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I. **Introduction**

Among the most challenging claims that may be alleged under Title VII of the Civil Rights Act of 1964 (“Title VII”) in the modern-day workplace is the retaliation claim. To address unlawful retaliatory conduct the anti-retaliation provision provides in section 704(a) of Title VII, codified as 42 U.S.C § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In order to prevail on a retaliation claim, a plaintiff must engage in protected activity and allege that she suffered adverse action that has a causal connection to the protected activity. *Arnold v. Tuskegee University*, No. 06-11156, 2006 WL 3724152 (11th Cir 2006). In 2006, the U.S. Supreme Court addressed the adverse action element and determined that the Title VII anti-retaliation provision extends beyond workplace related retaliatory acts and harms. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. __, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). Thus, the second element necessary to set forth a prima facie case of retaliation under Title VII requires a plaintiff to show that she was
subjected to actions that a “. . . reasonable employee would have found materially adverse” and would dissuade a reasonable employee from making or supporting a charge of discrimination. Id. at 2412-14.

The U.S. Supreme Court’s decision in White is likely to expand the scope of the adverse action potential plaintiffs may rely upon to support a retaliation claim. Given this recent development in the law, the purpose of this paper is to examine 42 U.S.C. § 2000e-3(a) and the aims of Title VII’s anti-retaliation provision, and discuss the impact the White decision may have on institutions of higher education.


The legislative history of Title VII’s anti-retaliation provision is arguably very sparse, and provides limited insight regarding Congressional intent. However, an examination of the language used in Title VII’s anti-retaliation provision and relevant caselaw indicate that Congress intended to prevent harm to employees based on their efforts to secure or advance enforcement of Title VII’s basic guarantees. Courts have found that the anti-retaliation provision has been viewed as providing very broad protections from retaliation to ensure that employees maintain unfettered access to Title VII’s statutory remedial mechanisms. Robinson v. Shell Oil Co., 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed. 2d 808 (1997); Deravin v. Kerik, 335 F.3d 195, 204 (2d Cir. 2003); United States v. Gonzales, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997).

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2 The Court in White observed that the Title VII’s substantive anti-discrimination decision 42 U.S.C. §2000e-2(a) and the anti-retaliation provision had distinct differences in language and purpose that were intended by Congress. White, 126 S.Ct. at 2412.
In addition, courts have looked to the Equal Employment Opportunity Commission (“EEOC”), the federal agency charged with enforcement of Title VII, for guidance regarding interpretation and analysis of the statute. In White, the Supreme Court noted that the EEOC Compliance Manual characterized the anti-retaliation provision as providing exceptionally broad protections. The introductory segment of the Compliance Manual indicates that enforcement of Title VII depends on the willingness of individuals to speak out in opposition to employment discrimination or to file charges, complaints, or serve as witnesses to investigations in EEOC proceedings without the chilling effect of a retaliatory reprisal serving as a consequence. Arguably, without these protections, the anti-retaliation provision’s objective cannot be achieved. White, 126 S.Ct. at 2412.

To establish a retaliation claim under Title VII, the plaintiff must navigate the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S.792, 800-801, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). This approach initially requires the plaintiff to show that (1) he or she engaged in protected activity, (2) that the employer subjected the plaintiff to adverse action, and (3) that a nexus exists between the protected activity and the adverse action. Assuming the plaintiff can make this prima facie case, the burden shifts to the defendant-employer to articulate a legitimate, non-discriminatory reason for the adverse action. Thereafter, the plaintiff has the burden to show that the employer’s proffered reason was false, and that the reason is merely a pretext for unlawful retaliation.
A. The Retaliation Prima Facie Case

The first element that must be established to present a prima facie case of retaliation focuses on protected activity. Protected activity may constitute an employee’s opposition to an employment practice made unlawful by Title VII, or an employee’s participation in activity authorized under Title VII. A broad approach is used when considering claims under the opposition clause. The opposition clause protects an individual who communicates to his/her employer a belief that some activity of the employer constitutes a form of employment discrimination covered under the statutes enforced by the EEOC. Opposition can include verbal communications, but also non-verbal acts such as picketing or a work slow-down. Carter-Obayuwana v. Howard University, 764 A.2d 779,791 (D.C. 2001) (For purposes of Title VII’s opposition clause, a lenient standard is applied that does not impose a rigorous requirement of specificity in determining whether an act constitutes opposition.)

