“I’m Gonna Git You, Sucka”: Employment Retaliation Claims Under Federal and Alabama Law
Introduction

Retaliation claims are among some of the most problematic causes of action for employers. The law provides protection for certain activities, such as serving on a jury, or taking a medical leave of absence, or seeking wage-replacement compensation when unable to work after a job injury. Employee also have certain statutory rights to complain about unlawful discrimination or other unlawful conduct, even if the complaint is unfounded, as long as the employee acts in good faith, the complaint is reasonable, and the employee expresses the complaint in a way that is not unreasonable or unduly disruptive. Many employee-plaintiffs are unable to prove the underlying claims of discrimination or other alleged illegal conduct, but can succeed on claims the employer illegally over-reacted to accusations of discrimination or other protected conduct and took adverse action against the employee. Tales of revenge permeate our culture, and jurors can readily understand and punish the employer who is “out to get” the employee who merely engaged in lawful conduct in good faith. Both federal and Alabama state law prohibit retaliation in the employment context. This paper will identify and discuss retaliation claims under several federal anti-retaliation statutes and the two Alabama anti-retaliation statutes.

As shown by recent statistics announced by the Equal Employment Opportunity Commission (EEOC) in January 2011, more and more employees are asserting retaliation claims. During fiscal 2010, retaliation charges became the most common charge filed with the EEOC, surpassing race discrimination. Retaliation charges rose to 36.3 percent of the EEOC’s fiscal 2010 charges, with 2,645 more charges filed in fiscal year 2010 than in fiscal 2009. As

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discussed below, one potential reason for the increase in federal retaliation charges may be recent United Supreme Court decisions which significantly expanded the scope of the claim.

**Major Federal Anti-Retaliation Statutes**

*Title VII of the Civil Rights Act of 1964; Pregnancy Discrimination Act.*

This landmark federal equal employment opportunity statute forbids discrimination against employees on the basis of race, color, sex, national origin, and religion. 42 U.S.C. §2000e-2(a). The *Pregnancy Discrimination Act* amended *Title VII* to define “sex” discrimination to also include discrimination because of pregnancy, childbirth or related medical conditions. 42 U.S.C. §2000e(k). *Title VII* also prohibits retaliation against employees for protected “opposition” to unlawful employment practices or for protected “participation” in *Title VII*’s enforcement proceedings and processes. The statutory text states as follows:

> 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 title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. §2000e-3(a). *Title VII* is one of the statutes enforced by the EEOC.

*A Americans With Disabilities Act.*

The *ADA* prohibits discrimination in employment against a “qualified individual with a disability.” 42 U.S.C. §12112(a). The *ADA*’s anti-retaliation provisions state as follows:

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

42 U.S.C. §12203. The ADA adopts Title VII’s enforcement and remedies provisions. 42 U.S.C. §12117(a). The EEOC also enforces the ADA.

**Age Discrimination in Employment Act.**

The ADEA prohibits employment discrimination against an individual because he or she is 40 years of age or older. 29 U.S.C. §623(a); §631(a). The ADEA contains an anti-retaliation provision which is identical to the provisions in Title VII:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment … because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

29 U.S.C. §623(d). The ADEA is enforced by the EEOC.


After the Civil War, the Congress passed a civil rights law to enforce the newly adopted Fourteenth Amendment. The statute, which has been amended from time to time and most recently in 1991, states in its current form as follows:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by
white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The courts have recognized retaliation claims under this statute. A person can sue for retaliation pursuant to this statute without any administrative proceedings similar to those required for claims under Title VII, the ADA, or the ADEA.


The *FLSA* is the principle federal law requiring payment of minimum wages and overtime pay to covered employees by covered employers as well as requiring covered employers to comply with various child labor standards. 29 U.S.C. §201 *et seq.* The *EPA* amended the *FLSA* in 1963 to prohibit employers from paying different wages to employees of the opposite sex for equal work. 29 U.S.C. §206(d). The *FLSA’s / EPA’s* anti-retaliation provision states as follows:

[I]t shall be unlawful for any person … 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 Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. §215(a)(3). The Department of Labor enforces the *FLSA*, while the EEOC enforces the *EPA*. An employee can file suit for *FLSA* retaliation without any administrative proceedings, but must first file an EEOC charge for alleged *EPA* violations.
Family and Medical Leave Act.

The *FMLA* applies to employers with 50 or more employees and requires employers to provide eligible employees with up to 12 or weeks of unpaid annual leave for several types of specified reasons, including absences caused by the employee’s own serious health condition. See 29 U.S.C. §2612. The *FMLA*’s anti-retaliation provision states as follows:

(a) … (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 title.

(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 title;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.

29 U.S.C. § 2615. Unlike *Title VII* or the *ADA* or *ADEA*, an employee can file suit for *FMLA* retaliation without any administrative proceedings.

Alabama’s Anti-Retaliation Statutes

Pursuant to Alabama’s employment at-will rule, unless modified by contract or statute, an employer may discipline or discharge an employee “for a good reason, a wrong reason or no reason” without incurring common law tort liability to the employee. *Ex parte Usrey*, 777 So. 2d 66, 68 (Ala. 2000). Traditionally, the Supreme Court of Alabama repeatedly rejected common law “wrongful discharge” claims by at-will employees who were allegedly fired for filing
workers’ compensation claims, e.g., *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978), or for serving on a jury, e.g., *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980).

