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Retaliatory Discharge and Whistleblowers

Joel S. Barras
John A. DiNome

9-1 WHISTLEBLOWER PROTECTIONS

Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, inserted text into the legislative history of the Sarbanes-Oxley Act[1] that aptly described the level of whistleblower protections afforded employees throughout the United States. Senator Leahy wrote as follows: "[E]mployees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions."[2]

While the Sarbanes-Oxley Act provides significant whistleblower protections to employees of publicly traded companies, private and public sector employees remain subject to the "patchwork and vagaries" of various state and federal whistleblower laws. There are at least 35 federal statutes that contain whistleblower protections, which are generally enforced by the U.S. Department of Labor. In Pennsylvania, employees may also enjoy protections under the Pennsylvania Whistleblower Law.[3] The subject matter of these laws varies significantly, but their underlying purpose is constant: i.e., to protect employees who endeavor to impede, report, or testify about employer action that is illegal, injurious, or violative of specified public policies.

9-2 PROTECTIONS FOR GOVERNMENT EMPLOYEES

9-2.1 Pennsylvania Whistleblower Law

The Pennsylvania Whistleblower Law (PWL) provides that a public employer cannot discharge, threaten, or otherwise discriminate or retaliate against an employee because the employee or a person acting on behalf of the employee either: (1) makes a good-faith report to the employer or an appropriate authority of an instance of wrongdoing or waste, or (2) is asked by an appropri-

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).
2. Congressional Record p. S7412; S. Rep. No. 107-146, 107th Cong., 2d Session 19 (2002).
3. Act of 1986, P.L. 1559, No. 169, as amended, 43 P.S. § 1421 et seq.

ate authority to participate in an investigation, hearing, or court action. An "employee" is broadly defined as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, for a public body."[4] The term "public body" is similarly liberally defined as including the following:

- A state officer, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the government;
- A county, city, township, regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency; and
- Any other body that is created by the Commonwealth or political subdivision authority, or that is funded in any amount by or through the Commonwealth or political subdivision.[5]

Furthermore, Pennsylvania courts have expanded the scope of the PWL's protections to private employers that receive grants or other funding from government sources.[6] However, federal courts have declined to follow this holding.[7]

In *Riggio v. Burns*,[8] a neurologist at a private medical institution was discharged, allegedly for notifying the hospital president and board of directors that resident physicians were placing electrodes in the brains of epileptic patients without proper supervision, resulting in one patient death and several comas. In challenging her discharge, the physician invoked the protection of the PWL, citing her statutory duties under the Health Care Facilities Act and the Medical Practices Act. In defense of this action, the employer argued that a private medical institution was not a "public body" under the statute, and, therefore Riggio was not a protected "employee" under the PWL. Although the trial court agreed, the Superior Court reversed, holding that the private medical institution was a "public body," because it had been appropriated over $4.5 million by the legislature. Similarly, in *Denton v. Silver Stream Nursing & Rehabilitation Center*,[9] the Superior Court held that any health-care facilities that received Medicaid funding (via the state) fell within the parameters of the PWL.

Pennsylvania state courts continue to follow the holding reached in *Denton*.[10] However, courts have yet to extend these protections to employees of private companies merely performing government contracts.[11] Moreover, there is at least one prior federal court ruling, which has not been reversed, that declined to expand the PWL in a similar manner. Specifically, a federal district court held that Medicaid reimbursements paid to Temple University, some or all of which ultimately passed through to a for-profit corporation contractually related to the university, was not "funding" so as to invoke the protection of the PWL.[12]

As noted above, a covered employee is protected from adverse employment action if he or she (1) makes a good-faith report of the employer's waste or wrongdoing, or (2) participates in an official investigation. To constitute a "good-faith report," the report must be supported by credible

4. 43 P.S. § 1422.
5. Id.
6. *Denton v. Silver Stream Nursing & Rehab. Ctr.,* 739 A.2d 571 (Pa.Super. 1999); *Riggio v. Burns,* 711 A.2d 497 (Pa.Super. 1998) (en banc), app. dismissed as improvidently granted, 739 A.2d 161 (Pa. 1999).
7. *Tanay v. Encore Healthcare, LLC,* 810 F.Supp.2d 734 (E.D. Pa. 2011).
8. *Riggio v. Burns,* 711 A.2d 497 (Pa.Super. 1998).
9. *Denton v. Silver Stream Nursing & Rehab. Ctr.,* 739 A.2d 571 (Pa.Super. 1999).
10. *Langoussis v. Easton Hosp.,* 61 Pa.D.&C.4th 176 (C.P. Northampton 2002).
11. *Krajsa v. Keypunch, Inc.*, 622 A.2d 355 (Pa.Super. 1993).
12. *Cohen v. Salick Health Care, Inc.*, 772 F.Supp. 1521 (E.D. Pa. 1991); but see *Davis v. Point Park Univ.,* Civil Action No. 10-1157 (W.D. Pa. November 30, 2010).

