



*Oklahoma Attorney General Scott Pruitt's  
Office of Civil Rights Enforcement Presents*

## TITLE VII 50<sup>TH</sup> ANNIVERSARY OCRE EDUCATIONAL OUTREACH

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*50<sup>th</sup> Anniversary of the Civil Rights Act of 1964*

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7.24.2014

Emphasizing Practical, Best Practices for Complying  
With Oklahoma's Anti-Discrimination Act

**[UNLAWFUL RETALIATION]**

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# TITLE VII RETALIATION

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## APPLICATION OF TITLE VII

- WHO:
  - Employers
  - Engaged in industry affecting commerce
  - 15 or more employees
- WHAT it prohibits:
  - Intentional Discrimination on the basis of a protected class
    - Failure to Hire, Wrongful Termination, Demotion
  - Disparate Impact to employee(s) in protected class
  - \*RETALIATION\*

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## Retaliation Claims on the Rise

- The number of Title VII retaliation claims filed with the EEOC has nearly DOUBLED in the past 16 years
- Just over 16,000 claims in 1997
- 31,478 claims in 2013
- Retaliation claims filed with the EEOC under all statutes are now the most common type of discrimination claim made nationally (41.1%), topping both race (35.3%) and gender (29.5%).

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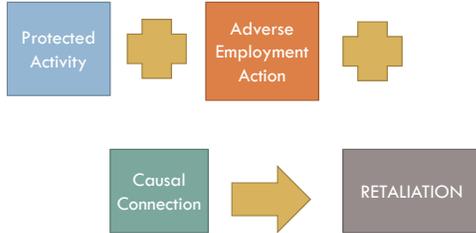
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## Title VII Retaliation: Elements



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## TITLE VII RETALIATION: ELEMENTS

### □ PROTECTED ACTIVITY

- **Opposing** a practice made unlawful by Title VII
  - Complaining to employer about workplace discrimination, informally or formally
- **Participating** in Title VII proceedings
  - Filing charge of discrimination
  - Participating in EEOC or internal investigation
  - Filing a lawsuit against employer

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## TITLE VII RETALIATION: ELEMENTS

### □ ADVERSE EMPLOYMENT ACTION

- To be materially adverse, must be sufficient to dissuade a reasonable employee from making or supporting a charge of discrimination.
- *Typically*, amounts to a "significant change" in employment status
  - Termination
  - Demotion, reduced pay
  - Failure to promote
  - Reassignment or transfer with different responsibilities

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## TITLE VII RETALIATION: ELEMENTS

### □ ADVERSE EMPLOYMENT ACTION

- However, "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.**" Examples:
  - FBI's refusal, contrary to policy, to investigate death threats against its employee/agent
  - Employer files false criminal charges against his former employee who complained about discrimination

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## Title VII Retaliation: Elements

### □ CAUSAL CONNECTION

- Timing: Very close temporal proximity
  - Tenth Circuit typically says that **3 months+** between protected activity and adverse employment action is too tenuous
  - **BUT:** US Supreme Court recently established heightened "but-for" causation standard for retaliation claims
- Identity of the person making the adverse employment decision
  - Did the decisionmaker **know** that the employee engaged in protected activity?
  - Cat's Paw Liability

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## Legitimate Non-Retaliatory Reason

- Need proof that the termination or employment action was lawful
  - Consider adding "comments section" to disciplinary records
- Documentation, documentation, documentation
- Examples:
  - Evidence of progressive discipline for performance or behavior
  - Reduction in force
  - Consistent treatment of employees engaging in similar behavior

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## EXHAUSTION OF ADMINISTRATIVE REMEDIES

- Employees wanting to bring Title VII claims against employers must exhaust their administrative remedies
  - 1) An employee must file a charge of discrimination with the EEOC or Oklahoma state agency within **300 days** of the allegedly unlawful employment practice.
  - 2) Set forth the specific facts, dates, and nature of the charge.
  - 3) The EEOC or state agency will contact the employer about responding to the charge, and begin investigation.

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## EXHAUSTION OF ADMINISTRATIVE REMEDIES

- 4) Employee may ask for an early right-to-sue letter from the EEOC.
- 5) If the EEOC finds reasonable cause to believe discrimination occurred, it will begin the conciliation process.
- 6) EEOC may find no cause to believe discrimination occurred, in which case it will dismiss the charge, and issue the employee a right-to-sue letter.
- 7) Once employee receives the right-to-sue letter, must file suit within **90 days**.

