



Labor & Employment 2024 Symposium

# Retaliation/Whistleblower Update; Anatomy of a Claim and Takeaways

Victoria del Campo, Monica Delgado, and Melissa Raphan  
Dorsey & Whitney LLP

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## Dorsey Speakers



**Victoria del Campo**  
Associate  
(612) 492-5594  
delcampo.victoria@dorsey.com



**Monica Delgado**  
Associate  
delgado.monica@dorsey.com  
(612) 492-6772



**Melissa Raphan**  
Partner  
raphan.melissa@dorsey.com  
(612) 343-7907



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## Agenda

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- **Protected Conduct: What is and is not enough**
- **Adverse Action: What is and is not enough**
- **Causation: What is and is not enough**
- **Pretext**
- **Hypotheticals**
- **Takeaways**

## Establishing a Prima Facie Retaliation Case

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1. **Employee engaged in protected conduct**
2. **Employer took adverse action**
3. **There was a causal connection between employee's protected activity and employer's adverse action**

## Laws Governing Retaliation

- **Federal:** Title VII, NLRA, FMLA, ADA, OSHA, industry-specific laws, etc.
- **State:** Human Rights Acts, Whistleblower Protection Acts, etc.
  - States can be more protective of employees



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## Examples of Protected Conduct

- **Asking for information or legal advice on workplace rights**
- **Complaining about unpaid wages**
- **Reporting harassment or discriminatory treatment**
- **Complaining about unsafe working conditions**

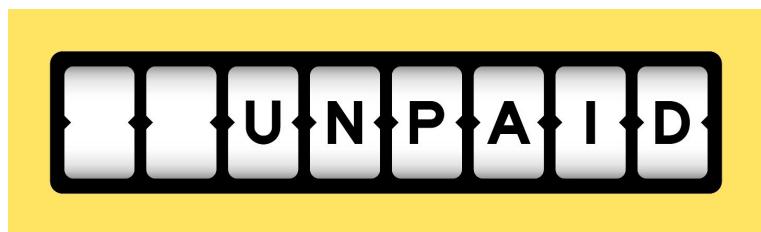


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## Examples of Protected Conduct

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- **Discussing unionizing, or other wage or workplace concerns, with coworkers**
- **Disability- or religion-related requests for accommodation**
- **Resisting sexual advances, or intervening on behalf of someone else**



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## Examples of Protected Conduct (cont.)

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- **Filing workers' compensation claim**
- **Filing or otherwise being part of governmental agency charge or complaint**
  - EEOC
  - State Labor or Human Rights Agency
  - Other workplace-rights agency
- **Filing a lawsuit against employer; supporting others who have**
- **Whistleblowing**
  - Accounting errors; fraud, waste, abuse, mismanagement
  - Other violations of state or federal law

## Examples of What is *NOT* Protected Conduct

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- **Informal complaints, informal protests, informally stated opposition to reporting procedures not stated “in a clear and unequivocal manner.”**
  - *Qing Qin v. Vertex, Inc.*, 100 F.4th 458, 470 (3rd Cir. 2024).
- **Remarks about unspecified interpersonal conflict**
- **Comments regarding micromanaging supervisor**
- **Complaints made by person belonging to a protected class, without more**
- **Employee’s bad conduct following report**

## Good Faith, Reasonable Belief

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- **Could “a reasonable fact-finder . . . believe that the conduct complained of was unlawfully discriminatory?”**
  - *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 322 (3rd Cir. 2008).
- **Is the party’s belief unreasonable given the applicable substantive law?**

## Takeaways on Protected Conduct

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- No magic words!
- Train supervisors how to listen to employees
- Empower supervisors to triage
- Err on the side of caution and over-inclusivity



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## Adverse Action Standards

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- Title VII - Retaliation
  - In the context of a Title VII retaliation claim, an adverse employment action is any action that “could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).
- Minnesota Human Rights Act
  - An adverse action must “materially alter the terms or conditions of the plaintiff’s employment.”
- Minnesota Whistleblower Act
  - The Act prevents an employer from “discharging, disciplining, threatening or otherwise discriminating against or penalizing an employee....”