evidence.[13] In *Golaschevsky v. Department of Environmental Resources,* a public employee informed his employer that he suspected violations of copyright law based upon his personal observations and conversations with fellow workers. The court held that where suspicion triggers a report of waste or wrongdoing, the employee has made a report within the meaning of the PWL. However, that report of alleged wrongdoing does not constitute "credible evidence." Instead, the court concluded that the employee was required to substantiate any alleged illegal computer use by producing actual evidence of such use.[14]

Even where credible evidence is produced, the alleged "wrongdoing" must constitute more than a mere technical violation of a federal, state, or local statute, regulation, or ordinance.[15] In addition, the reported wrongdoing in question must be committed by the agency or its employees, not by third parties; and the wrongdoing must be a violation of a law "of the type that the employer is charged to enforce for the good of the public or is one dealing with the internal administration of the governmental employer in question."[16]

In *Gray v. Hafer,* an employee of the auditor general's office reported instances of criminal misconduct by Temple University employees. This "report" allegedly led to the employee's dismissal by the auditor general. In rejecting the employee's PWL claim, the Commonwealth Court found that the reported instances of misconduct were not violations of any law or regulation that the auditor general's office was charged with enforcing for the good of the public. Accordingly, the alleged violations did not constitute "wrongdoing" under the PWL.

An individual must file a claim within 180 days of the alleged adverse employment action in any court of competent jurisdiction.[17] While individuals may file such claims in courts of common pleas, some Pennsylvania courts have concluded that there is no such right to a jury trial. If successful, the claimant would be entitled to actual damages, including reinstatement with back pay and benefits. Further, the court may award attorney's fees and costs.[18] In addition, the PWL imposes a fine of up to $500 on an "employer," which is defined as a "person supervising one or more employees, including the employee in question; a superior of that supervisor; or an agent of a public body."[19] Finally, if there was an intent to discourage disclosure of criminal activity, the offending employer may be suspended from public service for up to six months. This provision, however, does not apply to those holding an elected office.[20]

9-2.2 Whistleblower Protection Act

The Whistleblower Protection Act (WPA) provides statutory protection to most executive branch federal employees who disclose evidence of illegal or improper government activities. The statutory protections are typically available in four types of proceedings: (1) individually maintained rights of action before the Merit Systems Protection Board, (2) employee appeals to adverse actions taken by the Merit Systems Protection Board, (3) actions instituted by the Office of Special Counsel, and (4) grievances brought by the employee pursuant to negotiated grievance procedures.

13. *Golaschevsky v. Department of Envtl. Resources*, 683 A.2d 1299 (Pa.Cmwlth. 1996).
14. Id. at 1302.
15. *Podgurski v. Pennsylvania State Univ.*, 722 A.2d 730 (Pa.Super. 1998).
16. *Gray v. Hafer*, 651 A.2d 221, 224 (Pa.Cmwlth. 1994), aff'd per curiam, 669 A.2d 335 (Pa. 1995).
17. 43 P.S. § 1424(a).
18. Id. § 1425.
19. Id. § 1422.
20. Id. § 1426.

Covered employees include current employees, former employees, or applicants for employment to positions in the executive branch of government. However, a number of employees are exempted from these protections because of their "confidential, policy-determining, policy-making, or policy-advocating character,"[21] and any positions exempted by the president based on a determination that it is necessary and warranted by conditions of good administration. Furthermore, the statute does not apply to employees of the Postal Service, the Government Accountability Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and any other executive entity that the president determines primarily conducts foreign intelligence or counterintelligence activities.

