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Against Employer Retaliation: Protecting Low-Wage Workers Who Oppose Sex Discrimination

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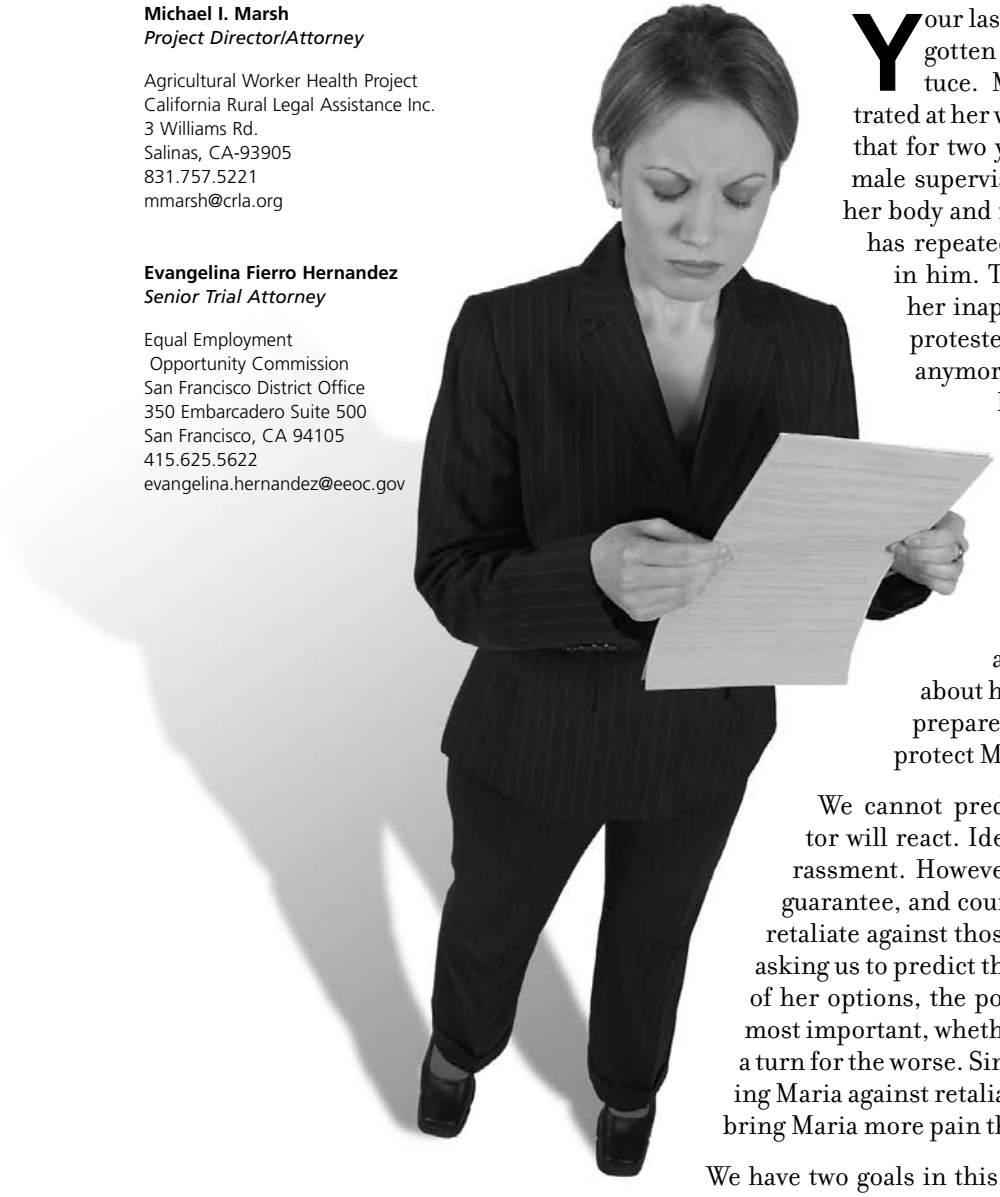

Your last client of the day is Maria. She has just gotten off a ten-hour shift field-packing lettuce. Maria is angry, frightened, and frustrated at her work situation. She cries as she explains that for two years she has worked at the plant. Her male supervisor makes daily lewd comments about her body and frequently asks her out on "dates." She has repeatedly told him that she is not interested in him. Today, for the second time, he touched her inappropriately and just laughed when she protested. Maria states that she cannot take it anymore. She would quit, but she needs the job because she is the only breadwinner in her family of three. She is thinking about taking her protests to the human resources department. She would have done this a long time ago, but the human resources director and her supervisor are drinking buddies and family by marriage. Maria asks if she may be fired for complaining about her supervisor's sexist behavior. Are you prepared to advise Maria? Are you prepared to protect Maria with due diligence?