## Not Everything That Makes an Employee Unhappy is Actionable – But What Is?

- U.S. Supreme Court weighs in via *Muldrow v. St. Louis*, 144 S. Ct. 967, 974 (2024).
  - Employee was transferred
  - Transfer did not change rank or pay
  - Transfer did change responsibilities, perks and schedule
- Key question: Did the action in question “[bring] about some disadvantageous change in an employment term or condition?”



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## Supreme Court Articulates the New Standard for SOX Whistleblower Claims

- U.S. Supreme Court concludes there is no implicit “retaliatory intent” requirement for whistleblower claims brought under SOX.
  - *Murray v. UBS Securities, LLC*, 601 U.S. 23 (2024).
- Discrimination simply requires evidence of differential treatment.
- SOX claims have a more lenient retaliatory-intent threshold.
  - Plaintiffs bringing claims under SOX need only show employee’s protected activity was a “contributing factor.”

## Adverse Employment Action (cont.)

- **State courts will likely follow the U.S. Supreme Court's recent rulings**
  - State courts often look to Title VII to interpret state anti-retaliation statutes
  - Harm is harm, no qualifier needed
  - Context matters
- **What is not an adverse employment action?**
  - Lower performance rankings
  - Placement on PIP
  - Disciplining an employee for misconduct
  - Everyday workplace grievances
  - Excessive work assignments

## Takeaways on Adverse Action

- **Not all actions by an employer, which an employee may disagree with, constitute adverse actions.**
- **Adverse actions are not limited to denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.**



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## Takeaways on Adverse Action (cont.)

- Other adverse actions may include work-related threats, warnings, reprimands, transfers, negative or lowered evaluations, transfers to less prestigious or desirable work or work locations.



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## Causation: But-For

- Some states apply the but-for standard, including Texas, Florida, and Colorado.
- Retaliation Claims under Title VII, ADA, and ADEA:
  - Require proof that the intent to retaliate was the "but-for cause" of the employment action.
  - Plaintiff must show discriminatory conduct would not have happened but for the protected conduct.
  - Distinguished from the *motivating factor* standard used in other Title VII claims.
  - More favorable for defendants.

## Causation: Motivating Factor

- Some states apply the motivating factor causation standard. These states include California, Minnesota, New York, and New Jersey.
  - Protected conduct must have "actually played a role" in the employer's decision-making process.
  - Retaliation need not be the only motivation but must be a "substantial causative factor."
  - More favorable for plaintiffs.



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## Obstacles for Plaintiffs in Establishing Causation

- Knowledge by decisionmaker
  - Anonymous complaints
- Intervening event
  - Employees cannot shield themselves from discipline due to misconduct solely by engaging in protected conduct



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## How Plaintiffs Show “Pretext”

- To demonstrate pretext, a plaintiff must either show:
  - Defendant’s explanation “unworthy of credence” or
  - A prohibited reason more likely motivated defendant by rebutting defendant’s decision on the adverse employment action.
- Retaliation claims are fact specific, requiring that the “evidence of pretext and retaliatory intent must be viewed in its totality.”

## How Plaintiffs Show “Pretext” (cont.)

- **Common Examples of Pretext**
  - Lack of records of termination decision
  - History of strong performance
  - Failure to address performance issues
  - Long term tolerance of alleged issues
  - Failure to investigate
  - Acts of retaliation against other employees

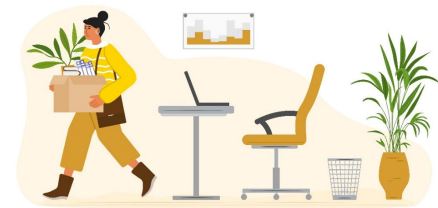


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## Takeaways on Causation

- **An employee engaging in protected conduct and an employer taking an adverse employment action against the employee does not constitute retaliation unless there is a causal connection between the two.**
- **Address performance issues with employees as they occur.**
- **Documentation of performance deficiencies is necessary.**



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## Takeaways on Causation (cont.)

- Temporal proximity alone is insufficient to establish a causal connection but consider the timing of an adverse action to an employee's protected conduct before taking adverse action.
- Employers are not prohibited from taking adverse action when warranted, even if there is an ongoing investigation or a recent complaint from that employee.
- Ask questions to determine what the true reason for an adverse action may be; inconsistent or shifting explanations may give rise to a pretext inference.