The WPS protects any disclosure of information that a covered employee reasonably believes evidences a violation of any law, rule, or regulation or evidences "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,"[22] provided that the disclosure is not prohibited by law or required to be kept secret by executive order. In addition, disclosures revealed to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, which reasonably establishes "a violation of any law, rule, or regulation," or evidences "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" are protected.[23]

9-3 WHISTLEBLOWER PROTECTIONS UNDER THE SARBANES-OXLEY ACT

On July 30, 2002, President Bush signed the Sarbanes-Oxley Act (SOX) into law, hoping to restore investor confidence in struggling financial markets declining, in part, from the highly publicized corporate financial scandals at companies such as Enron and Adelphia. Primarily, SOX reforms the oversight of corporate accounting practices and addresses a range of corporate accountability issues. Additionally, the legislative history of the statute evinces Congress's intent to close loopholes in existing state and federal laws that provide protection for whistleblowers.[24] The authors of the whistleblower section, Senators Chuck Grassly and Patrick Leahy, sought to deter retaliatory conduct by subjecting individuals who perpetrate such acts to substantial civil and criminal penalties, including prison sentences of up to 10 years and substantial monetary fines.[25]

Section 806 of SOX[26] prohibits publicly traded companies from discriminating or retaliating against employees who lawfully provide information to or assist an investigation of conduct that they reasonably believe constitutes a violation of securities law or any federal law relating to shareholder fraud.[27] To fall within the protection of the statute, the employee's acts must be lawful and the information must be provided to a federal regulatory or law enforcement agency,

21. 5 U.S.C. § 2302(a)(2)(B)(i).
22. Id. § 2302(b)(8)(A)(ii).
23. Id. § 1213(a)(1)(A)–(B).
24. 148 Cong. Rec. S6439-40, 107th Cong., 2d Session (2002).
25. Id.
26. 18 U.S.C. § 1514A.
27. Id. § 1514A(a)(1).

a member of Congress, or, significantly, "a person with supervisory authority over the employee."[28] The law also protects employees who file, testify, participate in, or otherwise assist, government proceedings involving such laws.[29]

Generally, the relief available to a successful claimant is make-whole type remedies, including reinstatement, "economic reinstatement," back pay with interest, promotion, bonuses, and litigation costs, including reasonable attorney's fees.[30] Further, civil remedies are not the only protection provided to whistleblowers. Anyone who knowingly retaliates against an individual for providing truthful information to a law enforcement officer relating to the commission or possible commission of a federal offense can be subject to criminal sanctions.[31]

The recent amendments to SOX also provide financial rewards to whistleblowers. The SEC or the Commodities Futures Trading Commission (CFTC) may provide a monetary reward to one or more whistleblowers who voluntarily provide "original information" that leads to a judicial or administrative action that results in monetary sanctions exceeding $1 million. Given that the whistleblower(s) may be entitled to recover an amount between 10 percent and 30 percent of the total amount of such sanctions—including penalties, disgorgement, and interest—the potential financial incentive on a million-dollar case can be worth at least $100,000 to $300,000. These agencies, however, retain ultimate discretion to set the actual amount of the reward (provided it is in the predetermined range) and, in some instances, may also deny the reward entirely if the whistleblower(s) do not submit information in a form satisfactory to the agency.

SOX expressly covers publicly traded companies and their officers, employees, contractors, subcontractors, and agents.[32] Settling a previously unresolved question, the recent financial reform legislation amended SOX to explicitly provide whistleblower protections for "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of [a public] company."[33]

Initially, to be considered timely, complaints under SOX must be filed within 180 days[34] of the alleged violation, i.e, when the discriminatory decision has both been made and communicated to the employee.[35] For example, when an employee learns that his or her employment will be terminated in the future, the clock begins running on the date the employee is notified of that decision, not the date of termination.[36] Within the U.S. Department of Labor, the Occupational Safety and Health Administration (OSHA) is responsible for receiving and investigating SOX complaints in accordance with the enforcement scheme established by the statute. However, if OSHA fails to adhere to certain time restrictions, the complainant may remove the case to federal district court.

28. Id.
29. Id. § 1514A(a)(2).
30. Id. § 1514A(c)(2)(A).
31. Id. § 1513(e).
32. Id. § 1514A; 29 CFR 1980.101, 1980.102.
33. Dodd-Frank Wall Street Reform and Consumer Protection Act, sections 922 and 929A.
34. This limitations period was recently raised from 90 days by the Dodd-Frank Wall Street Reform and Consumer Protection Act.
35. 29 CFR 1980.103(d).
36. Id.