We cannot predict how the human resources director will react. Ideally he will act quickly to stop the harassment. However, compliance with the law is never a guarantee, and countless directors ignore complaints and retaliate against those who dare complain. But Maria is not asking us to predict the future; she is asking us to inform her of her options, the possible outcomes for each option, and, most important, whether we will be there for her if things take a turn for the worse. Simply stating that there are laws protecting Maria against retaliation is not a sufficient answer and may bring Maria more pain than she is already experiencing.

We have two goals in this article. The first is to review the legal prohibitions on retaliation that protect workers who oppose or complain about sexual harassment and sex discrimination. The second is to help us understand Maria's plight and improve the advice and service that we offer to women like Maria.

I. Redress Under Title VII's Antiretaliation Provision

Among many federal laws protecting workers against retaliation, we focus here on one of the most widely used laws protecting workers who complain about sexual harassment and sex discrimination—Title VII of the Civil Rights Act of 1964.[1] Redress under this statute is found through the Equal Employment Opportunity Commission (EEOC), and plaintiffs have a private right of action after receiving a right-to-sue letter from the EEOC. Retaliation complaints of all types are now included in over 25 percent of all charges filed with the EEOC; this constitutes an important form of protection for workers who protest discrimination because of sex.[2]

While our focus is on Title VII, we must remember that other federal, state, and local laws and regulations have antiretaliation protection. For example, the federal Equal Pay Act, Fair Labor Standards Act, Agricultural Workers Protection Act, and Family Medical Leave Act, just to name a few, have antiretaliation provisions.[3] State laws, where they are, also help. California, for instance, has laws protecting workers from retaliation opposing sexual harassment or sex discrimination, appropriately taking time off due to a pregnancy-caused disability, appropriately taking time off if they are a survivor of sexual assault or domestic violence, or for expressing breast milk.[4] Whistleblower laws in many states may also be useful.

Section 704 of Title VII contains two separate clauses: an *opposition* clause that protects employees from retaliation for opposing a practice made unlawful by one of the antidiscrimination statutes, and a *participation* clause that protects workers for filing a charge with the EEOC, or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute.[5] Note that Section 703, which prohibits discrimination because of race, color, religion, sex, or national origin, is separate and distinct from Section 704, which prohibits retaliation.[6] The former protects workers on the basis of their membership in a certain class, while the latter protects workers on the basis of actions that they have taken. For example, a farmworker who is not subjected to harassment but who testifies or complains about what the farmworker had observed would be protected against retaliation. Among other reasons this distinction makes a difference in that the definition of an adverse employment action is broader under Section 704 than 703.[7]

Every retaliation claim has three essential elements:[8]

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[1]Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (2000).

[2]Equal Employment Opportunity Commission, Charge Statistics FY 1997 through FY 2006, www.eeoc.gov/stats/charges.html (last visited Feb. 21, 2007); Peter M. Panken, Retaliation: The New Vogue in Employment Litigation: Don't Get Mad, Don't Get Even, Just be Savvy 1 (2004), available at www.imninc.com/iln/Retaliation.pdf.

[3]The Equal Pay Act's antiretaliation protection is found in the Fair Labor Standards Act, 29 U.S.C. §§ 215(a), 216(b) (2000); Agricultural Workers Protection Act, 29 U.S.C. § 1855(a) (2000); Family Medical Leave Act, 29 U.S.C. § 2615 (2000).

[4]See Fair Employment and Housing Act, Cal. Gov. Code § 12940(a) (Deering 2006) (sexual harassment or sex discrimination); Pregnancy Disability Leave Act, Cal. Gov. Code § 12945 (Deering 2006) (pregnancy-caused disability); Cal. Lab. Code §§ 230, 230.1 (Deering 2006) (sexual assault or domestic violence); Cal. Lab. Code § 1030 (Deering 2006) (expressing breast milk).

[5]Note that, while the antiretaliation provision applying to the Equal Pay Act does not contain a specific opposition clause, courts recognize such protection. See *EEOC v. Romeo Community School*, 976 F.2d 985, 989–90 (6th Cir. 1992); *Contra Lambert v. Genessee Hospital*, 10 F.3d 46, 55 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994).

[6]Civil Rights Act of 1964, Pub. L. No. 88-352, § 704(a), 78 Stat. 241, 257 (codified as amended at 42 U.S.C. § 2000e-3(a) (2000)).

[7] See *Burlington Northern and Santa Fe Railway Company v. White*, 126 S. Ct. 2405, 2412 (2006).

[8]Equal Employment Opportunity Commission, Compliance Manual § 8, at 3 (1998). For a list of the principal cases in each circuit, see Lisa J. Banks & Alan R. Kabat, Retaliation Claims 6 (2005), available at www.kmblegal.com/pdfs/publications/2005_Dec_Advanced_Emp_Law_Litig.pdf. Note that the Sixth Circuit requires four elements, although the fourth element—that the employer had knowledge of the protected activity—is fundamental to the "causal connection" element. See *Hafford v. Seidner*, 183 F. 3d 506, 515 (6th Cir. 1999).