In 1980, the Alabama Legislature first enacted a statutory prohibition against discharging an employee because of jury service. In 2005, the Legislature expanded the scope of the statute by also making it unlawful to “subject [an] employee to an adverse employment action” solely because the employee served on a jury. The present statutory text, *Ala. Code* § 12-16-8.1, states as follows:

(a) No employer in this state may discharge any employee or subject any employee to an adverse employment action solely because he or she serves on any jury empanelled under any state or federal statute; provided, however, that the employee reports for work on his or her next regularly scheduled hour after being dismissed from any jury.

(b) Any employee who is so discharged or subjected to an adverse employment action shall have a cause of action against the employer for the discharge or adverse employment action in any court of competent jurisdiction in this state and shall be entitled to recover both actual and punitive damages.

In 1985, the Alabama Legislature amended the *Alabama Worker’s Compensation Act* to enact a prohibition against discharging an employee solely because the employee filed a workers’ compensation claim or a written notice of a violation of a safety rule. The present statutory text states as follows:

No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover worker’s compensation benefits under this chapter or solely because the employee has filed a written notice of violation of a safety rule pursuant to subdivision (c)(4) of Section 25-5-11.


**Methods of Proof**

*Federal Law.*
Generally speaking, a plaintiff suing his or her employer can establish a retaliation claim under Title VII, the ADA, the ADEA, the FMLA or the FLSA through “direct” evidence, “circumstantial” evidence, or statistical evidence, or any combination of these methods.

According to the Eleventh Circuit, “direct” evidence is evidence which reflects “a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004)). "[O]nly the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor, constitute direct evidence of discrimination." *Id.* Stated otherwise, “[d]irect evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption." *Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1330 (11th Cir. 1998). A remark is not direct evidence if it not related to the challenged employment action or was not made by the decision maker. *Id.*

If a plaintiff seeks to rely on circumstantial evidence to prove a retaliation claim, the allocation of proof shifts in accordance with a three-step procedure established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1972). In the first *McDonnell Douglas* step, the plaintiff must produce evidence sufficient to make out a *prima facie* case, thus giving rise to a presumption that the employer unlawfully retaliated against him in taking the alleged employment action. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

At the second step, the employer must rebut this presumption by producing evidence that the negative employment action was motivated instead by a legitimate, non-retaliatory reason or reasons. *Hicks*, 509 U.S. 509. The employer's “burden is one of production, not persuasion; ‘it can involve no credibility assessment.’” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.

At the third step, once the employer articulates a non-retaliatory reason or reason, the plaintiff must respond with evidence which would allow a reasonable jury to conclude that all of the employer’s reasons were not the real reasons for the adverse employment decision but instead were pretexts for retaliation. See Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997); see also Reeves, 530 U.S. at 143. “The result of this three step dance is that the burden is always on plaintiff to show that defendant's action is discriminatory” or retaliatory. Morris v. Emory Clinic, Inc., 402 F.3d 1076, 1081 (11th Cir. 2005) (per curiam).

Because most employment plaintiffs lack direct evidence of retaliation or discrimination, the vast majority of cases are resolved through the three-step circumstantial evidence framework outlined above. With respect to the first step, the most commonly articulated statement of the prima facie case involves three elements: “(1) the employee engaged in a statutorily protected activity; (2) the employee suffered an adverse employment action; and (3) the adverse employment action was causally related to the protected activity.” Leach v. State Farm Mut. Auto. Ins. Co., 2011 U.S. App. LEXIS 10831 *17 (11th Cir. May 27, 2011) (emphasis added).

Alabama Law.

With respect to the workers’ compensation retaliatory discharge claim, which is by far the most frequently litigated Alabama law retaliation claim, the Alabama courts generally follow the burden-shifting framework established for federal claims. For example, in Bleier v. Wellington Sears Co., 757 So. 2d 1163, 1167 ( Ala. 2000), the Supreme Court of Alabama held a
discharged employee can establish a *prima facie* case of retaliation by adducing evidence to show: (1) the existence of an employment relationship; (2) a work-related injury; (3) the employer knew about the employee’s claim for workers’ compensation benefits for the work-related injury; and (4) the employee was subsequently terminated. 757 So. 2d at 1171. *Accord Dunn v. Comcast Corp.*, 781 So. 2d 940, 943 (Ala. 2000). The employer will then have the burden of producing evidence to demonstrate that the employee was terminated for a legitimate non-discriminatory reason. *Dunn*, 781 So. 2d at 943; *Wal-Mart Stores, Inc. v. Smitherman*, 743 So. 2d 442, 446 (Ala. 1999). If the employer produces such evidence, the employee must then show that the proffered reason is not true or, if true, is a mere pretext and that the real reason for the employee’s discharge was retaliatory. *Dunn*, 781 So. 2d at 943; *Wal-Mart Stores, Inc.*, 743 So. 2d at 446.
Proper Party Plaintiffs

Federal Law.

