RETALIATION UPDATE

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I. Statistics

Retaliation charges continue to increase, and particularly in comparison to charges alleging discrimination, such as race, age, and sex discrimination. The Equal Employment Opportunity Commission ("EEOC" or the "Commission") reports that for FY 2016, there were 91,503 discrimination charges filed, 42,018 – or 45.9% -- included retaliation claims. For the same time period, race discrimination was alleged in 35.3% of charges filed, sex discrimination in 29.4%; age discrimination in 22.8%, and disability discrimination in 30.7%. In 2006, retaliation claims were made in only 29.8% of the charges filed. *See* www.eeoc.gov/eeoc/statistics/enforcement.cfm. Thus, in a 10-year period, retaliation claims went from appearing in less than 1/3 of the charges filed with the EEOC, to almost 1/2 of the charges filed.

II. EEOC Enforcement Guidance on Retaliation

On August 29, 2016, the EEOC issued its final Enforcement Guidance on Retaliation and Related Issues (the "Updated Guidance"), officially replacing and superseding its 1998 Compliance Manual section on retaliation. *See* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm. According to the EEOC, "[r]etaliation occurs when an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the EEO laws the Commission enforces." The Updated Guidance takes an expansive interpretation of protected conduct that can support a claim for alleged retaliation, and reiterates that an employee must engage in "protected activity" in order to support a claim of retaliation. Such protected activities include "participating" in an EEOC process or "opposing" discrimination.

A. Participation

According to the Updated Guidance, "participation in an EEO process is more narrowly defined to refer specifically to raising a claim, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under the EEO laws, but it is very broadly protected." The "participation clause" applies even if the underlying allegation is not meritorious or was not timely filed. "Opposition" is defined more broadly, and includes any activity by which an individual opposes any practice made unlawful by the EEO statutes. Unlike individuals who participate in an EEO process, however, those who engage in opposition activity must act with a reasonable good faith belief that a potential EEO violation exists and act in a reasonable manner to oppose it. Accordingly, "participation" is protected absolutely, while "opposition" activity is subject to a "reasonable belief" standard.

Under the EEOC's prior guidance "participation" was limited to: (1) individuals who challenged alleged discrimination in EEOC proceedings, state administrative proceedings, and state and federal court proceedings (e.g., a charging party/plaintiff); and (2) individuals who

testified or otherwise participated in such proceedings (e.g., individuals who assist the charging party/plaintiff in an investigation or lawsuit). According to the Updated Guidance, an employee engaging in *an employer's EEO complaint process* is considered both opposition *and* participation. This view differs from the one of some courts who view such activity as only falling under the "opposition" clause, and therefore requiring claimants to act with a reasonable good faith belief that a potential EEO violation exists and act in a reasonable manner to oppose it. Thus, under the Updated Guidance, individuals who engage in an employer's EEOC complaint process are protected absolutely and not constrained by the opposition clause's "reasonable belief" standard. Consequently, the Commission may find defective any anti-harassment or anti-discrimination policies that require complaints to be made in "good faith."

B. Opposition

The Updated Guidance stresses that "opposition" has an "expansive definition" and "applies if an individual explicitly or implicitly communicates his or her belief that the mater complained of is, or could be, harassment or other discrimination." The EEOC emphasizes that the opposition communication does not need to include the words "harassment," "discrimination," or any other legal terminology so long as the individual conveys opposition or resistance to a perceive potential EEO violation.

The Updated Guidance recognizes that the right to oppose employment discrimination must be balanced against the employer's need for a stable and productive work environment. Therefore, the protection of the "opposition clause" only extends to situations where the *manner* of opposition is reasonable. For example, the Commission finds it reasonable for an individual to make complaints to someone other than the employer such as union officials, coworkers, an attorney, or others outside the company. The Commission also finds it reasonable for an individual to raise complaints publicly, or to advise his or her employer of their intent to file a charge with the EEOC, or complaining about alleged or potential discrimination or harassment before the matter becomes actionable (e.g., the alleged harassment has not yet risen to the level of a "severe or pervasive" hostile work environment).