- the employee *engaged in a protected activity*;
- the employee suffered an *adverse employment action*; and
- the adverse employment action has a *causal connection* to the protected activity.

A plaintiff may prove retaliation through direct or circumstantial evidence. Direct evidence may be an employer's written or verbal statement that the employer is taking a certain employment action against the employee because of the protected activity. The EEOC states in Section 8 of its Compliance Manual of 1998 that if the plaintiff presents credible *direct evidence* that a retaliatory motive was the cause of an adverse employment action, the employer should be found strictly liable for retaliation.[9] The employer's evidence of a legitimate motive is relevant only to damages, not liability.[10] However, an employer can avoid liability for intentional discrimination in a mixed-motive case if the employer can prove that it would have made the same employment decision absent the discrimination.[11]

Direct evidence is frequently absent, and a plaintiff must rely on *circumstantial evidence*. In this situation, courts rely on a three-part burden-shifting analysis.[12] Under this approach, the plaintiff must first establish a *prima facie* case of employer retaliation for the plaintiff having exercised a protected right. Second, the burden shifts to the employer to produce evidence of a legitimate, nonretaliatory reason for the employment action. And, third, the plaintiff once again carries the burden to establish that the employer's stated reason is mere pretext meant to hide the employer's retaliatory motivation.

To prove pretext at trial, the plaintiff must show that the defendant's proffered reason is false. Savvy employers and their attorneys always articulate a nondiscriminatory reason for their employment actions—inadequate job performance of the employee, disciplinary problems, reduction in force, business necessity, and the like. Counsel for plaintiffs need to be aggressive during discovery to ferret out each excuse and the factual basis, if any, for each. Look carefully at the timing of the alleged retaliatory act. Does the employer's stated reason make sense given the timing of the employment action? Did the employer state one reason for the employment action and later change its reasoning? Look at the plaintiff's job performance and behavior before, during, and after the time in question. Look at the employer's actions toward other employees who are similarly situated. Interview as many witnesses as possible; the employer's agent may not have made comments showing intent directly to the plaintiff, but such comments might have been made to coworkers or in e-mail. Question whether the employer's actions were necessary to accomplish the stated goals.

An employee may challenge an employer's retaliation even if the retaliation occurred after their employment relationship ended; protection extends beyond the workplace or employment-related acts.[13] An employee may also "challenge retaliation by a respondent based on his/her protected activity involving a different employer, or based on protected activity by someone closely related to or associated with the charging party."[14] Further, a majority of courts allowed retaliation claims to be brought in court even if the original charge filed with the EEOC included only a harassment or discrimina-

[9]Equal Employment Opportunity Commission, *supra* note 8, at 16.

[10]*Id*.

[11]See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[12]See *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973).

[13]See *Robinson v. Shell Oil Company*, 519 U.S. 337, 345–46 (1997) (Clearinghouse No. 52,218); *Burlington Northern,* 126 S. Ct. at 2410.

[14]Equal Employment Opportunity Commission, *supra* note 8, at 2; *Murphy v. Cadillac Rubber and Plastics Incorporated*, 946 F. Supp. 1108, 1118 (W.D.N.Y. 1996) (retaliation found where plaintiff was subjected to adverse employment action based on wife's protected activities).

tion complaint as long as the retaliation was "reasonably related" to the discrimination complained of to the agency.[15]

A. Employee Engaged in Protected Activity

In our example, Maria has the right to complain about the harassment she suffers. She may complain to her employer (by using the employer's grievance procedure), to her union or legal representative, to a coworker, to a newspaper reporter, or to the EEOC or other governmental agency. The opposition clause of Section 704 protects a complaint to any person.[16] She would also have protection if she threatened to file a lawsuit or an EEOC charge or refused to obey an employer's order because of a reasonable belief that it was discriminatory.[17] A majority of courts held "that an employee's refusal to submit to sexual advances constitutes protected activity."[18]

The manner of an employee's opposition must be reasonable. Title VII does not protect an employee engaged in insubordinate or disruptive behavior.[19] Courts found these acts unreasonable:

- photocopying confidential documents relating to alleged discrimination and showing them to coworkers;[20]
- making an overwhelming number of complaints based on unsupported allegations while bypassing the chain of command;[21] and
- badgering a subordinate employee and attempting to coerce the employee to change the employee's statement.[22]

Furthermore, opposition to alleged discrimination does not necessarily insulate employees from adverse job action if they otherwise neglect their duties.[23]

On the positive side, an employee must have only a reasonable and good-faith belief that a challenged practice is unlawful; the challenged practice does not ultimately have to be found unlawful.[24] Requiring plaintiff to show that the challenged practice was actually illegal would undermine the central purpose of Title VII.[25]

In our example, under the participation clause Maria would have protection if she filed a charge or a lawsuit after she exhausted her administrative remedies. Notably, unlike the opposition clause which requires that an employee act reasonably and in good faith, the participation clause may not require that an employee's participation be reasonable or even undertaken in good faith.[26] Several

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[15]*Clockedile v. New Hampshire Department of Corrections*, 245 F.3d 1, 4, n.3 (1st Cir. 2001) (collecting cases from the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.)

