

- Did the claimant take any protected action?
- See Crawford v. Metropolitan Government of Nashville and Davidson County, ___ U.S. ___, 129 S. Ct. 846 (2009)

- Is the proposed defendant legally responsible?

- Did the claimant satisfy any internal requirement to be considered for something good, or to avoid something bad?

- Did anything bad happen to the claimant?
 - Denial of something good?
 - Occurrence of something bad?

- Was it bad enough that it “could dissuade” reasonable other employees from taking protected actions?
- Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

- Is there a causal relationship between the protected activity and the adverse employment action?
 - Admissions
 - Suspicious statements
 - Suspicious timing
 - Pattern of similar activity
 - Comparators

- Admissions

- Unambiguous?

- About this incident?

- Made at the time?

- By an authorized speaker?

- By a direct manager?

- Suspicious statements?
 - Unambiguous?
 - About this incident?
 - About a pattern?
 - Made at the time?
 - By a decision-maker?

- Suspicious timing?
 - How temporally close was it?
 - Is there a close starting point?
 - Was this the first opportunity?
 - When does the counting start?

- Pattern of similar activity?
 - How similar was it?
 - How uniform was it?
 - Did the same conduct ever occur in the absence of protected activity?

- Comparators?

- Must be alike in the important ways.
- Often the most persuasive proof.
- Both sides can use comparators.
- Look for exceptions.
- Look for explanations.
- Look for confounding facts.

- The decision-maker did not know about the protected activity.
- The decision-maker did not know that the claimant was the one who engaged in the protected activity.

- Proving that the decision-maker did in fact know about the protected activity.
- Proving that someone who knew tainted the decision: the “cat’s paw” line of cases.

- The claimant was not good, and the decision was made for a legitimate reason.

- The test is not whether defendant was accurate, but whether it believed in good faith that it was right.
- See the “*Prima Facie* and *Liability*” slides.
- Changes in stories are probative.
- Departures from ordinary standards and procedures are also probative.

- The claimant was not good, and the same decision would have been made anyway.

- Was there a prior policy, or was one made up to fit the claimant?
- Was any such policy uniformly applied before?
- Has any such policy been applied uniformly since?
- Do the exceptions make common sense?

- We learned in discovery that the claimant was no good, so we made the right decision anyway.

- McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995)
- See “Spiking Mixed-Motives Defenses”
- Affects remedies of back pay and reinstatement, not liability.
- Looking for “After-Acquired evidence” is not legitimate discovery.