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Retaliation: Still the Most Attractive Claim for Plaintiffs and Most Complicated for Defendants

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I head up Lloyd Gosselink's employment law practice group, where I focus on employment law compliance for my business and governmental entity clients. My goal is always the same – to help my business and governmental entity clients comply with the law, treat their employees fairly, and stay off the witness stand.

I believe that every organization, no matter its size, deserves competent and efficient counsel, and I do my best to provide that counsel. An ounce of prevention is worth a pound of cure, so I try to develop relationships with my clients where they take proactive steps like calling me before they fire someone and allowing me to visit them regularly to conduct training. When necessary, I defend employers before governmental agencies and when they are sued in state or federal court.

I enjoy being involved with local HR groups and I serve on Austin SHRM's Board of Directors and on Texas SHRM's state council. I speak regularly for various HR organizations and other trade organizations and love the opportunity to connect with other people that speaking provides. I have been listed as a Texas Super Lawyers Rising Star and a Top Austin Attorney by Austin Monthly Magazine in Labor and Employment categories for several years running.

I have long believed that it is important to love your job, enjoy your colleagues, and give back to your community. To that end, I have served as President of the Travis County Women Lawyers' Association, Chair of the Travis County Women Lawyers' Foundation, and I am a Barrister in the Robert W. Calvert Inn of Court.

I received my bachelor's degree from Washington University in Saint Louis and my law degree from the University of Texas School of Law.

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I. Introduction

Anti-discrimination and anti-retaliation provisions work in tandem to create better, more equitable workplaces.[1] Anti-discrimination provisions "endeavor to create a workplace where individuals are not treated differently on account of race, ethnicity, religion, or sex"[2] while anti-retaliation provisions support this objective by "preventing an employer from interfering . . . with an employee's efforts to secure or advance enforcement of [antidiscrimination] guarantees."[3] In other words, prohibitions on discrimination and retaliation are two pieces of a puzzle that, when they come together to prevent and rectify discrimination, result in better workplaces.

But while prohibitions on discrimination and retaliation both seek to produce better workplaces, retaliation claims have grown to become the most prevalent category of charges filed with the Equal Employment Opportunity Commission ("EEOC") by far.[4] In 2022, for example, 73,485 charges were filed with the EEOC.[5] Of those charges, 37,898 alleged retaliation, meaning 51.6% of the total charges filed included claims of retaliation.[6]

It was not always this way. In 1997, for example, only 22.6% of the total charges filed included claims of retaliation.[7] But since then, claims of retaliation have steadily risen until they hit their peak of being included in 56% of claims filed in 2021.[8] Despite the recent dip, claims of retaliation remain attractive.

This paper attempts to pull back the curtain and spotlight some of the reasons retaliation claims are so attractive to plaintiffs and complicated for defendants. Part II briefly examines reasons employees may be likely to file retaliation claims. Part III outlines the discrimination and retaliation standards and provides a digest of the key cases where the Court has relaxed the standard for retaliation. Part IV shifts from a legal analysis to a psychological analysis and addresses reasons juries are more likely to find in favor of a plaintiff on a claim for retaliation than they are on a claim for discrimination. Finally, Part V wraps up with a list of best practices for employers considering the discussion in this paper.

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[1] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 367–68 (2013) (Ginsburg, J., dissenting) ("This Court has long acknowledged the symbiotic relationship between proscriptions on discrimination and . . . retaliation.").

[2] *Id.*

[3] *Id.* (brackets in original).

[4] Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2022, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* Note that this decrease may have resulted from the sudden explosion of claims of religious discrimination on account the COVID-19 vaccine mandates. *Id.* ("*In FY 2022, there was a significant increase in vaccine-related charges filed on the basis of religion. As a result, FY 2022 data may vary compared to previous years.).

II. Peeking Behind the Curtain: Reasons Plaintiffs May File Claims of Retaliation

Retaliation claims are the most prevalent claim filed for a myriad of reasons, though many can be boiled down to a single basis: retaliation is viewed as a plaintiff-friendly cause of action.

One reason retaliation is viewed as a plaintiff-friendly cause of action is because it can be added, or "tacked on," to a claim of discrimination and doing so appears to increase a plaintiff's odds of success.[9] Not only does it appear to increase the odds, but adding a retaliation claim to an underlying discrimination claim generally does not increase the cost of the litigation; rather, it provides an additional cause of action for the plaintiff to recover.[10]

Retaliation claims are also viewed as plaintiff-friendly causes of action because they can be successful even when a claim of discrimination is not. Courts have explained it like this: claims of retaliation are "both logically and factually distinct from a claim of discrimination."[11] Logically, retaliation is different because retaliation is "based on conduct" and discrimination is "based on status."[12] Factually, retaliation is different because a claim of retaliation "does not depend on proof that status-based discrimination actually occurred."[13] In other words, discrimination is an employer's response to *who* an employee is and retaliation is an employer's response to *what* an employee did.[14] But what likely makes claims of retaliation more attractive to

