LITIGATING TITLE VII RETALIATION CLAIMS

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I. INTRODUCTION: FREEDOM'S LAW.[i]

> We have talked long enough in this country about civil rights. We have talked for one hundred years or more. It is time to write the next chapter, and to write it in the books of law.
>
> Lyndon B. Johnson
> State of the Union Address
> January 8, 1964

A. The 1964 Civil Rights Act Turns 50

The Golden Anniversary of the Civil Rights Act of 1964 is cause for reflection on what has been called the most monumental achievement for civil rights in the 20th Century. One legal scholar (Bruce Ackerman) even compared the law to a constitutional amendment because of its significance in our country's legal development.[ii] The heroes[iii] who brought about its passage against all odds included John F. Kennedy who introduced it to Congress and Lyndon B. Johnson who, after President Kennedy's assassination, made sure the legislation would pass through Congress largely unchanged in its provisions. Justice William Brennan played a big role in delaying the U.S. Supreme Court decision in *Bell v. Maryland*, a civil rights case, so as not to affect Congress as it considered the Civil Rights Act. There were also the men, women and children who protested and demonstrated against racial injustice in the South – through Freedom Rides and Sit-ins – some of whom gave their lives and all of whom believed "We shall Overcome." They did. What was achieved? In signing the Act on July 2, 1964, President Johnson said in relevant part (and I freely paraphrase):

> Each generation must fight to renew and enlarge the meaning of freedom. While Americans of every race and color have died in battle to protect our freedom, many have been denied equal treatment because of their race and color. The reasons for discrimination are deeply embedded in history and tradition and human nature. We understand – without rancor or hatred – how this happens. But our Constitution forbids discrimination; the principles of our freedom forbid it; morality forbids it; and the law I now sign (the Civil Rights Act of 1964) forbids it. Those who are equal before God shall now also be equal in the polling booths, classrooms, in hotels, restaurants, movie theaters, and in the workplace.[iv]

B. Title VII and the Most Frequently Filed EEOC Charge: Retaliation

The Civil Rights Act of 1964 has eleven titles prohibiting discrimination in voting and voter registration (the voting part was later strengthened by the Voting Rights Act of 1965), public facilities, schools, and employment. Employment is covered by Title VII and the anti-retaliation provision is a part of Title VII.

"Retaliation" is the most commonly filed EEOC charge by individuals and Title VII retaliation is the most common for all the statues EEOC enforces. The EEOC charge statistics for FY1997-FY2014 show a steady increase of Title VII retaliation charges between 2010 and 2013. In 2013, 33.6% of all filed EEOC charged were Title VII retaliation charges. This is about 31,478 charges out of a total of 93,727 filed in FY2013.[v] In Arizona in 2013, Title VII retaliation charges comprised 44.7% of all charges filed here.[vi]

C. Why is Retaliation So Popular?

Are employers still kicking against the goad after 50 years? Is the phenomenon simply human nature ("get even" or payback is as old as the Code of Hammurabi which predates the Jewish scriptures). It may be a bad or sluggish economy. Or have the courts interpreted Title VII's anti-discrimination provision to make it the high ground on the Plaintiff's legal battlefield?

For the Plaintiff, it may be easier to allege or even prove retaliation than the underlying complaint or protected activity – so long as Plaintiff has a "reasonable belief" the employer violated Title VII[vii] and can prove causation. Title VII is broadly construed as to the reasonableness of a plaintiff's belief that a violation occurred.[viii] In other words, a plaintiff can make a reasonable mistake of fact or law and still be protected against reprisal.[ix] Also, beginning in 2006 and in following years, the United States Supreme Court has weighed in on Title VII's anti-retaliation provision, greatly expanding the reach and flexibility of the law.

II. THE SEVEN STOREY STATUTE.

> [Title VII] prohibit[s] employers from discriminating against their employees on any of seven specified criteria. Five of them…are personal characteristics…[and] two…are based on…protected employee conduct.
>
> Justice William Kennedy
> 133 S. Ct. at 2525 (2013)

Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended,[x] prohibits discrimination on the basis of race, color, religion, national origin, or sex in harms that affect employment or alter workplace conditions such as hiring, firing, compensation, and other conditions of employment. Section 703(a), 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Title VII's anti-retaliation provision is found in Section 704(a) of the statute, 42 U.S.C. § 2000e-3(a) which protects those who oppose discrimination or participate in Title VII processes:

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

Title VII's Anti-Retaliation provision is comprised of two clauses which forbid discrimination against a protected or covered person based on "participation" or "opposition":

- Participation Clause: "Because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this [title]; and

- Opposition Clause: "Because he has opposed any practice made an unlawful employment practice by this [title]."

