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Feature

DODGING THE EXTRA ARROW
Recent Developments in the Law of Retaliation

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Retaliation claims under Title VII of the Civil Rights Act of 1964 have been rising dramatically in recent years. The number of retaliation charges filed with the Equal Employment Opportunity Commission (EEOC) more than doubled between 1991 and 1997. [1] It is by no means uncommon these days for an employer to avoid liability for a plaintiff's discrimination claim only to find that it is liable for as much or more in damages for retaliation. [2] From management's viewpoint, these retaliation claims are seen as “extra arrows” for employees' attorneys in discrimination lawsuits. [3] Recent developments within this circuit suggest that employers may need to reconsider how they respond to such claims. This article discusses those developments and makes some suggestions for improving an employer's chances of avoiding liability for retaliation.

The general framework for proving a case of retaliation under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and similar federal and state statutes has long been settled. Because direct evidence of retaliation is rare, plaintiffs generally rely upon circumstantial evidence. [4] A plaintiff establishes a prima facie case of retaliation using circumstantial evidence by showing that 1) she engaged in statutorily protected activity; 2) she suffered an adverse employment action; and 3) a causal connection between the protected activity and the adverse action. [5] The burden then shifts to the employer to produce a legitimate reason for the adverse employment action. [6] As in any other discrimination case, the employer's burden in a retaliation case is a burden of production only and is “exceedingly light.” [7] If the employer meets its burden of production, the plaintiff must then prove by a preponderance of the evidence that the defendant's “proffered reason is a pretextual ruse to mask a retaliatory action.” [8] The plaintiff bears the ultimate burden of persuasion to show that the employer was in fact motivated by retaliation in making its employment decision. [9]

The employer's burden of articulating a legitimate reason for its action and the plaintiff's proof of pretext are essentially the same in a retaliation case as in any other discrimination case. [10] This article will therefore concentrate on the plaintiff's proof of a prima facie case and suggest some steps prudent employers can take to avoid retaliation claims.

Statutorily Protected Activity

The first element of the plaintiff's prima facie case is proof that she engaged in statutorily protected activity. “Protected activity” is defined in Title VII's antiretaliation provision, 42 U.S.C. §2000e-3(a). That provision makes it unlawful for an employer to discriminate against an employee if 1) “he has opposed any practice made an unlawful employment practice by [Title VII]” (the opposition clause) or 2) “he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under [[Title VII]” (the participation clause).

· The Opposition Clause

The opposition clause has been interpreted expansively to protect employees even when they oppose practices that are not actually unlawful, so long as they have "'a good faith, reasonable belief that the employer was engaged in unlawful employment practices."' [11] Not every ***28** complaint an employee voices, however, is protected. The complaint must involve an alleged violation of Title VII. Complaints that an employer has violated its own personnel procedures or laws other than Title VII are not protected activity. [12]

Moreover, it is not enough for a plaintiff to allege simply that he genuinely and honestly believed his employer's practice violated Title VII. The employee's belief must be objectively reasonable. The objective reasonableness of the plaintiffs' belief is to be judged on the basis of existing law. In *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1988), for example, the court held that even though the plaintiffs honestly believed that their employer's hair length policy for men was unlawful, their opposition to the policy was not protected because their belief was not objectively reasonable in light of well established law upholding similar hair length policies.

· The Participation Clause

Like the opposition clause, the participation clause has also been read to provide expansive protection. Employees are protected from retaliation for filing EEOC charges, or participating "in any manner" as a complainant or witness in EEOC proceedings or lawsuits. [13] Even persons who are themselves accused of discrimination enjoy some level of protection when they cooperate with an EEOC investigation or reluctantly give favorable testimony to a plaintiff. [14]

As expansive as the participation clause is, however, it is limited by its terms to investigations under Title VII and does not include protection for participation in an employer's internal investigations. The 11th Circuit considered this issue in *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000). In that case, an employee alleged that her employer retaliated against her in violation of Title VII by discharging her after she testified in the employer's internal investigation of sexual harassment. The court held that the employee's testimony in the internal investigation did not constitute protected activity under the participation clause because that clause protects only "proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC." [15]