[16]Equal Employment Opportunity Commission, *supra* note 8, at 4.

[17]See *Carney v. American University*, 151 F.3d 1090, 1095 (D.C. Cir. 1998); *Equal Employment Opportunity Commission v. HBE Corporation*, 135 F.3d 543, 544 (8th Cir. 1998). For a nonexhaustive list of types of activity found to be protected by courts, see Banks & Kabat, *supra* note 8, at 8.

[18]*Little v. National Broadcasting Company*, 210 F. Supp. 2d 330, 385–86 (S.D.N.Y. 2002) (collecting cases).

[19]*Thomas v. Los Rio Community College District*, No. 02-15491, 2003 WL 329278 (9th Cir. Feb. 13, 2003).

[20]*O'Day v. McDonnell Douglas Helicopter Company*, 79 F.3d 756, 763 (9th Cir. 1996) (Clearinghouse No. 51,069) (Age Discrimination in Employment Act case).

[21]*Rollins v. Florida Department of Law Enforcement*, 868 F.2d 397, 399 (11th Cir. 1989).

[22]*Jackson v. Saint Joseph State Hospital*, 840 F.2d 1387, 1389 (8th Cir. 1988), *cert. denied*, 488 U.S. 892 (1988).

[23]*Coutu v. Martin County Board of Commissioners*, 47 F.3d 1068, 1074 (11th Cir. 1995) (no retaliation found where employee was spending an inordinate amount of time conducting "employee advocacy" and was not completing other aspects of her job).

[24]*Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001) (*per curiam*); *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956, 960 (11th Cir. 1997); *Shellenberger v. Summit Bancorp*, 318 F.3d 183, 191 (3d Cir. 2003); *Trent v. Valley Electric Association*, 41 F.3d 524, 526 (9th Cir. 1994).

[25]*Berg v. La Crosse Cooler Company*, 612 F.2d 1041, 1045 (7th Cir. 1980).

[26]*Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

courts, arguing that an "employer may not take it on itself to determine the correctness [of a charge]," found that protection from retaliation extended to the employee even if the EEOC charge was based on false or even malicious statements.[27] Maria would have protection if she gave testimony in a proceeding or hearing, or assisted or participated in an investigation, proceeding, or hearing.[28] Participation in an employer's internal investigation is protected.[29]

B. Employee Suffered an Adverse Employment Action

The antiretaliation provision of Title VII (Section 704(a)), according to the U.S. Supreme Court in *Burlington Northern and Santa Fe Railway Company v. White*, is not limited to discriminatory actions affecting a term, condition, or privilege of employment and thus is broader than Title VII's core antidiscrimination provision (Section 703(a)).[30] The antiretaliation provision protects individuals from a retaliatory action that a reasonable person would find "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process.

Sheila White operated a forklift for Burlington Northern. In 1997 White complained to Burlington that her immediate supervisor had repeatedly told her that women should not be working in the department. White was removed from forklift duty to make way for a "more senior man."[31] Shortly thereafter White was suspended for insubordination. White filed two EEOC charges, one alleging that her reassignment was discriminatory and the other alleging retaliation for the suspension. White filed a Title VII action in federal court. The jury found in White's favor, and, on appeal, the Sixth Circuit sitting *en banc* upheld the jury's verdict.[32]

The retaliation provision, according to the Supreme Court, protects an individual from retaliation that produces an injury or harm. The challenged action must have been materially adverse from the perspective of a reasonable person, meaning that the action might dissuade a reasonable person from making or supporting a charge of discrimination. The retaliation provision does not normally prohibit "trivial harms," such as "petty slights, minor annoyances, and simple lack of good manners," because such actions are not likely to deter victims of discrimination from complaining to the EEOC, the Court noted, citing the EEOC's retaliation section.[33]

According to *Burlington Northern*, the significance of any given act of retaliation must be evaluated in context. The employee's "subjective feelings" should not be considered, but her "particular circumstances" are a necessary part of the calculation.[34] For example, a particular schedule change might make little difference to most workers but matter enormously to a young mother with school-age children. Similarly, while a supervisor's refusal to invite an employee to lunch is normally a trivial and nonactionable slight, excluding an employee from weekly training lunches that would contribute to professional advancement might deter a reasonable employee from

[27]See, e.g., *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998, 1007 (5th Cir. 1969); *Jenkins v. United Gas Corporation*, 400 F.2d 28, 30 (5th Cir. 1968).

