EMPLOYMENT LAW OVERVIEW: DISCRIMINATION, HARASSMENT & RETALIATION IN THE WORK PLACE

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EEOC STATISTICS FOR 2016

- EEOC received 91,503 charges of discrimination during FY 2016
- Number of annual EEOC charges filed has been fairly consistent since 2008
- EEOC also reported $52.2 million in monetary benefits secured for employees through administrative enforcement in FY 2016

MOST COMMON CATEGORIES OF DISCRIMINATION ALLEGED

- 35% Race
- 29% Sex
- 23% Age
- 30% Disability
- Retaliation also alleged in 46% of all charges

NOTE: Charges which included multiple categories (i.e., race, age, retaliation, etc., were counted in all referenced categories

FACTORS CONTRIBUTING TO CONTINUED CHARGES OF DISCRIMINATION

1. Lawyer solicitation/advertisement.
2. Increase in size of federal government

   EEOC, Department of Labor, Department of Justice;

   Hired investigators, prosecutors;

   Taking much more active role in investigating and prosecuting cases.
3. Employees more educated on rights

   - societal norms changing.

MULTIPLICITY OF LAWS/REGULATIONS WHICH GOVERN DISCRIMINATION IN THE WORKPLACE, INCLUDING BUT NOT LIMITED TO:

1. Title VII of Civil Rights Act of 1964 (Title VII)- prohibits employment discrimination based upon race, color, religion, sex/gender or national origin- Enforced by EEOC/FCHR.
2. Title VII was later amended by Pregnancy Discrimination Act (PDA) to prohibit discrimination based upon pregnancy, childbirth or medically related conditions.
3. Age Discrimination in Employment Act of 1967 (ADEA)- prohibits discrimination based on age against workers who are 40 years of age or older.

MULTIPLICITY OF LAWS/REGULATIONS WHICH GOVERN DISCRIMINATION IN THE WORKPLACE, INCLUDING BUT NOT LIMITED TO (cont'd):

4. Americans with Disabilities Act (ADA)- prohibits discrimination against qualified individuals with an actual or perceived disability.
5. Equal Pay Act of 1963 (EPA)- prohibits sex based wage discrimination for performing substantially equal work.
6. Genetic Information Non-Discrimination Act (GINA)- prohibits discrimination against employees based upon genetic information.

MULTIPLICITY OF LAWS/REGULATIONS WHICH GOVERN DISCRIMINATION IN THE WORKPLACE, INCLUDING BUT NOT LIMITED TO (cont'd):

7. 42 U.S.C. s. 1983- general civil rights statute- authorizes suits against governmental entities for violations of U.S. constitution or federal law, i.e. First Amendment, Fourteenth Amendment (Equal Protection & Due Process).
8. Florida Civil Rights Act (FCRA)- prohibits discrimination in employment- essentially tracks Title VII, but includes protections for age, disability & marital status as protected characteristics.
9. The above list does not even include the additional federal, state & local ordinances, regulations, and guidance which govern an employer's duties and responsibilities.

SEXUAL ORIENTATION NOT PRESENTLY A PROTECTED CLASS

- Sexual orientation and gender identity are not currently recognized by the Federal (or Florida) courts as protected characteristics because neither Title VII nor the FCRA explicitly prohibit discrimination on the basis of sexual orientation or gender identity.
- However, since July, 2015 when it decided *Baldwin v. Dep't of Transportation,* EEOC Appeal No. 0120133080 (July15, 2015), the EEOC has taken the position that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII. In March, 2016 the EEOC filed its first two sex discrimination cases based on sexual orientation and gender identity.

SEXUAL ORIENTATION NOT PRESENTLY A PROTECTED CLASS (cont'd):

- Legislation which seeks to extend protected class classification to the LGBT community, namely the Employment Non-Discrimination Act (ENDA), has been introduced in Congress but has not yet garnered enough support to pass.
- Pursuant to Executive Order 13672 federal contractors are prohibited from discriminating against employees on the basis of sexual orientation and gender identity.
- Many states (not Florida) and localities (Orlando, Leon County, Volusia County, etc.) have also passed similar legislation.
- Suspect that this will be the next major expansion of scope of federal discrimination law.