In reaching this conclusion, the 11th Circuit distinguished its earlier decision in *Clover v. Total System Services*, 176 F.3d 1346 (11th Cir. 1999). In that case, the employee alleged that her employer retaliated against her for making statements in connection with an investigation conducted by the employer in response to an EEOC charge. The court held that the employee's statements were protected "[b]ecause participation in an employer's investigation conducted in response to a notice of charge of discrimination is a form of participation, indirect as it is, in an EEOC investigation." [16] Thus, the question of whether an employee's participation in an employer's internal investigation is protected turns on whether the investigation was initiated by the employer or prompted by the filing of an EEOC charge.

Adverse Employment Action

The second element of a prima facie case is proof of an "adverse employment action." Not every employment action that makes an employee unhappy gives rise to a claim of retaliation. [17] As the 11th Circuit has explained, it is important not to "make a federal case" out of minor employment actions that cause no objective harm. [18] "Otherwise, every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." [19] At the same time, it is equally important that the threshold for what constitutes an adverse employment action not be elevated artificially, because an

employer's action, to the extent that it is deemed not to rise to the level of an adverse employment action, is removed completely from any scrutiny for discrimination. [20]

Accordingly, for an employment action to give rise to a claim of retaliation, it must be "materially" adverse. [21]

In most cases, it is not difficult to determine whether an employment action is materially adverse. Discharges, demotions, denials of promotion, reductions in wages and denials of wage increases all have economic effects and obviously constitute materially adverse employment actions. Employment actions that do not have such obvious economic effects, such as the assignment of specific duties, derogatory comments, verbal criticism, lateral transfers, lowered performance evaluations, reprimands and counselings are not so obviously material or adverse.

The courts have generally held that complaints about an employee's assignments, verbal remarks, and general hostility from coworkers are not sufficient to constitute adverse employment actions, unless such conduct is severe or pervasive. [22] There is less agreement about whether criticisms which have no direct effect on pay, such as poor performance evaluations, counselings, and reprimands constitute adverse employment actions. Most courts hold that such criticisms are too minor to give rise to a claim for discrimination or retaliation. [23] The Fifth Circuit has held that performance evaluations and the like are mere precursors to employment action ***29** and that the laws against discrimination apply only to "ultimate employment actions." [24]

The 11th Circuit rejected the ultimate employment action requirement in *Wideman v. Walmart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998). In that case, the plaintiff alleged that her supervisors retaliated against her by improperly listing her as a no-show on a day that she was scheduled to have off, giving her written reprimands and a one-day suspension, soliciting fellow employees to make negative statements about her, threatening to "shoot her in the head," and refusing to immediately authorize medical treatment when the plaintiff had an allergic reaction. Recognizing the circuit split on the issue, the 11th Circuit decided that proof of an ultimate employment action was not necessary. The court explained that "permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination." [25]

The *Wideman* decision offers little to guide litigants in determining when an action is too insignificant to give rise to a claim. The court stated simply: "Although we do not doubt that there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause, we need not determine in this case the exact notch into which the bar should be placed." [26]

Fortunately, subsequent cases have provided considerably more assistance and narrowed *Wideman's* broad language significantly. In *Graham v. State Farm Mutual Insurance*, 193 F.3d 1274 (11th Cir. 1999), for example, the court held that various critical memoranda and classifying an employee as "AWOL" for two days "simply do not meet the 'threshold level of substantiality"' because "[n] either action constitutes an unwarranted negative job evaluation or disadvantageous transfer of responsibilities."

