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Retaliation

by

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I. Overview

A. Whose "Reasonable Belief" Suffices for the First Element of the *Prima Facie* Case?

Summa v. Hofstra University, 708 F.3d 115, 126, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. Plaintiff was a graduate student working as football team manager, and the harassers were members of the football team. "Hofstra concedes that each of Summa's asserted claims—namely, (1) the denial of the football manager position for 2007 Spring Ball; (2) the denial of the graduate assistantship position in the Office of University Relations; and (3) the termination of Summa's privilege of student employment—constitutes an adverse employment action." *Id.* The district court held that plaintiff could not reasonably have believed the harassment was a violation of Title VII, and thus held that her complaints were not protected. Rejecting this view, the court of appeals stated:

> That the school considered these complaints to be "student-on-student" issues is of no moment, as the first element of the prima facie case explicitly contemplates the belief of the plaintiff, not of the employer. . . . It is clear from Summa's formal EEO complaint that she believed that the event was employment related. Furthermore, this was an entirely reasonable belief because Summa was not on the football team bus in her capacity as a graduate student, but rather was there solely in her capacity as an employee of the Athletics Department.

Id. The court held that plaintiff had established protected conduct.

B. Protected Conduct

1. Participation in Internal Investigation

Crawford v. Metropolitan Government of Nashville and Davidson County, __ **U.S.** __, 129 S. Ct. 846, 172 L. Ed. 2d 650, 105 Fair Empl.Prac.Cas. (BNA) 353 (2009), reversed the decision of the Sixth Circuit and held that employees who give evidence of harassment in an internal investigation in response to the employer's questions, without having come forward on their own and without any EEOC charge having been filed, are protected by the opposition clause of § 704(a) of Title VII. Plaintiff and two other women described harassment by Employee Human Relations Director Hughes. No action was taken against Hughes, but all three women were fired. Plaintiff was assertedly fired for embezzlement. The Court stated: "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." Justices Alito and Thomas concurred in the judgment.

2. Complaint to Person Without the Power to Correct the Problem

Bonds v. Leavitt, 629 F.3d 369, 381-82, 111 Fair Empl.Prac.Cas. (BNA) 171, 31 IER Cases 1078 (**4th Cir.** 2011), reversed the dismissal of plaintiff's claims under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). The district court had dismissed plaintiff's claim that her she made a protected disclosure of wrongdoing to Dr. Elizabeth Nabel, who was the Director of the NIH's National Heart, Lung, and Blood Institute, and her third-level supervisor, in part because Dr. Nabel did not have authority to provide a remedy for the wrongdoing. The court relied on the amendment to the WPA changing the coverage language from "a disclosure" to "any disclosure," and restrictively read *Hooven-Lewis v. Caldera*, 249 F.3d 259, 276 (**4th Cir.** 2001), as holding only that a disclosure to the wrongdoer is nor a disclosure to anyone.

3. Oral Complaints

Kasten v. Saint-Gobain Performance Plastics, __ **U.S.** __, 131 S.Ct. 1325, 179 L.Ed.2d 379, 17 Wage & Hour Cas.2d (BNA) 577 (2011), held that an oral complaint of a wage and hour violation is sufficient to trigger the protections against retaliation in the Fair Labor Standards Act. The Court did not resolve the question whether complaints must be made to the government in order to be protected, or can instead be protected if made internally within the employer.

Summa v. Hofstra University, 708 F.3d 115, 126-27, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. The court held that plaintiff's oral complaints were protected:

> Finally, as Summa correctly notes, the district court erroneously confined its consideration to her written complaints. The written notes of the University's Equality Officer evidence that Summa complained about the entire course of harassment over the semester. In determining the reasonableness of Summa's belief, the court should have considered these complaints as well because "[t]he law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges."

(Citation omitted.)

4. The Need to Be Specific

Smith v. International Paper Co., 523 F.3d 845, 103 FEP Cases 37 (**8th Cir.** 2008), affirmed the grant of summary judgment to the Title VII racial discrimination defendant on plaintiff's retaliation claim. Plaintiff complained to Human Resources that his supervisor was constantly cursing and criticizing him, and asserted that his supervisor later told him that the supervisor would "get him" for making the complaint. The court held at p. 848 n.2 that, even if this were considered direct evidence as plaintiff asserted, the complaint itself was not protected by Title VII because plaintiff never said he was complaining of racial discrimination. The court observed that plaintiff's complaint to his supervisor, accusing the supervisor of prejudice, may

well have been protected, but plaintiff never asserted that he was retaliated against for that complaint. *Id.* at p. 849.

5. Symmetry and Asymmetry

a. Complaint of Conduct Not Protected by Statute Also Not Protected

Bonds v. Leavitt, 629 F.3d 369, 384, 111 Fair Empl.Prac.Cas. (BNA) 171, 31 IER Cases 1078 (**4th Cir.** 2011), affirmed the dismissal of plaintiff's Title VII retaliation claim because the conduct of which she complained did not involve an employment practice. Dr. Bonds had complained of the unconsented retention of cell lines from blood samples taken for research on sickle cell anemia. The court held that private employees would not be protected from such retaliation: "Title VII is not a general bad acts statute, however, and it does not prohibit private employers from retaliating against an employee based on her opposition to discriminatory practices that are outside the scope of Title VII." *Id.* The court stated it had "little doubt" that Congress intended to prohibit retaliation against Federal employees despite the lack of a reference to retaliation in 42 U.S.C. § 2000e-16, but added: "Nonetheless, we see no basis for concluding that conduct of the type at issue here—which would not be protected by § 2000e-3(a) if undertaken by a private employee—should be protected by § 2000e-16(a)." *Id.*

b. Complaint of Conduct Not Protected by Statute Is Protected

Dawson v. Entek Int'l, 630 F.3d 928, 936-37, 111 Fair Empl.Prac.Cas. (BNA) 306 (**9th Cir.** 2011), reversed the grant of summary judgment to defendant, and held, *inter alia*, that a complaint of discrimination based on sexual orientation is protected activity for purposes of Title VII's anti-retaliation provision. The court affirmed the grant of summary judgment on the underlying Title VII sexual harassment claim because plaintiff contended that he did not have effeminate characteristics, but reversed the grant of summary judgment on the underlying Oregon sexual-orientation harassment claim. *Id.* at 937-38.

6. Harassment Complaints About Trivia Not Protected

Grosdidier v. Broadcasting Bd. of Governors, 709 F.3d 19, 24, 117 Fair Empl.Prac.Cas. (BNA) 946 (**D.C. Cir.** 2013), affirmed the grant of summary judgment to the Title VII defendant on plaintiff's retaliation claim. The court held that plaintiff did not engage in protected activity because no person could have believed that the conduct of which plaintiff complained constituted harassment. The court stated: "The type of conduct referenced in Grosdidier's complaints, such as circulating an email with a suggestive image of a well-known musician straddling a cannon and excessive hugging and kissing between a female coworker and several male coworkers and visitors, is insufficient to support a good faith belief that the conduct was 'so objectively offensive as to alter the 'conditions' of [her] employment.'"

Comment by Richard Seymour on *Grosdidier*: I do not think this decision affects the question whether employees are protected when they complain of conduct before it reaches the critical mass of being severe or pervasive under *Faragher* and *Ellerth*. The above descriptions involve all that was potentially amiss over a period of years, with no evidence at all suggesting that there was an increasing crescendo of conduct that would imminently become severe or

pervasive. The best that can be said for the complaints is that they reflected a hyper-sensitive approach that nowhere came within a football field of offending a reasonable person.

7. Preemptive Demands for Fair Treatment Not Protected

Gilbert v. Napolitano, 670 F.3d 258, 262, 114 Fair Empl.Prac.Cas. (BNA) 923 (**D.C. Cir.** 2012), affirmed in part and reversed in part the grant of summary judgment to the Title VII and ADEA defendant. The court held that a preemptive demand of fair treatment and of freedom from retaliation for prior EEO activities, was not protected conduct: "But *Crawford* provides no support for the odd proposition that asking a new employer for fair treatment going forward, as opposed to challenging the employer's past unlawful activity, qualifies as opposing a practice made unlawful by Title VII." The court affirmed the grant of summary judgment to defendant on the retaliation count.

8. Stealing Federal Documents for Use in an EEO Case Not Protected

Gilbert v. Napolitano, 670 F.3d 258, 264, 114 Fair Empl.Prac.Cas. (BNA) 923 (**D.C. Cir.** 2012), affirmed in part and reversed in part the grant of summary judgment to the Title VII and ADEA defendant. The court held that defendant had articulated a legitimate nondiscriminatory reason for failing to select plaintiff for another position as to which plaintiff had claimed retaliation, in that he had asked another employee to take from the agency and provide him with confidential documents. The court stated: "But it makes no difference that Gilbert's actions—which Ahern honestly believed constituted misconduct—occurred in the course of a discrimination case because asking a government employee to obtain documents unlawfully cannot itself qualify as protected activity."

C. Actionable Events

1. The Standard Set by *Burlington Northern*

Burlington Northern and Santa Fe Ry. Co. v. White, 548 **U.S.** 53, 98 FEP Cases 385 (2006), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The Court held that the language and purpose of § 704(a) of the Act required that it reach employer conduct not reached by § 703(a). It stated that "purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64. The Court summarized its holding:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Id. at 57. The Court rejected the "ultimate employment decision" line of cases, stating:

> In any event, as we have explained, differences in the purpose of the two provisions remove any perceived "anomaly," for they justify this difference of interpretation. . . . Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." . . . Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.
>
> For these reasons, we conclude that Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions."

Id. at 67. The Court's holding is:

> The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Id. at 67-68 (citations omitted). The Court made clear that materiality was an important criterion:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed.1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. . . . It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. . . . And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 MANUAL § 8, p. 8–13.

Id. at 68 (emphasis in original; citations omitted). The Court explained the need for an objective test:

> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to deter-mine a plaintiff's*69 unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, *Suders*, 542 U.S., at 141, 124 S.Ct. 2342 (constructive discharge doctrine); *Harris v. Fork-lift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (hostile work environment doctrine).

