INTRODUCTION

In Fiscal Year 2008\(^2\), 95,402 charges were filed with the EEOC reflecting a significant jump from the numbers of charges filed in FY2007 (82,792) and in FY2006 (75,768). The retaliation charges increased significantly from 22,555 in FY2006 to 26,663 in FY2007 to 32,690 in FY2008. For a more stark illustration, in FY1997, retaliation charges were 22.6% of charges, but 34.3% of all charges in FY2008, representing an increase of over 50%. Not surprisingly, nearly all racial, national origin or sexual harassment charges are accompanied by a retaliation charge. Retaliation is a tool of power that discourages individuals from asserting their civil rights and that undermines the laws against discrimination. Two of the biggest failures of employers are not training supervisors not to retaliate and not holding supervisors accountable when they retaliate. For an employer, a retaliatory action sends a dangerous message to the workforce that it tolerates discrimination and undercuts an employer’s chances for affirmative defenses in harassment cases.

Under Title VII of the Civil Rights Act of 1964, “it shall be an unlawful practice for an employer to discriminate against any of his employees…because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has participated in any manner in an investigation, proceeding, or hearing under this title.” 42 USC §2000e-3(a). Last term, the U.S. Supreme Court unanimously affirmed the importance of this anti-retaliation provision and in particular held that the clause protects employees who voice disapproval of discrimination when questioned in the course of an employer initiated internal investigation.\(^1\) Crawford v. Metro. Govt’ of Nashville & Davidson County, Tenn., 129 S. Ct. 846 (2009) (discussed below).

UNITED STATES SUPREME COURT CASES

Title VII: A material adverse employment action that deters a reasonable employee from pursuing a claim of discrimination may constitute retaliation.

\(^1\) The author was appointed Regional Attorney in 1995. The EEOC San Francisco District’s jurisdiction prior to 2006 included Northern and Central California, Hawaii, American Samoa, Guam and the Commonwealth of the Northern Mariana Islands. As of 2006, the jurisdiction includes Northern California, Northern Nevada, Oregon, Washington, Alaska, Idaho and Montana. This paper is not an official EEOC document but solely reflects the author’s opinions. Contact: EEOC San Francisco District Office, 350 The Embarcadero, Suite 500, San Francisco, CA 94105-1260; (415) 625-5645; (415) 625-5657 fax; william.tamayo@eeoc.gov.

\(^2\) The federal fiscal year runs from October 1 to September 30.

**Facts:** Sheila White, hired in 1997 as a forklift operator, was the only female employee at Burlington Northern’s railroad site. Her supervisor, Joiner, consistently told her that women shouldn’t be working at the railroad and made other demeaning remarks about women in front of White’s male colleagues. She reported Joiner to Burlington and he was suspended for 10 days. In the meantime White was told that a more senior male employee should be operating the forklifts and was removed from forklift duty and assigned to more physically strenuous laborer tasks. White then filed a complaint with the EEOC alleging sex discrimination and that she was reassigned in retaliation for reporting Joiner. She filed a second charge soon after claiming that the roadmaster had placed her under surveillance. Three days after the second charge was mailed to the company, the company suspended White without pay for alleged subordination. She was without pay for 37 days which included the Christmas holiday period. White filed a grievance, the internal investigation concluded that she had not been insubordinate and she was reinstated with full pay. White filed a third retaliation charge based on her suspension. She filed a Title VII lawsuit alleging that she was discriminated on the basis of sex and that Burlington retaliated against her by changing her employment responsibilities and suspending her without pay. The jury found for White on both claims and the Sixth Circuit Court of Appeals affirmed.

**Issue:** Can an employer may be held liable for retaliatory discrimination under Title VII for any "materially adverse change in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment); for any adverse treatment that was "reasonably likely to deter" the railway from engaging in protected activity; or only for an "ultimate employment decision?"

**Holding:** The Supreme Court unanimously affirmed the Sixth Circuit’s decision and noted that Title VII’s substantive provision seeks to protect employees from discrimination based on their status, whereas the anti-retaliation provision seeks to protect employee conduct. The Court held that in order to prevail on a claim for retaliatory discrimination, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which means that it would dissuade a reasonable worker from bringing a discrimination claim against their employer. Burlington took retaliatory actions: they suspended White for 37 days and reassigned her duties. While her back pay was eventually restored through her union grievance the Court noted that not having income for 37 days had a chilling effect. (“White did receive backpay, but White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship….That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.”).