## Hypothetical #1

- **Key Facts**
  - John Jacob, male (43 years old), is compliance manager; he works in a highly regulated industry.
  - History of raising concerns.
  - Recently raised concern about financial accounting that raises external implications.
  - Company is also conducting a RIF.
  - John Jacob's supervisor, Michelle, is new to the company and is the decision maker for RIF.
- **What risks do you see? What information do you want to know? What steps can the company take to mitigate risk?**



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## Hypothetical #2

- **Key Facts**

- Marcy is salesperson with a history of high performance.
- She one of three female salespeople out of nine. She has historically been the highest paid female salesperson on her team.
- She is currently experiencing a downturn in sales and has raised concerns about a recent territory split, reassignment of accounts, and issues with commission payments.
- Clients complained to Marcy's supervisor that she was too "aggressive."
- Marcy's supervisor planned to put her on a PIP until she raised concerns.



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- **What risks do you see? What information do you want to know? What steps can the company take to mitigate risk?**

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# Dorsey Speakers



**Victoria del Campo**  
Associate  
(612) 492-5594  
delcampo.victoria@dorsey.com



**Monica Delgado**  
Associate  
delgado.monica@dorsey.com  
(612) 492-6772



**Melissa Raphan**  
Partner  
raphan.melissa@dorsey.com  
(612) 343-7907



**Victoria del Campo**  
Associate  
Dorsey & Whitney LLP  
Minneapolis, Minnesota  
delcampo.victoria@dorsey.com  
(612) 492-5594

Victoria is an Associate in Dorsey's Labor & Employment Group. She regularly defends employers before state and federal courts and administrative agencies in matters involving claims of discrimination, harassment, retaliation, wrongful termination, and wage and hour issues. She also provides advice and counseling to clients to assist them in taking proactive steps to avoid litigation. Victoria has experience reviewing handbooks and other employment-related policies, as well as counseling employers on pre-employment testing, leave of absence management, and reductions in force.

During law school, Victoria served as a legal extern for the U.S. Equal Employment Opportunity Commission.



**Monica Delgado**  
Associate  
Dorsey & Whitney LLP  
Minneapolis, Minnesota  
delgado.monica@dorsey.com  
(612) 492-6772

Monica is an Associate in Dorsey's Labor & Employment Group. She blends strong attention to detail with a commitment to broadly understanding each client's unique needs to assist them at every stage of litigation before federal and state courts and administrative agencies. Her practice touches employment issues involving harassment, discrimination, retaliation, wage and hour, competition, classification, and collective bargaining. In addition to representing clients once a dispute has arisen, Monica advises clients and conducts internal investigations to mitigate potential future disputes.

Monica's active pro bono practice centers on supporting victims of domestic violence and facilitating reentry for those who are formerly incarcerated. While in law school, Monica earned top pro bono distinction for her medical-legal partnership work with patients at federally qualified health centers, as well as for her immigration work with women and children detained at the U.S.-Mexico border.



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**Melissa Raphan**  
Partner  
Dorsey & Whitney LLP  
Minneapolis, Minnesota  
raphan.melissa@dorsey.com  
(612) 343-7907

Melissa is a Dorsey Partner, member of the firm's Policy Committee (Board of Directors), and former Chair of Dorsey's Labor & Employment Group. While she has deep relationships with clients of all types, she has particular expertise litigating disputes and providing advice to clients in the financial services, healthcare, food & agriculture and energy sectors. She is "an experienced, knowledgeable practitioner who consistently delivers high-quality work," reports *Chambers U.S.A.* in its most recent rankings of the top lawyers in America.

Melissa's employment litigation practice includes class actions, collective actions, multi-plaintiff actions and single plaintiff cases nationwide in federal and state courts and agencies. She regularly handles arbitrations before the American Arbitration Association and the Financial Industry Regulatory Authority, Inc. (FINRA), where she has a history of delivering successful results.

Melissa counsels employers on a full range of issues including performance management, selection and termination. Her decades of experience in these matters makes her a go-to partner and a trusted advisor for clients. (Her sense of humor doesn't hurt either.)

Melissa is known as a fierce advocate for diversity in the business community. Knowing that sponsorship is vital to advance the careers of women and minority attorneys, she advocates stridently on their behalf. Her awareness that diverse teams deliver the best results for clients accounts for the highly diverse teams she assembles for the matters she handles.



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