Id. at 68-69 (emphasis in original). The Court expanded on the application of this standard to particular cases, making clear that there are few, if any, bright-line tests:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "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." . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. . . . A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 MANUAL § 8, p. 8-14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." . . .

Id. at 69 (citations omitted). Here, plaintiff was assigned to a more arduous position, and was suspended without pay for 37 days, although she ultimately received back pay for this period. The Court held that each was actionable:

> First, Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. . . . We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation." 2 EEOC 1991 Manual § 614.7, pp. 614-31 to 614-32; see also 1972 Reference Manual § 495.2 (noting Commission decision involving an employer's ordering an employee "to do an unpleasant work assignment in retaliation" for filing racial discrimination complaint); EEOC Dec. No. 74-77, 1974 WL 3847, *4 (Jan. 18, 1974) ("Employers have been

enjoined" under Title VII "from imposing unpleasant work assignments upon an employee for filing charges").

To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" . . . But here, the jury had before it considerable evidence that the track labor duties were "by all accounts more arduous and dirtier"; that the "forklift operator position required more qualifications, which is an indication of prestige"; and that "the forklift operator position was objectively considered a better job and the male employees resented White for occupying it." . . . Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.

Id. at 70-71 (citation omitted). Turning to the suspension, the Court stated:

Second, Burlington argues that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay. Burlington says that "it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full back pay" to be unlawful, particularly because Title VII, throughout much of its history, provided no relief in an equitable action for victims in White's position. . . .

We do not find Burlington's last mentioned reference to the nature of Title VII's remedies convincing. After all, throughout its history, Title VII has provided for injunctions to "bar like discrimination in the future" . . . an important form of relief. . . . And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay. In any event, Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory (as White received here) and punitive damages, concluding that the additional remedies were necessary to "'help make victims whole.'" . . . We would undermine the significance of that congressional judgment were we to conclude that employers could avoid liability in these circumstances.

Neither do we find convincing any claim of insufficient evidence. 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. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused. 1 Tr. 154 ("That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed"). Indeed, she obtained medical treatment for her emotional distress. A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay. . . . Thus, the jury's conclusion that the 37-day

suspension without pay was materially adverse was a reasonable one.

Id. at 71-73 (citations omitted). Justice Alito concurred in the judgment.

2. Harassment

Many courts have held that the creation of a hostile working environment is an actionable form of retaliation. *E.g.*, *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3d Cir. 2001), *cert. denied*, 536 U.S. 906 (2002) (False Claims Act).

Noviello v. City of Boston, 398 F.3d 76, 89 (**1st Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant on plaintiff's claim of retaliatory harassment. Recognizing the split among the Circuits, the court held: "The weight of authority supports the view that, under Title VII, the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action under 42 U.S.C. § 2000e-3(a)." (Citations omitted.)

Jensen v. Potter, 435 F.3d 444, 97 FEP Cases 555 (**3d Cir.** 2006) (Alito, J.), reversed the grant of summary judgment to the Title VII retaliation defendant U.S. Postal Service. Plaintiff was assigned to the unit formerly headed by the supervisor who was fired after he sexually propositioned her and she complained of it. The employees in the area began to harass her by a variety of means, including threats, vandalism to her car, obnoxious statements, and physically intimidating behavior. She complained repeatedly and her supervisors took no action for nineteen months. The court held that co-worker harassment can constitute an actionable form of retaliation. "If harassment can alter the terms or conditions of employment under § 2000e-2, then *Robinson* teaches that the same is true under § 2000e-3." *Id.* at 449. The court defined the elements of such a claim: "Thus, Jensen must prove that (1) she suffered intentional discrimination because of her protected activity; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected her; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) a basis for employer liability is present." *Id.* (citations and footnotes omitted). The court held that the focus must not be on specific incidents in isolation, but on "'the overall scenario.'" *Id.* at 450.

Smith v. Northeastern Illinois University, 388 F.3d 559, 567 n.5, 94 Fair Empl.Prac.Cas. (BNA) 1295 (**7th Cir.** 2004), affirmed the dismissal of plaintiffs' claims, but held:

> The creation of a hostile work environment can be a form of retaliation. See *Knox v. State of Ind.*, 93 F.3d 1327, 1334 (7th Cir.1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint... No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment...").

Berry v. Delta Airlines, Inc., 260 F.3d 803, 809, 86 Fair Empl.Prac.Cas. (BNA) 1367 (**7th Cir.** 2001), affirmed the grant of summary judgment to the defendant, and stated:

> Moreover, while Title VII may impose liability on an employer for the creation or toleration of a hostile environment motivated purely by the plaintiff's filing of a

> complaint of sexual harassment, this is a form of retaliation rather than sexual harassment, and it must be argued as such.

(Citation omitted.)

Smith v. Northeastern Illinois University, 388 F.3d 559, 567 n.5, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment defendants. The court stated: "The creation of a hostile work environment can be a form of retaliation."

Baker v. John Morrell & Co., 382 F.3d 816, 830 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. The court upheld the jury's finding that plaintiff's female supervisor, Kathi Brown, retaliated against her for having filed her complaint with the Iowa Civil Rights Commission by creating a retaliatory hostile environment severe enough to qualify as an adverse employment action: "Here, Baker presented evidence showing Brown became antagonistic towards her because the ICRA complaint reflected badly on Brown's job performance. In response, Brown limited Baker's bathroom and other breaks, added to her job duties, refused to provide her necessary job assistance, repeatedly yelled at her for making mistakes, withheld privileges allowed to other employees, and attempted to dissuade her from making further complaints. We are satisfied these retaliatory changes in working conditions constituted significant and material disadvantages sufficient to support the retaliation claim."

3. Associational Discrimination

Thompson v. North American Stainless, LP, __ **U.S.** __, 131 S.Ct. 863, 111 Fair Empl.Prac.Cas. (BNA) 385 (2011) (Scalia, J.), reversed the Sixth Circuit, and held that Title VII protects employees from being fired because their fiancées or family members filed EEOC charges under the statute. The Court stated: "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired." *Id.* at 868. The Court stated: "We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. As we explained in *Burlington*, 548 U.S., at 69, 126 S.Ct. 2405, 'the significance of any given act of retaliation will often depend upon the particular circumstances.' Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules." *Id.* at 868-69. The Court held that the question whether Thompson could sue under Title VII was more difficult. *Id.* at 869. It held that the statutory phrase "person aggrieved" did not reach as far as Article III, but that it included persons within the zone of interests protected by the statute, referring to the use of that term in construing the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* *Id.* at 870 (citations omitted). Justice Ginsberg, joined by Justice Breyer, concurred, relying on the EEOC Compliance Manual. *Id.* at 870-71.

Comment by Richard Seymour on *Thompson v. North American Stainless*: The Court seems to be looking for ways to integrate civil rights law with existing bodies of law having nothing to do with civil rights. It would have been difficult to predict that the Court would draw its standard from the Administrative Procedures Act, and it is unclear what difference that standard is supposed to make. Will this "zone of interests" analysis now apply to all anti-retaliation statutes? Implied prohibitions against retaliation? Whistleblower laws? Unfair labor practice charges?

4. Discharge for Rejecting Demand to Arbitrate Existing Dispute

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1278–79, 102 FEP Cases 716 (**11th Cir.** 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. Plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because he was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court distinguished its earlier decision that refusal to sign an arbitration agreement was not protected conduct, because Bagby imposed the requirement knowing that plaintiff had a pending charge. The court stated: "No other employee had a pending charge when Goldsmith was terminated, although other employees with pending charges had been terminated earlier. When another employee objected to the dispute resolution agreement, the employee was urged to reconsider, but Goldsmith was not. Taken together, this evidence was sufficient for a reasonable jury to find a causal relation between the filing of Goldsmith's charge of discrimination and his termination." *Id.* at 1278–79. The court held that the failure to sign the arbitration agreement was not a nondiscriminatory reason, because it was retaliatory. *Id.* at 1279.

5. Failure to Hire or Transfer

Sánchez-Rodriguez v. AT & T Mobility Puerto Rico, Inc., 673 F.3d 1, 114 Fair Empl.Prac.Cas. (BNA) 912 (**1st Cir.** 2012), affirmed the grant of summary judgment to the Title VII religious discrimination and retaliation defendant. Plaintiff claimed retaliation, among other factors, because he was not interviewed for a position for which he applied. The record was silent as to whether he was qualified for the position. The court stated: "Because Sánchez is the party who bears the burden of demonstrating these factors, this lack of evidence weighs against Sánchez, even though AT & T was the summary judgment movant. . . . Thus, we conclude that Sánchez cannot demonstrate that the failure to interview him for the Small Biz Advisor position was an 'adverse employment action' for the purposes of his retaliation claim." *Id.* at 14 (citation omitted).

6. Proffering Unreasonable Religious Accommodations

Sánchez-Rodriguez v. AT & T Mobility Puerto Rico, Inc., 673 F.3d 1, 15, 114 Fair Empl.Prac.Cas. (BNA) 912 (**1st Cir.** 2012), affirmed the grant of summary judgment to the Title VII religious discrimination and retaliation defendant. Plaintiff claimed retaliation, among other factors, because he was assertedly offered unreasonable accommodations for his religious need not to work on Saturdays. The court stated: "Hypothetically, an employer could offer an "accommodation" that is so objectively unreasonable or unworkable, or such an insult to an employee's religious beliefs, that a reasonable worker would be dissuaded from pursuing a charge of discrimination. But that is not the case here."

7. Are Retaliatory Counterclaims Actionable?

a. Supreme Court Context

There has been a great deal of recent discussion on plaintiffs' attorneys' list-serves on whether some or all counterclaims against the plaintiff by the defendant employer or its officials is actionable retaliation, or can constitute a conspiracy to deprive the plaintiff of her or his civil rights under 42 U.S.C. § 1985(3). An analogous situation arose when defendants in cases based on legislative rights counterclaimed that the plaintiff had lobbied for and obtained the legislation in order to create barriers to competition, and that the lawsuit based on the resulting legislation was unlawful as a breach of the antitrust laws. One major roadblock to such claims is the First Amendment right of the employer and its officials to petition the government, including the courts, for relief.

Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 **U.S.** 127, 138 (1961), rejected the effort of trucking companies to declare that the railroads' successful campaign to obtain legislation favoring railroads over truckers was a violation of the Sherman Act. The Court held that "such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." The Court held that a motive to obtain competitive advantage, and to place competitors at a disadvantage, did not rob the effort of its protection under the First Amendment. *Id.* at 138-40. The Court explained:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. This Court has expressly recognized this fact in its opinion in United States v. Rock Royal Co-op., where it was said: 'If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act * * *.' Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

Id. at 139-40. Simultaneously, the Court recognized an exception for "sham" activity:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more

> than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here.

Id. at 143. The reason it was not the case was that it was the campaign really was intended to influence governmental action, and was highly successful. *Id.*

The Supreme Court again addressed this question in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 **U.S.** 49, 60-61 (1993). It stated:

> We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail.FN5/ Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," *Noerr, supra*, 365 U.S., at 144 81 S.Ct., at 533 (emphasis added), through the "use [of] the governmental process-as opposed to the outcome of that process-as an anticompetitive weapon," *Omni*, 499 U.S., at 380, 111 S.Ct., at 1354 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's economic viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.
>
> _____
>
> FN5/ A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in post hoc reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-422, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). *Accord*, *Hughes v. Rowe*, 449 U.S. 5, 14-15, 101 S.Ct. 173, 178-179, 66 L.Ed.2d 163 (1980) (*per curiam*). The court must remember that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Christiansburg, supra*, 434 U.S., at 422, 98 S.Ct., at 701.

(Emphasis in original.)

The Court applied this principle to the National Labor Relations Act in *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 **U.S.** 731, 743, 113 L.R.R.M. (BNA) 2647 (1983), holding that retaliatory motive did not matter if the retaliatory claim or counterclaim was well-founded: "The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice,

even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." The Court continued:

> Although it is not unlawful under the Act to prosecute a meritorious action, the same is not true of suits based on insubstantial claims—suits that lack, to use the term coined by the Board, a "reasonable basis." Such suits are not within the scope of First Amendment protection:
>
> > The first amendment interests involved in private litigation—compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts—are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.
>
> Just as false statements are not immunized by the First Amendment right to freedom of speech . . . baseless litigation is not immunized by the First Amendment right to petition.

(Citations and footnote omitted.) The Court held that the NLRB could not treat an ongoing action as baseless and enjoin it if its merit turned on the credibility of witnesses, or presented a genuine issue of material fact. *Id.* at 744-45. When the litigation was completed, however, a different standard applies. If the employer wins on its claim, the claim cannot be considered baseless. *Id.* at 747. If the employer loses or withdraws the claim, "the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses. It may also order any other proper relief that would effectuate the policies of the Act." *Id.* (citation and footnote omitted).

Finally, in *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 170 L.R.R.M. (BNA) 2225 (2002), the Court held that the NLRB could not declare unlawful any unsuccessful suit filed because of a retaliatory motive, but only those that were objectively baseless.

b. Courts of Appeals

Bryant v. Military Department of Mississippi, 597 F.3d 678, 691-92, 30 IER Cases 654 (**5th Cir.** 2010), *cert. denied*, __ **U.S.** __, 131 S.Ct. 287, 178 L.Ed.2d 141 (2010), affirmed the dismissal of the plaintiff airman's whistleblower lawsuit against the Mississippi Air National Guard and several of its officials. The court held that suits brought by individual defendants against plaintiff were not objectively baseless, and thus could not be violations of § 1985(3), without having to consider the issue of retaliatory motive:

> Accordingly, we find the narrow holding of *BE & K* inapposite to the issues raised in this case. Rather, the standard to be applied to the allegedly retaliatory litigation is the *Professional Real Estate Investors* test, requiring a finding that the petitioning activity is "objectively baseless," before subjective intent is considered. This test, rather than *Bill Johnson's*, has been extended outside the area of antitrust to other contexts and we find it appropriate here.

(Footnote omitted.) The court also held that the burden of showing objective baselessness was on the plaintiff. *Id.* at 692.

8. What Other Conduct is Actionable?

a. Request for Change in Office Space Not Actionable

Lockridge v. The University of Maine System, 597 F.3d 464, 108 Fair Empl.Prac.Cas. (BNA) 1160 (**1st Cir.** 2010), affirmed the grant of summary judgment to the Title VII sex discrimination defendant. The court held that the denial of plaintiff's request for a change in office space could not be actionable, where plaintiff's resulting office space was the same as for many of her co-workers.

b. Two Days' Loss of Pay Actionable

Young-Losee v. Graphic Packaging Int'l, Inc., 631 F.3d 909, 111 Fair Empl.Prac.Cas. (BNA) 488 (**8th Cir.** 2011), reversed the grant of summary judgment to the Title VII sexual harassment and retaliation defendant. The court stated at 912:

> Young-Losee presented direct evidence that she was terminated in retaliation for filing a formal complaint of harassment. At the May 6 meeting, plant supervisor Shelley wadded up her complaint, called it "total bullshit," threw it in the garbage can, told her to leave, and said he never wanted to see her again. These facts are direct evidence of a causal link between the filing of the complaint and her firing.

The lower court held there was no materially adverse employment action because she was paid through May 15, and an HR official who performed an investigation told her she had not been fired, and that she could return to work. The court of appeals held: "Being fired for making a discrimination complaint—even if rescinded after two days—might well dissuade a reasonable employee from making a complaint of harassment." *Id.* at 913.

9. Spreading Rumors

Abdullahi v. Prada USA Corp., 520 F.3d 710, 713, 102 FEP Cases 1537 (**7th Cir.** 2008), reversed the grant of summary judgment to defendant on plaintiff's Title VII retaliation claim, holding that plaintiff stated a valid claim by alleging that her former employer spread derogatory rumors about her in retaliation for her filing of her charge of discrimination.

10. *Burlington Northern* Standard Unavailable under USERRA

Lisdahl v. Mayo Foundation, 633 F.3d 712, 190 L.R.R.M. (BNA) 2325 (**8th Cir.** 2011), affirmed the grant of summary judgment to the USERRA defendant. The court held at 721 that USERRA retaliation claims are limited to adverse employment actions, unlike Title VII retaliation claims: "Unlike the situation in Burlington, no comparable textual distinction exists between USERRA's anti-discrimination provision, 38 U.S.C. § 4311(a), and the anti-retaliation provision, § 4311(b). USERRA's anti-retaliation provision expressly limits actionable harm to "adverse employment action," not the broader "discrimination" prohibited by Title VII's anti-

retaliation provision." The court held that the myriad of assertedly adverse employment actions alleged by two plaintiffs amounted to no more than petty irritations and slights. *Id.* at 722.

11. Retaliation by Co-Workers

Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 346, 102 FEP Cases 1165 (**6th Cir.** 2008), affirmed in part and reversed in part the grant of summary judgment to Ohio law defendant, using Title VII principles. Plaintiff Hill complained that, in retaliation for reporting harassment, the harasser set her car on fire. Plaintiff Jackson complained that, in retaliation for participating in an internal investigation of another woman's harassment complaint, the harasser set her house on fire. The court held that, "in appropriate circumstances, Title VII permits claims against an employer for coworker retaliation." *Id.* at 346. The court then defined the "appropriate circumstances":

> Taking into account our caselaw and the guidance provided by *Burlington Northern*, we hold that an employer will be liable for the coworker's actions if (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.

Id. at 347. The court held that Hill had provided enough evidence to survive summary judgment. She had informed management that Robinson had set the fire in retaliation for her complaint of sexual harassment, and management's only response was to chide her for making the complaint. *Id.* at 347–49. The court held that, regardless of whether Jackson was protected, defendant took reasonable action: "Anheuser-Busch undertook proactive steps to protect both Jackson and Hawkins from retaliation when it decided to fire Robinson, including coordinating with law enforcement to monitor Robinson, hiring a security guard to follow him, and offering Jackson the protection of a security guard at her home, which she refused." *Id.* at 349.

12. Actions Not Sufficiently Adverse

Semsroth v. City of Wichita, 555 F.3d 1182, 105 FEP Cases 1049 (**10th Cir.** 2009), affirmed the grant of summary judgment to the Title VII retaliation defendants. The court held at 1185 that under *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006), "We take a case-by-case approach, asking whether the record contains objective evidence of material disadvantage or merely the bald personal preferences of the plaintiff. . . . If only the latter, the retaliation claim fails." (Citations omitted.) The court held that the initial denial, and later reversal, of a requested transfer of plaintiff Warehime from one duty station to another, without a delay in the effective date of the transfer, was not shown to create a material disadvantage. *Id.* at 1186. The court similarly held that an assignment of plaintiff Voyles to one light-duty position rather than another, subjectively preferred, position had not been shown to create a material disadvantage, particularly where the plaintiff ultimately received a transfer to a position in which she had previously expressed interest. *Id.* Finally, the court held that plaintiff Semsroth had not

shown that a fitness-for-duty examination created a material disadvantage where it was not imposed on her, she voluntarily continued with the examination after being informed of its nature, and the Police Department ignored the results of the examination. *Id.* at 1187. The court stated: "The voluntary nature of the appointment with Dr. Bowman drains the incident of any material adversity that a mandatory fitness-for-duty test might present." *Id.*

D. Causation

Butler v. Crittenden County, 708 F.3d 1044, 117 Fair Empl.Prac.Cas. (BNA) 757 (**8th Cir.** 2013), affirmed the dismissal of plaintiff's § 1983 retaliation claim arising from her filing an EEOC charge because she was terminated before she filed a charge. It rejected her claim of retaliation for making internal complaints because she was first suspended for tardiness that occurred prior to her first internal complaint, and she was fired for continuing to be tardy.

