RETALIATION: How to Prove It, How to Avoid It
Attorney's Perspective – Plaintiff

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FILING A RETALIATION CLAIM -- Factors to Consider

The retaliation provisions of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act forbid employers to discriminate against any individual because he has opposed any unlawful employment practice or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act. 42 U.S.C. § 2000e-3(a) [Title VII], 42 U.S.C. § 12203(a) [ADA], 29 U.S.C. § 623(d) [ADEA], & 29 U.S.C. § 2615(a)(2) and (b) [FMLA].

Under the Americans with Disabilities Act, employers are additionally prohibited from coercing, intimidating, threatening, or interfering with an individual because he has exercised or encouraged another individual in the exercise of any right granted by the ADA. 42 U.S.C. § 12203(b). The Family and Medical Leave Act makes it unlawful for an employer to interfere with an employee's FMLA rights. 29 U.S.C. § 2615(a)(1).

It is worth mentioning that there are a number of federal whistleblower protections to be aware of. And, that they have incredibly short time limits for filing complaints. Several laws protect environmental whistleblowers under such acts as the

Safe Drinking Water Act and the Clean Air Act. These generally have 30 day time limits. Sarbanes-Oxley complaints must be filed within 90 days of the adverse action. These complaints are filed with OSHA.

Elements of a Retaliation Claim

Typically, an employee may withstand a motion for summary judgment by presenting evidence sufficient to show that: (1) he engaged in protected activity, (2) he was thereafter subject to an adverse employment action, (3) that he was performing his job satisfactorily, and (4) no similarly situated employee who did not engage in protected activity suffered an adverse employment action. *See Burks v. Wisconsin Dept. of Transportation*, 464 F.3d 744 (7th Cir. 2006). This is called the "indirect" method of proof. If the employer presents unrebutted evidence of a nondiscriminatory reason for the adverse action, it is entitled to summary judgment; otherwise, there must be a trial. *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640, 644 (7th Cir. 2002)

The "direct" method of establishing a prima facie case of retaliation requires the employee "prove by means of circumstantial evidence 'that he engaged in protected activity … and as a result suffered the adverse employment action of which he complains.'" *Sylvester v. SOS Children Villages Illinois, Inc.*, 453 F.3d 900, 902 (7th Cir. 2006). In the event the plaintiff's evidence is uncontradicted, then the employee is entitled to summary judgment. If it is contradicted, then "the case must be tried unless the defendant presents unrebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had no retaliatory motive; in that event the defendant is entitled to summary judgment because he has shown that the plaintiff wasn't harmed by retaliation.." *Stone* at 644.

In *Sylvester v. SOS Children Villages Illinois, Inc*., 452 F.3d 900 (7th Cir. 2006), the court found sufficient circumstantial evidence to preclude summary judgment. Here, four female employees signed a letter to the defendant's board chairman complaining that the CEO abused them by calling them "bitches," commenting on the sexuality of defendant's female executive director, and of other unprofessional behavior. The circumstantial evidence of retaliation was the prompt discharge of two of the signatories; the discussion of plaintiff's performance at the meeting when the decision to terminate the other two employees was made, even though her last performance review was a positive one; and the fact that the CEO was authorized to fire plaintiff, not for poor performance, but in the event that she reacted adversely to news of the firing of her two co-workers. The court ultimately held that

> (a) reasonable jury might conclude that she was being set up – that the defendant's officers who met the night before knew she was sure to be upset by the firings, and that (the CEO) was being invited to interpret that predictable reaction as insubordination. Putting together these items of circumstantial evidence, a reasonable jury could conclude that the accusations of sexual harassment in the letter signed by (the plaintiff) were a cause of her being fired. No more is necessary to show that she established a prima facie case using the "direct" method of proof.

Sylvester at 905.