An employee is not required, however, to exhaust his or her administrative remedies before bringing suit in federal court.[37] In addition, the recent financial reform legislation has precluded the use of pre-dispute arbitration agreements in litigation under SOX.[38] Furthermore, the time for filing many such actions has been greatly expanded beyond the 180-day limitations period for filing an administrative claim. Section 21F of the Securities Exchange Act prohibits employers from discharging, demoting, suspending, threatening, harassing (directly or indirectly), or otherwise discriminating against an employee for (1) providing information to the SEC in accordance with that section, (2) assisting in an investigation or judicial or administrative action relating to the information provided, or (3) making disclosures that are required or protected under SOX, the Securities Exchange Act, or any other law, rule, or regulation subject to the SEC's jurisdiction. Employees alleging violations of this provision can bring an action in federal district court under the following limitations periods: claims may not be brought more than six years after the violation has occurred *or* more than three years after the employee knew or reasonably should have known about the facts material to the claim; however, any such action may not be brought more than 10 years after the date on which the violation occurred. Prevailing employees are entitled to substantial damages under this provision, including double back pay plus interest, and attorneys' fees and litigation costs.

To establish a violation of section 806 of SOX, the complainant must establish by a preponderance of the evidence that:

1. the complainant engaged in protected activity as defined by the act;
2. his or her employer was aware of the protected activity;
3. the complainant suffered an adverse employment action; and
4. the circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action.[39]

If a claimant establishes these elements, a respondent employer may still avoid liability by presenting clear and convincing evidence that it would have pursued the same unfavorable personnel action absent any participation in protected activities.[40]

As noted above, activity protected by SOX includes legally providing information to a federal regulatory or law enforcement agency, a member of Congress, or "a person with supervisory authority over the employee." The law also protects employees who file, testify or participate in, or otherwise assist, government proceedings involving such laws. Further, by its terms, SOX only protects an employee who "reasonably believes" that the information reported constituted a violation of the federal mail, wire, bank, or securities fraud statutes, any SEC rule or regulation, or any other federal law relating to fraud against shareholders.[41] Notably, the complainant does not have to prove an actual violation of the law, only a reasonable belief that a violation occurred.[42] Consequently, the complainant's belief is scrutinized under both a subjective and an objective standard; i.e., the complainant must have actually believed the employer was in viola-

37. Dodd-Frank Wall Street Reform and Consumer Protection Act, section 922.
38. Id.
39. 29 CFR 1980.104(b), 1980.109(a).
40. Id. at 1980.109(a).
41. 18 U.S.C. § 1514A(a)(1); *Sylvester v. Parexel Int'l LLC,* ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011).
42. *Sylvester,* above.

tion of the law and that belief must have been reasonable.[43] For purposes of SOX cases, reasonableness is determined on the basis of the knowledge available to a reasonable person in the context of the complainant's training and experience, and is examined in light of the totality of the circumstances.[44] To establish that the employer knew of the protected activity, the complainant must prove, again by a preponderance of the evidence, that the employer had actual or constructive knowledge of the protected activity.[45]

Section 806(a) of SOX expressly prohibits retaliation in the form of discharge, demotion, suspension, threats, harassment, or any other discrimination against an employee in the terms and conditions of employment. In defining the more ambiguous of the identified terms, some ALJs and courts have looked to decisions under other whistleblower statutes and Title VII cases.

To satisfy the final element of his or her prima facie case, a complainant must establish, by a preponderance of the evidence, that the participation in protected activity was a "contributing factor" to the challenged adverse action.[46] Critically, this is a far less arduous standard to satisfy than Title VII's requirement that the membership in a protected class be a "substantial factor" in the adverse employment action. Courts and ALJs have interpreted the phrase "contributing factor" to mean any factor that alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law interpreting other whistleblower statutes, which requires that a whistleblower prove that his or her protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to establish a sufficient nexus between the protected activity and the adverse action.[47]

If a complainant establishes the requisite elements by a preponderance of the evidence, the burden then shifts to an accused employer or individual to establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.[48] The employer, therefore, must establish some nondiscriminatory reason for taking the adverse employment action against the employee, such as poor work performance, violation of the employer's policies and procedures, or even layoffs.