The Participation Clause is broadly interpreted. It covers innumerable aspects of an employee communicating (or refusing to communicate) allegations or evidence of Title VII violations to courts, EEO counselors, civil rights enforcement agencies, or other entities a covered person reasonably believes could enforce Title VII. "Participating" or "assisting" may also include being a probable witness, testifying for a co-worker, assisting other workers in their discrimination claims, assisting relatives in their discrimination claims, refusing to be a cooperative witness for an employer, defending against charges of sexual harassment, and even includes those who acted as representative of those who engaged in protected participation, or refused to block the ability of others to participate in an investigation, proceeding or hearing.[xi] The Participation Clause protects employees even if they are wrong about the merits of their discrimination claim.

The Opposition Clause provides even broader protection than the Participation Clause. The Opposition Clause protects covered persons if the employment practice they oppose is

"made an unlawful employment practice by [Title VII]" or if they have a reasonable belief the employer committed an unlawful employment practice.[xii]

III. FOUR SUPREME COURT DECISIONS THAT DEFY THE PRIMA FACIE CASE.

> There are more things in Heaven and earth, Horatio, than are dreamt in your philosophy.
>
> Hamlet, Act I, Scene V.

A. The Prima Facie Case.

Retaliation law has evolved over the past few years and has reached the point where the traditional model for the prima facie case cannot encompass it. Let's examine the prima facie case and how it has evolved through case law.

The "prima facie case" is a set of facts that establish a rebuttable presumption by which the trier of fact may infer the cause of action or claim. To establish a traditional prima facie retaliation claim under Title VII's Participation Clause or Opposition Clause, the plaintiff must show: (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[xiii]

If the plaintiff has established a prima facie case for retaliation, the burden shifts to the employer to furnish legitimate non-discriminatory reasons for the adverse employment action.[xiv] If the employer meets that burden, the plaintiff bears the ultimate burden of demonstrating that the reason advanced by the employer was merely a pretext for a discriminatory motive.[xv] The plaintiff may show pretext "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[xvi]

B. Four Cases That Redefined Retaliation Law.

1. "Adverse Employment Action" or "Materially Adverse"?

In *Burlington Northern and Santa Fe Railway Co., v. White* (2006)[xvii] Plaintiff Sheila White, who had complained of gender discrimination, alleged she was retaliated against when she was (a) reassigned from forklift operator to the dirtier, harder and less prestigious job of track labor, and (b) suspended without pay for 37 days although she was later reinstated with full back pay. The Court had to decide whether what happened to Sheila White was an adverse action for purposes of the anti-retaliation provision and in doing so distinguished between what is an adverse action under the substantive anti-discriminatory provision, Section 703(a), and the anti-retaliation provision, Section 704(a). Here is the Court's distinction:

Section 703(a)		Section 704(a)
Prohibits	Injury based on status or personal characteristics (race, color, religion, sex or national origin)	Injury based on conduct (opposition or participation)
Adverse Action	Harm affecting/altering workplace conditions: hire, discharge, compensation, terms, conditions or privileges of employment, employee status, equal employment opportunity	Materially adverse action, action that might well have dissuaded reasonable employee – in his/her position or context – from making or supporting charge of discrimination
Purpose	No discrimination against employee-based on race, color, ethnicity, religion, gender.	No interference with employee's efforts to secure or advance Title VII's basic guarantees.

In other words, the Court opted for a very malleable, unspecified concept of "adverse action" anchored only by what is "materially adverse," (not trivial) "that might well have dissuaded a reasonable employee," (objective standard) in his or her position ("context matters"), from opposing or participating in Title VII processes. What happened to Sheila White because she complained of discrimination may not have fit within the harm defined in Section 703(a) but under Section 704(a) it was materially adverse. In context, being given undesirable job duties and going without pay for 37 days "might well have dissuaded a reasonable employee from making or supporting a charge of discrimination."