Unanimously reversing an *en banc* decision of the Sixth Circuit Court of Appeals, in *Thompson v. N. Am. Stainless, LP*, --- U.S. ---, 131 S. Ct. 863, 178 L. Ed. 2d 694, 2011 U.S. LEXIS 913, 111 Fair Empl. Prac. Cas. (BNA) 385 (January 24, 2011), the United States Supreme Court held *Title VII*'s ban on workplace retaliation against an employee who challenges discrimination also protects a co-worker who is a relative or close associate of the targeted employee, even though the discharged employee personally never opposed or participated in protected activity. In this case, Eric Thompson filed an EEOC charge and then a lawsuit against his employer claiming the employer fired him in order to retaliate against his financee, Miriam Regalado, who had filed a sex discrimination charge with the EEOC three weeks before his discharge. 131 S. Ct. at 867.

Writing for the Court, Justice Scalia first noted Title VII defines “unlawful employment practice” as including an employer’s “discriminat[ion] against any of his employees . . . because he has made a charge" under Title VII. 42 U.S.C. § 2000e-3(a). 131 S. Ct. at 867. Justice Scalia then noted the statute permits “a person claiming to be aggrieved . . . by the alleged unlawful employment practice” to file a charge with the EEOC and, if the EEOC declines to sue the employer, to institute a private civil action against the employer. 42 U.S.C. §2000e-5(b), (f)(1).

Applying the broad view of what employer conduct is “retaliatory” under Title VII previously adopted by the Supreme Court in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), Justice Scalia concluded the employer’s discharge of Thompson was retaliatory: “We think it obvious that a reasonable worker might be dissuaded
from engaging in protected activity if she knew that her fiancé would be fired.” 131 S. Ct. at 868.

Justice Scalia then rejected the employer’s argument the phrase “person claiming to be aggrieved” should be limited only to the employee who had engaged in the protected conduct. Rather, applying a “zone of interests” test “enabling suit by any plaintiff with an interest ‘arguably [sought] to be protected by the statutes,’” Justice Scalia concluded as follows:

Thompson falls within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation -- collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.

131 S. Ct. at 870 (citation omitted).

The nature and closeness of the relationship between the employee who is discharged and the employee who engaged in the protected conduct is a question left open by the Thompson decision: “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.” 131 S. Ct. at 868.

The Thompson decision effectively overruled previous decisions from the Fifth, Eighth, and Third Circuits applying a categorical rule against third-party retaliation claims: Fogleman v. Mercy Hosp., Inc., 283 F.3d 561 (3d Cir. 2002) (plaintiff sued under the ADA, the ADEA, and a Pennsylvania statute, alleging that he was fired in retaliation for his father's discrimination complaint filed against their joint employer); Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998) (plaintiff alleged he was discharged in retaliation for the filing of a discrimination
charge by a female co-employee who lived with him); *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996) (former employee claimed he was fired because his wife, who worked for the same company, filed an age discrimination complaint).

**Alabama Law**

In *Chambers v. Advanced Processing Systems*, 853 So. 2d 984 (Ala. Civ. App. 2002), the Court of Civil Appeals confronted a retaliatory discharge claim asserted by the wife of an employee who had sought workers’ compensation benefits after a workplace injury. The couple both worked for a temporary staffing agency. Affirming summary judgment for the staffing company, the Court of Civil Appeals ruled the wife could not establish a *prima facie* case of retaliatory discharge because she never had a workplace injury and thus had never claimed workers’ compensation benefits. The Court of Civil Appeals also flatly rejected her request to adopt an "association discrimination" cause of action similar to a cause of action available under the Americans with Disabilities Act:

> [T]he Workers' Compensation Act does not provide for a retaliatory-discharge cause of action for a person who is related to worker who has filed a workers' compensation claim. It is the function and duty of the Legislature, and not of the courts, to determine whether to expand the Workers' Compensation Act to create such a cause of action. This court may not judicially create a cause of action such as the one advocated by the plaintiffs.

*Id.* at 990.
Protected Conduct

Federal Law.

In Kasten v. Saint-Gobain Performance Plastics Corp., --- U.S. ---, 131 S. Ct. 1325, 179 L. Ed. 2d 379, 2011 U.S. LEXIS 2147, 17 Wage & Hour Cas. 2d (BNA) 577 (March 22, 2011), the United States Supreme Court addressed whether the Fair Labor Standards Act’s statutory term "filed any complaint" includes oral as well as written complaints within its scope. In this case, Kevin Kasten claimed his former employer, Saint-Gobain had located its timeclocks between the area where Kasten and other workers put on and took off work-related protective gear and the area where they performed their assigned tasks. According to Kasten, this location prevented workers from being paid for the time they spent putting on and taking off their work clothes which he alleged was contrary to the FLSA’s requirements. 131 S.Ct. at 1329.

Kasten repeatedly used the employer’s internal grievance-resolution procedure by verbally complaining to his shift supervisor "it was illegal for the time clocks to be where they were" because of Saint-Gobain's exclusion of "the time you come in and start doing stuff", to a human resources employee "if they were to get challenged on" the location in court, "they would lose", to his lead operator the location was illegal and he "was thinking about starting a lawsuit about the placement of the time clocks", and to the human resources manager and the operations manager that he thought the location was illegal and that the company would "lose" in court. Kasten claimed the company fired him to retaliate for these internal, oral complaints. Id. at 1330.