DISCRIMINATION & HARASSMENT

- Harassment and discrimination often used interchangeably
  - Harassment generally used in context of sexual harassment, but not necessarily

- Plan is to discuss legal standards today in context of a sexual harassment claim, but legal framework is generally the same, regardless of whether alleged discrimination is based on sex, race, religion, etc.

SEXUAL HARASSMENT

- The law recognizes two separate and distinct categories of sexual harassment:
  - Quid pro quo
  - Hostile work environment

QUID PRO QUO SEXUAL HARASSMENT

- Literally means "this for that"

  i.e., if you sleep with me, you will get a raise

- Clearly illegal
- Can only be committed by supervisor because only supervisor has authority to affect terms and conditions of subordinate's employment
- Employer is strictly liable for this conduct; no real defense except "… it never occurred"

QUID PRO QUO SEXUAL HARASSMENT
(cont'd)

This conduct can be:

- Explicit – made an express condition of employment
- Implicit – employee who rejects advances is subsequently terminated, disciplined, transferred, etc.

"HOSTILE WORK ENVIRONMENT"

- A term of art in employment discrimination arena
- Generates the most litigation and confusion
- Courts are clear they are not in the business of ensuring you work in a fun and friendly place with great people
- Just because your boss or co-worker is a jerk does not mean there is an actionable hostile work environment
- Not a "general civility code" in the workplace; courts are not going to "legislate" that everyone gets along.
- "You are not legally guaranteed a stress-free working environment."

Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1233-34 (11th Cir. 2001)

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM

In order to establish a hostile work environment claim, Plaintiff must show:

1. that he/she belongs to a protected group;
2. that he/she has been subject to unwelcome harassment;
3. that the harassment was based on his/her [protected characteristic];

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

4. that the harassment was sufficiently severe or pervasive to alter the terms and conditions of his/her employment and create a discriminatorily abusive working environment; and
5. that Defendant is responsible for such environment under either a theory of vicarious or of direct liability.

   Miller v. *Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002)

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

#1 – Conduct must be based on protected characteristics:

- Conduct must be sexual in nature or based on sex (male or female); (Note: can also have claim based on race; religion; national origin, etc.)
  - ✓ Speech – jokes, suggestive remarks, comments about appearance; (ethnic slurs, terms derogatory to women); slurs)
  - ✓ Touching or other sexually suggestive conduct
  - ✓ Display of written material or objects – calendars, jokes, email forwards; photographs
- Merely rude/boorish behavior will not qualify

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

To establish that the harm alleged was 'based on his or her sex,' a plaintiff 'must show that **but for** the fact of his or her sex, they would not have been the object of harassment.'

Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)

So, for example, in a recent case plaintiff alleged that her accused harasser committed the following acts:

1. touching the ledge of her car door window;
2. asking her to remain with him while he typed a report;
3. squeezing her shoulder while walking past her and saying "tag you're it;"

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

4. rubbing or petting her left thigh while he leaned into her window to show her something on the computer;
5. picking at chipped paint on her car with his hand and then grabbing her wrist when she attempted to swat his hand away; and
6. telling her he wanted to watch her get out of her car before he cancelled her from a call and subsequently pulling her arm toward a store shelf.

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

Plaintiff did not allege that her alleged harasser made any statements concurrent with his conduct which indicated that the touching or conduct was sexual in nature. In fact, during the incident in which he was "petting" Plaintiff's thigh through her open car door window, he was talking to her about an issue with her computer.

Additionally, the undisputed evidence in the case demonstrated that he hugged, touched, and poked all co-workers regardless of their sex.