Courts and the EEOC have found that protected activity may include complaints to practically anyone (including management); refusing to obey an order an employee believes is unlawful under Title VII; and opposing unlawful acts by persons other than the employer. If a verbal complaint is made on behalf of another individual, both the individual making the complaint and the person on whose behalf the complaint is made are both protected from retaliation. If an individual refuses to obey an order because of the reasonable belief that the order would be discriminatory (such as a directive that a

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3 Although this paper focuses primarily on retaliation claims brought under Title VII, it is important to note that retaliation claims also may be alleged under the Age Discrimination in Employment Act (ADEA), section 4(d), 29 U.S.C. § 623(d); the Americans with Disabilities Act (ADA), section 503(a), 42 U.S.C. § 12203(a); and the Equal Pay Act section 15(a)(3) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3).
particular race not be hired for a position), then that refusal to obey the order would be protected opposition and covered under the retaliation clause. Likewise, a request for reasonable accommodation of a disability would constitute a protected activity under the ADA. Johnson v. University of Cincinnati, et al, 215 F.3d 561, 579 (6th Cir. 2000); Lewis v. State of Oklahoma ex rel. Board of Regents for Tulsa Community College, 42 Fed. Appx. 160 (10th Cir. 2002) (Employee’s comment that she would hire an attorney to help her get equal pay is a protected activity; however, plaintiff’s retaliation claim failed because employer offered a legitimate reason for plaintiff’s termination.)

Moreover, the conduct protected will only include opposition to a practice made unlawful by statute.4 The EEOC has observed that the employee’s opposition, however, must be reasonable and based on a good-faith belief that the opposed practices were unlawful. (EEOC Compliance Manual, (CCH) p. 8006.) Hence, whether the employment practice in question is ultimately found to be unlawful is not relevant. The alleged discriminatory act need not be actually illegal if the employee’s opposition is based on a reasonable and good-faith belief. Johnson v. University of Cincinnati, et al, 215 F.3d at 580.

Also, protected activity may be found under the participation clause that has been found to extend exceptionally broad protections where an employee can show that he or she was subject to adverse action for participating in any manner in some Title VII proceedings. Johnson v. University of Cincinnati, et al, 215 F.3d at 582. Protected

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4 For example, a retaliation claim under the Age Discrimination in Employment Act (ADEA) must be based on a practice made unlawful by the ADEA. A Title VII retaliation claim must be premised on activity protected under Title VII. See, Mary Lamb-Bowman v. Delaware State University, 152 F. Supp 2d 553, 560 (D. Del. 2001) (Plaintiff’s Title VII retaliation claim failed because the protected activity she alleged did not violate Title VII but constituted opposition to disparities between women’s and men’s athletic programs, a potential Title IX violation.)
activity under the participation clause might include conduct such as filing an EEOC charge, testifying, or assisting in a investigation, proceeding, or hearing. As with the opposition clause, whether an employee is wrong on the merits is of no consequence if the employee reasonably believed that he or she was engaging in activity protected under Title VII. Id.; Sacay v. The Research Foundation of the City University of New York et al., 193 F. Supp. 2d 611, 630-631 (E.D.N.Y. 2002) (plaintiff engaged in protected activity under the opposition clause by making complaint to human resources department, and under the participation clause when her attorney requested a reasonable accommodation.)

As the above discussion points out, an employee may engage in protected activity under the opposition clause by merely voicing a complaint, and under the participation clause by filing a complaint; even an internal complaint may suffice. Carter-Obayuwana v. Howard University, 764 A.2d at 791. Therefore, college and university lawyers and administrators should guard against dismissing complaints that appear to be without merit until such complaints are subject to a reasonable level of review and investigation. If the employee has a reasonable and good-faith belief that his or her rights have been violated under Title VII or another employment statute, this employee may have satisfying the first prong of a retaliation claim. By detecting such an event, the university has a golden opportunity to consult with the employee and diffuse or resolve a potential legal claim at an early stage. Thus, the employer’s objective is to assure the employee that the institution intends to provide all employees an opportunity to perform their jobs free from unlawful employment discrimination and/or retaliation.
B. Understanding Adverse Action.

The second element of the retaliation prima facie case requires that the plaintiff show that he or she suffered adverse action. Identifying what conduct does or does not constitute actionable adverse action has been the source of some controversy. Mukaida v. State of Hawaii; University of Hawaii, et al., 159 F. Supp. 2d 1211 (D. Haw. 2001).