The “opposition clause” in Title VII’s prohibition against retaliation covers an employee who was fired after she cooperated with her company’s internal investigation into sexual harassment rumors and described the harasser’s behavior.
**Crawford v. Metro. Gov’t of Nashville & Davidson Cty.,** 129 S. Ct. 846 (2009)

**Facts:** Title VII prohibits retaliation against an employee who has engaged in protected activity, either by 1) opposing discrimination or 2) being involved in proceedings related to the discrimination. Management had heard from an employee that several other employees had expressed concern that the employee relations director (Hughes) had been sexually harassing them. The assistant director of HR, Frazier, asked several employees, including Crawford, if they could be interviewed. Frazier asked Crawford and others about Hughes. Crawford stated that Hughes “had asked to see her titties on numerous occasions,” that she would say “hey Dr. Hughes, What’s up?” and he would “grab his crotch and state ‘you know what’s up,’” and “that he would approach her window and put his crotch up to the window and ask to see her titties all at the same time”. Crawford also stated that “Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch.” Crawford also stated that three employees who made statements about Hughes engaging in sexual conduct were immediately investigated on other grounds and promptly discharged. Crawford – a 30-year employee - was terminated months later after having been accused of embezzlement and drug use. Crawford filed suit alleging that her termination was in retaliation for her providing information during the employer’s investigation of harassment allegations. The District Court and the Court of Appeals held that Crawford’s actions were not “opposition activity” under Title VII’s retaliation clause because Crawford was cooperating with Metro’s investigation and did not initiate any complaint prior to the investigation nor prior to her firing. The Court of Appeals further held that absent a pending EEOC charge, the employee’s participation in the internal investigation was not protected activity.

**Issue:** Does an employee’s description of sexual harassment by a supervisor during a company initiated investigation constitute “protected activity” for purposes of Title VII’s anti-retaliation provisions?

**Holding:** The Supreme Court (9-0) reversed and held that Crawford’s statements during the internal investigation described and *ostensibly disapproved* sexually obnoxious behavior by a fellow employee and were “thus covered by the opposition clause” of Title VII’s prohibition against retaliation. According to the Court: “There is, then, no reason to doubt that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”

(Note: while Crawford was arguably covered because she “was involved in a proceeding”, i.e. internal investigation regarding sexual harassment, the Court did not specifically address that question but only addressed the first method of engaging in protected activity: opposition to what a reasonable person believes is unlawful discrimination.)
ADEA’s retaliation provisions also apply to federal employees.


**Facts:** Gomez-Perez worked for the U.S. Postal Service in Dorado, Puerto Rico. At age 45, she requested and was granted a transfer to another station to be near her ill mother. A month later she asked to return to her old job in Dorado but her job had been converted to part-time status and had been filled with another employee, and thus the request was denied. Gomez-Perez filed suit under ADEA charge alleging that the denial of the transfer was due to her age and later alleged that she was retaliated against when her supervisors reduced her hours and falsely accused her of sexually harassing other employees. The lower court dismissed the retaliation claims because the provisions of the ADEA applicable to federal employees (29 U.S.C. Sec. 633a) make no mention of retaliation, and the First Circuit Court of Appeals affirmed.

**Issue:** Does the ADEA as applied to the federal sector bar retaliation?

**Holding:** ADEA in 1967 originally only covered private sector workers and was amended in 1974 to cover federal workers. While the ADEA provision barring discrimination against federal employees did not specifically mention retaliation, the statutory phrase “discrimination based on age” in §663a of the ADEA includes retaliation based on the filing of an age discrimination complaint. The court relied on precedents in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (interpreting 42 USC §1982 which prohibits discrimination in property sales and rentals to prohibit retaliation against an individual who attempted to transfer property to an African-American) and *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167 (2005) (Title IX of the Education Amendments of 1972 which prohibits gender discrimination implied a prohibition against retaliation). Hence, federal employees filing ADEA claims are protected from retaliation.

**Retaliation:** 42 USC §1981’s prohibition against race discrimination in contracts encompasses a prohibition against retaliation.