In *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000), the court stated that to meet the minimum threshold level of substantiality the action must be "objectively serious and tangible enough to alter the [the plaintiff's] 'compensation, terms, conditions, or privileges of employment, deprive ... her of employment opportunities or adversely affect ... her status as an employee."' [27] The court held that actions such as placing the plaintiff on a committee, changing her teaching assignments, and terminating an informal dispute resolution process were not substantial enough to give rise to a claim for retaliation. [28] In *Davis v. Town of Lake Park*, the court held that placing "negative performance memoranda" in the plaintiff's personnel file and changing his work assignments were not "serious and material" enough, either individually or collectively, to constitute adverse employment actions. [29]

Transfers with no accompanying change in pay or benefits present a special problem. A transfer can certainly be detrimental, but it can also be beneficial to the employee and in many cases is simply lateral. For example, a transfer of a legal secretary from a law firm associate to a partner, even with no increase in pay would generally be viewed as beneficial to the employee and might even be viewed as a promotion or at least as an opportunity for career advancement. A transfer in the opposite direction, from the partner to the associate, might well be viewed as detrimental to the employee's career. The difficulty arises when the employee views the transfer as adverse, but the employer views it as beneficial or, at worst, lateral. The courts have generally held that "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." [30] It is important to preserve an employer's authority to laterally transfer employees because such transfers can be used to separate a plaintiff from those supervisors or coworkers who they believe are retaliating against them, avoiding ongoing conflicts without seriously injuring the transferred party. [31] If employers are dragged into court every time they transfer an employee, there would be little incentive to remove an employee from what she considers to be a hostile environment.

***30** A disagreement over whether a transfer was detrimental or merely lateral was at the heart of the 11th Circuit's decision in *Doe v. DeKalb County School District*, 145 F.3d 1441 (11th Cir. 1998). In that case, the plaintiff, who was HIV positive, alleged that his employer violated the ADA by transferring him from his position as a teacher of "psychoeducation" students to an "interrelated" classroom at a different school. The court concluded that the transfer was not a demotion in disguise because the plaintiff's salary, benefits, and seniority all remained the same, but the plaintiff insisted that he had nevertheless suffered an adverse employment action because he strongly preferred teaching the psychoeducational class. The court held that the determination of whether the transfer was materially adverse should be made on an objective basis. The plaintiff's subjective preferences are irrelevant. Otherwise, the requirement that "a plaintiff must show, as part of his prima facie case, that he has suffered an adverse employment action would be essentially meaningless."

Given that any employee willing to file a lawsuit must at least subjectively dislike some action his employer has taken, "a subjective standard would mean that no court would ever seriously consider the adverse employment action prong of a prima facie ... case-we would just assume this element to be satisfied in every case." [32]

The court offered some suggestions for determining when a transfer that does not result in any reduction in pay or benefits is nevertheless objectively adverse. First, the court held purely voluntary transfers are, by definition, not adverse. [33] Second, even if the transfer is involuntary, to be actionable it must result in a material change in the plaintiff's working conditions:

Any adversity must be material; it is not enough that a transfer imposes some de minimus inconvenience or alteration of responsibilities. Moreover, the fact that an employee must learn as a result of a transfer does not mean that the transfer is per se adverse .... [A]ll transfers require some learning, since they require employees to work with new people or products and to assume new responsibilities. [34]

The guidance the 11th Circuit offered in *Doe v. DeKalb* may not be as easy to apply in practice as it is in theory. The court stated for example, that a transfer to a less prestigious position may constitute an adverse employment action, but measuring the relative prestigiousness of a company's jobs may prove extremely difficult. What one employee may consider prestigious, another may consider undesirable. Whether it is more prestigious to work in the research division of a large company rather than in its manufacturing division, for example, will vary from employer to employer and from employee to employee. The difficulty of applying the court's test is illustrated by the fact that the 11th Circuit itself was unable to resolve the question of whether Doe had been transferred to an objectively worse position without a remand for further factual development.

The 11th Circuit's objective test leaves open a wide variety of disputes, but it at least forecloses claims based solely upon an employee's personal preferences. After *Doe*, in order to establish a prima facie case a plaintiff will have to come forward with at least some objective evidence that his transfer was adverse in terms of pay, benefits or prestige. [35]

Causal Connection

The third element of the prima facie case is the causal connection between the plaintiff's statutorily protected activity and the adverse employment action. Courts state the test for this element in extremely broad terms. To establish a causal connection, a plaintiff need only show that the protected activity and the adverse action were "not wholly unrelated." [36]