In the past year, the Seventh Circuit has reversed district courts' grants of summary judgment in two other retaliation cases, finding that the plaintiffs could succeed under the direct method. In *Phelan v. Cook County*, 463 F.3d 773 (7th Cir. 2006), a female employee working as a mechanical assistant in the boiler room of Cook County Hospital was subjected to sexually offensive comment, solicitations, offensive touching and displays of pornography. Four months after complaining about this behavior, she was given the option of either accepting a transfer to the hospital's CORE Center, where

she would work as a medical assistant or she would be terminated. Plaintiffs problems with co-workers continued after her transfer. One of her supervisors placed her in a headlock on two occasions, and Plaintiff was subjected to gender-related verbal abuse and other offensive conduct. All of these incidents were reported to human resources, which continued to provide inadequate response.

Plaintiff became distressed and began seeing a psychologist, who diagnosed her as suffering from major depression and post-traumatic stress disorder. As a result, she applied for a medical leave of absence, which Cook County denied. Instead, Plaintiff was notified that a pre-disciplinary hearing had been scheduled to determine whether he absence from work necessitated her termination. Two months later, the hearing proceeded, and the hearing officer selected by human resources concluded that Plaintiff should be terminated. After Plaintiff filed a charge of discrimination, Cook County reversed its decision to terminate her and reinstated her with back pay.

The court in *Phelan* determined that Plaintiff's four-month termination constituted an adverse employment action and that the time between her protected activity and her termination was sufficiently short, in context with the other evidence of discriminatory retaliation, to create a triable issue of fact. Plaintiff was warned by co-workers and her immediate supervisor that she would experience adverse consequences if she continued to complain about the harassment. Her attorney contacted Cook County on June 30, 2000, and Plaintiff filed her related leave request the following month. A few weeks later, Cook County initiated the process to terminate her.

In *Burnett v. LFW Inc.*, 472 F.3d 471 (7th Cir. 2006), the court found that Plaintiff provided sufficient evidence to survive summary judgment on his FMLA

interference and retaliation claims. In October 2003, Burnett first told his employer that he was going to see a doctor to find out the cause of his bladder problem. For the next several months, Burnett kept the employer informed as to the progress of the diagnosis of his condition. On the day that Burnett gave one of his supervisors a document describing a prostrate ultrasound and biopsy procedures, his direct supervisor issued him a reprimand for "substandard work." One week later, Burnett was given two additional written reprimands. When he returned after the prostrate biopsy, he had doctor instructions not to do any heavy lifting, for which his employer declined any accommodation. He was not feeling well and left work, which the employer viewed as insubordinate. His supervisor sent him a letter terminating his employment. Eleven days later, Burnett was diagnosed with prostrate cancer.

The Seventh Circuit held that Burnett engaged in protected activity by taking time off when he realized that he would not be able to perform one of the essential functions of his job and would not be afforded any accommodation. Then, he was terminated for the allegedly insubordinate act of leaving work early. These facts, the court found, "suggest a direct, causal connection between the protected activity and adverse action." 472 F.3d at 482.

Employees proceeding under the indirect method of establishing claims of retaliation have fared less well on their appeals to the Seventh Circuit in the past year. It can be very difficult to meet the requirement of showing that a similarly situated employee who did not engage in protected activity was treated more favorably. And, frequently, the court has found no showing that the plaintiff was performing her job satisfactorily. *See, e.g., Treadwell v. Office of Illinois Secretary of State*, 455 F.3d 778

(7th Cir. 2006); *Tomanovich v. City of Indianapolis*, 457 F.3d 656 (7th Cir. 2006); *Cassimy v. Board of Education of the Rockford Public Schools, District 205*, 461 F.3d 932 (7th Cir. 2006); *Burks v. Wisconsin Department of Transportation*, 464 F.3d 744 (7th Cir. 2006); *Bledsoe v. Potter*, 200 Fed.Appx. 604 (7th Cir. 2006); *Wallskog v. Indiana Department of Correction*, No. 06-2024, 2006 WL 3419806 (7th Cir. Nov. 18, 2006); *Kampmier v. Emeritus Corp.*, 472 F.3d 930 (7th Cir. 2007); *Miller v. Ameritech Corp.*, No. 05-4009, 2007 WL 186237 (7th Cir. Jan. 11, 2007); *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908 (7th Cir. 2007).