In contrast, the Updated Guidance makes clear that it is not reasonable opposition where an employee makes an overwhelming number of patently baseless complaints, or harasses a subordinate employee to give a witness statement in support of an EEOC charge. Further, activities that involve unlawful acts, such as committing or threatening violence to life or property, will not be considered reasonable. Finally, opposition to perceived discrimination does not permit an employee to neglect their job duties. According to the EEOC, if an employee's opposition renders the employee ineffective in performing their job duties, the retaliation provisions do not immunize the employee from appropriate discipline or discharge.

The Updated Guidance also provides further clarity on what the EEOC considers to be "a reasonable good faith belief that a potential EEO violation exists." According to the Commission, opposition may be based on a reasonable good faith belief even if the opposed conduct is ultimately deemed lawful. In this regard, the EEOC takes the position that it is reasonable for an employee to believe conduct violates the EEO laws if the Commission has

adopted that interpretation (e.g., discrimination on the basis of sexual orientation violates Title VII).

Finally, the Updated Guidance clarifies who the EEOC believes is protected from retaliation for opposition. In the Commission's view, all employees who engage in opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors. In adopting this position, the EEOC explicitly rejects the "manager rule" adopted by some courts, which require that managers "step outside" of their managerial role and assume a position adverse to their employer in order to engage in protected activity and be protected by the EEO anti-retaliation laws.

C. Materially Adverse Action

In addition to engaging in a protected activity (whether by "participation" or "opposition), an individual bringing a retaliation claim must also show that the employer took a "materially adverse action" against them. The Updated Guidance emphasizes that retaliation "expansively reaches any action that is 'materially adverse,' meaning any action that might well deter a reasonable person from engaging in protected activity." This encompasses a much broader range of action compared to "adverse action" under non-discrimination provisions in EEO laws. The Guidance provides several examples of actions that are "work-related" and "not work-related" that could be sufficient to constitute a "materially adverse action" depending on the context and surrounding facts.

1. Examples of Work-Related Actions: denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, discharge, threats, warnings, reprimands, transfers, negative or lowered evaluations, transfers to less prestigious or desirable work or work locations, threatening reassignment, changing the work schedule of a parent who has caretaking responsibilities for school-age children, excluding an employee from a weekly training lunch that contributes to professional advancement, scrutinizing work or attendance more closely than that of other employees without justification, removal of supervisory responsibilities, requiring re-verification of work status or making threats of deportation, or any other type of adverse treatment that in the circumstances might well dissuade a reasonable person from engaging in protected activity.

2. Examples of Non-Work-Related Actions: disparaging the person to others or in the media, making false reports to government authorities, filing a civil action, abusive verbal or physical behavior that is reasonably likely to deter protected activity, taking (or threatening to take) a materially adverse action against a close family member, or any other action that might well deter reasonable individuals from engaging in protected activity.

The Updated Guidance specifically notes that to the extent lower courts have found some of the above-listed actions to be insufficient to establish a "materially adverse action," the EEOC explicitly disagrees with such rulings, and concludes that these decisions are contrary to the reasoning and analysis endorsed by the Supreme Court.

D. Causal Connection

Unlawful retaliation is established when a causal connection is established between a materially adverse action and the individual's protected activity. The Updated Guidance acknowledges that retaliation claims are subject to a "but for" causation standard, and not the more relaxed (and plaintiff friendly) "motivating factor" standard employed in discrimination claims and federal sector retaliation claims.

In order to establish causation, the Commission states that it is the plaintiff's burden to show that it is more likely than not that retaliation has occurred. The Updated Guidance provides several examples of facts that may support a finding of retaliation, and facts that may defeat a claim of retaliation.