Another female employee testified that although she had told him to "keep your hands to yourself; or pushed him away or something," he hugged, poked, and "touched everybody"— men and women alike.

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

Plaintiff likewise testified during her interview that, with regard to his consistent touching, "he just think [sic] it's funny.

Court found that Plaintiff had failed to offer any record evidence that the conduct of which she complained was **because** of her sex, nor that her sex was the but for reason for the alleged harasser's conduct.

The court concluded that "Although [harasser's] conduct as alleged is annoying and inappropriate for the workplace, there is insufficient evidence to show that it amounted to discrimination because of Plaintiff's sex."

Patsalides v. City of Fort Pierce, 2016 WL 7971186 (S.D. Fla. 12/05/2016)

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

Gender-Specific Comments

Courts have recognized that certain terms are more degrading to women than men, and when used in a gender-specific manner, can constitute conduct based on sex.

Conversely, even gender-specific terms, if used in a context that has no reference to gender, does not normally give rise to a cognizable Title VII claim.

Baldwin v. BCBS of Alabama, 480 F.3d 1287 (11th Cir. 2007)

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

Compare:

1. **"Son-of-a-b…! They lost that truck!**

   with

2. **"Nancy is a real b…!**

Additionally, work and conduct that are sufficiently gender-specific and either severe or pervasive may give rise to an actionable claim, even if not directed specifically at the Plaintiff.

Reeves v. *C.H. Robinson Worldwide*, 594 F.3d 798 (11th Cir. 2010)

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

#2 – Conduct must be objectively and subjectively offensive:

- Objectively offensive – offensive to a reasonable man or woman
- Conduct which is offensive to an unusually sensitive person is not included
- Subjectively offensive - person must have been actually offended
- Even if a reasonable person would have been offended, not actionable unless employee was actually offended.

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

#3 – Conduct must be severe or pervasive:

- Single, isolated or sporadic comments generally will not be held to constitute a hostile work environment
- No "magic" number
- If conduct severe enough, one incident (i.e., sexual touching) could potentially be enough to meet standard
- Courts will be looking to see if the conduct is occurring with sufficient frequency or severity to alter the conditions of [the victim's] employment and create an abusive working environment

Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999)

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

- Simple teasing, off-hand comments and isolated incidents (unless extremely serious) will not amount to discriminatory charges in the terms and conditions of employment

  Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

- Fact Specific Determination, so outcome difficult to predict
- Court often will find that this is an issue of fact – jury will decide.
- Best practice – **zero tolerance** - do not engage or allow others to engage in any questionable behavior

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

#4 – Conduct must be unwelcome

- How has the complainant conducted him or herself in the past?
- Has the complainant engaged in similar conduct? (i.e., flirtation, jokes, frank speech, etc.)
- Has the employee make it known, in word or deed, that the conduct is unwelcome?
- Even if another employee initially participates in flirtation or frank speech, they can decide they are no longer comfortable and request it stop.
- If conduct continues, could be actionable, even if complainant has willingly participated in similar conduct in the past

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

#5 – Conduct must affect terms and conditions of employment:

- Has to reasonably interfere with the complainant's ability to do his/her job
- Has to be more than a mere nuisance
- No bright line – case specific – often decided by jury
- Employee not required to be psychologically injured
- Test is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

Employer Liability

- An employer can be held responsible for a hostile work environment under either a theory of vicarious or direct liability.
- An employer "is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee" *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)
- The employer will be strictly liable for the hostile environment if the supervisor takes tangible employment action against the victim
- No real defense if that occurs

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

- However, when an employee has established a claim for vicarious liability but where no tangible employment action was taken, a defending employer may raise an affirmative defense to liability or damages
- To establish this so-called *Faragher* defense, the employer has the burden of demonstrating:
  a. That the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
  b. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. i.e., report the harassment to HR, etc.

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

- Where the perpetrator of the harassment is merely a co-employee of the victim, the employer will be held directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action.