Adverse Action in Retaliation Claims

Burlington Northern v. White

In both the direct and indirect methods of proof, the plaintiff must demonstrate that she suffered an actionable adverse action. The Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, ___ U.S. ___ , 126 S.Ct. 2405 (2006), was widely viewed as expanding liability for employers in retaliation cases. In *Burlington*, Ms. White was a track laborer who primarily operated a fork lift and performed some of the other track laborer tasks, such as clearing litter and cutting brush from the right-of-way areas and removing and replacing track components. When White complained about some sexist remarks by her supervisor, she was removed from the forklift and was only allowed to perform the less desirable functions of her job. After she filed a charge of discrimination with the EEOC, she was suspended without pay for insubordination. Through a grievance process, White was reinstated and awarded backpay for the 37 days she had been suspended.

The Court found that both the change in job duties and the suspension were adverse actions under the retaliation provision of Title VII. While Section 703(a) of Title VII prohibits discrimination against an individual "with respect to his compensation, terms, conditions, or privileges of employment," Section 704(a), the anti-retaliation provision, is not limited to discriminatory actions that affect the terms and conditions of employment. Employees are not protected from all retaliation, but only from retaliation that "produces and injury or harm." Under the formula adopted by the Court, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Post *Burlington* Retaliation Cases on Adverse Action

Since the Supreme Court adopted the standard applied by the Seventh Circuit, *Burlington* has not had a significant impact on retaliation claims in this circuit. In fact, in the appeals challenging summary judgments in favor of employers in the year since *Burlington*, employees have not faired well on the issue of adverse action. There are at least five such decisions where the Seventh Circuit addressed the issue of whether the employee established an actionable adverse action in a retaliation case, and the court determined that they did not.

Shortly after issuing *Burlington*, the Court granted certiorari in several cases, remanding them to the circuit courts for reconsideration in light of the decision. *Thomas v. Potter*, No. 05-1454, 2006 WL 2929952 (7th Cir. Oct. 11, 2006), was one such case. Here, a pro se plaintiff did not provide sufficient evidence that he had a "unique vulnerability" that the post office sought to exploit by changing his shift schedule. In

contrast, in *Burlington*, the Court noted that, as in *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005), a change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.

Jordan v. Chertoff, No. 05-1788, 2006 WL 3716442 (7th Cir. Dec. 14, 2006) involved an African-American employee of the U.S. Customs Service who requested and sought a temporary assignment to a unit in a different group. Jordan was assigned to the group for 120 days. She then asked to be reassigned permanently. This request was initially denied, but then her temporary assignment was extended another 120 days. Jordan's permanent group experienced a personnel shortage and a backlog of work, and she was asked to and did return. Subsequently, Jordan was permanently assigned to the group she preferred. She claimed that Customs retaliated against her for filing administrative complaints by ending her temporary detail, refusing to make the reassignment permanent, and denying her request for overtime.

The court held that "no reasonable employee could have found any action of which she complains materially adverse." It was undisputed that there was no available position with her preferred group to which she could be reassigned. Overtime was given to her when she returned to her original group. And, she was not able to show that the duties she had with her original group were less desirable.

The employee is probably not going to love the outcome when the first sentence in the decision begins, "No stranger to litigation, Evelyn Symanski filed the present action. . . ." In *Szymakski v. County of Cook*, 468 F.3d 1027 (7th Cir. 2006), the employee had previously lost an employment discrimination case that was tried to a jury

and was terminated about three weeks later. She fared much better on her subsequent retaliation case, but she did not have much luck finding reemployment. And, she believed that the medical director who terminated her was blackballing her by giving negative references. The court examined each of the references in the record and determined that none of them rose to the level of retaliation. For instance, in one conversation, the medical director rated her as “good” in each of the categories presented to him. Interestingly, although the medical director alluded to the retaliation lawsuit in a conversation with a reference checking agency, the court noted that the agency was not an employer and did not forward the information to any prospective employers, so what was said did not affect her employment opportunities.