**Facts:** Humphries, an African-American associate manager at Cracker Barrel, sued his employer after he was fired and alleged that he was terminated because of his race and in retaliation for complaining to management about the discriminatory treatment of another black employee. The Title VII suit was dismissed for failure to timely pay a filing fee. Summary judgment was granted to the employer by the lower court on the 42 USC §1981 claims (which prohibits discrimination in making contracts including employment).

The Court of Appeals affirmed on the direct discrimination claim but held that 42 USC § 1981 protects against retaliation and noted that if Sec. 1981 allowed “unfettered retaliation” there would be a “wholesale circumvention and eventual undermining of the statute”. This would
result in employers firing complainants quickly to avoid damages under §1981. The court noted that “This is not an insignificant issue, as Section 1981 damages often have more than those available under Title VII”.

**Issue:** Does 42 USC §1981 include a prohibition against retaliation?

**Holding:** In affirming the Court of Appeals decision (7-2), the Supreme Court noted that in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) the Court held that Sec. 1981 did guarantee blacks the right to make and enforce contracts but did not extend to discrimination that occurred after a contract was entered into. Congress amended Sec. 1981 in 1991 to state that the term “make and enforce contracts” includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.” The Court noted that the Senate and House committee reports on the 1991 amendment indicated that Sec. 1981 would include protection against retaliation. The court relied on precedents in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (interpreting 42 USC §1982 which prohibits discrimination in property sales and rentals to prohibit retaliation against an individual who attempted to transfer property to an African-American) and *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167 (2005) (Title IX of the Education Amendments of 1972 which prohibits gender discrimination implied a prohibition against retaliation. Thus, an employee filing under §1981 can include a retaliation claim.

(Note: An employee filing a race discrimination suit under Title VII can also 42 USC §1981. Under §1981, the plaintiff does not have to exhaust administrative remedies with the EEOC. Furthermore, unlike Title VII, there is no statutory cap on damages under §1981.)

A collective bargaining agreement can require employees to resolve Age Discrimination in Employment Act claims through arbitration rather than take their cases to court.


Security guards, members of SEIU, filed grievances pursuant to the collective bargaining agreement (CBA) alleging that they were transferred to less desirable positions, denied promotions and denied overtime. The CBA’s “no discrimination” clause did contain language that all discrimination claims “shall be subject to the grievance and arbitration procedure….as the sole and exclusive remedy for violations.” The workers claimed that they were also discriminated against on the basis of age, but the union only pursued the overtime and promotion claims unrelated to age and not the ADEA claims. The arbitrator denied all the claims. The workers then filed suit in federal court under the ADEA and related state laws. The employer moved to dismiss or in the alternative force the employees to arbitrate their cases pursuant to the CBA. The District Court denied the employer’s motion to dismiss and refused to order arbitration. The Court of Appeals affirmed and held that a union-negotiated mandatory arbitration agreement that waives a worker’s right to federal court with respect to statutory rights, e.g. ADEA, is unenforceable. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (employee’s statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 is not
foreclosed by prior submission of claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement).

**Issue:** Can an employer and a union through a collective bargaining agreement require employees to settle ADEA discrimination claims through arbitration rather than take their cases to court?

**Holding:** The Supreme Court (5-4) reversed and held that where a collective bargaining agreement clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of law. Here, nothing prevents ADEA claims from being covered by a CBA negotiated under the National Labor Relations Act. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-33 (1991). *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) “did not involve the issue of the enforceability of an agreement to arbitrate statutory claims” but “the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.” The employee in the bargaining unit forgoes the right to go to court and must have her claim resolved under the CBA, assuming the union decides to pursue her ADEA claim. The Court declined to consider whether “the CBA operates as a substantive waiver of a plaintiff’s ADEA rights because it not only precludes a federal lawsuit, but also allows the union to block arbitration of these claims.”

Query: If the union decides not to grieve the discrimination claim, what are the consequences for the union and the employee? Will the union then be subjected to “duty of fair representation” claims by the employee? Can a union’s refusal to pursue the Title VII claim of a member be a violation of the retaliation provisions of Title VII as they apply to unions? In *Kravar v. Triangle Services*, 2009 WL 1392595 (S.D.N.Y.), decided after *Pyett*, the court in an ADA matter, held that since the Union (the same one involved in *Pyett*) has total control of whether a case can be brought to arbitration its refusal to submit a case to arbitration effectively waives the substantive rights of the employee. Noting that *Pyett* does not permit a “substantive waiver” of an individual’s discrimination claim, and since the individual cannot bring a claim to arbitration on her own, the court refused to compel arbitration. (The employer has filed a Motion to Stay proceedings while it seeks appeal of the District Court’s ruling.)