1. Facts That May Support a Claim of Retaliation:

    a. Suspicious timing between protected activity and adverse action;

    b. Oral or written statement by individuals recommending or approving the challenged adverse action, coupled with retaliatory animus or inconsistencies;

    c. Comparative evidence showing employer treated more favorably a similarly situated employee who had not engaged in protected activity; or

    d. Inconsistent or shifting explanations.

2. Facts That May Defeat a Claim of Retaliation:

    a. Employer was unaware of protected activity;

    b. Legitimate, non-retaliatory reason for challenged action; or

    c. Evidence of retaliatory motive but adverse action would have happened anyway.

E. EEOC's "Promising Practices" to Minimize Retaliation Violations

The EEOC ends its Updated Guidance with a section devoted to "promising practices" employers may implement to minimize the likelihood of retaliation violations. Such practices include:

1. Written Employer Policies: The Updated Guidance advises employer to maintain written, plain-language anti-retaliation policies, and provide practical guidance on the employer's expectation with user-friendly examples of what to

do and not to do. Such polices, the Commission states, should include (i) specific examples of actions that employees and managers may not otherwise realize are actionable as retaliation, (ii) proactive steps for avoiding actual or perceived retaliation, (iii) reporting mechanism for employee concerns about retaliation, and (iv) a clear explanation that retaliation can be subject to discipline, up to and including termination.

2. Training: The EEOC encourages periodic training of all managers, supervisors, and employees about the company's written anti-retaliation policy.

3. Anti-Retaliation Advice and Individualized Support for Employees, Managers, and Supervisors: The Commission opines that an automatic part of an employer's response and investigation following EEO allegations should be to provide information to all parties and witnesses regarding the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it. The Updated Guidance also encourages employers to provide tips for avoiding actual or perceived retaliation, as well as access to a resource individual for advice and counsel on managing the situation.

4. Proactive Follow-Up: The EEOC encourages employers to follow-up with employees, managers, and witnesses during the pendency of an EEO matter to provide guidance and evaluated whether there are any concerns regarding potential or perceived retaliation in order to provide an opportunity to identify issues before they fester, and to reassure employees and witnesses of the employer's commitment to protect against retaliation.

5. Review of Employment Actions to Ensure EEO Compliance: The Commission recommends that human resources, a designated management official, in-house counsel, or another resource review proposed employment actions of consequence to ensure those actions are based on non-discriminatory and non-retaliatory reasons.

III. Recent Fifth Circuit and Texas Retaliation Case Law

A. *William Fisher v. Lufkin Industries, Inc.*, 847 F.3d 752 (5th Cir. 2017)

In February 2017, the Fifth Circuit Court of Appeals reversed a decision from the United States District Court for the Eastern District of Texas, which originally dismissed the plaintiff's claim of retaliation under Title VII.
William Fisher, an African-American man, had worked for Lufkin Industries ("Lufkin") off and on for some 20 years before he was terminated in May 2009. At the time of his termination, Fisher was fifty-five years old.

Fisher's direct supervisor, Steven Saxton, is a white male who was approximately thirty-one years old at the time of Fisher's termination. In March 2009, Saxton instructed Fisher

to take his breaks when everyone else did, rather than when Fisher wanted to. When Fisher replied that he could not take breaks when his machine was running during certain operations, Saxton responded, "Boy, I don't know why every time I come over here it's a hassle!" Saxton was angry and spoke with a raised voice. Fisher then stated, "If you're going to harass me, we need to get a steward." Due to union rules, Saxton told Fisher to come to his office while a union steward was summoned. When no steward appeared, Saxton told Fisher to return on Monday so that they could resume the process.

After he left, Fisher called Lufkin's Vice President of Human Resources, Paul Perez, and left a voicemail stating that Saxton's use of "boy" in addressing him constituted racial harassment. Perez promptly directed another manager, Ty Thornton, to conduct an investigation. Thornton talked to both Fisher and Saxton and determined that, although Saxton had called Fisher "boy," he did not intend it as a racially derogatory term. Saxton's supervisor, David Jinkins, was also asked to look into the matter and talk to Saxton. The magistrate judge found that Saxton "more probably than not" intended "boy" as an "exclamation" rather than as an epithet for Fisher.