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## Failure to Exhaust Remedies

- Plaintiff's claim in federal court is limited by the scope of the EEOC charge
- Check the following:
  - Failure to mark a box
  - Failure to allege facts/claims in the narrative
  - Post-charge conduct/retaliation must be separately exhausted
  - Has each discrete incident of retaliatory conduct been exhausted?
  - If new allegations show up in the charge, should conduct internal investigation (even if employee didn't raise the allegations with employer)

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### Failure to Exhaust Remedies

- Sometimes, even marking the right box is not enough.
- In a recent W.D. Oklahoma case, the plaintiff checked the boxes for “race” and “retaliation” but only described allegations of race discrimination in the particulars section.
- The charge did not list any Title VII protected activity which could be the basis of unlawful retaliation.
- Plaintiff’s retaliation claim was dismissed for lack of jurisdiction.

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### POTENTIAL IMPACT OF TITLE VII CLAIM

- Compensatory damages
- Punitive damages (with caps)
- Two years of back pay liability
- Reinstatement
- Injunctive/Equitable relief
- Litigation costs and attorney fees
- Bad press, bad reputation, exposure to more lawsuits

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## RECENT DEVELOPMENTS

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**RETALIATION REQUIRES BUT-FOR CAUSATION**

- A 2013 U.S. Supreme Court case ruled that Title VII retaliation claims must be established using a but-for causation standard, not the “motivating factor” test
- CAN prove Title VII retaliation by showing adverse employment action would not have occurred “but-for” plaintiff’s protected activity
- CANNOT prove Title VII retaliation by the lessened causation standard in section 2000e-2(m):
  - Motive to retaliate was one of employer’s motives, even if employer had other lawful motive

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**Employees Must Keep Their Cool to Keep Their Retaliation Claim**

- Michael Benes charged his employer with sex discrimination, while still employed
- EEOC arranged for mediation, with initial joint session and then separated go-between sessions
- Benes received an offer from his employer that he thought was too low

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**Employees Must Keep Their Cool to Keep Their Retaliation Claim**

- Stormed into employer’s mediation room and yelled: “You can take your proposal and shove it up...”
- Within an hour after this occurred, employer fired Benes for misconduct

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### Employees Must Keep Their Cool to Keep Their Retaliation Claim

- Benes filed a Title VII retaliation claim
- Court agreed with employer:
  - ▣ Fired for misconduct, not for making/supporting charge of discrimination
  - ▣ Benes sabotaged the mediation session, which does not promote the goals of Title VII retaliation claims
  - ▣ Title VII does not forbid *all* adverse actions – just ones that would dissuade a *reasonable* worker from making or supporting a charge of discrimination

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### Employees Must Keep Their Cool to Keep Their Retaliation Claim

- **Takeaway:** Employee's participation in the investigation of a charge **does not insulate** him from being discharged for conduct that, if it occurred outside of the investigation, would warrant termination.
- Misconduct during EEOC investigation is unprotected.
- Title VII "does **not create a privilege to misbehave**" in court or mediation.

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### Can't Put the Cart Before the Horse

- Ms. Verma, an Asian Indian female, worked at a University under various supervisors
- Starting in 2006, and continuing through 2008, Verma had conflicts with each of her supervisors, mostly because she refused to perform tasks assigned to her
- She received verbal and written warnings

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### Can't Put the Cart Before the Horse

- Things came to a head in March 2008, when Verma refused instructions and sent an email disparaging her supervisor to others in the department
- She was fired less than two weeks later

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### Can't Put the Cart Before the Horse

- Verma alleged in her EEOC complaint that causation for retaliation could be inferred because of her October 2007 complaint of discrimination against her supervisor (which was internally investigated and deemed meritless), her subsequent discipline by her next supervisor, and then her March 2008 termination

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### Can't Put the Cart Before the Horse

- Court emphasized: the adverse employment action must occur **after or contemporaneous with** the protected activity
- Plaintiff had received negative evaluations from each of her supervisors since early 2006
- No but-for causation where an employee's negative performance evaluations **pre-dated** any protected activity

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### Close, But No Cigar

- Ms. Daniels alleged that after she filed her EEOC complaint in November of 2008, she suffered the following retaliation from her superiors at UPS:
  - UPS managers called her out on incorrectly recording her time
  - Her manager significantly decreased his business communication with her
  - UPS failed to investigate her previous internal complaint of discrimination

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### Close, But No Cigar

- As to the time recording, UPS showed a legitimate, nondiscriminatory reason: it audited multiple time records of employees suspected of keeping inaccurate time, including Ms. Daniels
- Daniels didn't present any evidence to undermine UPS's reason for auditing her; she was not singled out or treated differently from other employees