Kasten lost on summary judgment at the trial level and on appeal to the Seventh Circuit. These two courts categorically held the FLSA’s anti-retaliation provision did not cover oral complaints. 619 F. Supp. 2d 608, 610 (W.D. Wis. 2008), aff’d 570 F.3d 834, 838-840 (2009).
Writing for the Court, Justice Breyer reversed the Seventh Circuit and resolved a split among the Circuit Courts of Appeal in favor of the majority view holding oral and informal complaints were protected. *Id.* at 1330. Justice Breyer opined the term “filed any complaint” when viewed in isolation could result in the conflicting interpretations but, when viewed in context and purpose of the statute, allowed for coverage of oral complaints. *Id.* at 1331. Justice Breyer noted dictionary definitions, other statutes, and contemporaneous judicial usage all encompass “filing” of oral complaints. *Id.* at 1331-1333. Justice Breyer also noted “an interpretation that limited the provision's coverage to written complaints would undermine the Act's basic objectives. … Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?” *Id.* at 1333.

Such a narrow interpretation also could limit governmental enforcement methods by “prevent[ing] Government agencies from using hotlines, interviews, and other oral methods of receiving complaints” and could discourage employers from using “desirable informal workplace grievance procedures to secure compliance” with the FLSA. *Id.* at 1334. Accordingly, Justice Breyer concluded, the FLSA protects all complaints, whether oral or written, if the complaint is “sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.” *Id.* at 1335.

In *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 555 U.S. 271, 129 S. Ct. 846, 172 L. Ed. 2d 650 (Jan. 26, 2009), the Supreme Court held the protection of Title VII’s “opposition clause” extends to an employee who was fired after her employer questioned...
her during an internal investigation of another employee’s complaint about alleged sexual harassment. Crawford did not instigate or initiate any complaint of harassment prior to her participation in the investigation and did not take any further action following the investigation and prior to her firing. Rather, she simply cooperated in the investigation, responded to questions posed by her employer and, in doing so, spoke unfavorably against a supervisor who was the subject of the investigation triggered by another coworker's complaints. 129 S. Ct. at 849-850.

Writing for the Court, Justice Souter rejected the Sixth Circuit’s view the “opposition clause” “demands active, consistent ‘opposing’ activities to warrant ... protection against retaliation,' ... and that an employee must ‘instiga[e] or initia[e]’ a complaint to be covered”. Rather, an employee’s disclosure of a disagreement with an employer’s action or conduct in response to questions can be sufficient opposition:

"Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to "oppose" slavery before Emancipation, or are said to "oppose" capital punishment today, without writing public letters, taking to the streets, or resisting the government. And we would call it "opposition" if an employee took a stand against an employer's discriminatory practices not by "instigating" action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons. ... 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.

129 S. Ct. at 851 (citation omitted).

To be “statutorily protected expression,” the plaintiff must have “'had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.’” Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311 (11th Cir. 2002) (quoting Little v. United Techs.,
Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997)). The Eleventh Circuit succinctly described this standard as follows:

It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.

Id. at 1312. In Weeks, the Eleventh Circuit held a group of employees’ complaints about being required to sign employment arbitration agreements were not protected. Because such arbitration agreements had been “unequivocally approved” by the United States Supreme Court, the employees had no objectively reasonable belief the agreements were unlawful. Id. Thus, the employer’s decision to discharge the employees for refusing to sign the arbitration agreements was not unlawful retaliation. Id. at 1316.

In Howard v. Walgreen Co., 605 F.3d 1239, 1245 (11th Cir. 2010), the Eleventh Circuit held a black pharmacist’s complaint about his supervisor’s phone message “threatening that Howard's job was in jeopardy” was not protected activity. Because the supervisor had not actually taken any adverse job action against him, the pharmacist’s belief the threat alone was discriminatory “was not objectively reasonable.”

In Jackson v. Geo Group, Inc., 312 Fed. Appx. 229 (11th Cir. 2009), the Eleventh Circuit held a correctional facilities Lieutenant’s complaint to a newspaper reporter about his reassignment from a jail’s “Confinement Unit” was not objectively reasonable. The reassignment was not a form of discipline. The employee did not experience a decrease in pay, benefits, rank, or hours. Though his shift schedule changed, such a switch had occurred...
repeatedly to him in the past. He also did not suffer any substantial loss in seniority due to the reassignment, since all of the supervisors regularly rotated through the position of increased autonomy in the Confinement Unit, and his reassignment occurred only a few weeks before he had been scheduled to rotate out of that position. Accordingly, he could not have had an objectively reasonable belief the reassignment was a sufficiently adverse material change in his employment to be unlawful. *Id.* at 234.

In *Van Portfliet v. H&R Block Mortg. Corp.*, 290 Fed. Appx. 301 (11th Cir. 2008), Timothy Van Portfliet sued H&R Block asserting he was discharged in retaliation for his complaint another employee had been subjected to unlawful sexual harassment. The incident occurred at a company-sponsored “happy hour” which Van Portfliet did even attend. Rather, one of his supervisees named Elizabeth Sylves told him Paul LaBarbera, a District Manager, had "put his arm around her, pulled her in to him, and said, 'Why do you want to be with a loan officer like that when you can be with me?'" *Id.* at 302. Because this was an isolated incident, was not accompanied by any other offensive conduct, and only involved suggestive as opposed to overtly sexual words, the Eleventh Circuit concluded no reasonable person would view the complaint as objectively involving unlawful sexual harassment. *Id.* at 304.