About a month later, a white co-worker of Fisher, David Rhoden, approached Jinkins and said he did not like the fact that Fisher had reported Saxton for using the word "boy" and that he was offended by Fisher's statements that he would get Saxton fired. During this conversation, Rhoden mentioned that for a long time, Fisher had been selling DVD's out of his lunch box and some of the CD's were pornographic. Rhoden, however, later testified that it was Jinkins who raised the question of whether Fisher sold DVDs out of his lunch box.

Jinkins thereupon came up with a plan for Rhoden to conduct a "sort of sting operation" by buying DVDs from Fisher. Rhoden testified that he had never bought a DVD from Fisher and did not want to buy one even after Jinkins asked him to do so, but he nevertheless agreed to comply after Jinkins told him, "You scratch my back and I'll scratch yours." Rhoden soon bought a DVD from Fisher and took it to Jinkins, but it turned out to be blank. Jinkins instructed Rhoden to try again. The second time, Jinkins was able to view the DVD and said that he thought it was pornographic.

An investigation ensued. Thornton, Jinkins, Saxton, and Thomas confronted Fisher about conducting an unauthorized business on company property that involved pornographic material. Fisher said he did not have any such materials with him that day but did not admit or deny that he was engaged in such activity. He asked why this was coming up now and said that he did not know that "trading" things violated company policy.

The group then asked Fisher to go with them to open his locker. In the locker, they found a manila envelope that contained five DVDs. Fisher said they were not his and that they must have been planted because the hinges of his locker were broken and anyone could have forced their way in, and he denied selling any videos.[1]

[1] At an evidentiary hearing, however, Fisher admitted to selling and trading videos but denied selling any pornographic videos. After Lufkin's handwriting analyst testified that the pornographic titles of two DVDs

When asked to allow a search of his car in the parking lot, Fisher initially cooperated but soon after the search began, Fisher claimed that he received a call from his wife stating she was ill and had to leave to tend to her. Consequently, Fisher did not allow a search of the passenger compartment. Thomas testified that he heard Fisher's phone ring but the other witnesses testified that they did not hear anything.

After Fisher left work during the attempt to search his car, he was suspended by Thornton pending further investigation. The day after the search, Thornton prepared notes regarding the search, which he and Jinkins eventually presented to Perez. On May 18, 2009, Fisher was terminated via a letter signed by Jinkins, written at Perez's direction, which stated only that he was fired "for a serious violation of company policy." No further details were given to Fisher about his termination at that time.

Fisher filed suit. In his lawsuit, he said he had been subjected to retaliation for opposing discriminatory conduct.

The lower court granted summary judgment in favor of Lufkin. Although the court found that Rhoden's and Jinkins's actions were motivated by their desire to retaliate against Fisher for his racial discrimination or harassment complaint against Saxton, the court noted that Lufkin had no clear work rule against Fisher's conduct other than one that would require a mere warning for a first offense. The court also found that many Lufkin employees possessed pornographic magazines at work without any complaint, warning or discipline by Lufkin, and that employees had sold all manner of goods at work without complaint or discipline by Lufkin. Nevertheless, the district court found that Fisher's termination was justified independent of any other reasons because he "resisted the investigation by leaving before his car could be properly searched and by lying to his supervisors about his activities."

On appeal, Fisher's primary contention was that the district court erred in concluding that Lufkin did not violate Title VII's anti-retaliation provisions when it terminated him. Specifically, Fisher argued that because the investigation into his DVD sales was launched in response to his complaint about Saxton addressing him as "boy," he satisfied the causation element of his retaliation claim and his resistance to the investigation could not be used to justify his termination. Lufkin responded that there was no evidence of a retaliatory animus on the part of Thornton, who conducted the investigation into Fisher's sale of pornography, or Perez, who ordered the investigation and made the decision to terminate Fisher. It argued that there was sufficient evidence to support the district court's conclusion that Fisher would have been terminated even in the absence of any retaliatory action against him.

