RETALIATION CLAIMS: WHAT THEY ARE AND HOW TO PREVENT THEM

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I. INTRODUCTION

According to the Equal Employment Opportunity Commission, the number of retaliation charges filed with the agency increased by more than sixty percent between 2006 and 2010. While for years race discrimination charges have been the most common, retaliation charges now have surpassed them. In 2011, there were approximately 35,000 race discrimination charges, compared to 37,000 retaliation charges. Litigation of employment-related retaliation claims has seen a similar increase in recent years, and the trend shows no sign of reversing.

This outline will provide Virginia employers with an introduction to the law governing retaliation claims, with an emphasis on retaliation claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the American with Disabilities Act. This outline will then discuss specific steps Virginia employers can take to minimize the risk of legal liability for retaliation. This outline is intended solely for informational purposes, and is not offered as legal advice.

II. RETALIATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE AGE DISCRIMINATION IN EMPLOYMENT ACT, AND THE AMERICANS WITH DISABILITIES ACT

A. The Statutory Prohibitions

1. TITLE VII

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., prohibits retaliation through the following statutory provision:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he 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.

42 U.S.C. § 2000e–3(a). As applied to covered employers, this means that "to state a claim of retaliation, a plaintiff must have suffered adverse employment action because she "opposed any practice made an unlawful employment practice," or because she "participated in any manner in an investigation" against her employer." Retaliation claims under Title VII therefore can be made under either the "opposition" clause or the "participation" clause. *See generally Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

"The distinction between participation clause protection and opposition clause protection is significant because the scope of protection is different. Activities under the

participation clause are essential to 'the machinery set up by Title VII. As such, the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause." *Laughlin v. Metro Washington Airports Authority*, 149 F.3d 253 (4th Cir 1998) (internal citations omitted).

2. ADEA

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*., prohibits retaliation through the following statutory provision:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d). ADEA retaliation claims, like Title VII retaliation claims, can be for "opposition" or "participation." *See generally Johnson v. Mechanics and Farmers Bank*, No. 07-1725, 2009 U.S. App. LEXIS 1260 (4th Cir. 2009).

3. ADA

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*., prohibits retaliation through the following statutory provisions:

> (a) Retaliation
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a

> charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) Interference, coercion, or intimidation
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203. ADA retaliation claims, like Title VII and ADEA retaliation claims, can be for "opposition" or "participation" under subsection (a). In addition, ADA claims can be for "interference" under subsection (b).

B. Proving Retaliation

"Retaliation claims are tested under the burden - shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Holleman v. Colonial Heights School Board*, No. 3:11-cv-414 (E.D. Va. Feb. 22, 2012); *Laber v. Harvey*, 438 F.3d 404, 432 (4th Cir. 2006). "Under this regime, the initial burden rests with [the plaintiff], who must establish a prima facie case of discrimination. Upon such a showing the burden shifts to the [defendant], which must respond with a legitimate, nondiscriminatory reason for its action. When the [defendant] so responds, the final burden shifts back to [the plaintiff], who must show that the [defendant's] nondiscriminatory justification is in reality mere pretext." *Holleman v. Colonial Heights School Board, supra*; *see Altman v McHugh*, No. 5:11-cv-61, Memorandum Opinion (W.D. Va. Apr. 9, 2012); *Johnson v. Mechanics and Farmers Bank*, No. 07-1725, 2009 U.S. App. LEXIS 1260 (4th Cir. 2009) (ADEA).

C. The Prima Facie Case

To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) he engaged in a protected activity, (2) a materially adverse employment action was taken against him, and (3) the protected activity was causally connected to the adverse action. *Okoli v. City of Baltimore, 648 F.3d 216, 223 (4th Cir. 2011); Coleman v. Maryland Court of Appeals*, 626 F. 3d 187, 190 (4th Cir. 2010); *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405-06 (4th Cir. 2005); *Altman v McHugh*, No. 5:11-cv-61, Memorandum Opinion (W.D. Va. Apr. 9, 2012); *Holleman v. Colonial Heights School Board*, No. 3:11-cv-414 (E.D. Va. Feb. 22, 2012); *McGuire v. IBM Corp*., No. 1:11-cv-528 (E.D. Va. Sep. 8, 2011). Likewise, under the ADEA "the elements of a prima facie case of retaliation are (1) the plaintiff engaged in a protected activity, (2) the employer took an adverse employment action against the plaintiff, and (3) a causal connection existed between the protected activity and the adverse employment action," *Johnson v. Mechanics and Farmers Bank*, No. 07-1725, 2009 U.S. App. LEXIS 1260 (4th Cir. 2009), and "to establish a prima facie case of retaliation under the ADA, a plaintiff must show: (1) that he engaged in conduct protected by the ADA; (2) that he suffered an adverse action subsequent to engaging in the protected conduct; and (3) that there was a causal link between the protected activity and the adverse action," *Shively v. Henrico County, Virginia*, No. 4:10-cv-53 (W.D. Va. Aug. 29, 2011); *Posante v. Lifepoint Hospitals, Inc*., No. 4:10-cv-55 (W.D. Va. Aug. 23, 2011); *Williams v. Brunswick County Board of Education*, No. 10-1884 (4th Cir. Jul. 22, 2011) (citing *Freilich v. Upper Chesapeake Health, Inc*., 313 F.3d 205, 216 (4th Cir. 2002)).