An employee’s complaints also must include some reasonable connection between the allegedly unfair action and the protected status. In *Coutu v. Martin County Bd. of County Com’rs*, 47 F.3d 1068, 1074 (11th Cir. 1995), the Eleventh Circuit held that an employee's internal grievance “did not constitute statutorily protected activity” because “[u]nfair treatment, absent discrimination based on race, sex, or national origin, is not an unlawful employment practice under Title VII.” In *Gerard v Bd. of Regents of the State of Georgia*, 324 Fed. Appx. 818, 827 (11th Cir 2009), the Eleventh Circuit held a plaintiff’s grievance “letter cannot be
construed as protected activity because … it did not mention race, color, or national origin, nor did it allege that Gerard was subjected to discrimination on the basis of race, color, or national origin.” Similarly, in Birdyshaw v. Dillard's Inc., 308 Fed. Appx. 431, 433, 436-437 (11th Cir. 2009), the court held a plaintiff’s letter complaining about a supervisor’s profanity-laden tirade against her, which included a reference to her as a “lying bi***”, was not protected activity because it failed to assert that she was being discriminated against by the manager because of her gender. And in Jeronimus v. Polk County Opportunity Council, Inc., 145 Fed. Appx. 319, 326 (11th Cir 2005), the court held a white male employee’s email complaint of being “singled out,” being subjected to “a campaign of harassment,” and working in a “hostile environment” was not protected activity because “he never suggested that this treatment was in any way related to his race or sex.”

Alabama Law.

Workers’ Compensation Claim

The Alabama courts have broadly construed Section 25-5-11.1’s language making it unlawful to terminate an employee merely because he or she has “instituted or maintained any action” to obtain workers’ compensation benefits. In McClain v. Birmingham Coca-Cola Bottling Co., 578 So. 2d 1299, 1301-02 (Ala. 1991), the Alabama Supreme Court rejected an employer’s argument this language only protected those employees who filed a lawsuit seeking workers’ compensation benefits and held the statute also protected those who filed “claims” for such benefits short of a lawsuit. Accord Hexcel Decatur, Inc. v. Vickers, 908 So. 2d 237, 242 ( Ala. 2005) (reaffirming McClain).
In *Scott Bridge Co. v. Wright*, 883 So. 2d 1221 (Ala. 2003), the Alabama Supreme Court held an employee who never filed a workers’ compensation claim in Alabama pursuant to Alabama’s workers’ compensation law, but who had filed a workers’ compensation claim in Georgia, could not maintain a retaliatory discharge claim against the employer pursuant to Alabama’s workers’ compensation retaliatory discharge statute, *Ala. Code §25-5-11.1*. In *Chambers v. Advanced Processing Systems*, 853 So. 2d 984 (Ala. Civ. App. 2002), and *Thomas v. Bakers Indus.*, 737 So. 2d 469 (Ala. Civ. App. 1999), the Court of Civil Appeals held a person who is jointly employed by a staffing company and a staffing client could not sue the staffing client for retaliatory discharge if the person had not sought workers’ compensation benefits from the staffing client and had only sought such benefits from the staffing company.

**Notice of Safety Rule Violation**

*Ala. Code § 25-5-11.1* states “No employee shall be terminated by an employer … solely because the employee has filed a written notice of violation of a safety rule pursuant to subdivision (c)(4) of Section 25-5-11.” Section 25-5-11 provides a cause of action in favor of an employee against a co-worker whose “willful conduct” injured the employee. Subdivision (c)(4) of Section 25-5-11 defines “willful conduct” to include:

Willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee by another employee who, within six months after the date of receipt of the written notice, suffers injury resulting in death or permanent total disability as a proximate result of the willful and intentional violation.

*Ala. Code § 25-5-11(c)(4).* The subdivision then describes what constitutes “written notice”:

The written notice to the violating employee shall state with specificity all of the following:
a. The identity of the violating employee.

b. The specific written safety rule being violated and the manner of the violation.

c. That the violating employee has repeatedly and continually violated the specific written safety rule referred to in b. above with specific reference to previous times, dates, and circumstances.

d. That the violation places the notifying employee at risk of great injury or death.

Id.

In Morgan v. Northeast Ala. Regional Medical Ctr., 624 So. 2d 560 (Ala. 1993), the Alabama Supreme Court broadly construed §25-5-11.1’s “notice of safety rule violation” provisions to “prohibit employers from discharging employees for complaining about safety violations, regardless of whether the complaints met the strict requirements of § 25-5-11(c)(4).” In that case, the employee verbally complained to his supervisors and made a written complaint to OSHA that “he was forced to work in a boiler room that was insulated with materials containing dangerous amounts of asbestos”. The Alabama Supreme Court held the employee’s written complaint to OSHA, which OSHA provided to the employer, coupled with the employee’s “repeated oral complaints” was “sufficient evidence of notice to the defendants for [the employee] to invoke the protection of §25-5-11.1.” Id. at 563.

In Maro v. Sizemore Sec. Int’l, 678 So. 2d 1127 (Ala. Civ. App. 1996), the plaintiff filed a lawsuit alleging her security company employer had hired her to act as a "security, fire and safety watch" officer at Sizemore’s client (3M) Decatur plant. Her job duties included writing up safety violations by 3M employees. She alleged she was discharged “solely because she was too strict in the enforcement of safety rules.” Affirming a 12(b)(6) dismissal of the complaint, the Alabama Court of Civil Appeals held her “filing of reports of safety violations was not the
type of filing contemplated by § 25-5-11(c)(4)” and “was merely in performance of her job duties.” He complaint failed to state a claim because “her employment was terminated because of the way she performed her job and not because she filed a report of safety violations pursuant to § 25-5-11(c)(4).” *Id.* at 1128.