After reviewing a litany of the employment actions the plaintiff claimed to be adverse actions, the court in *Roney v. Illinois Department of Transportation*, 474 F.3d 455 (7th Cir. 2007), found that none of them were shown to be materially adverse. One complaint was that IDOT failed to create a performance plan for Roney between 1996 and 1999. Ultimately, however, the performance reviews were completed, so it was unclear what was the significance of the lack of a performance plan. Another issue was a threat of termination if Roney did not file an Economic Interest Statement. But, there was apparently no evidence in the record to suggest that such a threat would have been improper, let alone a materially adverse employment action. Again, the court reiterated the *Burlington* standard, which is that “the employer’s challenged action must be one that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in the protected activity.”

In a pro se plaintiff case, *Schmidt v. Canadian National Railway Corp.*, No. 06-1846, 2007 WL 755171 (7th Cir. Feb. 21, 2007), the court acknowledged that some of the employment actions could, in some situations, be considered materially adverse. Unfortunately, Schmidt did not provide the evidentiary support for his claims. These included altering his work schedule to have him start and end one hour later, forcing him to use vacation time, and changing his job duties.

As a side note, the good news in *Timmons v. General Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006); and, unfortunately, the only good news, was that the court, recognizing that "(m)oney is not the exclusive measure of adverse employment actions," held that placing Timmons on an involuntary, disability leave (and being paid the equivalent of his salary with disability pay and social security benefits) was an adverse action. *Timmons* is a discrimination, not a retaliation, case, so if this is an material adverse action that affects the terms, conditions or privileges of employment under Section 703(a), it should likewise satisfy the standard applied in retaliation cases.

It is also worth noting that the Illinois Appellate Court for the First District has applied *Burlington* to a case filed with the Illinois Department of Human Rights. In *Hoffelt v. Ill. Dept. of Human Rights*, 367 Ill.App.3d 628 (1st Dist. 2006), the court held that Hoffelt met her burden of showing substantial evidence of an adverse action in her retaliation claim. Here, the employee claimed the following retaliation: (1) sexual harassment by a superior who condoned the underlying complaint of sexual harassment, (2) frequent assignment to a post considered to be less desirable, (3) denial of her requests for compensatory time off, which had previously been granted, and (4) a lower performance rating.

TIPS FOR A CLIENT WHO IS STILL WORKING AT THE COMPANY

These are the "toughies." As often as I cringe when an employee contacts me after he has been terminated or quit without taking any action to substantiate a retaliation claim, there are unique challenges associated with representing an employee who is currently employed by the respondent.

Based on my experience, there are situations where it is advisable for the plaintiffs employment lawyer to remain incognito and coach the employee how to appropriately raise concerns about the discrimination that has occurred. And, there are circumstances where it is appropriate for the representation to be out in the open. But, where the employee is still working at the company when the representation is made known, it is best to get a charge on file first, when possible and appropriate, before the plaintiffs employment lawyer communicates with the employer.

For those employees who directly raise concerns themselves, it is a good idea to coach them on the difference between raising complaints that will likely carry some legal protection and just grousing that something is not fair. Also, the first step in raising legitimate complaints is to use the chain of command. And, the plaintiffs employment lawyer needs to review any memo or e-mail of significance before it is sent to a supervisor or human resources.

Things certainly tend to heat up once the current employee claims discrimination or retaliation, and I let them know that so they can make the decision whether to file or not. As horrible as experiencing discrimination in the workplace can be for employees, things generally tend not to improve any once an internal or external complaint is made. From this plaintiffs employment lawyer's perspective, current employees tend to be

significantly more challenging to manage. Once they perceive that they are armed with the law on their side, the inevitable resentment and anger is difficult to contain. Some current employees feel the need to inappropriately collect evidence to bolster their claims, such as interviewing co-workers and engaging supervisors in discussions about their claims while surreptitiously taping the conversations. These issues must be discussed with the employee in an initial consultation or shortly after the representation commences. Employees need to be counseled that not every slight or perceived slight they will experience at work will qualify as a material adverse action. Current employees need to know that they must be careful not to give the employer a legitimate reason for taking disciplinary action, such as violation of a workplace rule or insubordination.