While this standard is hardly difficult to meet, it is not wholly without content. The plaintiff must show at least that the person responsible for the adverse action was aware of the protected activity at the time he acted. This "requirement rests on common sense. A decision maker cannot have been motivated to retaliate by something unknown to him." [37]

Absent direct evidence of causation, the plaintiff must at least show some temporal proximity between the protected activity and the allegedly retaliatory action. In *Maniccia v. Brown*, 171 F.3d 1364, 1369-70 (11th Cir. 1999), for example, the court held that a gap of 15 months between the plaintiff's complaint and "the alleged adverse employment actions belies her assertion that the former caused the latter." In *Clark County School Disrict v. Breeden*, the Supreme Court held that a 20-month gap was too long and cited with approval cases holding that gaps of three to four months were too long. [38]

Responding to a Prima Facie Case of Retaliation

In the typical retaliation case, the employer responds to a prima facie case by articulating a legitimate nondiscriminatory reason for its actions. The case then shifts to the question of whether the plaintiff can prove pretext. When the employment action at issue is a discharge, demotion, or other obviously tangible employment action, this may be the only defense an employer has. When the employment action being challenged is intangible, however, the Supreme Court's recent decisions in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), provide another defense for those employers prudent enough to have adopted anti-harassment policies.

In *Ellerth* and *Faragher*, the Supreme Court held that whether an employer can be held directly liable for sexual harassment depends on whether the plaintiff's injuries are tangible or intangible. Employers are strictly liable for discriminatory acts that result in tangible job injuries, but they can avoid liability for harassment that affects only intangible conditions of employment by adopting and enforcing a sexual harassment prevention policy. The Court explained that "a tangible employment action constitutes a significant change in employment status, ***31** such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." [39] In most cases, tangible employment actions are documented in the employer's official records, inflict direct economic harm, and are subject to review by higher-level supervisors.

Intangible employment actions include verbal remarks, physical touchings, and other conduct that does not directly affect an employee's status. For intangible conduct to be actionable, it must be so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview." [40]

The Court held that even when the intangible action does rise to the level of an objectively hostile environment, the employer can still avoid liability if it can show that it took reasonable steps to prevent and correct such behavior:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successfully higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. *See* Fed. R. Civ. P. 8(c). The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the plaintiff employee unreasonably failed

to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure normally will suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as a discharge, demotion or undesirable reassignment. [41]

As this language indicates, the defense is not limited to those instances when the employee failed to use the employer's complaint procedure. It also includes instances when the employee filed an internal grievance and the employer took reasonable steps to investigate and remedy any harassment, even if the steps the employer took were not as aggressive as the employee may have preferred. Employers are not required to conduct perfect investigations or to take the most stringent action possible against alleged harassers. [42] In determining whether an employer took prompt, remedial action, the courts focus on whether the employer took action that would safeguard against any reoccurrence of harassment. [43] In assessing the promptness of an employer's response, it is important to consider the employer's organization. In large corporations and governmental agencies where there are various lines of command and grievance procedures available, a response that takes as much as three months may well be sufficiently prompt. [44]

Although *Ellerth* and *Faragher* involve sexual harassment claims, there is no reason why the Court's rationale should not apply to other forms of harassment. Whether an employee's injuries are a result of sexual harassment, racial harassment, or retaliatory harassment, an employer's liability still depends on the same principles of agency that the Court relied upon in *Ellerth* and *Faragher*. If an employer can avoid liability from intangible acts of sexual harassment by adopting and enforcing a policy against sexual harassment, it should be able to ***32** avoid claims of retaliatory harassment involving intangible injuries by adopting and enforcing a policy against retaliatory harassment.

The EEOC adopted this position in the enforcement guidance it issued after *Ellerth* and *Faragher*. [45] The commission has determined that the vicarious liability rules established in those cases "applies to harassment based on race, color, sex (whether or not of a sexual nature), religion, national origin, *protected activity*, age or disability." [46]

Many employers already include policies against retaliation within their general anti-discrimination policies. If, however, the employer's policy does not already make it clear that it extends beyond sexual harassment, it should be modified to make it clear. In light of *Ellerth* and *Farragher's* emphasis on preventing harassment through internal grievance procedures, all prudent employers should adopt such policies.