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[9] *See, e.g.,* B. Glenn George, Revenge, 83 TUL. L. REV. 439, 467 (2008) ("Empirical data suggests that retaliation claims may have the best odds - such claims are often more successful than discrimination claims themselves."); *see also* Richard A. Oppel, Jr., *Retaliation Lawsuits: A Treacherous Slope*, N.Y. TIMES, Sept. 29, 1999 ("In fact, over the last five years, employers lost a higher percentage of retaliation lawsuits than of cases that accused them of discrimination because of age, disability, race or sex, according to Jury Verdict Research, a legal research firm and publisher in Horsham, Pa."); *Retaliation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/retaliation ("Retaliation is the most frequently alleged basis of discrimination in the federal sector and the most common discrimination finding in federal sector cases.").

[10] David Sherwyn, Michael Heise and Zev J. Eigen*, Experimental Evidence that Retaliation Claims are Unlike Other Employment Discrimination Claims*, 44 SETON HALL L. REV. 455, 477 (2014).

[11] CBOCS W., Inc. v. Humphries, 553 U.S. 442, 460–61 (2008).

[12] *Id.*

[13] *Id.*; Vadie v. Mississippi State Univ., 218 F.3d 365, 374 n.24 (5th Cir. 2000) ("[E]vidence sufficient to support a claim of retaliation is not necessarily sufficient to support a claim of discrimination.").

[14] Alamo Heights Indep. Sch. Dist. v. Clark, 544 S.W.3d 755, 763–64 (Tex. 2018) ("A retaliation claim is related to, but distinct from, a discrimination claim, and one may be viable even when the other is not. Unlike a discrimination claim, a retaliation claim focuses on the employer's response to an employee's protected activity, such as making a discrimination complaint."); Tex. Dep't of State Health Services v. Resendiz, 642 S.W.3d 163, 180 (Tex. App.—El Paso 2021, no pet.) ("Unlike a discrimination claim, a retaliation claim focuses on the employer's response to an employee's protected activity, such as making a discrimination complaint, rather than on the validity of the underlying discrimination complaint. Thus, the plaintiff need not establish that the reported discrimination occurred to support a claim for retaliation and need only establish that he had a good faith and reasonable belief that the discrimination occurred when he made his report.") (internal citations omitted).

plaintiffs is that "[t]here is no requirement that a plaintiff must prevail on any underlying claim of intentional discrimination in order to prevail on a claim of retaliation."[15] Essentially, "tacking on" a claim of retaliation gives a plaintiff two independent avenues to recover. But as this paper explains in Part IV, the first avenue (*i.e.*, the discrimination claim) is akin to waking a sleeping bear and the second avenue (*i.e.*, the retaliation claim) is akin to provoking the disoriented bear: the initial claim (even if unsuccessful) may result in a retaliatory reaction that allows a plaintiff to recover.

Another reason retaliation is viewed as a plaintiff-friendly cause of action is that it has a psychological effect of bolstering the underlying claims of discrimination. Not only are plaintiffs alleging retaliation "regarded as having attempted to resolve a workplace without resort to the courts,"[16] but claims of retaliation provide more evidence of an employer's bad character. If an employer reacts by retaliating against an employee, juries may be more likely to give credence to the claims of discrimination under the belief that the employer did X, then the employer probably did Y too.

But the final reason that retaliation claims are the most prevalent and the more attractive claim, likely has to do with the fact that the standard for establishing retaliation was easier to satisfy.[17] Because the retaliation standard plays such a large role in making retaliation claims attractive to plaintiffs, this reason is examined in Part III. The authors would be remiss if they did not note the Fifth Circuit's decision in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc) and the Supreme Court's decision in *Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024). Both cases addressed what constitutes an "adverse employment action" in the context of a Title VII claim of discrimination, lowering the standard significantly in the Fifth Circuit, and making the discrimination and retaliation standards more alike, but not identical. This is discussed in detail below.

III. The Standard for Retaliation was Easier to Satisfy Than the Standard for Discrimination

In federal and Texas state courts, the question is not whether the standard for retaliation was easier to satisfy than the standard for discrimination; rather, the question is why it was easier to satisfy. Accordingly, Part III addresses the

[15] *Vadie*, 218 F.3d at 374 n.24.

[16] David Sherwyn, *supra* note 10..

[17] *See, e.g.,* Lesiv v. Illinois Cent. R.R. Co., 39 F.4th 903, 912 (7th Cir. 2022) (stating that the standard for Title VII retaliation claims "is easier to satisfy than the comparable standard for Title VII discrimination claims.").

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