  Breda v. Wolf Camera & Video, 2222 F.3d 985, 889 (11th Cir. 2000)

- Thus the victim of coworker harassment must show either actual knowledge on the part of the employer or conduct sufficiently severe and pervasive as to constitute constructive knowledge to the employer.

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

What constitutes a tangible employment action for imposition of vicarious liability for supervisor's conduct:

In this context, the U.S. Supreme Court has defined a tangible employment action as "a significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753–54, 118 S.Ct. 2257, 2265, 141 L.Ed.2d 633 (1998)

ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM (cont'd)

An employer is liable under Title VII if it (even unknowingly) permits a supervisor to take a tangible employment action against an employee because she refused to give in to his sexual overtures. That liability exists regardless of whether the employee took advantage of any employer-provided system for reporting harassment.

DISPARATE TREATMENT DISCRIMINATION

In order to establish a prima facie case of disparate-treatment employment discrimination, Plaintiff must show:

1. that he/she is a member of a protected class;
2. that he/she was qualified for the position;
3. that he/she experienced an adverse employment action; and
4. that he/she received less favorable treatment than someone outside of his/her protected class.

DISPARATE TREATMENT DISCRIMINATION (cont'd)

First two elements generally easily satisfied.

Dispute often centers on:

1. whether employee has suffered an adverse employment action;
2. whether employee can show he was treated differently than a similarly situated comparator outside of his protected class.

DISPARATE TREATMENT DISCRIMINATION (cont'd)

Adverse employment action requirement means employee must establish a materially adverse change in the terms and conditions of his employment

Changes in duties and working conditions that cause no materially significant disadvantage are not actionable.

Court often looks to whether employer's action has cost the employee any compensation – either now or ability to earn income in the future.

DISPARATE TREATMENT DISCRIMINATION (cont'd)

The person the plaintiff identifies as her comparator must be similarly situated "in all relevant respects."

Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir.1997)

In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.

Williams v. Ford Motor Co., 14 F.3d 1305, 1309 (8th Cir.1994)

DISPARATE TREATMENT DISCRIMINATION (cont'd)

When the plaintiff and the proposed comparator are not similarly situated, the employer's decision to impose a different punishment on each does not raise an inference of illegal discrimination.

Lathem v. Dep't of Children & Youth Servs., 172 F.3d 786, 793 (11th Cir.1999)

Similarly situated employees "must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it."

Gaston v. Home Depot USA, Inc., 129 F.Supp.2d 1355, 1368 (S.D.Fla.2001)

DISPARATE TREATMENT DISCRIMINATION (cont'd)

When plaintiff establishes a prima facie case, that creates the presumption of discrimination. The burden of production taken shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions.

The employer need not persuade the court that it was actually motivated by the proffered reasons.

If employer satisfies its burden by articulating one or more legitimate reasons for the employment action, then the presumption of discrimination is rebutted. The burden of production shifts back to the plaintiff to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination.

DISPARATE TREATMENT DISCRIMINATION (cont'd)

Courts do not second guess wisdom of employer's decisions. Not sufficient for plaintiff to demonstrate that a different employer would reach a different decision.

If employer's proffered reason is one that might motivate a reasonable employer, a plaintiff cannot just quarrel with that stated reason - has to show that it is a lie.

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

DISPARATE TREATMENT DISCRIMINATION (cont'd)

A plaintiff may prevail on a disparate treatment employment discrimination claim by either proving:

1. that intentional discrimination motivated the employer, or
2. producing sufficient evidence to allow a rational trier of fact to disbelieve the legitimate reason proffered by the employer.
3. If fact-finder disbelieves employer's reason for the action, the fact-finder is permitted, but not compelled, to find that there was illegal discrimination.

DISPARATE IMPACT DISCRIMINATION

Disparate impact theory allows a plaintiff to attack otherwise unprovable acts of intentional discrimination which may be hidden innocuously behind facially-neutral employment policies or practices.