2. Does "Protected Activity" Include Opposition through Response?

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee (2009),*[xviii] the Supreme Court addressed whether an employee is involved in Title VII protected activity when she does not affirmatively complain about alleged discrimination but only answers questions during the course of an internal investigation into another employee's complaint. An HR manager asked Vicki Crawford about another employee's sex harassment complaint. In her response, she said she too had been sexually harassed and described in detail the unwelcome sexual advances. She was then fired on concocted allegations of embezzlement, and filed an EEOC charge.

The Supreme Court held that an employee need not affirmatively complain of discrimination to be protected from retaliation. It suffices that an employee discloses opposition to such conduct in response to her employer's inquiries.

3. Does a Plaintiff have Title VII Standing even when not Engaged in Protected Activity?

In *Thompson v. North American Stainless, LP* (2011)[xix] Plaintiff Eric Thompson's fiancé filed an EEOC charge of discrimination. Three weeks later, Thompson was fired. The Supreme Court addressed whether (a) Thompson's termination was retaliation under Title VII and if so, (b) did Thompson and/or his fiancé have a retaliation claim.

The Supreme Court held there is a sliding scale of relationships and that the relationship should meet the *Burlington Northern* "materially adverse action" standard. Thompson's fiancé had a cause of action based on the relationship. And so did Thompson. The Court reasoned he was in the "zone of interests" sought to be protected by the statute whose violation is the basis of the complaint. The purpose of Title VII anti-retaliation provision is to prohibit and deter interference with an employee's efforts to secure or advance Title VII's guarantees. Not to provide Eric Thompson with a Title VII cause of action would defeat that purpose.

Under *Thompson*, third party retaliation claims are a derivative from a traditional retaliation claim. The two-step process is: (a) plaintiff must prove the underlying claim for retaliation and (b) plaintiff's own claim for relational third party retaliation.

4. Does Plaintiff have to Prove Sole Causation or just "the Straw that Broke the Camel's Back"?

In *University of Texas Southwestern Medical Center v. Nassar*[xx] the Supreme Court held that while Title VII status based discrimination (race, color, religion, sex or national origin) may be established by proof that protected status was a motivating factor, retaliation claims must be established by a much stricter causation standard, "but for causation." The "but for" causation standard requires proof that unlawful retaliation would not have occurred in the absence of the alleged wrongful conduct of the employer retaliating against the employee for his or her protected conduct. However, *Nassar's* causation standard was interpreted as a "sole cause" standard based on the Court's reference to "*the* but for cause."[xxi] (Emphasis supplied.)

In *Burrage v. United States,*[xxii] decided January 27, 2014, the Supreme Court, in a criminal case, clarified and re-characterized the "but for" standard not only in the criminal case before it ("the undoubted reality [is] that courts have not *always* required strict but for causality, even where criminal liability is at issue") but also the *Nassar* case and the whole body of employment discrimination cases. The Court[xxiii] used the word "a" for "the" in quoting the "but for" language in *Nassar*. The Court's correction means that "but for" causation in retaliation claims does not require a showing that an impermissible motive was the sole or only cause of the adverse action. An interpretation of *Nassar* is that discriminatory animus may be one of many causes yet "but for" the bias, the reprisal would not have occurred. There may be

multiple causes that produce the harm but a "but for" cause is the "straw that broke the camel's back."

The clarification will be helpful at the trial court level where plaintiffs can argue that the "but for" causation standard for Title VII retaliation is not a heightened standard of "sole cause" to be met in order to survive summary judgment. Nonetheless, the "but for" standard of causation is more onerous than "motivating factor" causation.

IV. EMPLOYERS FIGHT BACK: DEFENSES TO RETALIATION CLAIMS.

> For any commander, trying to anticipate the enemy's moves is an essential preoccupation. It is fundamental to put yourself always in the position of the enemy.
>
> Gen. Omar Bradley's advice to West Point Cadet (*A General's Life* (1983), p. 77.)