Current employees should be counseled in advance that when and if a post-complaint disciplinary action is taken, they are not entitled to have their attorney present, nor is there a requirement that non-union employees have a witness present. A popular misconception among employees is that refusing to sign a performance evaluation or written disciplinary action that they do not agree with somehow affects the document's legitimacy. Not only does that belief have no basis, such refusal to sign may amount to insubordination.

Some employees are going to be their own worst enemies regardless of all well-intentioned and sternly delivered advice. Some employees cannot handle the added stress. It may be appropriate to be in contact with the current employee's mental health provider or treating physician. As a practical matter, employees need to make life decisions where their mental and/or physical health is or may be compromised by continuing to be employed by the company. Litigation is extremely risky, and employees

ultimately should be making decisions about continued employment based on what is best for their health, their career goals, and their families, not on what effect the decision might have on the strength of the potential discrimination or retaliation claim.

RETALIATION UNDER §1981 -- in the Wake of the Seventh Circuit's Recent Decision in Humphries v. CBOCS West, Inc.

The bottom line is that, in the Seventh Circuit, Section 1981 as amended by the Civil Rights Act of 1991 applies to claims of retaliation. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007). And, all of the other circuits that have addressed this issue have made the same determination.

Humphries overturns *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005), a decision that had confounded plaintiffs employment lawyers for the last year and a half. The decision in *Hart* states that Section 1981 "encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination . . . ." 426 F.3d at 866. But, previous to *Hart*, the Seventh Circuit had long recognized that retaliation claims were actionable under Section 1981. *Humphries* acknowledges that *Hart* had been cited for the proposition that Section 1981 does not apply to retaliation claims, but indicates that it was "cited for this *inaccurate* proposition." (my emphasis). In any event, that issue is now clear.

Additionally, the Seventh Circuit expressly overturned *Hart* in holding that an individual who is not the subject of discrimination can assert a retaliation claim under Section 1981 for advocating the Section 1981 rights of others.

From this plaintiffs employment lawyer's perspective, *Humphries* is also important in that it rejects the defendant's view of similarly situated comparators as too rigid.

Hedrick Humphries was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. His performance for the first two and a half years was generally rated as excellent, he received annual merit raises and bonuses, and his supervisor testified that he considered Humphries to be his best associate manager. Things changed, as they frequently do in these cases, when a new general manager was temporarily assigned. The temporary general manager, Steve Cardin, made racially derogatory remarks, such as saying that all African-Americans are "drunk or high on drugs" and that "all Mexicans have a bunch of kids." Other employees confirmed these and other inappropriate comments, including the Cardin's statements that he was there "for the white people" and that he was "going to take care of the white people."

Within his first month as temporary general manager, Cardin had issued Humphries five disciplinary reports, which Humphries believed to be groundless and reflective of Cardin's racial animus. Humphries complained to Cardin's supervisor, the district manager, William Christensen, who apparently did not conduct any investigation, contrary to Cracker Barrel policies. Shortly thereafter, a new general manager, Ken Dowd, was assigned and Cardin, as planned, returned to his store. A short while later, one of Humphries' fellow associate managers, Joe Stinnett, terminated an African-American food server, which Humphries believed to be discriminatory. Humphries complained to both Dowd and Christensen, and Christensen's reaction was to berate Humphries for going over Dowd's head to complain to him.

The following week, Humphries was fired by Christensen, based on Stinnett's accusation that Humphries had left the store safe unlocked during the evening. Humphries denied this and claimed that just prior to his termination, a cashier told him that he should watch himself because Christensen and Stinnett were "up to something." Christensen terminated Humphries immediately after Stinnett informed him that Humphries had left the safe unlocked, without interviewing Humphries or conducting any investigation to determine whether or not the accusation was true.