When seemingly neutral policy and practices have a disproportionate, adverse impact on any protected class, usually minorities or women.

In the first stage of a disparate impact case, the complaining party must demonstrate] that an employer uses a particular employment practice that causes a disparate impact on the basis of a protected characteristic (i.e. race, color, religion, sex, national origin, etc.)

DISPARATE IMPACT (cont'd)

The plaintiff must offer statistical evidence of a kind and degree sufficient to show that *the practice in question* has *caused* the exclusion of applicants for jobs or promotions because of their membership in a protected group.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95, 108 S.Ct. 2777, 2789, 101 L.Ed.2d 827 (1988)

The burden of production then shifts to the defendant to establish that the challenged employment practice serves a legitimate, non-discriminatory business objective.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1117(11th Cir.1993)

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DISPARATE IMPACT (cont'd)

However, even if the defendant satisfies this burden, a plaintiff may still prevail by proving that an alternative, non-discriminatory practice would have served the defendant's stated objective equally as well.

See id. at 1118.

Example: Use of arrest record to exclude applicants from consideration for employment - EEOC has opined that said practice results in disparate impact upon African-American and Hispanic applicants.

DISPARATE IMPACT (cont'd)

A pizza delivery restaurant has an inflexible no-beard policy. The restaurant fires Jamal, one of its African American drivers, for failing to remain clean shaven. Jamal has a severe case of pseudofolliculitis barbae ("PFB"), an inflammatory skin condition that occurs primarily in Black men and that is caused by shaving.

The severity of the condition varies, but many of those who suffer from PFB effectively cannot shave at all. If Jamal or EEOC were to challenge the no-beard policy as unlawful because it has a significant negative impact on Blacks, the employer would have to prove the policy is job-related and consistent with business necessity.

DUTIES OF SUPERVISORS

Supervisors have the responsibility to:

- Be familiar with the harassment policies and procedures
- Be on the lookout for inappropriate behavior
- Be proactive
- If you see conduct you think is suspect, engage in corrective counseling
- Dealing with the vague "complaint" – "I don't want to get anyone in trouble, but …"
- Cannot ignore – must address – document exchange and your response

DUTIES OF SUPERVISORS (cont'd)

- If complaint or conduct appears serious/ significant, report it through the chain of command – "Better safe than sorry"
- Legally required to take action – whether you investigate or report to your supervisor – otherwise, the employer may be exposed to liability if you knew and did nothing
- Also, as governmental employee, supervisor can be sued individually – "supervisory liability "– knew about violation and did not take appropriate steps to address

DUTIES OF SUPERVISORS (cont'd)

- Supervisory liability under 42 USC §1983 for acts of subordinates
- Supervisor personally participated in the alleged violation
- Supervisor on notice of the alleged violation and fails to take corrective action
- Supervisor's custom or policy results in deliberate indifference to violation (i.e., encourage, condone or ratify behavior

RETALIATION/WHISTLEBLOWER CLAIMS

Retaliation and Whistleblower Claims in the employment arena are difficult for two important reasons:

- The human nature element to such claims; and
- The importance of timing in establishing causation.

RETALIATION V. WHISTLEBLOWING

Retaliation: where employer takes adverse action against employee, applicant, or former employee, because he/she engaged in some protected activity.

Whistleblowing: where employee discloses information regarding (1) a violation or suspected violation of any law, rule, or regulation, or (2) any act or suspected act of gross mismanagement, malfeasance, misfeasance or gross waste of public funds or gross neglect of duty.