1. Protected Activity

a. Participation

It normally is easy to recognize activities which come within "participation." It is well established, for example, that filing a charge of discrimination with the Equal Employment Opportunity Commission is a protected activity. *Crawley v. Norfolk Southern Corp*., No. 7:08-cv-267 (W.D. Va. 2011); *O'Brien v. U.S. Postal Service*, No. 6:10-cv-54 (W.D. Va. Jun. 20, 2011); s*ee Okoli v. City of Baltimore*, 648 F.3d 216, 223 (4th Cir. 2011) (describing the first element of the retaliation prima facie case as engaging in a protected activity "such as filing a complaint with the EEOC"). According to one court, "unlike the opposition clause, the participation clause in 42 U.S.C. § 2000e-3(a) grants an absolute privilege for filing a claim with the EEOC" and "there is no requirement in the statute that the discrimination claim be meritorious." *Blizzard v. Newport News Redevelopment and Housing Authority*, 670 F. Supp. 1337 (E.D. Va. 1984).

The participation clause applies only to cases involving the statutory process, and does not apply to internal investigations by an employer. *Johnson v. Portfolio Recovery Associates, LLC*, 682 F. Supp. 2d 560 (E.D. Va., 2009) (participation clause does not apply to internal investigation conducted before receipt of an EEOC charge); *Lassiter v. Labcorp Occupational Testing Services*, 337 F. Supp. 2d 746 (M.D.N.C. 2004); *Duron v. U.S. Department of Agriculture*, 2008 U.S. Dist. LEXIS 97197 (N.D. W. Va. 11/20/08).

b. Opposition as a Protected Activity

Internal complaints of unlawful discrimination, harassment or retaliation may constitute protected activity. To constitute protected activity, however, the complaint must describe conduct which may be unlawful, not just objectionable. *See Young v. HP Enterprise Services, LLC*, No. 1:10-cv-1096 (E.D. Va. Sep. 6, 2011). The line between what does and does not constitute adequate notice of potentially unlawful conduct, however, is not always clear. In *Young v. HP Enterprise Services, LLC*, No. 1:10-cv-1096 (E.D. Va. Sep. 6, 2011), the district court, quoting *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006), held that "merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient." However, in *Okoli v. City of Baltimore*, 648 F.3d 216 (4th Cir. 2011), the Fourth Circuit found an employee's complaints sufficient to constitute protected activity, explaining:

> Here, it was enough for Okoli to twice complain of "harassment," even if it might have been more ideal for her to detail the sexual incidents she later relayed. While Okoli's January 26 email to Gillard referenced only a "complaint," her March 23 email was entitled "Harassment Complaint." Okoli's April 1 memo to the Mayor further described "unethical and unprofessional business characteristics, e.g., harassment, degrading and dehumanizing yelling and demanding, disrespect, mocking and gossiping about other colleagues (anyone in the City government) and lack or disregard for integrity."
>
> The City surely should have known that Okoli's complaints of "harassment" likely encompassed sexual harassment. Indeed, Okoli's description of "unethical," "degrading and dehumanizing" conduct suggest severe misbehavior related to her identity - not a mere workplace squabble. Moreover, based on his alleged conduct, Stewart himself surely would

> have known that Okoli was complaining of sexual harassment.

Okoli, 216 F.3d at 223-24. "Sexual harassment complaints," the court noted, "need not include 'magic words' such as 'sex' or 'sexual' to be effective." *Okoli, supra*.

The Fourth Circuit applies a balancing test to determine whether an employee has engaged in a legitimate protected activity under the opposition clause. *See Johnson v. Portfolio Recovery Associates, LLC*, 682 F. Supp. 2d 560 (E.D. Va. 2009). For an employee complaint to be protected activity, it is not necessary that the complaint be about conduct which actually is illegal. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 216 (4th Cir. 2002) ("a plaintiff need not establish that the conduct she opposed actually constituted an ADA violation"). The employee is only required to have a good faith reasonable belief that the conduct is unlawful. *See EEOC v. Navy Federal Credit Union*, 424 F.3d 397 (4th Cir 2005) ("Section 704(a) protects activity in opposition not only to employment actions actually unlawful under Title VII but also employment actions an employee reasonably believes to be unlawful"); *Mason v. Wyeth, Inc*., 183 Fed. Appx. 353, 363 (4th Cir. 2006) ("one who claims retaliation following a complaint must establish, at a minimum, that she had a good-faith belief that the opposed conduct violated the ADA"); *Shively v. Henrico County, Virginia*, No. 4:10-cv-53 (W.D. Va. Aug. 29, 2011); *Posante v. Lifepoint Hospitals, Inc*., No. 4:10-cv-55 (W.D. Va. Aug. 23, 2011) ("one who claims retaliation for opposing an employment practice must establish, at a minimum, that he had a good faith belief that the conduct he opposed or complained of violated the ADA"). "A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also

that this belief was objectively reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable." *Shively v. Henrico County, Virginia*, No. 4:10-cv-53 (W.D. Va. Aug 29, 2011) (quoting *Roberts v. Rayonier, Inc*., 135 Fed. Appx. 351, 357 (11th Cir. 2005)); *Posante v. Lifepoint Hospitals, Inc*., No. 4:10-cv-55 (W.D. Va. Aug. 23, 2011).