Note: The EEOC may be able to sue the employer for discrimination. See *EEOC v. Waffle House*, 534 U.S. 279 (2002) (EEOC is not a party to mandatory arbitration agreement between company and its employees and therefore may sue the employer in federal court).

**OTHER RECENT RETALIATION CASES**

Termination of Muslim sales representative of Moroccan descent soon after complaining of discrimination justifies punitive damage award of $200,000.
Youssef Bouamama, a Muslim employee of Moroccan descent, was hired as a call center sales representative in September 2001. He received a raise in December 2001, and was promoted to team leader in February 2002 and soon after promoted to sales manager with a raise and bonus. After this promotion, Bouamama complained to human resources about a conversation six months earlier with a supervisor (Villanueve) who overheard him speaking French and who told the employee that it was helpful to the company that the employee could speak English, French and Arabic. Villanueve told other employees near Bouamama’s cubicle, “The bastard Muslims need to die.” At trial, Bouamama explained that he did not complain to management because “we were at war” and that complaints result in termination. On April 1, 2003, Craig Franklin was placed in charge of the command center and the next day reorganized the center, eliminated 15 jobs, including Bouamama’s and created six new sales supervisor positions to which Bouamama applied. Five days later, Franklin saw photographs in Bouamama’s cubicle and found that they were from Morocco. Franklin asked Bouamama if he was from Morocco and whether he was Muslim. Bouamama answered “yes” and Franklin stated, “you know, you’re lucky that I like you.” Later that day, Bouamama brought the matter up to Ms. Slezak of Human Resources.

Franklin denied Bouamama a sales supervisor position but was informed on April 14 to stay on with the company as a sales representative but also had the option to accept a severance package. On April 15, he was denied a position as a market analyst. He contacted the EEOC on April 17, 2003 and was terminated that same afternoon. The EEOC filed suit alleging, inter alia, that Go Daddy failed to promote Bouamama to Sales Supervisor and later terminated him in retaliation for engaging in protected activities. The jury found liability on the retaliation claim and awarded Bouamama $5,000 for mental and emotional pain and suffering, $135,000 in lost earnings and $250,000 in punitive damages (later reduced to $200,000 per the statutory cap). Go Daddy filed a renewed motion for judgment as a matter of law under FRCP 50(b) and in the alternative, moved for a new trial under Rule 59(a). The court denied both motions.

In affirming the lower court, the Court of Appeals found that Bouamama had been subjected to more than “offhand comments” and “isolated incidents.” and that he had a reasonable belief that he was subjected to unlawful discrimination. The Court noted that when Franklin saw Bouamama’s photographs from Morocco on April 7, Bouamama had just been informed that his position was eliminated but that the way to avoid demotion was to apply for a job through Franklin. The Court found consequently that Bouamama’s two and possibly three complaints (about Franklin in particular) to HR were therefore protected activity. The HR official who received the complaints of discrimination about Franklin’s comments just days earlier, Ms. Slezak, had also taken part in the interviews (along with Franklin) of candidates for the Sales Supervisor position which include Bouamama. Slezak and Franklin took part in the decision not to offer Bouamama a Sales Supervisor position and ultimately took part in the decision to terminate him. The Court found that the jury could conclude that there was sufficient opportunity for Slezak to inform Franklin about Bouamama’s complaints about Franklin. The Court ultimately held that there was sufficient evidence for the jury to find that Bouamama’s
termination and denial of promotion were made in retaliation for his complaints about discrimination. Based on this evidence, the court (2-1) upheld the retaliation finding and the punitive damages award.

A final decision maker’s wholly independent, legitimate decision to terminate an employee insulates a lower-level supervisor involved in the case from liability despite the supervisor’s retaliatory motive to have the employee fired.