The Seventh Circuit determined that Humphries did meet the requirements of the indirect method and thus declined to decide whether he had enough evidence under the direct method. Cracker Barrel argued that similarly situated comparators must have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. While acknowledging that some of its decisions have stated the similarly situated requirement in the "must" terms that Cracker Barrel argued, the court explained that "a more sensitive reading of our cases indicates that we have often stated that the similarly situated requirement *normally* entails" such a showing. "In other words, we have emphasized that the similarly situated inquiry is a flexible one that considers 'all relevant factors, the number of which depends on the context of the case.'" 474 F.3d at 405

Humphries identified Stinnett as a comparative. And, the court found that Stinnett "was a sufficient comparator." Both held the same associate manager position, had the same duties (including responsibility for ensuring that the safe was locked at all times), shared the same supervisor and the same ultimate decisionmaker. Both had received some past negative performance evaluations. Humphries testified that Stinnett

routinely left the safe unlocked, and Humphries hotly disputed the accusation that he had left the safe unlocked. The court found unconvincing Cracker Barrel's argument that Stinnett was not similarly situated because he left the safe unlocked during the daytime, whereas Humphries had left it unlocked overnight. One comparator was sufficient to meet his prima facie case.

Broadening the scope of Section 1981 is important to employees for several reasons: (1) Section 1981 does not require aggrieved employees to file a charge of discrimination with the U.S. Equal Employment Opportunity Commission within 300 days, (2) Section 1981 has a four year statute of limitations for most claims, and (3) Title VII's cap on punitive and compensatory damages does not apply to Section 1981 claims.

RETALIATION CLAIM DAMAGES

That brings us to the availability and the limits on compensatory and punitive damages for retaliation claims. The Civil Rights Act of 1991 provides for compensatory and punitive damages in disparate treatment Title VII claims where the employer engaged in "unlawful intentional discrimination" prohibited under section 703, 704, or 717 of the Act. 42 U.S.C. § 1981a(a)(1).

The Civil Rights Act of 1991 also clearly provides for compensatory and punitive damages in disparate treatment ADA claims where the employer engaged in "unlawful intentional discrimination" under section 102 of the Act. 42 U.S.C. § 1981a(a)(2). However, because the disability section does not expressly include the anti-retaliation and anti-interference sections of the ADA, there has been some doubt cast as to whether the Civil Rights Act of 1991 permits compensatory and punitive damages for ADA

retaliation claims. And, correspondingly, whether there is a right to a jury trial in a retaliation claim brought under the ADA.

In a case of first impression for federal circuit courts, the Seventh Circuit held that punitive and compensatory damages are not authorized for an ADA retaliation claim because the plain language of the Civil Rights Act of 1991 "permits recovery of compensatory and punitive damages . . . only for those claims listed therein." And, because "claims of retaliation under the ADA (§12203) are not listed, compensatory and punitive damages are not available for such claims." *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961, 965 (7th Cir. 2004).

Judge Williams was on the panel in *Kramer*, *Hart v. Transit Management of Racine, Inc.,* and in *Humphries v. CBOCS West, Inc.*, which she wrote for the court. It is unclear how the language in the most recent decision, *Humphries*, such as "(a) prohibition against retaliation is a necessary adjunct to the anti-discriminatory provision itself," and the recognition that "(t)o hold that section 1981 allows unfettered retaliation . . . would create perverse incentives for the employer to fire employees as quickly as possible to thereby limit (or entirely avoid) damages under section 1981," squares with the holding in *Kramer*.

In cases where the plaintiff claims that she was retaliated against for exercising her rights under the ADEA, the usual common law tort damages, such as emotional distress, may be recovered. *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283 (7th Cir. 1993). The same is true for retaliation cases under the Fair Labor Standards Act. *Neal v. Honeywell Inc.*, 191 F.3d 827 (7th Cir. 1999). The expectation is that the

same would hold true for retaliation claims under the FMLA, although there do not appear to be any Seventh Circuit decisions on point.