In reversing the decision of the district court, the Fifth Circuit Court of Appeals relied upon recent Fifth Circuit precedent in noting that a Title VII retaliation plaintiff is entitled to use

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produced by Lufkin from undisclosed sources were written by the same hand who wrote Fisher's employment applications in his personnel file, Fisher's counsel stated that he did not contest the analyst's conclusions.

the cat's paw theory of liability if he can demonstrate that a person with a retaliatory motive "used the decisionmaker to bring about the intended retaliatory action." *See Zamora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015). The Court explained that such a plaintiff must produce sufficient evidence that "(1) his . . . supervisors, motivated by retaliatory animus, took acts intended to cause an adverse employment action; and (2) those acts were a but-for cause of his [termination]." *Id.* at 333.

Although an adverse action resulting from an investigation for reasons unrelated to the supervisor's retaliatory statements could be a superseding cause breaking the causal chain necessary to establish a Title VII retaliation claim, the Court agreed with the lower court's finding that a desire to retaliate against Fisher motivated Rhoden to complain about Fisher, and motivated Jinkins to launch the investigation into Fisher. Thus, the Court concluded that the investigation would not have taken place but for Rhoden's and Jinkins's retaliatory actions. Moreover, the Court found that Fisher's lack of cooperation with an investigation that was launched for retaliatory purposes was "inextricably tied" to his coworker's and supervisor's retaliatory animus, and Fisher's refusal to acquiesce fully in a retaliatory investigation did not break the causal chain. Therefore, the Court found that the actions of Rhoden and Fisher were proximate causes of Fisher's termination, and accordingly, reversed the grant of summary judgment.

B. Cabral v. Brennan, 853 F.3d 763 (5th Cir. 2017)

In April 2017, the Fifth Circuit Court of Appeals affirmed a decision from the United States District Court for the Western District of Texas, which dismissed the plaintiff's claim of retaliation after finding his two-day suspension did not constitute a "materially adverse action."

Javier Cabral is a letter carrier for the United States Postal Service ("USPS"). In 2012 and 2013, Cabral complained repeatedly of discrimination, harassment, and retaliation at the hands of his supervisors, filing three EEO complaints and numerous union grievances.

On September 3, 2013, Cabral returned to work after a suspension related to an incident in which he allegedly struck a supervisor with a postal vehicle. Cabral contended that upon his return, a supervisor began "badgering" him with questions. On September 9, Cabral was placed on unpaid leave after a supervisor asked him to produce a valid driver's license and he failed to do so. After two days, he was reinstated. A few weeks later, he was reimbursed for any lost pay during the two-day suspension.

Cabral filed suit and alleged, among other things, that he was placed on leave in retaliation for filing complaints. USPS claims he was placed on unpaid leave because his supervisors believed he was operating his postal vehicle with a suspended driver's license. Cabral admitted that his license had been suspended for a DWI conviction and that he failed to notify his supervisors of the suspension, in violation of USPS rules. Cabral did have an occupational license, which would have permitted him to drive postal vehicles despite the suspension, however it may have been invalid at the time because of his failure to pay an

administrative fee. In any event, when Cabral was asked to produce a valid license, he failed to do so.

USPS moved for summary judgment on Cabral's retaliation claim, which the district court initially denied in reliance upon the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, which opined that a suspension without pay *could* constitute a materially adverse action, depending on the particular circumstances. In its initial ruling denying summary judgment, the district court erroneously interpreted *White* as establishing a *per se* rule that a suspension without pay constitutes a materially adverse action. Upon reconsideration, however, the court realized its error and granted USPS's motion for summary judgment on Cabral's retaliation claim, finding that the two-day suspension did not amount to a "materially adverse action" under the particular circumstances in the case.