c. Some Examples of Protected Opposition

"Opposition activities encompass utilizing informal grievance procedures...." *Laughlin v. Metro Washington Airports Authority*, 149 F.3d 253 (4th Cir 1998).

"Opposition activities encompasses ... staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities." *Laughlin v. Metro Washington Airports Authority*, 149 F.3d 253 (4th Cir 1998).

Hiring an attorney to assert a race discrimination claim may constitute protected opposition activity. *See Johnson v. Portfolio Recovery Associates, LLC*, 682 F. Supp. 2d 560 (E.D. Va. 2009) (Title VII).

2. Adverse Employment Action

a. The Litmus Test for Adverse Employment Action: Burlington Northern & Santa Fe Railway Company v. White

In *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006), the Supreme Court made it clear that "the antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." Because the Courts of Appeals "used differing language to describe the level of

seriousness to which this harm must rise before it becomes actionable retaliation," the Supreme Court granted certiorari in Burlington Northern to resolve "how harmful an act of retaliatory discrimination must be in order to fall within" Title VII's retaliation provisions.

The Supreme Court held that an action, to support liability under Title VII, must be "materially adverse." The Court also held that an action can be "materially adverse" only if "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court emphasized that whether an action is "materially adverse" must be judged using an objective standard, i.e., how a "reasonable" employee would react. The Court expressly rejected application of any standard which is based upon the "subjective feelings" of a particular employee.

The Court emphasized that "the significance of any given act of retaliation will often depend upon the particular circumstances." According to the Court, "context matters" and "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." Nevertheless, the Court reiterated its previous admonition that Title VII "does not set forth a general civility code for the American workplace," and expressly affirmed that "petty slights, minor annoyances, and simple lack of good manners" including "snubbing by supervisors and coworkers" are not actionable under Title VII. The Court cautioned that an action can give rise to Title VII liability only if it results in "significant" harm, and that "trivial harms" cannot serve as the basis for a Title VII retaliation claim.

Since *Burlington Northern*, courts have struggled to determine what actions are "materially adverse" and what actions are not. While in some situations it is easy to determine whether a particular action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," in other situations the answer to that question may not be obvious and the decision on that issue may be difficult to predict.

b. Particular Employment Actions

(1) Termination of Employment

Termination of employment is an adverse employment action. *O'Brien v. U.S. Postal Service*, No. 6:10-cv-54 (W.D. Va. Jun. 20, 2011).

(2) Written and Oral Reprimand

A written or oral reprimand may or may not be an adverse employment action, depending on the circumstances. *See Jackson v. Winter*, 497 F. Supp. 2d 759, 771 (E.D. Va. 2007) (written reprimand placed in Plaintiff's personnel file not sufficiently adverse to support Title VII retaliation claim).

(3) Negative Performance Evaluation

In some cases, courts have held that a negative performance evaluation is not a materially adverse employment action because it is not sufficient to dissuade a reasonable worker from making or supporting a charge of discrimination. *E.g.*, *Parsons v. Wynne*, No. 06-1876 (4th Cir. Mar. 9, 2007). In *Amaram v. Virginia State Univ.*, No. 3:07-396 (E.D. Va. Mar. 31, 2008), the court held that a negative performance evaluation of a university professor was not a materially adverse employment action where the

professor's salary was reduced because of the evaluation but after successfully appealing the evaluation he received an upgrade in his performance rating and a retroactive pay increase. Similar rulings were made in *Fernandez v. Alexander*, No. 04-3009 (D. Md. Aug. 27, 2007), *aff'd*, No. 08-1118 (4th Cir. Jan. 12, 2009), *cert. denied*, 129 S. Ct. 2778 (2009), and in *Watson v. Snow*, No. 103-00394 (M.D.N.C. Mar. 20, 2006), *aff'd as modified*, No. 06-1471 (4th Cir. Apr. 10, 2007). One court has concluded that "in the Fourth Circuit, a negative performance evaluation alone, without any accompanying injury or change in the terms or conditions of employment, is insufficient to constitute a materially adverse employment action in order to establish a cause of action for retaliation in violation of Title VII and the ADEA." Altman v McHugh, No. 5:11-cv-61, Memorandum Opinion 36 (W.D. Va. Apr. 9, 2012). Nevertheless, each case stands on its own particular facts, and in the opinion of the author it is entirely possible that a negative performance evaluation could, under appropriate circumstances, be sufficient to support a retaliation claim. *See Nye v. Roberts*, No. 03-1683 (4th Cir. Aug. 5, 2005) (pre-*Burlington Northern* case in which the Fourth Circuit ruled that a negative performance evaluation was sufficient to support a retaliation claim where it was preceded by a retaliatory written reprimand). Such circumstances could exist, for example, where the negative performance evaluation directly leads to denial of tenure to a college professor. At least one court has recognized that a negative performance evaluation could be an adverse employment action, even in the absence of any immediate effect on the plaintiff's employment conditions, if it could effect a term, condition or benefit of employment in the future. *See Macon v. E.I. Dupont*, No. 3:10-cv-260 (E.D. Va. May 13, 2011).