[28]*Glover v. South Carolina Law Enforcement Division*, 170 F. 3d 411, 414 (4th Cir. 1999) (offering "exceptionally broad protection" to individuals who testify).

[29]*Clover v. Total System Services*, 176 F.3d 1346, 1352 (11th Cir. 1999); *Miller v. Washington Workplace, Inc.*, 298 F. Supp. 2d 364, 376 (E.D. Va. 2004).

[30]*Burlington Northern*, 126 S. Ct. at 2412.

[31]*Id*. at 2409 (internal cites omitted).

[32]*White v. Burlington Northern and Santa Fe Railway*, 364 F.3d 789 (6th Cir. 2004).

[33]*Burlington Northern*, 126 S. Ct. at 2415.

[34] *Id*.

complaining about discrimination. Thus a legal standard based on general terms is preferable to one based on specific prohibited acts. The Court quoted from *Oncale*: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[35] Under this standard, there was sufficient evidence for the jury to find on White's behalf on her retaliation claim.

Justice Alito, in his concurrence, worried where the majority's logic might lead: "The majority's illustration introduces three individual characteristics: age, gender, and family responsibilities. How many more individual characteristics a court or jury may or must consider is unclear."[36] But, for advocates of low-wage workers, these are exactly the factors which make our clients vulnerable to discrimination *and* retaliation in the first place. Among the "individual characteristics" that we might include in our reasonable-person analysis are age, gender, family obligations, immigration status, marital status, medical condition, language skills, educational level, availability of a support network, and economic status.

Burlington Northern creates an opportunity for advocates of low-wage workers to present judges and juries with a view of workplace retaliation as seen through the eyes of the workers themselves.

C. Adverse Employment Action Has Causal Connection to Protected Activity

The plaintiff must show through direct or circumstantial evidence that there is a causal connection, or nexus, between the protected activity and the adverse employment action. The causal connection is not a "but for" standard, and the plaintiff "need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to establish the 'causal link' element."[37] Courts consider a number of factors in determining if there is a causal connection:

- the time gap between the protected activity and the adverse action;
- derogatory or probative comments that the employer or the employer's agents made to the employee and that refer to or can be tied to the protected activity;
- adverse employment actions that can be linked to the protected activity because there is no other reasonable explanation for the action; employer's treating the complaining employee differently from other employees through, for example, greater scrutiny of the employee by the employer, unjustified personnel reviews and actions, or greater punishment;[38] or
- the employer's failure to follow its own established policies and procedures.[39]

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[35]*Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 81–82 (1998), *quoted at Burlington Northern*, 126 S. Ct. 2415–16.

[36]*Burlington Northern*, 126 S. Ct. at 2421 (concurrence by Justice Alito).

[37]*Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002).

[38]*Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990) (disparate treatment of employees who engaged in similar conduct); *Lee v. New Mexico State University Board of Regents*, 102 F. Supp. 2d 1265, 1277 (D.N.M. 2000) (heightened scrutiny and surveillance); *Weaver v. Casa Gallardo Incorporated*, 922 F.2d 1515, 1525 (11th Cir. 1991) ("The pronounced increase in negative reviews and the careful scrutiny of [plaintiff's] performance, coupled with testimony suggesting that management personnel were acutely aware of [plaintiff's] EEOC charge, is sufficient to establish a causal link."); *Smith v. Riceland Foods Incorporated*, 151 F.3d 813, 820 (8th Cir. 1998) (plaintiff "presented evidence that management at Riceland confronted her about filing her charge and that other employees who had not filed charges of discrimination were not investigated as closely or punished as severely as she was ….").

[39]*McClam v. Norfolk Police Department*, 877 F. Supp. 277, 283 (E.D. Va. 1995) ("[T]he articulated reason for refusing to transfer [plaintiff] based on his disciplinary record was not consistently applied [to other employees] in the past."); *National Labor Relations Board v. Transportation Management Corporation*, 462 U.S. 393, 404 (1983) ("[T]he employer departed from its usual practice in dealing with rules infractions ….").