FEDERAL LAWS WHICH CONTAIN ANTI-RETALIATION PROVISIONS

1. Title VII of the Civil Rights Act of 1964
2. The Age Discrimination in Employment Act (ADEA)
3. The Americans with Disabilities Act (ADA)
4. The Family and Medical Leave Act (FMLA)
5. The Fair Labor Standards Act (FLSA)
6. The National Labor Relations Act (NLRA)
7. The Occupational Safety and Health Act (OSHA)

FLORIDA LAWS WHICH CONTAIN ANTI-RETALIATION PROVISIONS

1. The Florida Workers' Compensation Act (§ 440.205)
2. The Florida Civil Rights Act of 1992 (FCRA)
3. The Florida Public Sector Whistleblower's Act (§112.3187)
4. The Florida Public Employees Relations Act (§§ 447.501)

ELEMENTS OF RETALIATION/ WHISTLEBLOWING CLAIMS INCLUDE:

a) Employee engagement in protected activity
b) Adverse employment action -- taken against employee
c) Causal connection between protected activities and adverse personnel action

ELEMENT #1 – PROTECTED ACTIVITY OPPOSITION V. PARTICIPATION

Opposition: filing a charge; threatening to file a charge; making an internal complaint; refusing to obey an employer's order because of a reasonable belief that it's discriminatory; and disclosing rule, policy or statute violation, malfeasance or misfeasance.

Participation: participation in an investigation or a lawsuit.

ELEMENT #2 - ADVERSE EMPLOYMENT ACTION

What constitutes an adverse employment action for purposes of a retaliation claim?

The U.S. Supreme Court held in *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct.

The Court held that the anti-retaliation provision, unlike the substantive provision of Title VII, is not limited to discriminatory actions that affect the terms and conditions of employment. Rather, Title VII's anti-retaliation provision prohibits any employer action that "…well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

ELEMENT #2 - ADVERSE EMPLOYMENT ACTION (cont'd)

An employee need only show that a reasonable employee would have found the challenged employment action taken by the employer to be materially adverse. In other words, that the materially adverse employment action would discourage a reasonable employee from making or supporting a charge of discrimination.

Additionally, the Supreme Court concluded that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.

ELEMENT #2 - ADVERSE EMPLOYMENT ACTION (cont'd)

Rather, any action, whether or not directly related to work, can form the basis of a retaliation claim, so long as a "reasonable employee" would consider the action to be "materially adverse."

ELEMENT #2 - ADVERSE EMPLOYMENT ACTION (cont'd)

Courts in this Circuit have been conservative in evaluating nature of conduct necessary to amount to an adverse employment action to support a retaliation claim.

Plaintiffs' assertions that supervisor became "extremely and overtly hostile towards plaintiffs and began to constantly shout and curse at plaintiffs," threw a stapler at one of the plaintiffs, used derogatory names and humiliated the plaintiffs in front of co-workers and attorneys attending mediations, "continued to advise other employees that Plaintiffs were not to be trusted,[5] were thieves, and accused plaintiffs of theft," accusing Ms. Perez of stealing the mail key, requiring Ms. Perez to drive home to retrieve the client backup files were not adverse actions.

Perez v. Anastasia M. Garcia PA, 2016 WL 492599 (S. D. Fla. 2016)

ELEMENT #2 - ADVERSE EMPLOYMENT ACTION (cont'd)

Smith v. *City of Fort Pierce, Fla.*, 565 Fed.Appx. 774, 778 (11th Cir. 2014) (stating that "glaring, slamming a door in an employee's face, inquiring into retirement plans, commenting that an employee is not a team player, blaming an employee for failed union negotiations, or harboring concerns over an employee's dependability and trustworthiness are not actions that would dissuade a reasonable worker from making or supporting a charge of discrimination.

ELEMENT #2 - ADVERSE EMPLOYMENT ACTION(cont'd)

Marshall v. Aryan Unlimited Staffing Sol./Fanueil Inc./MC Andrew & Forbs Holding, No. 12-81404, 2013 WL 836990, at *3 (S.D. Fla. Mar. 6, 2013)(finding that "general lack of professionalism and meanness on the part of defendant's staff, who allegedly isolated and shunned plaintiff as the only non-Caribbean language speaking employee in the office" was not "adverse action."