*Lakeside-Scott v. Multnomah County*, 556 F. 3d 797 (9th Cir. 2009)

Scott, a county worker, reported a supervisor’s alleged favoritism (preferential treatment in hiring and promotions) of gay and lesbian employees by filing a complaint with the Oregon Bureau of Labor and Industries. Brown, the lower-level supervisor, took the allegations personally. A higher level supervisor, Fuller, ordered Brown to search the email of another employee (Landis) which ultimately led to the termination of Scott for improper use of the county’s computer and email systems. The investigation of Landis’ computer was part of the investigation of another employee who had allegedly sent racially discriminatory emails. A search of Landis’ emails revealed Scott’s journal which contained discriminatory comments about employees and derogatory comments about gays. Brown showed the emails to Fuller who placed Scott on leave. Fuller ordered Turner, an investigator, to investigate whether Scott violated other work rules or policies. Turner interviewed 20 witnesses including Brown, and Brown’s involvement was limited to answering Turner’s questions. Turner concluded that Scott had violated work rules and county policy, and based on Turner’s investigation, Fuller terminated Scott. Scott sued the county and Brown claiming retaliation under 42 USC Sec. 1983 and the Oregon Whistleblower Act. A jury awarded Scott $650,000 and the company appealed. On appeal, the Ninth Circuit, reversed and held that the decision to terminate Scott was not shown to have been influenced by Brown’s retaliatory motives. Rather, Fuller relied upon Turner’s investigation which included statements of 20 other witnesses and Scott’s admission that she improperly used the email system. Scott had to show that Brown’s actions, i.e. filing a complaint with BOLI, caused the termination of Scott, and the facts indicated that Brown’s action was not the motivating factor for the termination. No causation was established between Brown’s action and Fuller’s ultimate decision to terminate Scott.

Title VII does not extend to third-party retaliation claims by relatives or other close associates of charging party.


Robert Thompson was employed for six years as a metallurgical engineer for the company. He met Miriam Regalado at work in 2000 and developed a relationship with her and eventually they became engaged. Their relationship was common knowledge at the company. Regalado filed a charge with the EEOC in September 2002 alleging that her supervisors were discriminating against her because of her gender. The company was served with the charge in February 13, 2003 at a time when Thompson and Regalado were engaged to be married. On March 7, 2003, the company fired Thompson and he alleged in his lawsuit that the termination was in retaliation
for Regalado’s charge. The company moved for summary judgment on Thompson’s suit arguing that Thompson’s allegation that his termination was based on his relationship to Regalado was not a violation under Title VII’s anti-retaliation provisions. The trial court granted summary judgment for the employer and on appeal Thompson contended that Title VII’s anti-retaliation provision prohibits an employer from firing an employee based on the protected activity of his fiancée who works for the same employer.

Although the EEOC guidelines broadly define the protected classes who can allege retaliation because of their close relationship to a charging party or someone who has otherwise engaged in protected activity, the Sixth Circuit Court of Appeals, sitting en banc and relying on Fogleman v. Mercy Hosp., Inc. 283 F.3d 561 (3rd Cir. 2002) (termination of son because of father’s protective activity did not violate ADEA), Holt v. JTM Industries, 89 F.3d 1224 (5th Cir. 1996) (no coverage for terminated husband of employee who had engaged in protective activity under ADEA) and Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998) (rejecting notion that terminated “significant other” of female employee who engaged in protected activity was covered by Title VII) held (10-6) that the “plain language” of Title VII provides that only an individual who has personally engaged in “protected activity” may file a retaliation claim. Thompson had not alleged that he actively opposed the discrimination Regalado endured nor that he helped Regalado file her charge. The court noted that Regalado, however, could file a retaliation charge if the termination of Thompson reasonably served to chill her out.

The dissenters argued that in view of Crawford v. Metro. Gov’t of Nashville & Davidson Cty., 129 S. Ct. 846 (2009), Thompson’s presumed support for his fiancée was sufficient to meet the opposition clause of Title VII and noted that the plaintiff in Crawford had not filed a charge nor made a formal complaint. The dissent also argued that how much opposition Thompson had engaged in was a finding that should not be resolved at summary judgment but is for the jury to decide.

(Note: EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206 (E.D.Cal. 1998) (plaintiff’s claim that his former employer refused to rehire him in retaliation for the discrimination charge filed by the employee’s sister was actionable under Title VII’s anti-retaliation provision).