In drafting a harassment prevention policy, it is important to specify who is authorized to accept complaints on behalf of the employer. [47] "Once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then it is 'incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances.'" [48] Any complaint made to the person or persons designated by the employer to receive complaints immediately puts the employer on notice and triggers the obligation to promptly investigate and resolve any wrongdoing that is discovered. [49] Employers who already have such policies in place should remember to republish them on a regular basis, train employees how to use the policy, and be sure to enforce the policy vigorously, if they wish to ensure the defense remains available.

Footnotes

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1 Simon J. Nadel, *Analysis and Perspective*, 11 EMPL. DISCR. 665, 665 (BNA Nov. 11, 1998).

2 *See, e.g.*, *Brungart v. BellSouth Telecomm.*, 231 F.3d 791 (11th Cir. 2000) (even though plaintiff was not eligible for leave under the FMLA, she still could pursue claim for retaliatory discharge).

3 *See supra* note 1.

4 *See, e.g.*, *Arrington v. Cobb County*, 139 F.3d 865, 873 (11th Cir. 1998); *see also Damon v. Fleming Supermarkets*, 196 F.3d 1354, 1358 (11th Cir. 1999) (direct evidence is defined as "evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.") (Internal citations omitted.)

5 *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997); *Durley v. APAC*, 236 F.3d 651 (11th Cir. 2000) (applying same test to ADA claim); *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000) (Family and Medical Leave Act); *Sierminski v. Transouth Financial*, 216 F.3d 945 (11th Cir. 2000) (Florida Whistle Blower's Act); *Wolf v. Coca-Cola*, 200 F.3d 1337 (11th Cir. 2000) (Fair Labor Standards Act).

6 *Raney*, 120 F.3d at 1196.

7 *Tipton v. Canadian Imperial Bank of Commerce*, 872 F. 2d 1491, 1495 (11th Cir. 1989).

8 *Raney*, 120 F.3d at 1996.

9 *Meeks*, 15 F.3d at 1021.

10 For a thorough discussion of proving pretext, *see Chapman v. AI Transport*, 229 F.3d 1012, 1028-36 (11th Cir. 2000) (en banc).

11 *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998), quoting from, *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997). In *Clark County School District v. Breeden*, 121 S. Ct. 1508 (2001), the Supreme Court noted that this standard has been widely accepted by the circuit courts, but held that it was unnecessary to decide whether it was correct under the particular circumstances of the case. Even assuming the standard was correct, the Court explained, no reasonable person could find that a single incident of sexually tinged banter constitutes sexual harassment. The plaintiff's complaint about the incident therefore did not constitute protected activity.

12 *See, e.g.*, *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 524 n. 4 (3d Cir. 1997); *Barber v. CSX Distribution Serv.*, 68 F.3d 694, 701-02 (3d Cir. 1995). For similar reasons an employee's objection to his employer's failure to implement an affirmative action plan is not protected because Title VII does not require affirmative action. *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745 (6th 1986). The courts have also cautioned that the employee's actions must not be unduly disruptive. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000) ("While the law is clear that opposition to a Title VII violation need not rise to the level of a formal complaint in order to receive statutory protection, ... [s]lapping one's harasser, ... in response to Title VII-barred harassment, is not a protected activity.").

13 42 U.S.C. §2000e-3(a).

14 *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185-86 (11th Cir. 1997).

15 *EEOC*, 221 F.3d. at 1174.

16 *Clover*, 176 F.3d at 1353.

17 *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 274 (1996).

18 *Doe v. DeKalb County School District*, 145 F.3d 1441, 1453 (11th Cir. 1998).

19 *Williams*, 85 F.3d at 274; *see also Doe*, 145 F.3d at 1453; *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996).

20 *Doe*, 145 F.3d at 1453 n.21.

21 *Id.* at 1453 ("Any adversity must be material; it is not enough that [the employment action] imposes some de minimus inconvenience or alteration of responsibilities.").