The temporal connection between the protected activity and the adverse employment action is one of the principal factors which courts examine to find causation. In one case, finding that either the employer had no knowledge of plaintiff's EEOC charge when it made the decision to transfer her to a new position, or that it knew about the filing twenty months before the alleged adverse employment action, the Supreme Court upheld summary judgment for the employer.[40] The Court stated, "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."[41] The Court added, "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close,'.... Action taken (as here) 20 months later suggests, by itself, no causality at all."[42]

While there is no cutoff point below which causality is proven and above which causality is not found, case law provides some direction. Gaps of three months, four months, thirteen months, and twenty months were found to be too long, whereas gaps of three months, two months, one month, and two weeks were found to show causality.[43] The temporal gap between the protected activity and the adverse action is "but one method of proving retaliation," and courts may consider timing in conjunction with other factors to find causation.[44]

II. Counseling Suggestions

Maria asked whether she could be fired if she reported her supervisor's harassing behavior. What advice do we have for her? What are her risks? What are her next steps? What is our role if Maria decides to report the harassment?

A. General Counseling Points

Two important considerations stand out as we begin to counsel Maria. First, Maria is taking all the risks. By reporting her supervisor's harassment, she is risking her employment, her financial status, and her mental condition. But if she does not report the harassment, she is also risking her well-being. Second, no one understands Maria's situation better than Maria. As advocates, we can listen to Maria, learn about her life, and empathize with Maria, but we will never understand Maria's life as she knows it. Our initial role is to give Maria the information she needs to make her own decision.

In light of the two points above, we must assure Maria that all information she discloses to us will be kept completely confidential and that we will take no action on her case—including further investigation—without her permission. We must stress that we will not contact her employer unless and until she tells us that the time is appropriate.

We must convey to Maria that we are on her side and that she is not alone. Let her know that you have experience in this area of law and that you have successfully helped other women in similar situations. Provide Maria with resources

[40]*Clark County School District*, 532 U.S. at 273.

[41]*Id*. at 272.

[42]*Id*. at 273–274 (internal citations omitted).

[43]See *Richmond v. ONEOK Incorporated*, 120 F.3d 205, 209 (10th Cir. 1997) (three months too long); *Hughes v. Derwinski*, 967 F.2d 1168, 1174 (7th Cir. 1992) (four months too long); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 647 (9th Cir. 2003) (thirteen months too long); *Singfield v. Akron Metropolitan Housing Authority*, 389 F.3d 555, 563 (6th Cir. 2004) (three months not too long); *Little*, 210 F. Supp. 2d 330, 386 (S.D.N.Y. 2002) (two months not too long); *Calero-Cerezo v. U.S. Department of Justice*, 355 F.3d 6, 25–26 (1st Cir. 2004) (Clearinghouse No. 55,679) (one month not too long); *Turner v. Housing Authority of Jefferson County*, 188 F. Supp. 2d 1066, 1079 (S.D. Ill. 2002) (two weeks not too long). For a broader discussion of the time-gap factor and a list of case citations, see Banks & Kabat, *supra* note 8, at 16–18.

[44]*Che v. Massachussets Bay Transportation Authority*, 342 F.3d 31, 38 (1st Cir. 2003) (finding that an eleven-month gap together with racist remarks and disparate disciplinary actions was sufficient to show causation).

from within your office and refer her to resources outside your office. Think holistically. Depending on her situation, Maria may need crisis counseling, family law assistance, medical care, referral to a women's support group, or assistance on public benefits.

Often clients have difficulty remembering everything we tell them during a one- or two-hour initial interview. Having something the clients can take home might help them focus on points made during the interview. We frequently give clients "to do" lists or "take-home points" in addition to a brochure or two from our or another organization. You should ensure that the documents are not replete with legal language but instead are written in easy-to-read terms.

The problems of note taking are many. Ideally an interview should be a conversation, with plenty of eye contact and plenty of sympathetic comments and gestures. Having to interrupt a client's story repeatedly to catch up with your note taking and having your eyes focused on your notepad are not conducive to permitting your client to tell her story. At the same time we have a duty to take notes and record the information that is being presented. If you are a slow writer, consider your options: have the client give a short oral summary of what happened and just listen, then go back over the story slowly and take notes; consider the pros (such as having a record of important details and improving the flow of the interview) and cons (a chilling effect) of asking permission to use a tape recorder and write the relevant notes after the client leaves; or ask someone else to take notes as you converse with the client.

Male advocates have gender as an obstacle to both genuinely understanding Maria's situation and gaining Maria's confidence. Listening to women, hearing their stories, reading materials written by women, and repeated, heartfelt contact with female clients over time will help a male advocate develop an understanding of Maria's life. Even after a male advocate gains a perspective that allows him to be helpful, conveying that perspective to Maria in a short time also becomes a problem. Some of what a male advocate can do to help female clients may be maintaining his office as a comfortable, pleasant, and safe space; asking the client if she would be more comfortable speaking with a woman and letting her know that he would not be offended if she chose a woman; cointerviewing with a woman; asking the client if she would like his office door open or closed; briefly explaining that he has worked on behalf of many women; offering that particularly painful or sexual parts of a client's history could be left until later or told to a woman; and admitting that imagining as a man being in Maria's situation is difficult, thus opening the door to be educated about the difficulties she has faced.