1. Admission: Plaintiff "Overstepped Bounds" by Reporting Misconduct

Bonds v. Leavitt, 629 F.3d 369, 382, 111 Fair Empl.Prac.Cas. (BNA) 171, 31 IER Cases 1078 (**4th Cir.** 2011), reversed the dismissal of plaintiff's claims under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). The district court had dismissed plaintiff's claim that her she made a protected disclosure of wrongdoing to Dr. Elizabeth Nabel, who was the Director of the NIH's National Heart, Lung, and Blood Institute, and her third-level supervisor, in part because the disclosure was part of her official job duties. Reversing, the court of appeals reserved the question whether it would permit such an exception to the protections of the WPA, and held that in any event plaintiff's superiors' view that she overstepped the bounds of her job, or was unprofessional, in reporting wrongdoing to Dr. Nabel, were enough to defeat summary judgment on the question whether the report was outside the duties of her job.

2. Intervening Cause

Vaughn v. Vilsack, __ F.3d __, 2013 WL 856515 (**7th Cir.** March 8, 2013) (No. 11-3673), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that adverse actions against plaintiff shortly after he settled his discrimination claims were actually caused by the settlement the defendant had just reached with the female employee who had filed repeated sexual harassment claims against plaintiff, obtained a state-court injunction against him for his admitted stalking and repeated compulsive contacting her.

3. Knowledge of Protected Activity

Rivera-Colón v. Mills, 635 F.3d 9, 12, 111 Fair Empl.Prac.Cas. (BNA) 737 (**1st Cir.** 2011), affirmed the grant of summary judgment to the Title VII retaliation defendant. Plaintiff made an anonymous complaint, and was subsequently suspended for two days. The court affirmed the lower court's determination that this could not have been retaliatory, because plaintiff did not rebut defendant's showing that "she was suspended before the supervisors who imposed the suspension learned she was the source of the anonymous complaint."

Summa v. Hofstra University, 708 F.3d 115, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York

State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. The court stated at 124:

> It is apparent that a number of Hofstra officials—including Cohen, Equality Officer Maureen Murphy, and Linda O'Malley of the Office of the Dean of Students—were aware of Summa's complaints throughout 2006 and 2007. And, at a minimum, the University's legal office knew about the instant litigation. Nothing "more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity" . . . and it is apparent Hofstra had such knowledge here.

(Citation omitted.) The court continued at 127:

> The district court concluded that Summa could not establish that her November 2006 complaints caused her replacement as football manager because there was no evidence that the *decisionmaker* responsible for hiring spring managers, Equipment Manager Battaglia, either knew about Summa's complaints or knew that Summa had wanted to return as a manager. To the extent that decisionmaker knowledge is relevant in establishing causation, that knowledge may be satisfied by demonstrating that "the agent who decides to impose the adverse action but is ignorant of the plaintiff's protected activity *acts pursuant to encouragement by a superior* (who has knowledge) to disfavor the plaintiff." *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 148 (2d Cir. 2010) (emphasis added). While there is no direct evidence that Cohen specifically told Battaglia not to hire Summa, crediting Summa, as we must, Cohen and Perry told her the position continued into the spring and the email regarding the position clearly identified both the fall and spring seasons. A reasonable jury could conclude that these facts, coupled with the fact that these coaches then either allowed Battaglia to replace her or told Battaglia that new managers were needed, constitute Battaglia's superiors encouraging him to disfavor Summa. Battaglia's affidavit states only that at the time he selected students to serve as managers, he was not aware that Summa had any interest in returning. The affidavit does not say who told him to hire managers, and a jury could reasonably infer that it was Cohen who told Battaglia that they needed to hire new managers. This conclusion is further supported by Perry's deposition testimony that he had hired student managers in the past because Cohen told him it needed to be done. A jury could reasonably conclude that the same procedure characterized manager hiring in the spring.

Papelino v. Albany College of Pharmacy of Union University, 633 F.3d 81 (**2d Cir.** 2011), reversed in part and affirmed in part the grant of summary judgment against the Title IX student plaintiffs. The court described the case succinctly at 84: "In this case, plaintiff-appellant Daniel Papelino alleges that he was sexually harassed by a professor when he was enrolled as a student at the defendant-appellee Albany College of Pharmacy (the "College"). He complained to the Associate Dean of Student Affairs. Shortly thereafter, the College accused Papelino and his two roommates, plaintiff-appellant Michael Yu and plaintiff Carl Basile, of cheating on exams. All three were disciplined, and Papelino and Basile were expelled." The court rejected—as irrelevant—defendants' arguments that they did not know of plaintiff's protected activity:

> Even if the agents who carried out the adverse action did not know about the

> plaintiff's protected activity, the "knowledge" requirement is met if the legal entity was on notice. . . . "Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity."
>
> While the individual agents' claims of unawareness of the protected activity are relevant to the jury's determination of causality, a jury is entitled to disregard such claims if they are unreliable. Further, while lack of knowledge on the part of particular agents who carried out the adverse action is evidence of lack of causal connection, a plaintiff may counter with evidence that the decision-maker was acting on orders or encouragement of a superior who did have the requisite knowledge. . . . In a retaliation case, a plaintiff is only required to prove that "a retaliatory motive play[ed] a part in adverse [ ] actions toward [him], whether or not it was the sole cause." . . .

Id. at 92.

Zerante v. DeLuca, 555 F.3d 582, 585-86, 28 IER Cases 1133 (**7th Cir.** 2009), affirmed the grant of summary judgment to the First Amendment political-affiliation defendants because plaintiff could not show that defendants knew of her prior support for competing candidates, or that her decision not to support them was a motivating factor in her termination.

4. How Specific Must Defendant's Knowledge of Protected Conduct Be?

Bonds v. Leavitt, 629 F.3d 369, 382-83, 111 Fair Empl.Prac.Cas. (BNA) 171, 31 IER Cases 1078 (**4th Cir.** 2011), reversed the dismissal of plaintiff's claims under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). The court of appeals held that there was sufficient circumstantial evidence from which a jury could infer that the decisionmaker, Dr. Peterson, was aware of plaintiff's protected disclosure to the Office of Special Counsel. The court held that a combination of several factors was sufficient: (1) Dr. Peterson's knowledge of the investigation since he was one of the persons OSC interviewed; (2) Dr. Peterson's knowledge that she was the only person objecting to the retention of cell lines at issue, (3) another official's learning of her involvement, (4) that official's reluctance to admit his knowledge of her involvement, (5) the jury's ability to infer that that official had told Dr. Peterson, and (6) even without that person's knowledge, plaintiff's poor relationship with Dr. Peterson, giving Dr. Peterson reason to believe she would blow the whistle on his involvement. It stated: "We agree with Bonds that she created a genuine issue of material fact concerning whether Peterson knew at the time he terminated her that she had 'blown the whistle' to the OSC." *Id.* at 383.

Cline v. BWXT-12, LLC, 521 F.3d 507, 514, 102 FEP Cases 1859 (**6th Cir.** 2008), reversed the grant of summary judgment to the Tennessee Human Rights Act defendant. There was no dispute that the decisionmaker changed his decision to hire plaintiff because he was informed that plaintiff was in litigation with the company. The lower court held that this was not enough, because there was no showing that the decisionmaker knew the substance of the claim involved in the litigation, and it could have involved unprotected conduct. Reversing, the court of appeals stated:

> While we have no Tennessee case that tells us so, we doubt that the Tennessee courts would allow the State's anti-retaliation provision to be so easily evaded by the simple expedient of refusing to hire (or discharging) any individual with any litigation claim against the company. Two triable issues of fact thus exist: (1) Do the Mack and Zava statements (and any other relevant evidence) permit the inference that the company knew about the content of Cline's claim against the company; and (2) do the Mack and Zava statements (and any other relevant evidence) permit the inference that the company had a policy against hiring (or retaining) individuals with litigation against the company?

5. Temporal Proximity

a. Can Be Circumstantial Evidence of Causation

Sánchez-Rodriguez v. AT & T Mobility Puerto Rico, Inc., 673 F.3d 1, 114 Fair Empl.Prac.Cas. (BNA) 912 (**1st Cir.** 2012), affirmed the grant of summary judgment to the Title VII religious discrimination and retaliation defendant. Plaintiff claimed retaliation, among other factors, because he was disciplined for not working on Saturdays as scheduled. The court stated:

> "'Very close'" temporal proximity between protected activity and an adverse employment action can satisfy a plaintiff's burden of showing causal connection. . . . Here, Sánchez filed his EEOC complaint in February of 2007 and was disciplined in May of 2007. We believe this proximity is close enough to suggest causation, especially given the inferences we must draw in Sánchez's favor.

Id. at 15 (citations omitted).

DeCaire v. Mukasey, 530 F.3d 1, 19, 102 FEP Cases 1758 (**1st Cir.** 2008), reversed the grant of summary judgment to the Title VII defendant. The court stated: "Instead, our law is that temporal proximity alone can suffice to 'meet the relatively light burden of establishing a prima facie case of retaliation.' . . . All of the events described here took place within a period of about one year. In our view, the court may have overlooked the temporal closeness of events by focusing on the fact that Dichio had mistreated DeCaire prior to her complaint." (Citation omitted.)

Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152 (**3d Cir.** 2013), reversed the grant of summary judgment to the Federal Rail Safety Act defendant. The court stated at 160: "Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action." (Citation omitted.)

Fitzgerald v. Action, Inc., 521 F.3d 867, 875-76, 103 FEP Cases 30, 44 EB Cases 1096 (**8th Cir.** 2008), reversed the grant of summary judgment to the ERISA § 510 defendant in part because of the temporal proximity between plaintiff's announcement that he needed expensive shoulder surgery and his termination. The court quoted an earlier decision to the effect that "Viewed within the context of the overall record, temporal proximity may directly support an inference of retaliation, and it may also affect the reasonableness of inferences drawn from other evidence." *Id.* at 875. The court continued: "Here only a few days elapsed between Fitzgerald's notification of his intent to have surgery and Action's decision to terminate him, and temporal

proximity provides support for an inference of retaliatory intent. Moreover, the reason Action gave for terminating Fitzgerald—accumulated misconduct—had existed for months before Fitzgerald notified Action of his surgery." The court stated a general rule:

> Where an employer tolerates an undesirable condition for an extended period of time, and then, shortly after the employee takes part in protected conduct, takes an adverse action in purported reliance on the long-standing undesirable condition, a reasonable jury can infer the adverse action is based on the protected conduct. . . . In this case, a fact finder could reasonably infer Action would have terminated Fitzgerald sooner if accumulated misconduct had been the true motivation for his discharge.
>
> Viewed in concert with other evidence of pretext, the close temporal proximity between Fitzgerald's notification and Action's termination decision provides support for an inference of retaliatory intent. Because material questions of fact exist on the issue of pretext, we conclude it was error for the district court to grant Action summary judgment on Fitzgerald's ERISA claim.