22 *See, e.g., Drake v. Minnesota Binding & Manuf. Co.*, 134 F.3d 878, 886 (7th Cir. 1998) (shunning of plaintiff by co-workers did not affect the terms and conditions of her employment and did not constitute a materially adverse employment action); *Munday v. Waste Management*, 126 F.3d 239 (4th Cir. 1997) (yelling at an employee during a public meeting, directing other employees to ignore her and spy on her, and generally refusing to communicate with her concerning her employment-related complaints was not actionable adverse employment action); *Landgraf v. U.S.I. Film Prod.*, 968 F. 2d 427, 431 (5th Cir. 1992), *aff'd*, 511 U.S. 244 (1994) (hostility from coworkers and anxiety from stolen tools did not constitute adverse employment actions).

23 *See, e.g., Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000) (various criticisms of employee's competence were not adverse employment actions); *Kerns v. Capital Graphics*, 178 F.3d 1011, 1017 (8th Cir. 1999) (a supervisor's criticism and threat that the complainant would be "fired for any subsequent exercise of poor judgment" was not enough for an adverse employment action); *Sanchez v. Denver Public Sch.*, 164 F.3d 527, 533 (10th Cir. 1998) (oral threats and "ageist" remarks "did not rise to the level of a materially adverse employment action"); *Benningfield v. City of Houston*, 157 F.3d 369, 376-78 (5th Cir. 1998) (criticism of an employee's performance was not an adverse employment action); *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998) (no adverse employment action where plaintiff "was unfairly reprimanded for conduct she either did not engage in or should not have been responsible for"); *Nunez v. City of Los Angeles*, 147 F.3d 867, 874-75 (9th Cir. 1998) ("mere threats and harsh words are insufficient."); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3d Cir. 1997) ("'unsubstantiated oral reprimands' and 'unnecessary derogatory comments"' did not "rise to the level of [an] 'adverse employment action."'); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355 (8th Cir. 1997) (employee's evaluation "was not adverse employment action sufficient to support Title VII retaliation claim, even though it was lower than pre-complaint evaluation because the evaluation still rated the employee as meeting expectations.").

24 *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997); *accord Lederberger v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (To be actionable under Title VII, an adverse employment action must "rise to the level of an ultimate employment decision.").

25 *Wideman*, 141 F.3d 1453, 1456 (11th Cir. 1998).

26 *Id.*

27 212 F.3d 571, 588 (11th Cir. 2000) (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)).

28 *Id.* at 587-88.

29 245 F.3d 1232, 1242-1243 (11th Cir. 2001)

30 *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *accord Montandon v. Farmland Industries, Inc.*, 116 F.3d 355, 359 (8th Cir. 1997) (allegedly retaliatory transfer was not adverse because it "did not entail a change in position, title, salary or any other aspect of ... employment."); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (employee's transfer was not adverse because it did not entail a loss of pay, duties, or prestige); *Lederberger v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) ("The clear trend of authority is to hold that" a purely lateral transfer is not an adverse employment action); *Crady v. Liberty National Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993) (transfer from one managerial position to another with no loss in pay or benefits was not an adverse employment action); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n.6 (9th Cir. 1994) (where employee "was not demoted or put in a worse job or given any additional responsibilities" it was questionable whether he had suffered an "adverse employment action.").

31 *See Ford v. West*, 222 F.3d 767, 779 (10th Cir. 2000) (plaintiff's transfer to another division was a reasonable remedial response to her allegations of harassment); *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 540 (5th Cir. 1998) (offer to transfer plaintiff to another office to ensure that she would have no further contact with the alleged harasser was a reasonable remedial response); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998) (noting that courts have generally held that "scheduling changes and

transfers" are reasonable responses to internal discrimination complaints); *Buchanan v. Sherrill*, 51 F.3d 227, 229 (10th Cir. 1995) (employer's offer to transfer the plaintiff away from her alleged harasser was a reasonable remedial response).

32 *Doe*, 145 F.3d at 1452.

33 *Id.* at 1454; *see also Stewart v. Board of Trustees of the Kemper County Sch. Dist.*, 585 F.2d 1285, 1289 (5th Cir. 1978) (voluntary transfer was not unlawful under Title VII).

34 *Id.* at 1453 (footnote and citations omitted).