B. The Law and the Risks

Many times clients come to our office after the retaliation occurs, and we have no choice but to react. But at times a client such as Maria comes in before the retaliation occurs. We need to be careful with the advice we give and the strategies we develop in these instances.

Title VII prohibits retaliation and provides a remedy if an employer retaliates against an employee who opposed or reported discrimination or harassment. Title VII does not guarantee that an employer will not retaliate against a worker. We need to inform Maria of the protections *and* the limitations of the law. We should review possible positive and negative outcomes with her. On the one hand, the employer might respond positively. The harassment might stop, and the harasser might be disciplined appropriately. On the other hand, a client needs to know that her fears are real and that employers can and do retaliate against workers who complain. We should review with her some of the most common of employers' retaliatory actions, including demotion or firing; change of work assignment, schedule, or pay; further harassment in an effort to get the employee to quit; improper and exaggerated oversight; and improper warnings and bad work reviews. We should ask the client which types of retaliation, if any, she has seen the employer use in the past. We should ask who is the likely person to

retaliate—the supervisor, someone else in the chain of command, or the company itself. We should give some thought to how each outcome might affect the client and what our response might be in each situation.

In the aftermath of *Burlington Industries* and *Faragher*, we must advise Maria of the possible risks if she does not report the harassment.[45] If the company has policies and procedures in place that would prevent further harassment or discrimination, Maria's future damages might be limited if she does not report the harassment.

We need to tell Maria whether we are committing to represent her in a retaliation action even if she does not ask us. If we do not, Maria may assume that, because we offered her information at her initial interview, we *will* represent her later. We may not want to commit to Maria at this point. We might want to see how events unfold and learn the facts before we commit ourselves. We might work for organizations that have specific procedures to follow before we accept a case for litigation. In any case, we need to be clear with Maria exactly what our commitment is, and we should do this in the form of a written, comprehensible retainer agreement at the initial interview.

The best option is to consider and discuss internally your office's position on possible retaliation cases before your next client walks in the door. Some offices prioritize retaliation cases because such cases are the combination of two evils—the discriminatory act, followed by the retaliatory act for complaining about the discrimination—and are prepared to commit to representation at the initial interview. Other offices might decide to develop clear and comprehensive language for their retainer agreement, which explains exactly what they are willing and not willing to do if the employer does retaliate. Other options may be to say that while you cannot promise that your office will represent Maria, you believe that other attorneys would be willing to take her case and that you could give her an appropriate referral; or to offer to provide assistance to Maria so that she can effectively bring her case to the EEOC.

C. The Next Steps

The two basic options that we should review with Maria if she decides to complain about her supervisor's harassment are that she or her representative could make an initial complaint directly to her employer or that she could immediately file a charge of discrimination with the EEOC. If Maria chooses to file immediately with the EEOC, this on the one hand has the advantage of starting the ball rolling sooner and bringing the agency's weight and resources down upon the offending employer. This might scare the employer into not retaliating against Maria. On the other hand, many employers might resent that Maria had not kept the problem "in-house." Defending against an EEOC charge costs a company time and money. Some employers retaliate against employees for bringing EEOC charges, but these employers might retaliate against the employee regardless of how the employee complained.

One approach is to write the employer a letter challenging the discrimination or harassment. Occasionally such letters do not name the client. For instance, when a single supervisor sexually harasses or discriminates against several women, there might be some protection in not naming one employee initially. This approach might protect a client from retaliation at least until a later stage in the claim, but the downside is that the client might not gain the protections of the antiretaliation statute—the employer might claim that it did not know that the client opposed discrimination, made a complaint, or participated in a proceeding.

What is better, in many cases, is to write to the employer a letter naming the client and setting forth relevant facts regarding the supervisor's harassment. Our letters specifically state that they do not contain all the facts. We ask that the employer

[45] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (requiring an examination of the reasonableness of employer's conduct in seeking to prevent and correct harassing conduct and of the reasonableness of employee's conduct in seeking to avoid harm).

initiate an investigation and that immediate steps be taken to protect our client from further harassment. We suggest specific corrective steps when appropriate. We ask that our client not be interviewed unless we are present. We offer our assistance in resolving the matter and indicate our interest in discussing appropriate corrective steps. Our letters clearly remind the employer that retaliation is illegal. We may list specific acts which we and courts would consider to be retaliation if the employer has a history of taking certain retaliatory acts against employees or we believe that the employer might be unclear about the law. If we are willing to give the employer a timeframe during which we will not notify the EEOC, we state that in the letter. Generally these letters do not seek monetary damages for the underlying discrimination; that occurs in later communication. Our letters are usually sent via certified mail, return receipt requested.