Summary judgment reversed where hearing impaired employee was terminated 3 days after saying “Aren’t you being discriminatory” to Chief’s secretary who questioned employee’s ability to work because of her impairment.

Casna v. City of Loves Park, 574 F.3d 420 (7th Cir. 2009)

Mary Casna was hired by the City of Loves Park in 1996 as a deputy to the City Clerk. In 1999 she asked to transfer to an administrative-assistant position to another department within the city. Her new supervisor repeatedly told Casna that he was unhappy with her performance. Casna complained about the supervisor to an alderman which upset the Mayor. The Mayor and the Chief agreed to transfer Casna to a temporary position as a police clerk for six months in order to evaluate her performance under a different supervisor. Casna suffered from a hearing impairment resulting from chemotherapy and wore aids in both ears. While this impairment was not the source of her friction with her first supervisor, it became an issue with the police chief’s
secretary, Elliot. Elliot regularly logged Casna’s performance and made frequent negative comments. Two months after the temporary assignment was made, at 4:45 PM, Elliot put a stack of police reports on Casna’s desk and told her to file them by 5:00 PM. While Elliot testified that filing by 5:00 PM was not office protocol, she returned minutes later and told Casna that she was disappointed that the filing was not completed. Casna apologized to Elliot the following morning for not filing the reports immediately but explained that she did not know that the task had to be completed immediately. While Elliot knew that Casna had a hearing impairment, she had seen Casna listening to music at her desk and was frustrated by the apparent inconsistency in Casna’s hearing abilities. After Casna spoke, Elliot snapped, “How can you work if you cannot hear?” Casna countered, “Aren’t you being discriminatory?” Elliot refused to speak further with Casna, and consulted with the Chief who instructed Elliot to prepare a written evaluation of Casna. This was the first time that Elliot had ever conducted a written evaluation of a subordinate during the subordinate’s first year on the job and never evaluated a probationary employee before the full six months of probation were completed. Three days after the encounter between Casna and Elliot, the Mayor based on the Chief’s recommendation fired Casna. Casna sued the City alleging that she was, inter alia, fired in retaliation of the ADA. The District Court granted summary judgment to the City finding that Casna had not engaged in protective activity and was already a candidate for discharge because she fell short of the city’s expectations.

On appeal, the Court of Appeals reversed summary judgment on the retaliation claim. Relying on Phelan v. County County, Ill, 463 F.3d 773 (7th Cir. 2006) (informal complaints can provide an employer with sufficient notice to establish employer liability even if the alerts did not technically comply with company’s notification process), the court held that an informal complaint may constitute protected activity for purposes of retaliation claims. And while the lower court found that there was no causal link between the protected activity and the termination because of the employee’s poor performance, the Court found that while the employee’s failings “may have prompted the discharge, but so may have Loves Park’s intolerance of her complaint about discrimination.” The court focused on the fact that the Chief recommended that Casna be fired the day after she complained to the Chief’s secretary about her hostility to Casna’s hearing impairment. The court held that the suspicious timing in this case, i.e. termination “on the heels” of the protected activity, was extreme enough to create a triable issue of fact. The lower court had to determine whether the Chief recommended termination because of Casna was a poor performer or because she protested the secretary’s discriminatory attitude.

RETALIATION IN HARASSMENT CASES

More and more often, charges of harassment are also accompanied by a retaliation charge. A common form of retaliation occurs when an employer demands sexual favors, the employee refuses and she is terminated or suffers other adverse actions.

As noted earlier, employer conduct which would deter a reasonable employee from reporting discrimination or harassment or from pursuing a complaint is retaliation. Burlington Northern Santa Fe Railway v. White, 126 S. Ct. 2405 (2006). Nearly every harassment lawsuit
filed by the EEOC includes a retaliation charge. Indeed, there have been several cases where the jury finds that the harassment was not “severe or pervasive” enough to constitute harassment but finds that the company retaliated against the employee after she complained. The fact that an employee is retaliated against after she has complained about harassment indicates that a supervisor may not have been aware about the prohibition against retaliation and more importantly, aware that an employee has the right to complain about what she reasonably believes is harassment – whether she is right or not. This again speaks to the need for training for supervisors but also to the importance of imposing discipline against supervisors or coworkers who retaliate. A finding of retaliation can lead to a punitive damages award but disciplining the retaliating party might serve to limit the award.