(4) Failure to Promote

Failure to promote can constitute an adverse employment action. *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536, 544 (4th Cir 2003) ("it has long been held clear that failure to promote an employee constitutes an adverse employment action"); *Crawley v. Norfolk Southern Corp*., No. 7:08-cv-267 (W.D. Va. 2011).

(5) Change in Work Schedule

In *Parsons v. Wynne*, No. 06-1876 (4th Cir. Mar. 9, 2007), the Fourth Circuit held that an employee's removal from the alternate work schedule would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." {Altman v McHugh, No. 5:11-cv-61, Memorandum Opinion 36 (W.D. Va. Apr. 9, 2012).}

(6) Change in Job Duties

In *Wilson v. United Parcel Services, Inc.,* No. 1:10-cv-636 (E.D. Va. Feb. 7, 2012), the court held that a two week change in the area to which a delivery driver delivered packages was not a materially adverse employment action.

(7) Involuntary Transfer or Reassignment

A number of courts have held that transfer of an employee to a different work location is not a materially adverse employment action and therefore under *Burlington Northern* will not support a retaliation claim. For example, in *Holleman v. Colonia Heights School Board,* No. 3:11-cv-414 (E.D. Va. Feb. 23, 2012), the court held that the transfer of a kindergarten teacher from one school to another was not a materially adverse employment action, even though she had taught at the school for 32 years and had significant friends and support there, because she was paid more at the new school and

suffered no loss of health insurance, life insurance, or other benefits. The court observed that "under *Burlington Northern's* objective inquiry, district courts in this circuit have held again and again that involuntary transfers have not constituted adverse action under the retaliation provision." Other cases with similar holdings include *Sturdivant v. Green*, No. 1:09-cv-589 (E.D. Va. Nov. 19, 2009) ("when courts have addressed the issue of involuntary transfer in the retaliation context, they have similarly held, even after *Burlington Northern*, that such reassignment did not constitute an adverse employment action"), and *Rivera v. Prince William County School Board*, No. 1:09-cv-341 (E.D. Va. Jul. 22, 2009) (firth grade teacher transferred to teach third grade at different school within district).

3. Causal Connection

To establish a causal connection between a protected activity and an adverse employment action, "the employer must have taken the adverse employment action because the plaintiff engaged in protected activity." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998); *Wilson v. United Parcel Services, Inc.*, No. 1:10-cv-636 (E.D. Va. Feb. 7, 2012).

a. Knowledge of Individual Taking Adverse Action

"[T]he most fundamental requirement for showing a causal link between the protected activity and the adverse employment action is that the decision-makers have knowledge of the employee's protected activity." *Cuffee v. Tidewater Community College*, 409 F. Supp. 2d 709, 721 (E.D. Va. 2006); *Wilson v. United Parcel Services, Inc.*, No. 1:10-cv-636 (E.D. Va. Feb. 7, 2012). That knowledge "is absolutely necessary

to establish the third element of the prima facie case." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998); *Wilson v. United Parcel Services, Inc.*, No. 1:10-cv-636 (E.D. Va. Feb. 7, 2012). A retaliation claim will be dismissed if the plaintiff cannot establish that the individuals taking the adverse employment action had knowledge that the plaintiff engaged in the protected activity. *E.g., Balas v. Huntington Ingalls Industries, Inc*., No. 2:11-cv-347 (E.D. Va. Jan. 18, 2012); *O'Brien v. U.S. Postal Service*, No. 6:10-cv-54 (W.D. Va. Jun. 20, 2011).

b. Time Between Protected Activity and Adverse Action

Temporal proximity can provide evidence of a causal connection between a protected activity and an adverse action. *See Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001); *King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003); *Williams v. Cerberonics, Inc*., 871 F.2d 452, 457 (4th Cir. 1989), *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994); *Crawley v. Norfolk Southern Corp*., No. 7:08-cv-267 (W.D. Va. 2011) ("a prima facie case of retaliation arises when a plaintiff shows that an adverse employment action occurred shortly after the plaintiff filed his EEOC complaint"); *O'Brien v. U.S. Postal Service*, No. 6:10-cv-54 (W.D. Va. Jun. 20, 2011) ("absent the employer's direct knowledge [of the protected activity], temporal proximity of the protected activity and the adverse employment action is often proffered as circumstantial evidence of a causal connection between the two events"). "[A]n employer's knowledge coupled with an adverse employment action taken at the first opportunity can satisfy the causation requirement of a prima facie retaliation claim." *O'Brien v. U.S. Postal Service*, No. 6:10-cv-54 (W.D. Va. Jun. 20, 2011); *see Price v. Thompson*, 380 F.3d 209, 213 (4th