On appeal, the Fifth Circuit Court of Appeals agreed with the district court's analysis, noting that in *White*, the plaintiff was placed on unpaid leave for thirty-seven days, causing her to fall into a deep depression. The Court distinguished Cabral from the plaintiff in *White*, noting that he had not shown that his suspension exacted a physical, emotional, or economic toll. Therefore, the Court held that Cabral failed to establish a "materially adverse action" and affirmed the district court's grant of summary judgment dismissing Cabral's retaliation claim.

C. *Alkhawaldeh v. Dow Chemical Co.*, 851 F.3d 422 (5th Cir. 2017)

In March 2017, the Fifth Circuit Court of Appeals affirmed a decision from the United States District Court for the Southern District of Texas, which dismissed the plaintiff's claim of race discrimination and retaliation under Title VII.

In January 2008, Dow Chemical Company ("Dow"), hired Ammar Alkhawaldeh ("Ammar") to serve as a Functional Scientist/Functional Leader ("FS/FL") in Dow's Epoxy Research and Development Group. As Ammar's direct supervisor, Dr. Bruce Hook was responsible for annually evaluating Ammar's performance.

In October 2009, Hook rated Ammar a 1, the lowest possible rating on Dow's 1–5 scale. Hook also placed Ammar on a Performance Improvement Plan ("PIP") in order to determine whether Ammar's performance was capable of rehabilitation.

Ammar vigorously protested his rating to no avail. On April 2, 2010, Ammar filed his first EEOC charge, alleging discrimination in violation of Title VII. Following his eventual termination, Ammar filed an amended charge on November 17, 2010 alleging discrimination and retaliation under Title VII. In his charge, Ammar alleged that in November 2009, he complained to human resources that a trainer made offensive remarks to him because of his Arab descent. Ammar alleged that Hooks became aware of his complaint, became angry, made offensive remarks to him, and told another employee that Hooks wanted Ammar to leave the company. Ammar further alleged that he was subjected to retaliation in the form of being placed on a PIP and being denied a transfer to another

position with the company so that he wouldn't have to work for managers he complained about.

Dow subsequently filed a motion for summary judgment, which the district court granted.

On appeal, the Fifth Circuit Court of Appeals noted (in a footnote), that the only adverse employment action at issue was Ammar's termination, because a negative performance evaluation does not constitute an adverse employment action under Title VII. Dow told the EEOC that it terminated Ammar's employment because of "his poor performance in 2009 and his failure to complete a Performance Improvement Plan" in 2010. Ammar claimed, on appeal, that Dow's stated reason was "inconsistent" with the sworn testimony of Dow employees who testified that Ammar did, in fact, complete the PIP in 2010. Ammar argued that this alleged inconsistency *necessarily* raised a genuine dispute of material fact as to the issue of pretext.

The Court disagreed, stating that a court *may* infer pretext where an employer "has provided inconsistent or conflict explanations for its conduct." However, the Court noted, the ultimate question is not one of pretext, but whether a reasonable fact-finder could conclude that the employer would not have fired the employee "but for" the employee's decision to engage in an activity protected by Title VII.

According to Ammar, he first engaged in "protected activity" in November 2009, when he reported to his then-manager, Hook, that two Dow employees made what he interpreted to be racially insensitive remarks at a Dow training session. In response, Hook allegedly threw a piece of paper at Ammar and told him, "Ammar," when you come from the part of the world that you come from, "there's a perception, and perception is reality."

In a footnote, the Court noted that even assuming Ammar's conversation with Hook was considered protected activity, Dow did not terminate Ammar until October 30, 2010, which "in and of itself raises serious temporal-proximity concerns." The Court further noted that even if Ammar continued to engage in protected activity throughout his employment, "a Title VII claimant cannot, with each protected activity, re-start 'the temporal-proximity clock.'"