It is important that employers utilize good policies for investigating and addressing claims of retaliation. There are many situations that call for prompt remedial action. There are also situations involving meritless or even frivolous claims. Justice Kennedy, in the *Nassar* opinion, described a hypothetical "set up" engineered by an employer who feels threatened he or she may be disciplined for poor performance and fabricates a bogus claim:

> Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of…discrimination; then when the unrelated employment action comes, the employee could allege that it is retaliation.[xxiv]

1. "But for" Causation – Plaintiff cannot prove it. Based on this hypothetical, Justice Kennedy who wrote the majority opinion in *Nassar*, said a more strict causation standard could act as a defense to such meritless claims. The passage of time can also weaken the inference of causation.

2. Unreasonable or Disruptive Conduct - If the employee or other covered person opposes what is in fact a violation of Title VII or what they reasonably believe to be so, the protection may be lost because of the form of the opposition -- disruptive or other conduct that is not "reasonable." Or if the alleged "opposition" to unlawful employment practices was outside the bounds of lawful behavior, the protection is lost.

3. "Manager Rule" Defense - Under the "Manager Rule," an HR investigator doing an investigation and who is neither the aggrieved or accused party, is not protected simply by doing her job. Instead there would have to be a clear transition from an HR investigator doing a job to employee lodging a complaint for there to be protected conduct. Or if the HR Manager's opposition constitutes a refusal to do her job (e.g., EEO manager filing class action discrimination case against employer and inviting others to sue or join in the class action, thereby becoming ineffective in their position) there is no protection.[xxv]

4. Failure to timely exhaust administrative remedies and fulfill conditions precedent to filing suit (e.g., 300-day filing requirement and filing within 90 days of receipt of notice of right to sue).

5. Employer had policies in place against unlawful harassment, discrimination and retaliation, and took reasonable care to prevent and promptly correct any alleged unlawful conduct.[xxvi]

6. The Plaintiff failed to reasonably take advantage of preventative or corrective measures the Employer provided, or did not otherwise avoid harm.[xxvii]

7. Employer had legitimate, non-discriminatory and non-retaliatory reasons for the actions it took that allegedly adversely affected Plaintiff.

8. Employer was not given timely notice of Plaintiff's concerns that allegedly gave rise to discrimination or retaliation. This is closely related to defenses 5 and 6, above.

9. Plaintiff's alleged "opposition" is not cognizable under Title VII's anti-retaliation provision because it did not concern employment practices made unlawful by Title VII.

10. Employer was not the proximate cause of Plaintiff's alleged injuries. This is similar to defense 1, above.

V. ALTERNATIVE CAUSES OF ACTION: A VERY SMALL SAMPLING:

It is said there are over 500 statutes and regulations that prohibit retaliation. Here is a sampling of 10 of them.

1. ADA Anti-Retaliation Process (42 U.S.C. § 12203);

2. ADEA Anti-Retaliation Process (29 U.S.C. § 623(d));

3. 42 U.S.C. § 1981 (retaliation recognized by *CBOS West, Inc. v. Humphries*, 553 U.S. 442 (2008);.

4. 42 U.S.C. § 1983 (public employees may bring retaliation claim except solely based on Title VII);

5. 42 U.S.C. § 1985(3) (retaliation claim cognizable unless secured by Title VII);

6. NLRA Section 8(a)(1), remedy for retaliation for engaging in concerted protected activity;

7. FLSA, 29 U.S.C. § 215(a)(3), prohibits retaliation for filing charge or giving testimony under FLSA;

8. OSHA, 29 U.S.C. § 660(c)(1);

9. First Amendment right to free speech, prohibiting retaliation for public employees who speak on matters of public concern. (*Garcetti v. Ceballos*, 547 U.S. 410 (2006)). First Amendment right to Petition by Redress of Grievances or Assembly (Public employees protected under *Pickering v. Bd. Of Ed.*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983); and

10. Federal Employee Whistleblower Protection Act, 5 U.S.C § 2302(b)(8).

CONCLUSION: EQUALITY IS THE LAW BUT TITLE VII IS STILL NEEDED

The purpose of Title VII is to protect our freedom – freedom from being harmed on the bases of such personal characteristics as gender, race, color, religion or natural origin. Freedom from employer interference with our efforts to secure or advance these basic guarantees. And freedom to seek legal vindication of rights that have been trampled. The law has significantly evolved and its anti-retaliation provision is increasingly involved. Employers are not without potent and effective defenses so long as their policies and procedures are kept current and constantly enforced.