Prior to the U.S. Supreme Court’s decision in White, several federal circuit courts, arguably, appeared to embrace a standard which articulates adverse action as a material change in employment that is beyond action that reflects mere inconveniences.

Several courts have indicated that adverse action exists if the plaintiff endures a materially adverse change in the terms and conditions of employment. Ruggiere v. Harrington et al., 146 F. Supp. 2d 202, 215 (E.D.N.Y. 2001); Tademe v. St. Cloud State University, 2001 U.S. Dist LEXIS 20666, No. 00-1725 (DSD/JMM) (D. M.N. Dec. 10, 2001) (Plaintiff failed to show materially adverse employment action because the decision not to raise plaintiff’s salary did not decrease his pay.) Vadie v. Mississippi State University, et al., 218 F.3d 365, 374 (5th Cir. 2000) (The plaintiff has the ultimate burden to show that “but for” the protected activity the adverse employment action would not have occurred.) Other courts have held that adverse action is not defined by a bright-line rule but rather determined on a case-by-case approach reviewing the unique factors of each case. Gunnell v. Utah Valley State College, 152 F.3d 1253, 1264 (10th Cir. 1998). Moreover, prior to White, materially adverse employment action has been held to include employment termination, a demotion that results in a decrease in wages or salary, a less distinguished title, and material loss of benefits or responsibilities and negative consequences that were employment related.
While a change in the terms and conditions of employment may constitute an adverse employment action, courts have also recognized that not every unpleasant employment action short of discharge or demotion creates a cause of action for retaliation. _Smart v. Ball State Univ._, 89 F.3d 437, 442-43 (7th Cir. 1996) (A negative job evaluation alone did not constitute adverse employment action for purposes of retaliation prima facie case). _McFadden v. State University of New York_, 195 F. Supp. 2d 436, 457 (W.D.N.Y. 2002) (Plaintiff was not subjected to a materially adverse employment action by now receiving a new computer because such conduct constituted a mere inconvenience.) _Ruggiere v. Harrington et al._, 146 F. Supp. 2d at 215. Likewise, de minimis employment action has not been accepted as a materially adverse change in terms or conditions of employment. _Speers v. University of Akron_, 189 F. Supp. 2d 759, 767 (N.D. Ohio 2002).

C. Proving the Causal Connection Necessary to Establish Retaliation

After a plaintiff has demonstrated that he or she has engaged in protected activity and has been subjected to adverse action, a causal connection must exist between the protected activity and the adverse action to complete the prima facie case. The plaintiff may establish causation by showing that the employer knew the plaintiff engaged in protected activity and that the adverse action took place shortly thereafter. _Weigert v. Georgetown University_, 120 F. Supp. 2d 1, 19 (D. D.C. 2000). Put another way, this element of the retaliation prima facie case is satisfied once the plaintiff shows that the decisions-makers were aware of the protected activity, and that the protected activity and
the adverse action were not wholly unrelated.\textsuperscript{5} Gupta v. Florida Board of Ruggiere v. Harrington et al., 212 F. 3d 571, 590 (11\textsuperscript{th} Cir. 2000). This can be accomplished through circumstantial evidence which shows that the protected activity was followed by discriminatory treatment. Ruggiere v. Harrington et al., 146 F. Supp. 2d at 218. Close temporal proximity may be a significant factor in determining whether the protected activity and the adverse employment action are wholly unrelated. Sandra Lee v. New Mexico Board of Regents, et al., 102 F. Supp. 2d at 1276. However, where close temporal proximity is absent, additional indirect evidence such as heightened scrutiny, negative criticism, differential treatment or violation of standard internal protocol and procedure may be sufficient to establish causation. Id. at 1277.

\textbf{D. Responding to the retaliation prima facie case.}

Once a plaintiff has set forth the prima facie case, the defendant-employer has the burden to produce a legitimate, non-discriminatory reason for the adverse decision. If such a reason is forthcoming, the burden shifts back to the plaintiff to show that the defendant’s reason is pretext, and that the adverse action was indeed based on a retaliatory motive. Ceasar v. Lamar University, 147 F. Supp. 2d 546, 554 (E.D. Tex. 2001); Weigert v. Georgetown University, 120 F. Supp. 2d 1, 22 (D. D.C. 2000). (Once the defendant has met its burden of producing a non-discriminatory reason, the presumption of retaliatory discrimination drops from the case and the plaintiff must demonstrate that the proffered reason was not true.)