**Jury Service**

In *Norfolk Southern Railway Company v. Johnson*, the Supreme Court of Alabama determined that to “serve” on a jury as that term is used in Section 12-16-8.1 means “to perform all the legal duties and responsibilities associated with a juror’s participating in the jury process [such as]…reporting for jury service; answering voir dire questions truthfully; listening to, observing and weighing the evidence presented at trial; observing the demeanor of the witnesses; participating in deliberations; and ultimately rendering a verdict.” 740 So. 2d 392, 387 The Court concluded that the Alabama Legislature’s enactment of Section 12-16-8.1 went beyond merely protecting an employee who is required to miss work for jury service. *Id.* The Court also noted that Section 12-16-8.1 does not protect an employee who misses work to attend trial as a juror when such employee then engages in “illegal or inappropriate conduct” such as lying during voir dire or receiving bribes. *Id.*

In *Givens v. Heilig-Meyers Co., Inc.*, 738 So. 2d 1282, 1283 (Ala. Civ. App. 1999), the Court of Civil Appeals refused to extend the protection of Alabama Code Section 12-16-8.1 to an employee called to be a witness in a grand jury proceeding.
Adverse Employment Action

Federal Law.

In Burlington N. & S. F. R. Co. v. White, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), the United States Supreme Court addressed what type and severity of employer conduct were sufficient to constitute adverse employment action made illegal by Title VII’s anti-retaliation provision. In that case, Sheila White was employed as a "track laborer" whose primary job duty involved operating a forklift. She was the only woman working in the Maintenance of Way department at Burlington's Tennessee Yard. 548 U.S. at 57. After White internally complained about her immediate supervisor’s sexist comments, a higher level manager removed her from the forklift duty and assigned her to perform only standard track laborer tasks. After White filed an EEOC charge, the manager suspended White for 37 days after concluding she had been insubordinate to another supervisor. Following an internal complaint, the employer reversed this discipline and awarded her backpay for the period of suspension. Id. at 58-59.

White exhausted the EEOC process, filed suit, and obtained a jury verdict in her favor, which eventually was upheld by the Sixth Circuit en banc. Id. at 59.

The Supreme Court accepted Burlington’s petition for certiorari review to resolve a split among the Circuit Courts of Appeals regarding whether the “challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.” Id. at 60.

Writing for the Court, Justice Breyer held Title VII’s anti-retaliation provision must be construed to cover a broad range of employer conduct because it prohibits an employer from "discriminat[ing] against any of his employees" for engaging in protected conduct, without
specifying the employer acts that are prohibited. 548 U.S. at 62 (quoting §2000e-3(a)). Based on the textual distinction between the discrimination provision and the anti-retaliation provision's purpose, the Court held "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Id. at 64.

The Supreme Court also addressed the issue of the degree of severity of the adverse actions. Rejecting decisions holding only “ultimate employment actions” (e.g., demotions, discharges) are sufficiently adverse, the Supreme Court established the following standard of adversity:

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.

... 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." [citations omitted] 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. ...

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 determine a plaintiff's unusual subjective feelings.

Id. at 68, 69 (italics in original; internal quotation marks omitted).

Applying this standard to the case before the Court, Justice Breyer ruled the jury had sufficient evidence to conclude the removal of White’s forklift operator duties was objectively, materially adverse: “the jury had before it considerable evidence that the track laborer 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." *Id.* at 71 (internal quotation marks omitted). Likewise, even though Burlington reimbursed White for the 37 days she was suspended, the jury reasonably could conclude the suspension was materially and objectively adverse: “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.” *Id.* at 72.

It is an open question whether the more-expansive *Burlington Northern* standard for adverse employment action applies to retaliation claims brought under other statutes, such as the Family and Medical Leave Act. *E.g.*, *Foshee v. Ascension Health - IS, Inc.*, 384 Fed. Appx. 890, 891 (11th Cir. 2010) (“we have not addressed whether the ‘materially adverse effect’ standard articulated in *Burlington Northern* should apply to claims of FMLA retaliation”).

In the last several years, the Eleventh Circuit has applied the *Burlington Northern* standard to find a variety of employer conduct was not sufficiently materially adverse to support a *Title VII* retaliation claim.

In *Hyde v. K. B. Home, Inc.*, 355 Fed. Appx. 266, 270 (11th Cir. 2009), the employer removed substantially all of a female employee’s job responsibilities and assigned them to two other employees about a month and a half before she left work for an FMLA pregnancy leave. But she was allowed all the time she needed for the leave, and was able to use vacation pay for part of the leave. Her job title did not change. Her salary did not change. And she did not receive a reduction in pay for taking FMLA leave. The employer explained the reassignment of duties was to ensure continuous operations during her leave. The appellate court held these facts
were insufficient evidence to show an adverse employment action to support her *Title VII* retaliation claim.