Cir. 2004). On the other hand, in *Pascual v. Lowe's Home Centers, Inc*., 193 F. Appx. 229, 233 (4th Cir. 2006), the court held that a period of three or four months between the protected activity and an adverse action was too long to be constitute evidence of causal connection. In *Young v. HP Enterprise Services, LLC*, No. 1:10-cv-1096 (E.D. Va. Sep. 6, 2011), the court found that a five month period likewise was too long. *See also Price v. Thompson*, 380 F.3d 209 (4th Cir. 2004) (nine to ten months too long); *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998) (thirteen months between filing of EEOC charge and termination of employment is too long to establish causation without other evidence of retaliation); *O'Brien v. U.S. Postal Service*, No. 6:10-cv-54 (W.D. Va. Jun. 20, 2011) (two years is "much to long a time to provide any inference of a causal connection").

Although a lapse of time may be too long to prove causation, that lapse of time does not necessarily disprove causation. In *Templeton v. First Tenn. Bank, N.A.*, No. 10-1753 (4th Cir. Apr. 22, 2011), which involved a lapse of time of over two years, the Fourth Circuit quoted with approval the statement by the Sixth Circuit in *Dixon v. Gonzales*, 481 F.3d 324, 335 (6th Cir. 2007), that "a mere lapse in time between the protected activity and the adverse employment action does not inevitably foreclose a finding of causality" and that "this is especially true in the context of a reinstatement case." In *Young v. HP Enterprise Services, LLC*, No. 1:10-cv-1096 (E.D. Va. Sep. 6, 2011), the court, following *Templeton* and *Dixon*, rejected as "unpersuasive" a defendant's argument that "the amount of time between the EEOC charge Plaintiff filed in 2007 and the alleged failure to hire in 2010 is simply too long to sustain a causal connection between the protected activity and the alleged adverse action." The Fourth

Circuit has made it clear that "in cases where temporal proximity between protected activity and the alleged retaliatory conduct is missing, courts may look to the intervening period for other evidence of retaliatory animus." *Lettieri v. Equant, Inc*., 478 F.3d 640, 650 (4th Cir. 2007).

c. Self-Serving Opinions Are Insufficient

A plaintiff must offer credible evidence establishing a causal connection between the protected activity and the adverse action. "Plaintiff's own self-serving opinions, absent anything more, are insufficient" to establish a causal connection in a retaliation claim. *Mickey v. Shalala*, 360 F.3d 463, 469-70 (4th Cir. 2004); *Young v. HP Enterprise Services, LLC*, No. 1:10-cv-1096 (E.D. Va. Sep. 6, 2011).

D. Exhaustion of Administrative Remedies

1. The General Rule: Exhaustion Required

Lack of subject matter jurisdiction can be a defense to a Title VII / ADA / ADEA retaliation lawsuit. A plaintiff has the burden of proving that the court has subject matter jurisdiction. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642 (4th Cir. 1999). If the defendant challenges subject matter jurisdiction, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure based on lack of subject matter jurisdiction will be granted "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a

matter of law." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States,* 945 F.2d 765, 768 (4th Cir. 1991).

The general rule for Title VII / ADA / ADEA claims is that a federal court will have subject matter jurisdiction over those claims only if the plaintiff first exhausts his administrative remedies with the EEOC before filing suit. See *Jones v. Calvert Group, Ltd.*, 551 F.3d 297 (4th Cir. 2009); *Chacko v. Patuxent Inst*., 429 F.3d 505, 506 (4th Cir. 2005) (Title VII); *Davis v. North Carolina Department of Corrections*, 48 F.3d 134 (4th Cir 1995); *Tetreault v. Advanced Federal Services Corp*., Report and Recommendation, No. 4:11-cv-159 (E.D. Va. Mar. 15, 2012), adopted by Order (Apr. 9, 2012); *Downie v. Revco Disc. Drug Ctrs., Inc*., 448 F. Supp. 2d 724, 728 (W.D. Va. 2006) (ADA); *Flickinger v. E.I. du Pont de Nemours & Co*., 466 F. Supp. 2d 701, 707 (W.D. Va. 2006) (ADEA). A claim for which EEOC administrative remedies have not been exhausted is subject to dismissal for lack of subject matter jurisdiction.