35 *See, e.g.*, *Greene v. Lowenstein*, 99 F. Supp. 2d 1373 (S.D. Fla. 2000) (transfer from position as plant manager to special projects manager with no loss in pay or benefits was not a materially adverse employment action because the plaintiff produced no objective evidence of a loss).

36 *See, e.g.*, *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999). It is important to distinguish between the establishment of a causal connection sufficient to support a prima facie case and the plaintiff's ultimate burden of proving that the adverse action was actually a result of retaliation. While "[a]t first glance, the ultimate issue in an unlawful retaliation case-whether the defendant discriminated against the plaintiff because the plaintiff engaged in conduct protected by Title VII-seems identical to the third element of the plaintiff's prima facie case-whether a causal link exists between the adverse employment action and the protected activity ... the standards of proof of these questions differ significantly. The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision .... The standard for establishing the 'causal link' element of the plaintiff's prima facie case is much less stringent." *Long v. Eastfield College*, 88 F.3d 300, 310 (5th Cir. 1996); *accord Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1123 n.6 (5th Cir. 1998).

37 *Brungart v. Bell South Telecommun.*, 231 F.3d 791, 799 (11th Cir. 2000); *see also Strickland v. Water Works & Sewer Bd. of Birmingham*, 239 F.3d 1199, 1208 (11th Cir. 2001) (quoting *Brungart* and applying this principle in an FMLA retaliation case).

38 121 S. Ct. 1508, 1511 (2001), *citing Richmond v. ONEOK, Inc.*, 120 F.3d 205, 210 (10th Cir. 1997) and *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992).

39 *Ellerth*, 118 S. Ct. at 2268-69. The Court also offered some guidance for determining when a transfer constitutes a tangible employment action. The reassignment must be "undesirable" and involve "significantly different responsibilities." *Id.* The court cited with approval such cases as *Crady v. Liberty National Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993), in which the court held that a transfer from one managerial position to another with no loss in pay or benefits was not an adverse employment action, and *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (6th Cir. 1996), in which the court held that a demotion without a change in pay, benefits, duties, or status was not a materially adverse employment action.

40 *Oncale v. Sundown Offshore Serv.*, 523 U.S. 75, 81 (1998) (quoting *Haris v. Forklift Sys.*, 510 U.S. 17, 21 (1993)).

41 *Ellerth*, 118 S. Ct. at 2270; *see also Faragher*, 118 S. Ct. at 2293.

42 *See, e.g.*, *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999) ("[T]he law requires reasonableness, not perfection."); *Knabe v. Boury Corp.*, 114 F.3d 407, 414 (3d Cir. 1997) (even when the employer's investigation is flawed, it cannot be held liable if it took "corrective action reasonably likely to prevent the offending conduct from reoccurring.").

43 *See Nash v. Electro-Space Sys.*, 9 F.3d 401 (5th Cir. 1993) (employer could not be held liable for sexually hostile environment where, after its investigation was unable to corroborate the plaintiff's allegations, it transferred the plaintiff to another location where she no longer had to deal with the harasser); *Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993) (employer's internal grievance procedure was effective, notwithstanding an investigator's conclusion that the evidence of sexual harassment was inconclusive); *Dudley v. Metro-Dade County*, 989 F. Supp. 1192 (S.D. Fla. 1997) ("Determination of whether an employer took prompt remedial action depends on whether the action prevented any further reoccurrence of harassment, not whether it meets all of the plaintiff's needs.").

44 *See Waymire v. Harris County*, 86 F.3d 424 (5th Cir. 1996); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987).

45 *EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors* (1999).

46 *Id.* at §II (emphasis added).

47 *Madray v. Publix Supermarkets*, 208 F.3d 1290, 1300 (11th Cir. 2000) (quoting *Farley v. American Cast Iron Pipe*, 115 F.3d 1548, 1554 (11th Cir. 1997)); *accord Coates v. Sundor Brands*, 164 F.3d 1361 (11th Cir. 1999).

48 *Id.*

49 *Breda v. Wolf Camera Video*, 222 F.3d 886, 889 (11th Cir. 2000).

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