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### Close, But No Cigar

- As to the decrease in communications with her manager, Daniels tried to argue that this was retaliation because it professionally isolated her and interfered with her ability to do her job
- The Tenth Circuit said, even though a retaliatory action need not affect a plaintiff's employment status (affect a term/condition), Daniels could not prove that the manager's decrease in communications with her rose above the level of a mere slight or snub

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## Close, But No Cigar

- Finally, as to UPS's failure to investigate her August 2008 internal discrimination complaint, the Tenth Circuit said a "failure to investigate an internal complaint **cannot** be considered retaliatory" under these circumstances
- Unless a failure to investigate a complaint leads to a **demonstrable harm**, it leaves an employee no worse off than before the complaint was filed

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## SPECULATION DOES NOT EQUAL RETALIATION

- Plaintiff, a deaf man, sued his former employer alleging he was terminated in retaliation for his complaints to his employer about interpreter services
- In the termination memorandum, Plaintiff's supervisor documented his horrible behavior (abrupt, demanding, intimidating, disrespectful, offensive)
- Had previously received a warning about his conduct
- Got loud, angry, and frantic in front of other employees when displeased with an interpreter

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## SPECULATION DOES NOT EQUAL RETALIATION

- Court said lodging complaints about quality of interpreters *could be* protected activity
- Plaintiff had no evidence; just speculation that employer's reason for terminating him was false
- Court said, "**Speculation is not enough.**"
- Employer had documentation and witness corroboration of Plaintiff's inappropriate and extreme behavior
- **Practice Tip:** Train management how to properly document.

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### Recent EEOC Settlement

- EEOC sued on behalf of female employees of Basta Pasta
- Owner of the restaurant blatantly harassed, touched, and sexually assaulted his employees
- A manager complained to upper management about the owner's sexual behavior to no avail
- Restaurant warned manager to keep her mouth shut, and then fired her in retaliation

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### Recent EEOC Settlement

- After the EEOC filed suit against the restaurant for Title VII harassment and retaliation, Basta Pasta settled:
  - \$200,000 in monetary relief
  - Three-year consent decree enjoins restaurant from hostile work environment
  - Required to implement policies and train employees
  - Post a remedial notice
  - Implement claims process for victims to come forward

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### Recent EEOC Lawsuit

- EEOC sued Turner Machine Company for retaliation on behalf of Ken Woodard
- Woodard was hired in 2011
- He voiced concerns about mandatory employee meetings called "huddles" which happened every morning
- Employees would discuss their personal lives, religious affiliations, and church activities at the huddles

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## Recent EEOC Lawsuit

- Woodard opposed the huddles, and subsequently filed a religious discrimination charge
- The EEOC claims Turner later retaliated against Woodard for filing the charge by terminating him
- EEOC Director stated, "Employers should never penalize employees for exercising their rights. . . ."

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## PRACTICAL TIPS FOR TITLE VII RETALIATION

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## IMPLEMENT A POLICY

- Most employers have anti-discrimination and harassment policies
- Make sure policy specifically prohibits retaliation
- Policy should **require** employees to come forward with complaints of unlawful conduct without fear of reprisal
- **Practice tip:** Always get employee's signed/dated acknowledgment of policies and amendments.

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## PROVIDE TRAINING

- Just having a policy is not enough
- Regularly train managers and supervisors how it works
- Emphasize the following:
  - ▣ Treat employee complaints seriously
  - ▣ Investigate the complaint
  - ▣ Document investigations and conclusions/actions taken
  - ▣ Retaliation can be more subtle than you think (not always demotions, discharges, and decreases in pay)

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## PROTECTIVE MEASURES

- When employee makes complaint of discrimination/harassment, **document** the conversation
- If employee has complained about a particular manager, supervisor, or co-worker, consider temporarily re-structuring the work environment so he/she does not have to report to or work with that person
- However, the re-structuring cannot be retaliatory, i.e., no unfavorable shift changes
- Get employee's input

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## CLOSELY SCRUTINIZE SUBSEQUENT EMPLOYMENT ACTIONS/DECISIONS

- HR, management, and legal counsel should consult on employment actions affecting an employee who has made a complaint to ensure no unlawful retaliation
  - ▣ Is the proposed action consistent with employer's business practice and policies?
  - ▣ Is the proposed action supported by appropriate documentation?
  - ▣ Is the claimant now being criticized or disciplined for conduct that was previously tolerated/accepted?

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## KEEP IT CONFIDENTIAL

- Limit those who “need to know” that employee engaged in protected activity

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**THIS PRESENTATION PROVIDES GENERAL,  
SUMMARY INFORMATION AND IS NOT  
INTENDED TO BE LEGAL ADVICE  
APPLICABLE TO  
SPECIFIC MATTERS.**

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