The scope of the claims which may be asserted in a Title VII / ADA / ADEA lawsuit is determined by the contents of the EEOC charge. *Jones v. Calvert Group, Ltd*., 551 F.3d 297, 300 (4th Cir. 2009) (Title VII); *Chacko v. Patuxent Institution*, 429 F.3d 505 (4th Cir. 2005); *Bryant v Bell Atlantic Maryland, Inc*., 288 F.3d 124, 132 (4th Cir. 2002). "Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit." *Evans v. Technologies Applications & Service Co*., 80 F.3d 954, 963 (1996); *Stoneman v. ASR Restoration, Inc*., No. 3:11-cv-855 (E.D. Va. May 19, 2012) ("the contents of the EEOC

charge determine the scope of a plaintiff's right to file a federal lawsuit"); *McDonald v. Loudoun County Board of Supervisors*, No. 1:10-cv-449 (E.D. Va. Sep. 6, 2011). Therefore, for example, a plaintiff cannot assert race discrimination in his EEOC charge, and then claim sex discrimination in his lawsuit. *See Bryant v. Bell Atlantic Maryland, Inc*., 288 F.3d 124 (4th Cir. 2002); *Sloop v. Memorial Mission Hospital, Inc*., 198 F.3d 147 (4th Cir. 1999). Likewise, a plaintiff cannot bring a Title VII or ADA lawsuit based on failure to promote, and then in his lawsuit claim discrimination in pay and benefits, s*ee Evans v. Techs Applications & Serv. Co.*, 830 F.3d 954 (4th Cir. 1996), or claim wrongful discharge in his EEOC charge and then assert failure to hire in his lawsuit, *see Lawson v. Burlington Industries, Inc*., 683 F.2d 862 (4th Cir. 1982). An EEOC charge alleging a discreet act of discrimination, such as disciplinary discipline, will not satisfy the exhaustion requirement for a broader form of discrimination, such as a pattern and practice of discriminatory hiring, training and promotion. *See Dennis v. County of Fairfax*, 55 F.3d 151 (4th Cir. 1995) (42 U.S.C. § 1981). And factual allegations in an EEOC charge which are too broad or too vague may be insufficient to satisfy the exhaustion requirement for any claim. *See Taylor v. Virginia Union University*, 193 F. 3d 219 (4th Cir. 1999) (facts alleged in charge insufficient to satisfy exhaustion requirement for sexual harassment claim).

2. The Exception to the General Rule: Exhaustion Not Required for Retaliation Based on Filing Charge

An exception to the general rule requiring exhaustion of administrative remedies applies where the retaliation was for filing an EEOC charge. "[A] plaintiff asserting a Title VII claim of retaliation for filing a previous EEOC charge ... may raise the

retaliation claim for the first time in federal court," because a claim of retaliation for filing an EEOC charge is "like or reasonably related to and growing out of such allegations." *Jones v. Calvert Group, Ltd*., 551 F.3d 297, 301-02 (4th Cir. 2009); *see Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1994); *Wilson v. Dimario*, Civil Action No. 97-2252 (4th Cir. Mar. 31, 1998); *Stoneman v. ASR Restoration, Inc*., Memorandum Decision and Order, No. 3:11-cv-855 (E.D. Va. May 10, 2012); *Keegan v. Dalton*, 899 F. Supp. 1503 (E.D. Va. 1995).

One case applying that exception is *Turpin v. The Wellpoint Companies, Inc*., No. 3:10-cv-850 (E.D. Va. May 25, 2011). In *Turpin*, the plaintiff filed an ADEA charge against her employer in 2007. The EEOC issued a right to sue letter to the plaintiff on the ADEA charge later that year. The plaintiff did not file suit on the ADEA claim. In 2010, the plaintiff reapplied for employment to the same company and was not hired. She then filed a Title VII charge of discrimination against the company, alleging the company refused to hire her in retaliation for her filing her prior charge. The court found that she sufficiently exhausted her administrative remedies, explaining, "although there is no indication that Plaintiff received a notice of right to sue with respect to her 2010 retaliation claim, *Jones [v. Calvert Group, Ltd.]* makes clear that Plaintiff was free to raise this claim for the first time in federal court."

According to at least one court, the exception to the general rule of exhaustion of administrative remedies may apply only if the plaintiff can establish that the EEOC actually investigated his retaliation charge. In *Stoneman v. ASR Restoration, Inc*., Memorandum Decision and Order, No. 3:11-cv-855 (E.D. Va. May 10, 2012), the court

dismissed a retaliation claim because the EEOC notice that it had concluded its investigation did not verify that it had investigated the retaliation claim and the court was unable to determine from any other evidence presented that the EEOC had actually investigated the retaliation claim.

3. Timeliness

Under Title VII, a plaintiff must file an EEOC charge for retaliation against a private employer no more than 300 days after the alleged act of retaliation. 42 U.S.C. § 2000e-5(e)(1); *Edelman v. Lynchburg College*, 300 F.3d 400, 404 (4th Cir. 2002). A claim based on a discreet act of discrimination that occurred more than 300 days before the charge was filed is time barred. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002); *e.g.*, *McDonald v. Loudoun County Board of Supervisors*, No. 1:10-cv-449 (E.D. Va. Sep. 6, 2011).

4. The "Retaliation" Box on the EEOC Charge

Sometimes a plaintiff claiming retaliation will not check the "retaliation" box on the EEOC charge. The failure to check that box normally is not sufficient, standing alone, to justify dismissal of a retaliation claim. If the retaliation box is not checked, most courts will look to the contents of the charge and will hold the charge sufficient to include retaliation if the charge gave the defendant fair adequate notice that retaliation was being claimed. *See Johnson v. Portfolio Recovery Associates, LLC*, 682 F. Supp. 2d 560, 570 (E.D. Va. 2009) (Title VII); *Tetreault v. Advanced Federal Services Corp*., Report and Recommendation, No. 4:11-cv-159 (E.D. Va. Mar. 15, 2012), adopted by Order (Apr. 9, 2012).