Federal circuit courts of appeal are split as to whether an ALJ's determination has preclusive effect with respect to the employee's subsequent Title VII and ADEA claims. In an unpublished opinion, the Third Circuit concluded that such preclusive effect does attach. Specifically, the Third Circuit court found that an administrative ruling under SOX, determining that an employee was fired for the legitimate, nonpretextual reason of having falsified sales reports, had preclusive effect on her subsequent discrimination claims brought in federal court under Title VII and the ADEA. The court noted that Congress explicitly provided that when a federal agency adjudicated a claim arising under SOX, that claim was not amenable to collateral attack in any other forum, and that legal precept applied notwithstanding the general presumption of de novo review under Title VII.[49]

43. *Prioleau v. Sikorsky Aircraft Corp.,* ARB No. 10-060, ALJ No. 2010-SOX-003 (ARB November 9, 2011); *Welch v. Chao,* 536 F.3d 269 (4th Cir. 2008).
44. Id.
45. 29 CFR 1980.104(b)(1).
46. Id. at 1980.104(b)(2).
47. *Grant v. Dominion East Ohio Gas,* 2004-SOX-63, 33 (ALJ March 10, 2005).
48. 29 CFR 1980.109.
49. *Tice v. Bristol-Myers Squibb Co.,* 325 Fed. Appx. 114 (3d Cir. 2009).

9-4 ANTIRETALIATION LAWS

Virtually all federal and state antidiscrimination laws prohibit an employer from retaliating against an employee who, among other things, opposes unlawful discriminatory practices or files a charge of discrimination with a federal, state, or local fair employment practices agency. Examples of provisions prohibiting retaliation include the following:

- **Title VII: Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings (42 U.S.C. § 2000e-3)**

  It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

- **ADA: Prohibition against retaliation and coercion (42 U.S.C. § 12203)**

  (a) Retaliation

  No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

  (b) Interference, coercion, or intimidation

  It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

- **ADEA: Same as Title VII (42 U.S.C. § 12203)**

- **Family and Medical Leave Act: Prohibited acts (29 U.S.C. § 2615)**

  (a) Interference with rights

  (1) Exercise of rights

  It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

  (2) Discrimination

  It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

  (b) Interference with proceedings or inquiries

  It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

> (1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;
>
> (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or
>
> (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

■ **Fair Labor Standards Act (29 U.S.C. § 215)**

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

. . .

> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Prior to 2006, the federal circuit courts were left to devise their own standards for what constituted unlawful retaliation under Title VII and other federal antidiscrimination statutes. More important, the standards they chose varied greatly from federal circuit to federal circuit. In 2006, the United States Supreme Court adopted a standard for retaliation claims under Title VII, with its holding in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). Before *Burlington Northern*, the Third Circuit applied the same standard for retaliation claims that they applied to the substantive claim of discrimination, requiring the plaintiff to show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions of employment." Under that standard, the challenged action must result in an adverse effect on the employee's terms, conditions, or benefits of employment.

In *Burlington Northern*, the Supreme Court adopted the following standard for judging whether conduct constitutes actionable retaliation under Title VII:

> 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.'"

548 U.S. at 67.

In distinguishing the antiretaliation provision from the substantive antidiscrimination provision, the court noted that the "antiretaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct," not on who they are. Id. at 63. Because of that difference, the court found that "one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace." Id. "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." Id. (emphasis in original).

Significantly, however, "[t]he antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." Id. at 67. Consequently, the antiretaliation provision protects only against significant harms, as stated by the court:

> 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.

Id. at 68 (citations omitted).

The *Burlington Northern* decision changed the way many courts have interpreted Title VII's antiretaliation provision in two respects: (1) it focuses on the materiality of the challenged action from the perspective of a reasonable person in the plaintiff's position, i.e., whether the conduct would likely deter a reasonable person in the plaintiff's position from complaining about discrimination, and (2) the challenged action does not have to be related to the terms and conditions of employment. As the Supreme Court stated, "[t]he scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." Id. at 67. The "standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint." Id. at 69.

To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) he or she engaged in protected activity, (2) he or she was subsequently or contemporaneously subject to an adverse employment action, and (3) there was a causal link between the protected activity and the adverse action. See *Woodson v. Scott Paper Co.,* 109 F.3d 913, 920 (3d Cir. 1997); *Jalil v. Avdel Corp.,* 873 F.2d 701, 708 (3d Cir. 1989). After the complainant establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, nondiscriminatory reason for the adverse employment action. See *Jalil,* 873 F.2d at 708. To meet its burden, the employer must only articulate a legitimate reason; the defendant need not prove that the stated reason was in fact the actual reason. See *Woodson,* 109 F.3d at 920. To sustain a retaliation claim, the complainant must then show that any alleged nondiscriminatory reason proffered by the employer is pretextual and that the real reason was retaliatory or otherwise present evidence from which a fact finder reasonably could find that retaliation was more likely than not a determinative cause of the adverse employment action. See *Jalil,* 873 F.2d at 708.