ELEMENT #2 - ADVERSE EMPLOYMENT ACTION (cont'd)

- *Burlington Northern and Santa Fe Rwy Co. v. White* -

  retaliatory conduct need not be employment related.

- Employee must show that the action would have dissuaded a reasonable worker from making or supporting a charge of discrimination.

ELEMENT #2 – ADVERSE EMPLOYMENT ACTION (cont'd)

Obvious: Termination, demotion, failure to promote, raises.

Not as obvious: a poor performance review that affects merit increase eligibility, transfers.

ELEMENT #3 – CAUSAL CONNECTION

The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action.

Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 798-99 (11th Cir. 2000)

In the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law.

Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir.2004)

ELEMENT #3 – CAUSAL CONNECTION
(cont'd)

But mere temporal proximity, without more, must be "very close."

Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509 (2001)

A three to four month disparity between the statutorily protected expression and the adverse employment action is not enough.

Brown v. Ala. Dept. of Transp., 597 F.3d 1160, 1182 (11th Cir.2010); *Richmond v. ONEOK*, 120 F.3d 205, 209 (10th Cir.1997) (3 month period insufficient) and *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir.1992)

ELEMENT #3 – CAUSAL CONNECTION
(cont'd)

A three-month interval between the protected activity and termination is too attenuated, as a matter of law, to satisfy the causation element of a retaliation claim.

Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir.2007)

The Eleventh Circuit has commented (albeit in an unpublished decision) that a two month temporal proximity is not "very close" as required to establish the causal connection. *See* *1293

Williams v. Waste Mgmt., Inc., 411 Fed.Appx. 226, 229–30 (11th Cir.2011)

ELEMENT #3 – CAUSAL CONNECTION
(cont'd)

Other courts within the circuit have found a two month gap between protected activity and adverse action sufficient to establish a causal connection.

Gaddis v. Russell Corp., 242 F.Supp.2d 1123, 1147 (M.D.Ala.2003)

Court found that gap of 5 to 6 weeks between protected activity and adverse action was sufficient to establish causal connection.

Bryant v. Johnny Kynard Logging Inc., 930 F. Supp. 2d 1272 (N. D. Ala. 2013)

Passage of time and good documentation are the best, most effective shields against a retaliation claim!

"The trick is for the employer to be able to establish that the employment action at issue was 'previously contemplated' (before the whistleblowing took place), and here well-documented prior performance problems and/or warnings are often key."

Clark County School District v. Breeden, 532 U.S. 268 (2001)

SHIFTING BURDEN

- Applied with circumstantial evidence.
- If employee shows all three elements (protected activity, adverse action and causal connection), employer must produce a legitimate, non-retaliatory reason for its actions.
- Legitimate, non-retaliatory reason should be:
  1. A legitimate business reason;
  2. Consistent with prior actions;
  3. That seems fair.

SHIFTING BURDEN - PRETEXT

- Employee must show employer's reason for its action is a pretext for an unlawful discriminatory/retaliatory motive.
- Employee's subjective belief is insufficient.
- Employee must demonstrate weaknesses, inconsistencies, implausibilities or contradictions in the employer's reasoning to prove its unworthy of credence.

AVOIDING WHISTLEBLOWER AND RETALIATION CLAIMS

1. Respond to employee complaints (i.e., "protected activity")
    a. Do not take complaint personally;
    b. Maintain confidentiality;
    c. Implement strong anti-retaliation policy;
    d. Train managers and supervisors;

AVOIDING WHISTLEBLOWER AND RETALIATION CLAIMS (cont'd)

e. Remove authority of alleged discriminator to make employment decisions about accuser (and separate);

f. Investigate thoroughly;

g. Notify complainant about outcome of investigation.

2. Assess the risks before taking adverse action

KEY consider "timing" of your action

EMPLOYMENT LAW OVERVIEW: DISCRIMINATION, HARASSMENT & RETALIATION IN THE WORK PLACE

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