On the other hand, sometimes a plaintiff will check the "retaliation" box on the charge, but will state few or no facts in the charge suggesting retaliation. In that situation, courts may hold that the retaliation claim is barred because the plaintiff failed to exhaust his administrative remedies in regard to that claim. See *Chacko v. Patuxent Inst*., 429 F.3d 505, 509 (4th Cir. 2005) ("if the factual foundation in the administrative charge is too vague to support a claim that is later presented in subsequent litigation, that claim will ... be procedurally barred"); *McDonald v. Loudoun County Board of Supervisors*, No. 1:10-cv-449 (E.D. Va. Sep. 6, 2011) (retaliation claim barred because, although the plaintiff checked the retaliation box in the charge, in the charge he did not make an adequate "factual foundation" for retaliation).

5. Who Drafted the Charge

A factor which may affect how liberally a charge is interpreted is whether the charge was drafted by government agency staff or by counsel. In *Alvarado v. Board of Trustees of Montgomery Community College*, 848 F.2d 457, 460 (4th Cir. 1988), the Fourth Circuit stated that "EEOC charges must be construed with utmost liberality since they are made by those unschooled in the technicalities of formal pleading." In *Williams v. Mancom, Inc.*, 323 F. Supp. 2d 694 (E.D. Va. E.D. Va. 2004), the court stated, "EEOC complaints filed by individuals acting without the assistance of an attorney are not so strictly construed that a failure to check the 'Retaliation' box on the EEOC charge form is necessarily fatal to the later assertion of a retaliation claim." In *Stoneman v. ASR Restoration, Inc*., Memorandum Decision and Order, No. 3:11cv855 (E.D. Va. May 10,

2012), however, the court suggested that such a failure may be fatal where the charge was filed with the assistance of an attorney, but the court decided the case on other grounds.

III. RETALIATION UNDER OTHER LAWS

Retaliation also is prohibited under many other federal and state laws. The Fair Labor Standards Act, for example, makes it unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding...." 29 U.S.C. § 215(a)(3); *e.g., Dellinger v. Science Applications International Corp.*, No. 10-1499 (4th Cir. May 10, 2011); *Hart v. Hanover County School Board*, No. 3:10-cv-794 (E.D. Va. May 9, 2011); *Boscarello v. Audio Video Systems, Inc*., No. 1:10-cv-1193 (E.D. Va. Apr. 20, 2011). The Family and Medical Leave Act makes it illegal for employers to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA and makes it unlawful for any person "to discharge or in any other manner discriminate against any individual because such individual has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to [the FMLA], has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under [the FMLA], or has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA]." 29 U.S.C § 2615; see *Campbell v. Verizon Virginia, Inc.*, 812 F. Supp. 2d 748 (E.D. Va. 2011); *Bosse v. Baltimore County*, 692 F. Supp. 2d 574 (D. Md. 2010). The Virginia Worker's Compensation Act's

antiretaliation provision prohibits an employer from discharging an employee "solely because the employee intends to file or has filed a claim under this title or has testified or is about to testify in any proceeding under this title." Virginia Code § 65.2-308(A); *see Warner v. Buck Creek Nursery, Inc*., 149 F. Supp. 2d 246 (W.D. Va. 2001); *Dunn v. Bergen Brunswig Drug Co.*, 848 F. Supp. 645 (E.D. VA 1994); *Cooley v. Tyson Foods*, 257 Va. 518 (1999); *Mullins v. Virginia Lutheran Homes*, 253 Va. 116 (1997). The legal principles applicable to retaliation under each such law can be similar to those discussed above, but can also be different in important ways. Therefore, it is important for employers confronted with retaliation claims under a specific law to evaluate the claim under the statutes, regulations, and judicial decisions applicable to retaliation under that specific law.

IV. HOW TO PREVENT RETALIATION CLAIMS

There is no way for an organization to guarantee that it will never be accused of unlawful retaliation. However, there are steps that all organizations can take to help prevent retaliation claims and to reduce the risk of legal liability when retaliation claims are asserted.

A. Adopt an Antiretaliation Policy

Many employer policies prohibiting discrimination and harassment also prohibit retaliation. While that is appropriate, it also is appropriate and desirable to adopt a policy specifically addressing retaliation. A freestanding antiretaliation policy more effectively communicates the fact that the organization prohibits retaliation. It also more effectively communicates how employees with retaliation concerns can have those concerns

addressed. In addition, an antiretaliation policy, by explaining the concepts of protected activity and retaliation, helps everyone in the organization understand retaliation and avoid situations which may lead to retaliation claims. An antiretaliation policy can and should serve as the centerpiece for training of supervisors and managers regarding retaliation. It also can be incorporated by reference into other applicable policies, such as policies concerning sexual harassment, disability accommodation, Fair Labor Standards Act compliance, and whistleblower protection.