In defending retaliation actions, an employer has several defenses, which include the following:

- **Plaintiff's failure to satisfy administrative prerequisites if the alleged retaliation occurred prior to or contemporaneously with the filing of the initial charge.**
  - failure to file the underlying charge of discrimination or harassment that includes a claim of retaliation within the appropriate 180/300-day time period;
  - failure to include a claim of retaliation in a timely filed charge of discrimination or harassment;
  - assuming that a right-to-sue notice was issued by the EEOC or PHRC, failure to file a lawsuit within 90 days of receipt of the right-to-sue notice.
- **No actionable retaliation.** The employer may be able to rebut the plaintiff's case by proving:
  - the events complained of did not occur;
  - the plaintiff did not engage in protected activity;

- if the plaintiff made an internal complaint of discrimination, he or she did not have a "good-faith, reasonable belief" from an objective standpoint taking into account the facts and existing law that the employer had engaged in a practice made unlawful by Title VII.

- **No material harm.** There was no *"material harm"* to the plaintiff; i.e., the alleged retaliation was isolated and/or trivial and would have dissuaded a reasonable worker from making or supporting a charge of discrimination.

- **No causal connection.** Title VII requires intent to discriminate, and retaliation claims are no different. There must be a *causal connection* between the filing of the charge or lawsuit or other protected activity and the conduct characterized as retaliation. The lack of causal connection can be shown by establishing that the person charged with the retaliation had no knowledge that the plaintiff had engaged in protected activity or that the time period between the protected activity and the alleged retaliation was too long.

9-5 REPRESENTATIVE SAMPLE OF RECENT ANTIRETALIATION CASES IN PENNSYLVANIA

- ***Moore v. City of Philadelphia,* 461 F.3d 331, 352 (3d Cir. 2006)**

The plaintiff was a policeman. The Philadelphia Police Department had a policy of performing "sick checks" on officers out on medical leave. In the three months prior to filing suit, the department performed three sick checks on the plaintiff; in the three months after the plaintiff filed suit, the department performed approximately 30 sick checks. After he failed five sick checks, the plaintiff was fired.

The Third Circuit held: "The striking difference in the application of the sick-check policy before and after the date William filed his lawsuit would support an inference that it was caused by retaliatory animus. [cite omitted]. In addition, enforcing the sick check policy so vigorously would allow a jury to conclude that the disparate application of this policy 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id. at 352.

- ***Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010)**

The antiretaliation provision of section 510 of the Employee Retirement Income Security Act (ERISA), which makes it unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he or she has given information or has testified or is about to testify in any inquiry or proceeding relating to ERISA, does not protect an employee's unsolicited internal complaints to management.

- ***McGee v. P&G Distributing Co.*, 445 F.Supp.2d 481, 491 (E.D. Pa. 2006)**

The district court applied *Burlington Northern* to an ADA case.

- ***Flax v. Delaware*, 329 Fed. Appx. 360, 365 (3d Cir. 2009)**

Flax claimed that he suffered an adverse employment action in retaliation for filing a union grievance regarding a reduction in salary and a subsequent grievance alleging discrimination based upon his alleged disability. The district court found that, to the extent that Flax intended to bring a Title VII retaliation claim, there was no mention of race discrimination in either the grievance complaining of salary reduction or the grievance alleging discrimination based upon

disability. Accordingly, the district court concluded that Flax's having filed these grievances unrelated to race discrimination did not constitute protected activity for purposes of a Title VII retaliation claim. The Third Circuit agreed, reiterating that "protected activity" in the antiretaliation provision of Title VII refers only to participation in certain Title VII proceedings and to opposition to unlawful discrimination under Title VII.

- ***Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183 (3d Cir. 2003)**

The court held that the absence of a disability does not translate into an absence of protection under the ADA. The ADA protects the right to request an accommodation in good faith without regard to whether the complainant is "disabled."

- ***Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, 450 F.3d 130 (3d Cir. 2006)**

A teacher at a private Catholic school claimed that the school's termination of her after she signed a pro-choice newspaper advertisement constituted sex discrimination, since offending male employees at the school had been treated less harshly. The court found the claim was not cognizable under Title VII and the Pregnancy Discrimination Act; no male employee comparators had engaged in public pro-choice advocacy, necessitating the court's assessment of the relative severity of the respective violations of church doctrine, in violation of the First Amendment, and Congress did not clearly intend for Title VII to apply in the situation presented.