If a company does not punish the harasser and the retaliating party (who might also be the harasser) it sends a signal to the workforce that retaliation is consistent with company policy and that it is not safe to complain about discrimination or harassment. Thus, the employer will not be able to meet the second prong of the Faragher affirmative defense: the plaintiff employee unreasonably failed to take advantage of available preventative or corrective opportunities, or otherwise failed to avoid harm. Supervisors must be trained to understand that retaliation might constitute a “tangible employment action” that eliminates any affirmative defense. Supervisors that need to know that a charge was filed must always be reminded not to retaliate. See EEOC v. Harris Farms, 2005 WL 2071741 (E.D. Cal.) (punitive damage award upheld where company placed complainant (who alleged that she was raped at gunpoint in the fields by her immediate supervisor) to work in field next to immediate supervisor’s home; supervisor who made the placement was not informed by HR that the charging party had complained to the company).

Separation to Prevent Retaliation:

It is important during an investigation that the complainant and the harasser have no or very limited interaction if required by the nature of their jobs. This may require putting the harasser on administrative leave, moving him to another building, changing his shift, etc. The employer must minimize the opportunities for further harassment and/or retaliation to occur. During the investigation, the work conditions of the complainant should generally not be changed unless she agrees to it. Hence, her duty station, hours of work, job assignments, and benefits should not change. Any change to her normal work routine might be considered retaliation. Unpaid leaves of absences for the complainant until the investigation is finished might be perceived as retaliation since she is losing income when she otherwise could be working.

HR Investigator’s Conduct as Retaliation

The conduct of the investigator after a complaint has been made will also be scrutinized by plaintiff’s counsel. Any acts by the investigator that hint of retaliation will also defeat the affirmative defense. These acts might include inter alia statements like, “if you withdraw your charge we can all go home” or “I’m not here to help you but to protect the company” or “Joe is a family man and needs his job. Are you sure you want to pursue this?” Any hint of retaliation will also raise the question of whether the investigator is truly unbiased. In a recent racial

---

harassment and retaliation case settled in 2008 against a major government contractor, the HR investigator told the charging party that she “wasn’t here to help the charging party but to protect the company”. It is not surprising then that when she heard statements that harassers called the charging party vile, racial slurs on a daily basis and made threats of lynching that she concluded that this wasn’t harassment but merely “guys being guys”. She also stated that in determining whether harassment exists, the investigator must focus on the intent of the alleged harasser. (EEOC v. Lockheed Martin (D.Hawaii), $2,500,000 settlement; under the the Consent Decree Lockheed Martin agreed to terminate one of the harassers and permanently bar the rehire of the remaining harassers).

In Lockheed Martin, the Charging Party traveled from Honolulu, Hawaii to Greenville, South Carolina to speak with a top official in Human Resources at corporate headquarters. Charging party asked that he not be assigned to work again with the same crew that had been racially harassing him and threatening his safety. He was told that if he did not take the assignment in Maine, he would be laid off. Thereupon, the charging party informed HR that he had just filed a charge with the EEOC. The HR official then stated to the effect, “What did you do that for? We have 130,000 employees. I could have found you a job. You see those file cabinets? They’re full of cases filed by employees. You can take your chances with the EEOC. We’re Lockheed-Martin. We never lose.” The lay off and the official’s statements were clearly intended to “chill the charging party” and thus constituted retaliation.

Thus, the steps taken by the company even before the formal investigation begins are critical. They can doom an investigation, buttress a charge of retaliation and defeat an affirmative defense. Furthermore, such actions may also support a claim for punitive damages. See EEOC v. Harris Farms, 2005 WL 2071741 (E.D. Cal.) (punitive damage jury award upheld where employee had complained about sexual harassment (including rapes by her supervisor) and retaliation occurred during the investigation and while the EEOC charge was pending).4

4 The court in Harris Farms noted:

As applied to this case, there is sufficient evidence to support the award of punitive damages. First, evidence was presented that Defendant had an out of date written policy against sexual harassment. For example, the policy did not describe conduct that could constitute sexual harassment or have an anti-retaliation provision.