Id. at 875-76 (citation omitted).

Dawson v. Entek Int'l, 630 F.3d 928, 936-37, 111 Fair Empl.Prac.Cas. (BNA) 306 (**9th Cir.** 2011), reversed the grant of summary judgment to defendant on plaintiff's Title VII retaliation claim, holding that evidence of temporal proximity was enough to show causation. The court explained: "Viewing the facts in the light most favorable to Dawson, the protected activity occurred at most two days before the discharge and the treatment of Dawson was a topic during both the protected activity and the discharge, as explained by the supervisor and human resources person who fired him. The gravity of Dawson's complaints coupled with the time frame are such that a reasonable trier of fact could find in favor of Dawson on his retaliation claim. The district court erred in resolving this claim by summary judgment." *Id.* at 937

b. <u>"First Opportunity to Retaliate" May Make Period More Proximate</u>

Summa v. Hofstra University, 708 F.3d 115, 128-29, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. The court held that causation could be shown simply by temporal proximity. It referred to the "first actual opportunity to retaliate" rule, *id.* at 128, and stated:

> Only four months passed between Summa's November 2006 complaints and the denial of the spring season manager position. There is strong reason to find this four-month time span sufficient in this case to establish causation because Summa's complaints were based on events that occurred on the very last day of the fall season. The start of the spring season was the first moment in time when the football coaching staff could have retaliated against Summa as she was not directly working for them over the intervening months. This Court has recently held that even gaps of four months can support a finding of causation. *Hubbard v. Total Commc'ns, Inc.*, 347 Fed.Appx. 679, 681 (2d Cir. 2009)

(summary order). Here, this close temporal relationship is made even closer by the fact that the adverse action occurred at the first actual opportunity to retaliate. . . .

The court also stated: "The seven-month gap between Summa's filing of the instant lawsuit and the decision to terminate her employment privileges is not prohibitively remote." *Id.* at 128 (citation omitted).

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1278, 102 FEP Cases 716 (**11th Cir.** 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court rejected defendant's argument that the eight-month gap between the filing of plaintiff's EEOC charge and his termination precluded any inference of causation. The court held that the argument was a "straw man" because plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because plaintiff was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court held that plaintiff adequately showed a connection between his EEOC charge and his termination.

c. Temporal Proximity Plus "Building a Case"

Hamilton v. General Elec. Co., 556 F.3d 428, 435-36, 105 FEP Cases 737 (**6th Cir.** 2009), reversed the grant of summary judgment to the Kansas Civil Rights Act defendant. Plaintiff was fired three months after he filed an EEOC charge of age discrimination, and sued under the KCRA for retaliation. The court held that this temporal proximity, coupled with evidence of increased supervision, satisfied the causation element:

> In analyzing causation, the district court stated that "[u]nder Sixth Circuit precedent, ... temporal proximity is not enough to satisfy the causation element of Plaintiff's prima facie case." . . . We have recognized, however, that in some cases temporal proximity may be sufficient to establish causation. *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523-26 (6th Cir. 2008). In *Mickey*, we held that "[w]here an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation." *Id.* at 525. Hamilton's case, however, does not rest on temporal proximity alone. Instead, Hamilton alleges that his bosses heightened their scrutiny of him after he filed his EEOC complaint. *See Jones v. Potter*, 488 F.3d 397, 408 (6th Cir. 2007) (noting that an employer cannot conceal an unlawful discharge by closely observing an employee and waiting for an ostensibly legal basis for discharge to emerge). On a motion for summary judgment, we view the facts in the light most favorable to Hamilton, and he has testified in his deposition that GE increased its scrutiny of him after he filed his EEOC complaint. The combination of this increased scrutiny with the temporal proximity of his termination occurring less than three months after his EEOC filing is sufficient to establish the causal nexus needed to establish a prima facie case.

The court rejected the lower court's view that GE's scrutiny of plaintiff was understandable in light of the Last Chance Agreement:

> Hamilton does not argue that his work had not been scrutinized before, but he states that the level of scrutiny increased greatly after he filed the EEOC complaint. The fact that the scrutiny *increased* is critical. The district court also emphasized Hamilton's prior disciplinary history. Though this case includes information about the pre-existing relationship between Hamilton and GE, we must decide what made GE fire Hamilton when it did. GE did not terminate Hamilton until *after* he filed an EEOC complaint alleging age discrimination. We hold that this temporal proximity of less than three months combined with the assertion that GE *increased* its scrutiny of Hamilton's work only after the EEOC complaint was filed are sufficient to establish the causation element of a prima facie case of retaliatory termination.

Id. at 436 (emphases in original). The court also rejected GE's argument that its innocence was established by intervening favorable treatment of plaintiff:

> GE asserts that after Hamilton filed his EEOC complaint in May 2005, GE had cause to fire him in June 2005, but it chose not to, instead warning him and letting him continue working until his termination in August 2005. GE argues that because it did not fire Hamilton at the first opportunity that arose after he filed his EEOC complaint, the choice to fire him must not have been retaliatory. GE asserts that its "favorable treatment [i.e., its decision to give Hamilton another chance] dissolves any inference of retaliatory motive on the part of GE." . . . Were we to adopt GE's position, any employer could insulate itself from a charge of retaliatory termination by staging an incident to display its purported "favorable treatment" and then waiting for a second opportunity to terminate the employee. Accordingly, we refuse to adopt GE's argument, and we hold that an employer's intervening "favorable treatment" does not insulate that employer from liability for retaliatory termination.

Id. at 436. The court held that the showing that GE waited for an opportunity to fire plaintiff demonstrated pretext as well as the element of causation: "We have held that when an 'employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee,' the employer's actions constitute 'the very definition of pretext.'" *Id.* (citation omitted). Judge Griffin dissented.

d. Too Long a Period is Not Circumstantial Proof of Causation

Gilbert v. Napolitano, 670 F.3d 258, 263, 114 Fair Empl.Prac.Cas. (BNA) 923 (**D.C. Cir.** 2012), affirmed in part and reversed in part the grant of summary judgment to the Title VII and ADEA defendant. The court held that no inference of causation could be drawn from plaintiff's informing his supervisor that he had had unspecified EEO activity three years earlier in San Diego: "In our view, no reasonable jury could infer that the mere mention of such long-ago activity at a distant office would give Jacksta a reason to discriminate. This is especially so given that Jacksta was based in Washington and had no involvement in the events underlying Gilbert's San Diego claims." (Citation omitted.)

e. May Help Employer Show Truth of Nondiscriminatory Reason

Desardouin v. City of Rochester, 708 F.3d 102 (**2d Cir.** 2013), affirmed the grant of summary judgment to the Title VII, § 1983, and New York State Human Rights Law retaliation defendants. Plaintiff secretly taped conversations involving her superiors in the Police Department, a felony, and then lied about it. The court held that termination for this offense was a legitimate nondiscriminatory reason. Plaintiff sought to defeat the causal link between this explanation and her termination by showing that she was fired four months after the taping. The court rejected her reasoning: "Because her misconduct reasonably required some time to investigate, the four-month interval did not impair the legitimacy of the Defendants' proffered reason for the termination." *Id.* at 106.

6. Following Standard Practices Precludes Causation

Rivera-Colón v. Mills, 635 F.3d 9, 111 Fair Empl.Prac.Cas. (BNA) 737 (**1st Cir.** 2011), affirmed the grant of summary judgment to the Title VII retaliation defendant. Plaintiff made an anonymous complaint, was subsequently notified of an option to transfer to Philadelphia or to take a severance package, failed to decide within the extended time period allowed by the employer, and was terminated. The court held that plaintiff could not claim retaliation as a cause of the transfer or termination, because the options and consequences had been negotiated with the employee union, and had been applied to large numbers of people.

7. Choosing to Follow a Standard Practice May Show Causation

Nassar v. University of Texas Southwestern Medical Center, 674 F.3d 448, 114 Fair Empl.Prac.Cas. (BNA) 986, 95 Empl. Prac. Dec. ¶ 44,440 (**5th Cir.** 2012), *cert. granted*, affirmed in part, vacated in part, and remanded the judgment after a jury trial for the Title VII racial discrimination plaintiff. Plaintiff is a physician of Middle Eastern descent, who was a faculty member at the University of Texas Southwestern Medical Center ("UTSW"). "UTSW is affiliated with Parkland Hospital, where UTSW faculty make up most of the physician staff." *Id.* at p. *1. The jury found that Dr. Beth Levine, plaintiff's supervisor, harassed him because of his race. Dr. Gregory Fitz was the UTSW Chair of Internal Medicine and Dr. Levine's supervisor. When plaintiff resigned from UTSW to escape Dr. Levine's harassment, he submitted a resignation letter stating: "The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine .... I have been threatened with denial of promotion, loss of salary support and potentially loss of my job[.] ... [This treatment] stems from [Levine's] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment." *Id.* at 452. The court affirmed the jury's verdict finding of retaliation:

> Nassar's claim is that Fitz blocked his move to become a Parkland staff physician because he complained about harassment by Levine. UTSW has argued here and at trial that Fitz thwarted Nassar's prospective employment at Parkland as a routine application of UTSW's rights under the UTSW–Parkland affiliation agreement. Viewing the evidence in the light most favorable to the jury's verdict, Nassar offered sufficient proof that Fitz invoked UTSW's putative rights under the agreement in order to punish Nassar for his complaints about Levine. Keiser testified that Fitz told him that Nassar's complaints in the resignation letter were his reason for blocking the Parkland position. UTSW put on testimony indicating that Fitz made his decision before the letter and that

> he regarded the matter as a routine application of the agreement. The jury considered both parties' evidence and resolved the conflict against UTSW. Since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," we find no basis to upset the jury's verdict that UTSW retaliated against Nassar because of his complaints of racial discrimination.