\textsuperscript{5} The causal connection of a retaliation claim is not a logical connection that would justify a prescription that the protected activity in fact prompted the adverse action, because this would require direct evidence of discrimination. Thus, the causal connection can be established by merely showing that the protected activity and the adverse action are not wholly unrelated. Gibbons v. Auburn University at Montgomery, et al., 108 F. Supp. 2d 1311, 1320 (M.D. Ala. 2000).
III. Examining the Divergent Views among Federal Courts regarding the Nature and Scope of Retaliatory Action Prior to the *Burlington Northern & Santa Fe Railway Co. v. White* decision

The U.S. Supreme Court in *White* understood that Circuit Courts had different views as to what adverse action was sufficient to establish a retaliation claim and sought to resolve this split in its opinion. The Second, Third, Fourth, and Sixth Circuits shared the view that a close relationship should exist between the retaliatory action and employment such that a materially adverse change in the terms and conditions of employment was necessary to show adverse action. *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir 2001). The First, Fifth and Eight Circuits embraced a restrictive approach that limited retaliatory action to conduct that constituted an ultimate employment decision such as hiring, granting leave, discharging, promoting, and compensating. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); Finally, the Seventh, Ninth, Tenth, and District of Columbia Circuits have applied an expansive view describing adverse action as conduct that would dissuade a reasonable worker from making or supporting a charge of discrimination. *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).^6^

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^6^ The Ninth Circuit, for example, has adopted the EEOC’s standard which holds that adverse employment action is any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000). However, it is important to note that recognizing the differences among the Circuits is not an exact science. For example, in *Gupta v. Florida Board of Regents, et al.*, 212 F. 3d 571, 587 (11th Cir. 2000) the Eleventh Circuit defined adverse employment action by using the narrow ultimate employment decision language, and relied on an opinion from the Third Circuit to support its position. Hence, the Eleventh Circuit, contrary to the Ninth Circuit’s opinion in *Ray*, had arguably taken a restrictive view to adverse action prior to *White*.  

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The Court in *White* recognized that different U.S. Circuit Courts had reached different conclusions as to whether the challenged adverse action had to be confined to employment or workplace related conduct, and about how harmful the alleged action must be to substantiate a retaliation claim. The Court resolved this split among the Circuits by finding that the anti-retaliation provision was not limited to discriminatory action that affected the terms and conditions of employment. According to the Court, the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts. Agreeing with the reasoning set forth by the Seventh and District of Columbia Circuits, the Court held that to demonstrate adverse action a plaintiff must show that a reasonable employee would have found that the challenged action materially adverse. Put another way, the challenged action would have dissuaded a reasonable worker from making or supporting a charge of discrimination to satisfy the adverse employment element for the retaliation claim. *White*, 126 S. Ct at 2415.

IV. **Considerations for Avoiding Retaliation Allegations in the Higher Education Community**

While the retaliation claim poses a significant challenge for college and university administrators, several steps can be taken to minimize the potential for these claims and reduce the likely success of a retaliatory charge.

- Review, audit, and promote an anti-retaliation policy that provides notice to the institution’s workforce that the university is committed to maintaining an environment free of discrimination and unlawful employment conduct. The policy should make clear that employees who report an act of misconduct and/or
discrimination will not be subject to retaliation because such conduct is not permitted by the institution’s employment policies, practices, and procedures.

- Develop and implement complaint procedures that provide clear guidance for staff and managerial employees regarding the appropriate action steps and investigative protocols to be taken to resolve the complaints. These procedures should be promoted throughout the institution and consistently applied such that all employees understand the avenues available to pursue complaints.

- Employment decisions should be based on legitimate, non-discriminatory reasons. The institution should apply its best efforts to ensure that all employees are given an opportunity to perform his or her job function successfully. However, it is unlikely that all employees will be satisfied and some may even become disgruntled. Any employment action taken against an employee should be based on a business reason that can be articulated by the college and/or university.

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Retaliation will remain a challenging cause of action to avoid and defend. To some degree, the retaliation claim is problematic because it is often preceded by an underlying climate of misconduct or wrongdoing that is unproductive and paves-the-way for perceived or actual retaliatory conduct. Besides being aware of the legal components of the retaliation claim, college and university administrators should consider those subjective factors (poor communication, lack of teamwork, early detection of performance deficiencies, workplace stress, and others) that often set the stage for retaliatory conduct and address them in a forthright manner.