In *Hawkins v. Potter*, 316 Fed. Appx. 957, 961 (11th Cir. 2009), the Eleventh Circuit ruled the employer’s acts of requiring a postal employee to sign a document entitled "Expectations of Assigned Position as Customer Service Supervisor/Riverdale Post Office," by then giving him the proposed letter of warning which was later rescinded, and by refusing to accommodate his request for a reassignment to another post office were not objectively material adverse actions.

In *Siler v. Hancock County Bd. of Educ.*, 272 Fed. Appx. 881 (11th Cir. 2008), the court found a four-day delay in issuance of employee’s paycheck was not a materially adverse action.

In *Byrd v. Auburn Univ.*, 268 Fed. Appx. 854 (11th Cir. 2008), the facts showed that, although an employee’s job title changed after she complained about pay inequities, she maintained the same position with the school, received positive evaluations, and raises in salary. The title change was not a materially adverse demotion. Other actions, including being left off an email announcement, being told to contact the Vice-Chancellor about salary grievances, and the misassignment of two student disciplinary cases, also were not sufficiently materially adverse.

In *Cain v. Geren*, 261 Fed. Appx. 215 (11th Cir. 2008), the appellate court held an employee’s receipt of the second highest rating on a performance evaluation was not a material adverse action because employee failed to show she would have received a bonus if she had received the highest rating or that the rating had an adverse impact on her ability to receive a promotion, raise, or other employment benefit.
In *Nettles v. LSG Sky Chefs*, 211 Fed. Appx. 837 (11th Cir. 2006), the employer’s alleged actions included (1) undermining the employee in front of customers, (2) excluding the employee from a business meeting, (3) evaluating the employee as “Fully Meets Expectations” rather than “Fully Exceeds Expectations,” and (5) offering the employee a sector vice-president position allegedly on less favorable terms than other vice-presidents. The court held none of these actions, individually or collectively, were materially adverse action.

*Alabama Law.*

In *White v Midtown Restaurant Corp.*, 632 So.2d 1330 (Ala. 1994), the Court held a demotion from manager to assistant manager — without a pay cut or reduction in hours or even a resignation by the employee — was not a “termination” within the meaning of §25-5-11.1. But a “termination” may be a “constructive termination,” which requires proof that the employer deliberately made the employee's working conditions so intolerable that the employee was forced to resign. *Compare National Sec. Ins. Co. v Donaldson*, 664 So 2d 871 (Ala 1995) (demotion, substantial pay cut, loss of company car and credits cards, and relocation from Elba to Phenix City which motivated employee to quit was sufficient to create jury question on constructive discharge); *and Barlow v. Piggly Wiggly Dixieland*, 680 So. 2d 297 (Ala. Civ. App. 1996) (jury question on “constructive discharge” created by facts showing grocery manager was demoted to cashier, had his pay reduced to minimum wage from a weekly salary, and had his hours cut in half, as well as supervisor’s alleged statement “he had been instructed to make things difficult for Barlow in an effort to make him quit his job” which allegedly caused him to resign); *with Keystone Foods Corp. v Meeks*, 662 So 2d 235 (Ala 1995) (criticism of job performance in lab and statement employee could not be trusted to work in lab, coupled with offer of another position).
position elsewhere in plant, which employee declined, was not sufficient to show constructive discharge); and Irons v Service Merchandise Co., 611 So.2d 294 (Ala. 1992) (below average performance evaluations and warning of possible discharge if improvement not made was not sufficient to show constructive discharge).

### Causal Connection

**Decision-Maker’s Actual Knowledge – State and Federal Law.**

Prevailing law in the Eleventh Circuit requires proof the decision-maker who takes the adverse action against the employee must have actual knowledge of the protected activity in order to show a causal link:

a plaintiff must, at a minimum, generally establish that the defendant was actually aware of the protected expression at the time the defendant took the adverse employment action. Since corporate defendants act only through authorized agents, in a case involving a corporate defendant the plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff’s protected expression, and acted within the scope of his or her agency when taking the action.

*Rainey v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997) (emphasis added).

Stated otherwise, a “decision-maker cannot have been motivated by something unknown to him.” *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000).

Alabama law similarly requires the decision-maker who discharged the plaintiff to actually know about the employee’s claim for workers’ compensation benefits and not just have a general awareness of the employee’s job injury.¹ *Tyson Foods, Inc. v. McColllum*, 881 So.2d 101 (Ala. 2004).---

1 The Alabama Code defines “compensation” as “money benefits to be paid on account of injury or death, as provided in Articles 3 and 4” and further states the term “does not include medical and surgical treatment and attention, medicine, medical and surgical supplies, and crutches and apparatus furnished an employee on account of an injury.” *Ala. Code §25-5-1(1).*
976 (Ala. 2003). In *McCollum*, the evidence was undisputed that the supervisor who allegedly discharged the plaintiff was aware of her previous on-the-job-injury but was unaware she had claimed and received workers’ compensation benefits because of the injury. The Supreme Court held that the plaintiff’s failure to show that the decision-maker who discharged her was aware of her workers’ compensation benefits claim was fatal to her retaliatory discharge lawsuit:

[Section] 25-5-11.1 demands that there be specific knowledge of the plaintiff's claim for benefits on the part of the one who terminated the plaintiff, and that that knowledge be the sole motivating force behind the termination. There is no room in the statute for a generalized ‘imputation’ of such knowledge throughout a company or other entity; rather, in order to establish a prima facie case, the plaintiff must demonstrate, by substantial evidence, a direct and distinct causal link between one having knowledge of the plaintiff's workers' compensation claim and the termination.