Id. at 454 (footnote omitted).

E. Common-Law Remedies for Retaliation Under the 1977 Amendment to the Fair Labor Standards Act (Excerpt from Winning Brief)

1. The Language of 29 U.S.C. § 216(b)

The statutory language is:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

(Emphases supplied.)

2. The Availability of Punitive Damages Under the 1977 Amendments

As a matter of policy, Congress has provided that the Court may order "such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title." Punitive damages both punish conduct that strikes at the heart of the FLSA enforcement system and deter defendants and others like them from engaging in such conduct in the future. A company the size of defendants is unlikely to be deterred solely by the prospect of having to pay back pay, liquidated damages, and compensatory damages to a plaintiff, without the additional risk of also having to pay punitive damages.

Against this backdrop, the Seventh Circuit has held that punitive damages are available for retaliation in violation of the anti-retaliation provision of the FLSA. *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 111–12 (7th Cir. 1990), *cert. denied*, 502 U.S. 812 (1991); *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1226 (7th Cir. 1995). *Accord, Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1059–60 (N.D. Calif. 1998) (FLSA) (Conti, J.).

The Seventh Circuit has also held that punitive damages are available under two other Federal statutes to which the FLSA anti-retaliation provisions apply: the Equal Pay Act, *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543, 551 (7th Cir. 1991), and the ADEA, *Moskowitz v. Trustees of Purdue University,* 5 F.3d 279, 283 (7th Cir. 1993).

The Seventh Circuit's approach conforms to the rule stated by the Supreme Court in a Title IX case, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992). There, the Court stated:

> Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action . . . we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. *Davis, supra*, 442 U.S., at 246–247, 99 S. Ct., at 2277–2278. This principle has deep roots in our jurisprudence.

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> "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777, 90 L. Ed. 939 (1946).

Under the FLSA retaliation provisions, punitive damages are not expressly excluded. Accordingly, Congress must be deemed to have intended that they be available.

Defendants have previously argued that the principle set forth in *Franklin* applies only where Congress has been completely silent on remedies. However, such a limitation cannot be reconciled with *Franklin*'s holding that Congress needs to expressly bar a remedy before it will be considered unavailable. Rather, *Franklin* and *Bell v. Hood* express a strong Federal policy in favor of the broadest relief that could have been intended under the statutory language, and that broad remedial policy applies equally where Congress has been silent on remedies or has specified remedies. For example, Title VII of the Civil Rights Act of 1964 had specific, limited remedies prior to the enactment of the Civil Rights Act of 1991. Yet the Supreme Court drew on the broad remedial policy articulated in *Bell v. Hood* in construing the scope of the specified Title VII remedies, and in light of that policy found a presumption in favor of the availability of make-whole relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Prior to *Albemarle Paper*, back pay was an uncommon remedy. After *Albemarle Paper*, back pay awards were common.

Defendants' argument that *Franklin* applies only where Congress has been silent on remedies is also based on a footnote, 503 U.S. at 69 n.6, in *Franklin* distinguishing a case involving a statute that "expressly enumerated the remedies available," in defendants' words. Defendants have thus suggested that § 216(b) is like that statute, and that *Franklin* is therefore inapplicable to § 216(b). Defendants' argument assumes the result defendants desire—that the specific examples in § 216(b) are all the remedies there are—a conclusion that the express language of the statute does not support. Moreover, the case cited by the Supreme Court, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 139–44 (1985), simply held that the ERISA provision in question provided only remedies for losses to the employee benefit plan, and not remedies to individual beneficiaries as individuals, for breaches of fiduciary duty. The Court

reserved the question whether the plan can recover extracontractual compensatory and punitive damages from the fiduciary. *Id.* at 144 n.12. *Franklin*'s footnoted citation to *Massachusetts Mutual* cannot constrain *Franklin* as defendants suggest.

Following reasoning similar to that in *Franklin* and in *Bell v. Hood*, the Second Circuit has taken an expansive view of remedies for employers' violations of statutes intended to protect employees. The court held that punitive damages are available under Title I of the Landrum-Griffin Act: *Morrissey v. National Maritime Union of America*, 544 F.2d 19, 25 (2d Cir. 1977), stated:

> We also disagree with the contention that punitive damages cannot be assessed for a violation of Title I of the Landrum-Griffin Act. Section 102 authorizes the bringing of civil actions "for such relief (including injunctions) as may be appropriate." The availability of punitive damages under this section is an open question in this circuit, upon which the district courts have divided.

After canvassing the divided district court decisions, the Second Circuit stated that it agreed with some aspects of the district court's opinion, but "we see no justification for his ruling as a matter of law that the Union could not be held liable for punitive damages under the Landrum-Griffin Act. Section 102 is proof enough that Congress intended that labor organizations could be civilly liable for violating § 101. If punitive damages can be awarded against other defendants, they can be awarded against unions as well." *Id.* at 26. Defendants have previously attempted to distinguish *Morrissey* by stating that the statutory language—providing "for such relief (including injunctions) as may be appropriate"—has no sequence of specific words following the general grant of authority. To the contrary, the statute recites "including injunctions" as a specific example of relief. If the Second Circuit had followed defendants' approach, it would have had to limit the general remedial provision to forms of prospective equitable relief, and could not have reached its result.[1] That is a clear indication that defendants' approach to statutory construction is unsustainable.

Relying on the same kinds of broad reasoning as to remedies as the Second Circuit, the Seventh Circuit has held that punitive damages are available to an unrepresented employee in a Railway Labor Act retaliation case, where there would be no interference with collective bargaining. *Lebow v. American Trans Air, Inc.*, 86 F.3d 661 (7th Cir. 1996). District courts within the Second Circuit have reached the same result. *Beckett v. Atlas Air, Inc.*, 968 F. Supp. 814, 824 (E.D. N.Y. 1997) (punitive damages available in Railway Labor Act retaliation case on behalf of non-union employee); *Riley v. Empire Airlines, Inc.*, 823 F. Supp. 1016, 1021–22 (N.D. N.Y. 1993) (same);

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[1] If defendants intend to distinguish *Morrissey* by stating that *ejusdem generis* applies only to statutes with two or more examples but not to statutes with one example, it calls to mind the statement of the Supreme Court in a Federal-sector Title VII case that "'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" *Chandler v. Roudebush*, 425 U.S. 840, 845 (1976) (citations omitted).

The First Circuit applied *Franklin v. Gwinnett County Public Schools* to hold that an award of punitive damages is appropriate in a whistleblower case under the Occupational Safety and Health Act, a statute that is *not* silent as to remedies. *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1194 (1st Cir. 1994). The First Circuit stated:

> We cannot find, therefore, in the legislative history of the OSH Act any "clear direction" that the term "all appropriate relief" was intended to deny to the courts remedial powers to award compensatory and punitive damages in a cause of action analogous to an intentional tort. *See Smith*, 461 U.S. at 48–49, 103 S. Ct. at 1636 ("As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action.").

(Footnote omitted.) The court was quoting *Smith v. Wade*, 461 U.S. 30 (1983), a § 1983 case. The First Circuit continued: "We conclude, in accordance with the meaning of the same words as used in *Franklin*, that the statutory power to award 'all appropriate relief' gave the district court authority, where such relief is in fact appropriate, to award compensatory and even such traditional other relief as exemplary damages." 26 F.3d at 1194. The exemplary damages awarded there were a doubling of back pay.

Other district courts within the Second Circuit have followed similar reasoning in holding that punitive damages are available under various statutes. *Oldroyd v. Elmira Sav. Bank, F.S.B.*, 956 F. Supp. 393, 401 (W.D. N.Y. 1997) (holding punitive damages available on FIRREA whistleblower retaliation claim), *denial of arbitration vacated*, 134 F.3d 72 (2d Cir. 1978); *Reich v. Skyline Terrace, Inc.*, 977 F. Supp. 1141, 1147 (N.D. Okla. 1997) (awarding $5,000 in punitive damages in OSH Act whistleblower retaliation case).

Moore v. Freeman, 355 F.3d 558, 563–64 (6th Cir. 2004), agreed that § 216(b) authorizes recovery of damages for emotional distress in FLSA retaliation cases, but did not reach the question of punitive damages. The court stated at 564:

> As noted by the Seventh Circuit, which is the only other circuit to address at length the question of whether the provision of § 216(b) at issue here provides for damages for emotional distress, the provision allows for "appropriate" relief, and "compensation for emotional distress . . . [is] appropriate for intentional torts such as retaliatory discharge." *Travis*, 921 F.2d at 112. In addition, both the Eighth and Ninth Circuits have allowed damages for emotional distress to stand without directly addressing the issue. *See Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 992 (8th Cir. 2001); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999). Although the circuits are divided on the question of whether the statute permits punitive damages, *compare Travis*, 921 F.2d at 111–12, *with Snapp*, 208 F.3d at 934, consensus on the issue of compensatory damages for mental and emotional distress seems to be developing. We now join our sister circuits in finding that the damages awarded by the jury in this case fall within the ambit of § 216(b).

The language of § 216(b) does not mention damages for mental and emotional distress any more than punitive damages, and damages for mental and emotional distress are not tied to

the compensation of the employees affected by retaliation. Like punitive damages, they cannot be calculated arithmetically. Holdings that recognize the availability of emotional-distress damages under § 216(b) depend on a logic of statutory interpretation that applies with equal force to punitive damages.

3. The Eleventh Circuit's Decision Accepting Compensatory Damages as as an Additional Remedy But Rejecting Punitive Damages

Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 932–39 (11th Cir. 2000), *cert. denied*, 532 U.S. 975 (2001), held that punitive damages are not allowed by § 216(b) but stated in *dicta* that some additional compensatory relief is available in retaliation cases, such as reinstatement or front pay. *Id.* at 937. *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333 (11th Cir. 2002), held that injunctive relief is available under the 1977 amendment to § 216(b), although injunctive relief is generally barred to private plaintiffs suing under the FLSA. The Eleventh Circuit's approach to the construction of the statute contrasts sharply with that of *Morrissey* and the lower courts in this Circuit.

a. The Maxim of *Ejusdem Generis* is Inapplicable

Defendants and their principal case, *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933–37 (11th Cir. 2000), *cert. denied*, 532 U.S. 975 (2001), rely heavily on the "*ejusdem generis*" maxim of statutory construction. Such reliance is inappropriate.