If Maria asks us to send a letter, the letter should be sent shortly after her initial interview, within a day or two. When her employer asks her about the discrimination, Maria should answer questions about the discrimination and aid the employer's investigation. She should ask that her attorney be present if she is to be formally interviewed by an investigator or counsel for the employer. Maria should suggest specific and immediate corrective steps from her employer. And, of course, we should ask Maria to report back to us whenever she has important information from the employer or the employer has taken positive steps to correct the harassment or adverse actions against her.

D. Making a Complaint to the EEOC

Whether before or after you notify the employer of the discrimination or retaliation, at some point Maria will need to exhaust her administrative remedies by filing a charge with the EEOC if she wishes to proceed to court.[46] A client such as Maria should be advised to bypass the long and confusing precharge questionnaire that many EEOC offices use. Many EEOC offices appreciate that a legal office writes the charge and sends it to them to serve. Make sure your client signs the charge before you mail it to the EEOC.

As a general rule, retaliation that occurs before the filing of the charge must be alleged in the charge, whereas retaliation that arises as a result of the filing of the charge is automatically incorporated into the charge.[47] If the retaliation occurs before the charge is filed, the best practice is always to list the retaliation in the charge. If the retaliation occurs after the charge is filed, especially if the relationship between the original charge and the retaliation is not entirely clear, always file a second charge alleging retaliation. If the client filed the EEOC charge on her own and did not list retaliation, file a second charge if there is still time; otherwise argue that public policy and the goals of Title VII would be stymied if an unsophisticated and unrepresented claimant were deprived of the opportunity to make her claim simply because she was not versed in the finer details of the law.

If your client is a migrant worker or moves or changes telephone numbers frequently, and your client agrees, list your office's address and phone number as your client's contact information. Also, when you send the charge to the EEOC, write a cover letter asking that all communication with the client be done through your office.

■ ■ ■

Thousands of women go to work each day only to be harassed by men or discriminated against because of their sex. Laws protect women and men from sexual ha-

[46]Visit the EEOC's website for instructions on how to file an EEOC charge. See Equal Employment Opportunity Commission, Filing a Charge of Employment Discrimination, www.eeoc.gov/charge/overview_charge_filing.html (last visited Feb. 21, 2007).

[47]*Clockedile*, 245 F.3d at 6 ("[R]etaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency—e.g., the retaliation is for filing the agency complaint itself."). See also *Ang v. Procter and Gamble Company*, 932 F.2d 540 (6th Cir. 1991); *Strouss v. Michigan Department of Corrections*, 250 F.3d 336 (6th Cir. 2001).

rassment and sex discrimination; many are unaware of these laws or fear retaliation if they assert their rights. The Supreme Court's expansive interpretation of Title VII's Section 704 in *Burlington Northern* provides legal advocates with another tool in the fight against discrimination and retaliation. Only by mobilizing our resources against employers who discriminate against employees and retaliate against them for complaining will we provide working women with what they need to say "no" in the workplace.

Authors' Note

Evangelina Fierro Hernandez coauthored this article in her private capacity. Our views here do not necessarily represent the views of the Equal Employment Opportunity Commission or the U.S. government.

Tips for Advocates

1. We must understand that there are many valid reasons for not wanting to report sexual harassment—fear of further harassment or retaliation, fear of a husband's or boyfriend's reaction, fear of loss of job, fear of inability to pay the rent, fear of impact on family and specifically children, and fear of deportation, to name a few.
2. We must remember that our clients take all the risks and that no one is better able to analyze their life and the risks to it than they themselves.
3. Depending on the circumstances, consider making a referral to the police, a crisis counseling center, a medical provider, a women's support group, or a public benefits counselor. Think holistically.
4. If our client has not yet reported the discrimination to her employer or the Equal Employment Opportunity Commission (EEOC), we need to speak with her about how not reporting might limit her remedies should she decide to file a charge later on.
5. Investigate and consider state laws which may also provide protection against retaliation.
6. Retaliation charges must be administratively exhausted with the EEOC. We must not forget to include the retaliation charge together with the discrimination charge whenever applicable and possible. If the retaliation occurs after the EEOC charge is filed, file a second charge alleging the retaliation, even if the retaliation arose from the original discrimination.
7. We must recognize that, following *Burlington Northern v. White*, protection against retaliation is broader than protection against discrimination under Title VII. While discriminatory actions generally must affect a term, condition, or privilege of employment, protection against retaliation extends to any action that would have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process, even if that action did not affect a term, condition, or privilege of employment.
8. We must consider our client's "individual characteristics" to determine if the employer's action would have been materially adverse from the perspective of a reasonable person. These characteristics can include age, gender, family obligations, immigration status, marital status, medical condition, language skills, educational level, and economic status.
9. Retaliation cases frequently are complicated and difficult cases. Employers will always allege a nonretaliatory reason for their actions. We need to inform our clients of the protections *and* limitations of the law.

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