B. Incorporate Antiretaliation Policy Into Applicable Personnel Documents

Many employers use standard documents for processing employee requests, concerns, complaints and grievances. Employers should consider incorporating their antiretaliation policy into those documents, such as employee complaint and grievance forms. Doing so will improve the organization's perceived commitment to preventing and remedying retaliation.

C. Train Supervisors and Managers Concerning Retaliation

Most employers probably already train their supervisors and managers regarding discrimination and harassment. Many employers, however, do not provide their supervisors and managers with training specific to retaliation, and address it only briefly in the context of discrimination and harassment training. Doing so is a mistake. Are your supervisors and managers able to recognize protected activity in all of its different forms? Do they know what actions are appropriate, and what actions are not appropriate, in response to protected activity? Do they know how to respond to retaliation complaints? Do they know your organization's specific policies and procedures

concerning retaliation? If the answer to any of these questions is anything other than an unequivocal "yes," then your organization is unnecessarily exposing itself to potential legal liability which can be greatly reduced by providing training supervisors and managers on retaliation.

D. Identify and Consider Potentially Protected Activity Before Taking Action Materially Affecting the Terms or Conditions of a Worker's Employment

Closeness in time between a protected activity and an adverse employment action can suggest that the adverse employment action was taken in retaliation for the protected activity, especially in the mind of the employee. Therefore, before taking an adverse employment action, especially discharge, employers should identify any recent potentially protected activity by the employee. Such an activity might include, for example, filing a charge of discrimination with the EEOC, supporting another employee in his EEOC charge, complaining about perceived discrimination or harassment, requesting overtime pay, requesting FMLA leave, requesting an accommodation to a disability, or filing a workers' compensation claim. Employers should then assess the risk of a potential retaliation claim based on the adverse employment action, and take appropriate actions to minimize that risk. Appropriate actions could include, for example, taking particular care to ensure that the specific legitimate reasons for the adverse action are well documented. If the adverse action involves disciplinary action, employers may wish to give the employee a clear explanation of the proposed disciplinary action and the grounds for it, and give the employee ample opportunity to respond, before the action is taken. At a minimum, employers should ensure that all of

their standard policies and procedures have been followed, and that no "shortcuts" have been taken. It is seldom beneficial, however, for an employer to forego taking adverse action, or to unduly delay taking the action, solely out of fear of a retaliation claim. More often than not, doing so will only dilute the perceived legitimacy of the adverse action, thereby making the action riskier in the future, while leaving a workplace problem uncorrected.

E. Limit Disclosure of Information About Protected Activity to Those Having a Need to Know

An individual who does not know of an employee's protected activity cannot, by definition, retaliate against the employee because of the protected activity. Conversely, every person who knows of an employee's protected activity represents an additional potential source of retaliation. Therefore, limit disclosure of information about the protected activity, such as complaints of discrimination and filing of EEOC charges, to persons within the organization having a need to know.

F. Conduct Separate Investigations of Retaliation Claims and Underlying Complaints

Retaliation claims often relate to actions taken in response to an underlying complaint. For example, an employee claiming retaliation may contend the adverse employment action was taken in response to his filing a charge of discrimination. In such situations, separate investigations should be conducted for the underlying complaint and for the retaliation claim. Retaliation claims are legally distinct from the underlying claims, and by conducting separate investigations, the organization will ensure that both the underlying claim and the retaliation claim are fully investigated and considered.

G. Warn Other Employees Not to Retaliate

When an employee files a charge of discrimination against a supervisor, the organization normally will need to notify the supervisor in order to investigate and respond to the charge. The same is true when an employee accuses a supervisor of unlawful conduct such as sexual harassment. In either situation, the supervisor normally will not be pleased. The natural response of the supervisor may be to retaliate against the employee, either directly or indirectly. It is important in such situations that the organization reminds the supervisor that retaliation is unlawful, against company policy, and will not be tolerated.

H. Do Not Disclose Complaints or Claims of Former Employees to Third Parties

Many organizations appropriately limit the information they share with third parties about former employees to dates of employment and position held. Others disclose more information, such as whether the employee is eligible for rehire. In any event, organizations should not disclose to third parties information about a former employee's protected activities, such as whether the employee ever sued the company, filed an EEOC charge against it, or complained about his working conditions. Such disclosure can lead to retaliation claims when the employee is denied employment or discharged by a potential future employer and assumes the discharge was the result of the potential or new employer receiving the information about his protected activity.

I. Modify Organizational Culture

Retaliation claims often are based more on perception than reality. Because organizational culture affects employee perceptions, employees are more likely to

perceive retaliation if the organization has a culture of discouraging employee expression, complaints or concerns. Organizations which are perceived by employees as being open and welcoming to employee complaints and concerns, in contrast, are less likely to generate perceptions of retaliation and resulting retaliation claims. Therefore, a change in organizational culture toward openness can be an effective method of reducing the risk of retaliation claims.