The law has worked well for the past 50 years.

Lyndon Johnson said, "Those who are equal before God shall now also be equal in the workplace." And that is written into the books of the law of Title VII. Is Title VII still needed? Justice Sonia Sotomayor in her dissent on April 22, 2014 in *Schuette v. BAMN*[xxviii] eloquently gave us a response to that question:

> Race...matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities...in areas like employment.... And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?" regardless of how may generations her family has been in the country. Race matters to a young person addressed in a foreign language, which he does not understand because only English was spoken at home. Race

> matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”

Yes, race, color, religion, national origin and gender still matter and Title VII is still needed. Here’s to the next 50 years!

[i] The author is indebted to Long-Daniels and Hall, "Risky Business: Litigating Retaliation Claims," ABA Journal of Labor and Employment Law, Vol. 28, No. 3 (Spring 2013); the article also may be found online at http://www.natlawreview.com/article/risky-business-litigating-retaliation-claims. And special thanks to Bobbie J. Fox who brought the article to the author's attention.

[ii] Ackerman, "We the People, Vol. 3: The Civil Rights Revolution."

[iii] *See O'Donnell, The Atlantic (March 2014),* "How LBJ Saved the Civil Rights Act" (www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630. *See also* Caro, "The Years of Lyndon Johnson: The Passage of Power (2012), pp. 558-570 (detailing LBJ's significant role in passage of the Act; and Stern and Wermiel, Justice Brennan: Liberal Champion (2010), pp. 216-219 (Justice Brennan's role in slowing down the Court so as to not affect Congress's consideration of the Act)). (In the Spring of 1964, the author was a religious studies undergraduate who, with hundreds of others like him, participated in a 24-hour a day vigil at the Lincoln Memorial to pray for the Act's passage. This was indicative of the larger and larger role the clergy were taking in seeking passage of the law. *See, Caro, supra,* pp. 565-566.)

[iv] en.wikipedia.org/wiki/civil_rights_act_of_1964 (contains video of LBJ's remarks on signing the Act into law on July 2, 1964.)

[v] Charge Statistics FY1997 through FY2013: www.eeoc.gov/statistics/enforcement/charges.cfm

[vi] EEOC Charge Receipts by State. See www.eeoc.gov/eeoc/statistics/enforcement/state_13.cfm

[vii] *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994); *Little v. Windemere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002)("It is unnecessary that the employment practice actually be unlawful; opposition thereto is protected when it is 'based on a "reasonable belief" that the employer has engaged in an unlawful employment practice.'")

[viii] *Id.*

[ix] *Id.*

[x] Title VII was amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, 42 U.S.C. § 1981a and 42 U.S.C. §§ 2000e-2(k)-(n). Title VII was also amended to prohibit discrimination against a woman because of pregnancy, childbirth, or medical condition related to pregnancy or childbirth.

[xi] *Lindemann, Grossman and Weirich, Employment Discrimination Law, Vol. I, pp. 15-6 to 15-12.*

[xii] *Id. at pp. 15-12 to 15-32.*

[xiii] *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000); *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002).

[xiv] *Ray*, 217 F.3d at 1240

[xv] *Id.*

[xvi] *Villaramo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002).

[xvii] 548 U.S. 53, 126 S. Ct. 2405 (2006).

[xviii] 555 U.S. 271, 129 S. Ct. 846 (2009).

[xix] 131 S. Ct. 863 (2011).

[xx] 133 S. Ct. 2517 (2013).

[xxi] *Id.* at 2528.

[xxii] 134 S. Ct. 881, 888-889, 890, 2014 WL 273243 (Jan. 27, 2014).
[xxiii] *Id*. at 889.
[xxiv] *Nassar,* 133 S. Ct. at 2532-33.
[xxv] The "Manager Rule" is found in *Bush v. Sears Holding Corp.*, 466 F. App'x. 781, 786-88 (11th Cir. 2012).
[xxvi] *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S. Ct 2275 (1998).* The *Faragher/Ellerth* defense has "two necessary" elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [discriminatory] behavior, and (b) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*
[xxvii] *Id.*
[xxviii] *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary, (BAMN) et al.*, 572 U.S. ___ (April 22, 2014) (Justice Sotomayor dissenting), pp. 45-46 (slip op.)