...[T]he facts relevant and essential to establishing a prima facie case are undisputed and are fatal to McCollum's cause of action. According to McCollum's account of what happened on March 10, 2000, McCollum was terminated on that date by David Smith. Smith had no knowledge of McCollum's workers' compensation claim, which was concluded some 20 months before the date of her termination. ... While Smith may have had knowledge of McCollum's on-the-job injury, it is neither necessary nor prudent, on that basis alone, to impute to Smith knowledge of McCollum's filing of a workers' compensation claim.

Simply put, even when viewed in the light most favorable to McCollum, there is no substantial evidence of a direct and distinct causal link between one having knowledge of the plaintiff's workers' compensation claim and the termination. Therefore, McCollum failed to establish a prima facie case of retaliatory discharge under *Ala. Code* 1975, § 25-5-11.1, and the trial court erred in denying Tyson's postjudgment motion for a judgment as a matter of law.

881 So.2d at 983, 984 (italics in original; footnotes and citations omitted).

*Adverse Action Before Protected Conduct – State and Federal Law*

Because a retaliation claim requires proof the alleged protected conduct caused the later adverse action, a plaintiff cannot sustain a retaliation claim if the evidence shows the alleged
protected conduct did not occur until after the challenged employment decision. For example, in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001), the employee filed a sexual harassment lawsuit on April 1, 1997, her supervisor announced a plan to transfer the employee to a less desirable location on April 10, 1997, and then the supervisor went through with the transfer in May 1997. But the employer provided undisputed proof the lawsuit was not served until April 11, 1997, and the supervisor was unaware of the lawsuit until that date. The Supreme Court held the fact the transfer occurred in May 1997 after the lawsuit filing was “immaterial in light of the fact that [the employer] concededly was contemplating the transfer before it learned of the suit. Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.” 532 U.S. at 272, 121 S.Ct. at 1511. *Accord Walton-Horton v. Hyundai of Ala.*, 402 Fed. Appx. 405, 409 (11th Cir. 2010) (“Smith, who recommended Walton-Horton be discharged, had no knowledge of Walton-Horton's pre-investigation complaints, and Walton-Horton only complained to Smith after Smith had already begun investigating her behavior. Because Smith was unaware of the protected activity at the time she recommended Walton-Horton's termination, the fact that she later learned of Walton-Horton's complaints does not establish a causal connection.”); *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1232 (11th Cir. 2006) (holding there was no causal connection between harassment complaint and employee’s later reduction in work hours, when employee had been hired to perform a part-time seasonal cashier job with the understanding her hours would be reduced after Christmas holidays).

Likewise, under Alabama law, if an employee does not seek workers’ compensation benefits until after his or her employment terminates, the employee cannot establish a retaliatory
discharge claim. Falls v. JVC America, Inc., 7 So. 3d 986, 990-991 (Ala. 2008) (affirming summary judgment for employer: “There is no evidence indicating that Falls had filed a claim or even that she had talked about filing a claim before JVC terminated her employment. … Because the statute uses the verb phrase ‘has instituted or maintained’ in relation to an action to recover worker's compensation benefits, it is clear that §25-5-11.1 contemplates an action for a termination of employment in retaliation against an event, i.e., the filing of a worker's compensation claim, that has already occurred.”); Allen v. Albrecht Enterprises, Inc., 675 So. 2d 425 (Ala. Civ. App. 1995) (employee who admittedly was terminated a day before she sought workers’ compensation benefits could not maintain a retaliatory discharge claim).

**Temporal Proximity as Proof of Causation**

“Causation may be inferred by close temporal proximity between the protected activity and the adverse employment action.” Williams v. Waste Mgmt., 2011 U.S. App. LEXIS 1530 *9 (11th Cir. Jan. 25, 2011) (citing Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007)). "But mere temporal proximity, without more, must be very close." Id. In Williams, the Eleventh Circuit held a two-month gap between a January 2006 complaint and a March 2006 decision not to promote the plaintiff was not “very close” and thus failed to support a retaliation claim. Id. at *10. This ruling was even stricter than previous decisions. E.g., Drago v. Jenne, 453 F.3d 1301, 1308 (11th Cir.2006) (finding a three month period between a protected activity and an adverse employment action was not sufficiently proximate to show causation on a retaliation claim); Higdon v. Jackson, 393 F.3d 1211, 1221 (11th Cir.2004) (“By itself, [a] three month [intervening] period ... does not allow a reasonable inference of a causal relation between [a] protected expression and [an] adverse action.”). On the other hand, a period of a month or
less between the protected conduct and the adverse action would likely be considered “very close.” See Jones v. Flying J, Inc., 2011 U.S. App. LEXIS 1124 *11 (11th Cir. Jan. 19, 2011) ("Jones was fired 22 days after her first sexual harassment complaint and only 1 day after her second. Thus, she has shown close temporal proximity between her protected activity and the adverse employment action."); Donnellon v. Fruehauf Corp., 794 F.2d 598, 601 (11th Cir. Ga. 1986) (Holding that, since plaintiff filed her EEOC charge on August 12, 1980 and was fired on September 12, 1980, the “short period of time … between the filing of the discrimination complaint and the plaintiff's discharge belies any assertion by the defendant that the plaintiff failed to prove causation.").