West v. Gibson, 527 U.S. 212, 217–18 (1999), presented a question of statutory construction strikingly similar to that in the case at bar. *West* involved the EEOC's ability to award compensatory damages to Federal employees in the Title VII Federal-sector administrative process.[2] There, the Court did not apply *ejusdem generis*[3] where the general remedial provision was followed by language "including" the specific examples. The Court set forth the language and its interpretation:

> The relevant portion of the Title VII extension, namely, § 717(b), says that the EEOC "shall have authority" to enforce § 717(a) "through appropriate remedies, including reinstatement or hiring of employees with or without back pay." 42 U.S.C. § 2000e-16(b). After enactment of the 1991 CDA, an award of compensatory damages is a "remedy" that is "appropriate."
>
> We recognize that § 717(b) explicitly mentions certain equitable remedies, namely, reinstatement, hiring, and backpay, and it does not explicitly refer to compensatory damages. But the preceding word "including" makes clear that the authorization is not limited to the specified remedies there mentioned; and the 1972 Title VII extension's

[2] The Court referred to the provisions of the Civil Rights Act of 1991 authorizing awards of compensatory damages as the "Compensatory Damage Amendment,", or the "CDA." 527 U.S. at 215.

[3] Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, argued for application of the maxim *ejusdem generis*. *Id.* at 225–26.

> choice of examples is not surprising, for in 1972 (and until 1991) Title VII itself authorized only equitable remedies.

Id. at 217–18.[4] Here, the statutory phrase in question presents an even stronger case for plaintiff than in *West* , because § 216(b) specifically adds "without limitation" to the word "including." *Accord*, *Zurich American Ins. Co. v. ABM Industries, Inc.*, 397 F.3d 158, 165 (2d Cir. 2005) (The court stated in construing an exception in an insurance policy for business interruption: "Such a reading would require us to ignore the phrase 'but not limited to' as well as the disjunctive 'or' in the provision.")[5]

Also supporting plaintiff's position is the treatise NORMAN J SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION 6TH ED. (West Group, 2000) (hereafter, "SINGER"). SINGER states in § 47.18, "Classification by enumeration," at 287:

> The doctrine of ejusdem generis applies when the following conditions exist: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

(Footnote omitted.) SINGER elaborates on this point, recognizing that the maxim has no application if the legislature clearly indicates that the specific terms are not meant to limit the general terms:

> A final qualification on the doctrine is that the general words are not restricted in meaning to objects of the same kind (ejusdem generis) if there is a clear manifestation of a contrary intent.

SINGER, § 47.22 at pp 297-98 (footnote omitted). The decision of Congress to use the word "including" in the compensatory damages provision of the Civil Rights Act of 1991, and the decision of Congress to use the phrase "including without limitation" in § 216(b), are the clear manifestation of intent that this treatise recognizes as making the *ejusdem generis* maxim inapplicable.

The Second Circuit has identified another problem with applying the maxim *ejusdem generis* as to statutes like that at bar. The court held that the maxim should not be applied where

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[4] Defendants have previously tried to distinguish *West v. Gibson* by arguing that the Court did not hold that the word "including" created the right to compensatory damages. That misses the point. The Court held that the phrase "appropriate remedies" encompassed compensatory damages as soon as Congress added them to the remedies available for intentional violations, and the Court rejected the defendant's argument there—identical to defendants' argument here—that the examples limited the general term.

[5] Defendants have previously attempted to distinguish *Zurich* by stating that their proposed interpretation would not render any terms in § 216(b) superfluous, but that begs the question to be decided.

it would render the general grant of authority superfluous. Thus, in *Zurich American Ins. Co. v. ABM Industries, Inc.*, 397 F.3d 158, 165 (2d Cir. 2005), the court stated: "Moreover, if a property interest were required under the contract, the terms "controlled," "used," and "intended for use" would be superfluous. In interpreting an insurance contract under New York law, a court must strive to "give meaning to every sentence, clause, and word." Here, the obligation to give effect to every statutory word is no weaker than the need to give effect to every word in an insurance policy.

SINGER agrees:

> Where the specific words embrace all the persons or objects of the class designated by the enumeration, the general words take a meaning beyond the class. To apply the rule in this instance would render the general words meaningless for the reason that there is nothing of the same kind (ejusdem generis) to fall within their purview. Its application, consequently, would contravene the more important rule of construction that all words are to be given effect.

SINGER, § 47.21 at pp. 295–97 (footnotes omitted).

Finally, SINGER elaborated on situations like those herein, in which the enumeration of specific examples exhausts the class:

> The human mind generally enumerates things in descending order. In case of any doubt, therefore, it is assumed that things of a higher order are named at the beginning of an enumeration. If not so named they are intended to be excluded from the statute.
>
> Where the specification of those objects classed as inferior is exhaustive and general words are added, then objects of a superior nature are embraced within the meaning of the general words in order to prevent their rejection as surplusage.

SINGER, § 47.19 at pp. 292–93 (footnotes omitted). Here, the specific relief mentioned in § 216(b) covers prospective relief and compensatory remedies based on pay: "employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." Compensatory remedies based on pay are an important class of remedies, because these are the only compensatory remedies allowed for violations of the minimum-wage and overtime provisions of the FLSA. In § 216(b), Congress added injunctive relief, which is not available to private plaintiffs under the FLSA, specified the traditional FLSA compensatory remedies, and made clear its intent to provide a full panoply of remedies by inserting before the specification the extremely broad language: "for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation . . . ." Punitive damages, like compensatory damages, are outside the scope of the class of specified remedies and are the "things of a higher order" and "objects of a superior nature" to which SINGER refers.[6]

[6] Defendants have previously argued that the examples in § 216(b) are examples of compensatory remedies, and that compensatory damages are therefore authorized by the statute but punitive damages are not. However, the examples of compensation are clearly the traditional

Plaintiff submits that for all of these reasons the maxim of *ejusdem generis* has no application herein. *Snapp v. Unlimited Concepts, Inc.*, should not be followed because the court there disregarded all limitations on the maxim, treated it as applicable whenever specific terms are used in the same sentence as a general term, *id.* at 234, ignored the year-earlier decision in *West v. Gibson*, and cited broad language in an earlier case, *Hughey v. United States*, 495 U.S. 411, 419 (1990), that does not support the weight placed on its language.

Hughey involved the question whether a court could order restitution to crime victims for injuries caused by offenses for which the defendant was charged but not convicted, as long as the defendant was convicted of some charged offense. The statute in question was then 18 U.S.C. § 3580(a), and provided:

> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

The government argued that the "such other factors" catch-all language allowed restitution orders that went beyond the injuries caused by the offense on which the individual was convicted. In rejecting this argument, the Supreme Court pointed out that § 3579 set forth the details of the restitution that could be ordered, and that it was unlikely that Congress would then have expanded its scope in the next provision. The Court added:

> The remaining considerations preceding the catchall phrase also are designed to limit, rather than to expand, the scope of any order of restitution. These factors—"the financial resources of the defendant" and "the financial needs and earning ability of the defendant's dependents"—provide grounds for awarding *less* than full restitution under the statute. Congress plainly did not intend that wealthy defendants pay more in "restitution" than otherwise warranted because they have significant financial resources, nor did it intend a defendant's dependents to be forced to bear the burden of a restitution obligation because they have great "earning ability." In light of the principle of *ejusdem generis*—that a general statutory term should be understood in light of the specific terms that surround it—the catchall phrase should not be read to introduce into the restitution calculus losses that would expand a defendant's liability beyond the offense of conviction. *Cf. Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734, 93 S. Ct. 1773, 1779, 36 L. Ed. 2d 620 (1973) (holding that "catchall provision" is "to be read as bringing within a statute categories similar in type to those specifically enumerated"). Moreover, this reading of the catchall phrase harmonizes § 3580(a) with § 3579(a)(2), which states that "[i]f the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor." If a court chooses to

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FLSA remedies and are clearly based on pay and calculable. Defendants are trying to ignore their maxim to obtain a construction that avoids a term being made superfluous, and then apply the maxim again to avoid the necessary corollary that punitive as well as compensatory damages must be available, Maxims of statutory construction are not supposed to be turned on and off like a light switch.

award partial or no restitution in accordance with § 3579(a)(2), it must couch its refusal in terms of the criteria set forth in § 3580(a).

Id. at 418–19 (footnote omitted).

The general term herein is not a summarizing catch-all provision, and *Hughey* does not support the Eleventh Circuit's reasoning in *Snapp*.

b. <u>The Existence of Criminal Penalties Does Not Bar Punitive Damages</u>

Snapp circularly held that the criminal penalties for FLSA violations exhausted the intent of Congress to provide for punitive sanctions, without any authority in the legislative history of the 1977 amendments for its reasoning, and without any support in case law for the concept that punitive damages are automatically unavailable where a criminal sanction is available. 208 F.3d at 934–35, 939. A subsequent Supreme Court case explicitly rejected such reasoning. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003), stated explicitly: "The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility." The Court went on to state that "Punitive damages are not a substitute for the criminal process," and held that a punitive damage award is not automatically justified by "the remote possibility of a criminal sanction." The Supreme Court has thus provided clear guidance that punitive damages and criminal penalties can co-exist for the same conduct.

Defendants have previously argued that under the criminal provisions of § 216(a) the government is only allowed to prosecute exceptional cases that are particularly malicious, and that allowing punitive damages under the civil enforcement provision in § 216(b) would allow private plaintiffs to escape this limitation. However, § 216(a) does not contain the limitations proclaimed by defendants; it merely requires that the violation be willful and that no one be imprisoned unless he or she was previously convicted of a violation. Nothing in § 216(a) can reasonably be deemed to limit civil remedies for intentional retaliation under § 216(b).

