation claims.

VI. CONCLUSION

Employers should develop an internal policy against retaliation and a procedure for handling retaliation claims. When an employee makes a discrimination or harassment complaint, it is wise to keep that complaint as confidential as possible, thereby reducing the risk that colleagues or supervisors would retaliate. As always, employers should also document all communications with the complaining employee regarding his or her complaint and the subsequent investigation of the claim. Such documentation will not only help the ensuing
investigation, but will also assist an employer in the event that the employee does add a retaliation claim.

Employers do not have their hands tied if an employee files a harassment or discrimination claim. Employers may take adverse employment actions against complaining employees, but should be very careful when doing so and be on notice that such adverse actions may lead to a retaliation claim. As with all adverse employment actions taken against an employee, whether they have complained of discrimination or harassment or not, the employer should be prepared to defend its action with valid, non-discriminatory reasons as well as documentation supporting the reasons for its action.