Also, evidence was presented that after the conclusion of Tamayo's (charging party) first complaint against Rodriguez (for grabbing her arm and harassing her), Tamayo was assigned to work in a field near Rodriguez's home. Although Tamayo's supervisor, Raul Enriquez, admitted that he assigned Tamayo to work in the field near Rodriguez's home, he was not told by human resources that Tamayo had filed a complaint against Rodriguez or that the two should be kept apart. Similarly, when Tamayo reported Rodriguez's truck driving slowly back and forth near the field where she was working and that she was afraid, no further formal action appears to have been taken.

On August 18, 1999, two days after the “drive by” incident, evidence was presented that Tamayo reported to Defendant's human resources department that Rodriguez had raped her. Although Defendant had called Deputy Sheriff Crittenden to investigate the “grabbing incident” involving Rodriguez, Crittenden was not contacted about the rapes. Moreover, Rodriguez was not
interviewed regarding the rapes until September 29, 1999, approximately six weeks after Tamayo reported the rapes. During this six week period, Tamayo filed a complaint with the EEOC on September 24, 1999. Despite the seriousness of the allegations, no further discipline was taken and no final report or findings were made by Defendant/the human resources department. Instead, the status quo remained and Rodriguez retired in December 1999.

Also, testimony was presented that between 1999 and 2001, rumors regarding Tamayo and Rodriguez were being spread. The rumors evolved into threats of violence, specifically that Rodriguez was willing to pay $2,000 to have Tamayo drugged and then have pictures made showing her having sex. The pictures would then be sent to Tamayo's husband in order to break up the marriage. Additionally, rumors/gossip was spread that Tamayo preferred to be on top of men during sex. Tamayo complained of these rumors in late twice in late January 2001 to her immediate supervisors. On February 2, 2001, Tamayo went to the office and told the human resources director, Sylvia Gomez, about the rumors, said that employees Hernandez, Mendoza, and Mosqueda were spreading the rumors, said that she was scared, and requested not to work alone. The following day Tamayo returned to the office and was informed that her request to be transferred to a job where she would not work alone was denied. Tamayo then requested that she and two witnesses to the gossip/rumors (Gustavo and Lourdes Ramirez) speak with Larry Chrisco, the farm manager. Despite the violent nature of the rumors and Tamayo's fears, Tamayo and her witnesses did not meet with Chrisco until approximately three weeks later on February 21, 2001. At the meeting with Chrisco, the gossip and rumors were related to Chrisco by both Tamayo and her witnesses. Additionally, the Ramirezes told Chrisco that their work vehicles had been vandalized prior to the meeting. Specifically that the tires of Gustavo's truck had been slashed and hydraulic lines on Lourdes's vehicle had been cut.

Gomez began an investigation that ended on March 12, 2001. Gomez concluded that there were two groups involved in the rumors, one group consisting of Tamayo and the Ramirezes and a second group consisting of Hernandez, Mendoza, and Mosqueda. All involved in the gossip/rumors were disciplined, including Tamayo and the Ramirezes. Tamayo was suspended for one day without pay and given a final written warning about engaging in sexually inappropriate behavior at the work place. Chrisco had recommended that everyone involved be suspended without pay for two weeks. Gomez concluded that Tamayo had participated in the gossip and made sexually inappropriate comments, but no specific evidence was introduced to support this conclusion. Gomez also refused to tell Tamayo what was going to happen to the other workers involved. Three of the workers involved, Lourdes Ramirez (one of Tamayo's witnesses), Mendoza, and Mosqueda were terminated because of prior warnings. Even though Tamayo was the one who complained about the gossip against her and sought help, and despite the prior histories of inappropriate gossip and harassment by Mendoza and Mosqueda, Gomez and Defendant's management reached the conclusion that Tamayo had engaged in inappropriate sexual communications/conduct and that discipline was appropriate.

Taken as a whole, the above evidence is sufficient to support a finding that Defendant acted with reckless disregard to Tamayo's rights. The evidence of the failure to transfer jobs, suspension, and a final written warning is sufficient to support the jury's finding of retaliation, which can support an award of punitive damages. (citations omitted) …. Finally, the investigations of the 1999 complaints were performed by Defendant's human resources agents and the investigation and retaliatory conduct regarding the 2001 complaint were performed and approved by Defendant's human resources director and management. (citations omitted) ….Viewed in this favorable light, the above evidence is sufficient to show that Defendant acted with reckless disregard to Tamayo's federally protected rights.

(emphasis added)