Plaintiff has independently checked the legislative history, and has found no support for the contentions advanced by defendants and articulated in *Snapp*, let alone a statement so clear that it might support an exception to the rule of *State Farm*.

c. <u>The Legislative History Does Not Support the Eleventh Circuit's Reliance on the Possibility of Criminal Penalties to Justify Limiting Relief to Employees</u>

The legislative history suggests strongly that the Eleventh Circuit erred in relying on the possibility of criminal penalties as a reason for limiting relief to employees. The provision allowing private rights of action for retaliation and containing the language in question arose in the Senate. Senate Committee Report No. 95–440 (95th Cong., 1st Sess.) made clear at p. 31 that the reason for allowing private rights of action for retaliation is that retaliation occurs "[a]ll too frequently," only the government could take action, and a fair reading suggests that the government was not proceeding in many of these cases. The Report stated that the Secretary of Labor had recommended the provision, and added:

> In his testimony before the Labor Subcommittee, the Secretary recommended that a private right of action be added in these cases to relieve the Department of the burden of these suits. The committee strongly supports the administrations' [sic] view that employees should have a private right of action to enforce their rights under section 15(a)(3). This will relieve the heavy burden on the Department and ensure that employees are not left without any means of protecting their rights.

Id. It is highly unlikely that the same Congress that created a private right of action to protect employees against offenses the government could not often or effectively prosecute would subject the same employees to less than full common-law legal remedies in deference to governmental discretion whether to prosecute such offenses criminally.

A copy of relevant excerpts from the Report is attached hereto as Attachment 1.

4. <u>Defendants' Other Authorities Cited in Its Previous Briefs</u>

Plaintiff expects defendants to continue to rely on the other authorities cited in this section, to support their arguments. Plaintiff respectfully submits that these decisions are unpersuasive. *Johnston v. Davis Security, Inc.*, 217 F.Supp.2d 1224, 1229–32 (D. Utah 2002), *Lanza v. Sugarland Run Homeowners Ass'n, Inc.*, 97 F.Supp.2d 737, 739–42 (E.D. Va. 2000), *Bolick v. Brevard County Sheriff's Dept.*, 937 F. Supp. 1560, 1566–67 (M.D. Fla. 1996), and *Tumulty v. Fedex Ground Package System, Inc.*, 2005 U.S. Dist. LEXIS 25997 (W.D. Wash. Aug. 16, 2005) (attached as Attachment 2), follow the same analysis as *Snapp*, and are subject to the same criticisms. *Glorioso v. Williams*, 130 F.R.D. 664, 665 (E.D. Wis. 1990), is from a court within the Seventh Circuit, is clearly not good law after *Travis* was handed down later in the same year, and in any event reached its conclusion without discussion. *Waldermeyer v. ITT Consumer Financial Corp.*, 782 F. Supp. 86, 88 (E.D. Mo. 1991), uttered a one-sentence conclusion and cited only *Glorioso*.

Defendants cite an unpublished opinion and cite a 1991 opinion from the Eastern District of Missouri, but did not cite a 1996 case from the Western District of Missouri with a more substantial discussion, *O'Brien v. Dekalb-Clinton Counties Ambulance Dist.*, 1996 WL 565817, 3 Wage & Hour Cas.2d (BNA) 972 (W.D. Mo. June 24, 1996):

> The *Waldermeyer* determination on this issue, however, consisted of one cursory sentence citing to a lower court decision from the Seventh Circuit rendered prior to *Travis*. See *Glorioso v. Williams*, 130 F.R.D. 664, 665 (E.D. Wis.1990).[2] In the absence of conflicting interpretation of the amended § 16(b) by another circuit, the court is persuaded to follow the Seventh Circuit's reasoning and hold that compensatory and punitive damages are available for violation of the FLSA's anti-retaliation provision.[3]

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[2] *Glorioso* was decided on May 1, 1990, while *Travis* was decided on December 27, 1990.

[3] Defendants also contend that a comparison of § 16(b) with the nearly identical language of the remedial provision of the ADEA requires a contrary determination.

> Recovery under the ADEA is limited to unpaid wages and, in the case of willful violation, liquidated damages. . . . Despite the conclusion reached by the *Travis* court that compensatory and punitive damages are now available under the FLSA, the Seventh Circuit has not changed its position that compensatory and punitive damages are not available in an ADEA action. See *Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir.) (Easterbrook, J.), *cert. denied*, 497 U.S. 1005 (1990). Significantly, Judge Easterbrook also wrote the *Travis* opinion less than a year later; moreover, Judge Cudahy joined in both opinions.

(Citations omitted.)

Defendants' cases also tend to reflect a hostility to punitive damages that is inappropriate under *Franklin*.

5. The Language of the ADEA

Defendants' argument based on the rejection of common-law damages for ordinary ADEA violations despite similar statutory language has surface appeal, but that appeal disappears on close inquiry.

In *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146–48 (2d Cir. 1984), the Second Circuit held that emotional-distress damages were not available under the ADEA. The court based its ruling on factors not present in the case at bar, including a statutory policy of administrative conciliation of ADEA claims.[7] Most importantly, the court relied on language peculiar to the ADEA stating that all damages are to be considered unpaid wages, and on legislative history barring punitive damages:

> The statutory provision in question further states that "[a]mounts owing ⋯ as a result of a violation ⋯ shall be deemed to be unpaid ⋯ wages." 29 U.S.C. § 626(b). Under accepted principles of statutory construction, we consider this specific indication to be dispositive of the drafters' intentions. See 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.05 at 57 (1973). The more expansive grant of judicial authority relied upon by Johnson permits courts in their discretion to supplement back pay awards with injunctive relief, orders of reinstatement or promotion, or similar non-monetary remedies designed to "effectuate the purposes of [the ADEA.]" 29 U.S.C. § 626(b).
>
> A final indication that Congress did not envision punitive damage recoveries is the legislators' statement, made when the ADEA was amended in 1978 to ensure the availability of jury trials on liquidated damages claims, that "The ADEA as amended by this act does not provide remedies of a punitive nature." H.R. Rep. No. 950, supra, at 14, U.S. Code Cong. & Admin. News, 1978, p. 535. This subsequent legislative history,

[7] The court perceived a risk that the administrative process would be undermined and judicial filings increased if charging parties were unable to get compensatory damages in the administrative process. *Id.* at 147. Although this decision was handed down prior to *West v. Gibson* and has not been re-examined since, this ground of decision has no application to the FLSA, which has no exhaustion requirement for claims of violations or of retaliation.

> while not dispositive, *see Zipes v. Trans World Airlines, Inc.*, *supra*, 455 U.S. at 394, 102 S. Ct. at 1133, is evidence of Congress's understanding that back pay, liquidated damages, and injunctive relief such as reinstatement (or, conceivably, an affirmative action program or similar non-monetary remedies) are the forms of relief a court may award in the event that administrative conciliation fails. Similarly, the courts of nine other circuits have decided that compensatory or punitive damages are unavailable under the ADEA.

Id. at 147–48 (footnote omitted). Here, the 1977 amendments to the FLSA do not contain any policy of administrative conciliation, there is no conflicting statutory language, and there is no conflicting legislative history.

The rationale of *Johnson* is controlling here, and the similar language in the ADEA does not support defendants' argument.

6. Punitive Damages Are Appropriate Herein Under Federal Law

Under Federal law, "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). This has become the general standard under Federal law. *Kolstad v. American Dental Association*, 527 U.S. 526, 535–36 (1999), relied on it in construing the punitive-damages provision of the Civil Rights Act of 1991. *Kolstad* adapted *Smith* to discrimination cases, stating: "Applying this standard in the context of § 1981a, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. There is no requirement of egregious or outrageous conduct in order to justify an award. *Id.* at 538–39. Here, the high level of the decisionmaker also means that there is no problem tying the conduct to the defendants. *Id.* at 542–44.

7. Punitive Damages on the FLSA Claim Are Supported by the Back Pay Award

As stated above, the jury was instructed that, if it found liability, the Court would award back pay and liquidated damages. It was not to address those elements of compensatory damages. The award of back pay and liquidated damages by the Court is enough to support an award of punitive damages. *Provencher v. CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5, 12 (1st Cir. 1998) (Title VII) ("We see no reason to allow punitive damages only where the jury enters an award for compensatory damages and not where the judge enters an award for back pay, given that injury to the plaintiff is redressed in both instances."); *Corti v. Storage Technology Corp.*, 304 F.3d 336, 341–42 (4th Cir. 2002) (Title VII) ("Because we are satisfied that the evidence at trial was sufficient to support the punitive damages award and because the district court awarded Corti back pay based on the jury's finding of liability, we find no error in allowing the punitive damages award to stand.") (footnote omitted); *Tisdale v. Federal Express Corp.*, 415 F.3d 516, 534 (6th Cir. 2005) ("Because backpay awards under Title VII serve a similar purpose as compensatory damages awards under the common law, courts have held they may be considered in determining the appropriate size of a punitive damages award."); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995) ("As

evidenced by the court's award of back pay, Hennessy was clearly injured when she was unlawfully terminated. Especially considering the trial court's award of back pay, the jury's consideration of the issue of punitive damages was appropriate, even though it did not award compensatory damages."); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 575 (8th Cir. 2002) (ADA) ("We need not decide whether an award of punitives could stand without any award of compensatory or nominal damages, because the award of front pay in this case serves the purpose of compensating Salitros for economic losses resulting from the retaliation. We agree with the First and Eleventh Circuits that the common law policy prohibiting punitive damages where the plaintiff has not shown any harm is not implicated where the plaintiff has shown wage loss."); *E.E.O.C. v. W&O, Inc*., 213 F.3d 600, 615 (11th Cir. 2000) ("punitive damages may be appropriate where a plaintiff has received back pay but no compensatory damages") (footnote omitted).

The Second Circuit has gone further than the above cases, and has held that punitive damages may be awarded in a Title VII case even where no compensatory damages, nominal damages, or back pay are awarded. *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001) ("We hold that in Title VII cases, where the factfinder has found in a plaintiff's favor that the defendant engaged in the prohibited discrimination, punitive damages may be awarded within the limits of the statutory caps if the defendant has been shown to have acted with a state of mind that makes punitive damages appropriate, regardless whether the plaintiff also receives an award of compensatory or nominal damages."). The award of punitive damages here is adequately supported under Federal law.