Even assuming the veracity of Ammar's claims, the Court concluded that no reasonable fact-finder could conclude that Ammar would not have been fired but for his November 2009 conversation with Hook, reasoning that Hook gave Ammar the 1 rating in October 2009—one month *before* Ammar's alleged conversation with Hook took place.

In the summer of 2010, Ammar sent an email to the Chairman and CEO of DOW claiming Hook had retaliated against him in furtherance of Hook's "racist agenda" and that the PIP deadlines that Hook imposed were unreasonable. Consequently, Dow transferred Ammar to a new group on July 6, 2010, and placed him under the direct supervision of David West. The parties disagree as to whether Ammar's PIP had been completed or was terminated at this point, but the Court said it made no difference because Ammar was not terminated on July 6, 2010. Rather, Ammar was transferred to a different group where,

after two months, his new supervisor had concluded, like Hook, that Ammar was an under-performing employee.

Pursuant to company policy, Dow convened a committee tasked with evaluating Ammar's performance. The committee's findings were ultimately consistent with that of Ammar's current and previous supervisors, concluding that "[b]ased upon feedback from technical team members and his leaders, his relative performance is tracking towards segment "1" again for 2010."

Thereafter, Dow terminated Ammar's employment on October 30, 2010.

The Court concluded: "We find that, in light of all of this evidence, no reasonable fact-finder could conclude that Ammar would not have been fired but for his decision to engage in activity protected by Title VII. Poor performance is not an activity protected by Title VII. Even assuming that Ammar completed the PIP, West's negative, post-PIP evaluation independently justifies Ammar's termination. The "but for" standard represents a "high burden" that Ammar cannot meet and has not met."

Thus, the Court affirmed the district court's decision to grant Dow's motion for summary judgment dismissing Ammar's claims under Title VII.

D. *McNeel v. Citation Oil & Gas Corp.*, __ S.W.3d __, 2017 WL 2959822 (Tex. App.—Houston [14th Dist.] July 11, 2017, no pet. h.)

In July 2017, the Fourteenth Court of Appeals in Houston affirmed the trial court's grant of summary judgment dismissing the plaintiff's claims of sex discrimination and retaliation under the Texas Commission on Human Rights Act ("TCHRA").

Susette McNeel is a certified public accountant who worked for Citation Oil and Gas Corporation ("Citation") in the company's tax department from November 2005 until March 2012. McNeel's tax department supervisor was Tom Patrick. McNeel complained to Citation about Patrick twice during her employment. She first complained in 2011 that Patrick made negative comments about female employees' weight (but not McNeel's weight), yelled, slammed his phone, and "coughed excessively."

McNeel's second complaint came in 2012. Patrick allegedly stated that he would "kill himself" if employees made errors in their work. In response to this comment, several employees allegedly expressed concern to McNeel, who in turn, reported Patrick's comments to Nancy Anglin, Citation's vice president of human resources.

During McNeel's tenure at the company, McNeel received a copy of Citation's Corporate Compliance Policy Statement and Code of Conduct ("Code of Conduct"), which, among other things, prohibited conflicts of interest and required employees to disclose any business or financial interest or relationship that might interfere with the employee's ability to pursue Citation's best interests. McNeel also received a copy of Citation's

employee handbook, which, among other things, prohibited misusing Citation's confidential information.

While employed by Citation, McNeel formed an oil and gas consulting business that marketed itself as a company that "specialize[d] in reducing Sales, Use and Severance Tax liability for oil and gas producers," which would include Citation and Citation's competitors. McNeel did not disclose her side business to Citation. Citation eventually learned of McNeel's side business and terminated her employment for violating the company's Code of Conduct.

McNeel sued Citation under the TCHRA, claiming age discrimination, sex discrimination, and retaliation. McNeel alleged that, while she was employed at Citation, Patrick "displayed abusive behavior toward her and other women" and "made rude and sexist comments to them and about them to [McNeel] and to other employees." McNeel claimed she was treated less favorably in the terms and conditions of her employment because of her gender and her age. She also alleged that Citation terminated her employment in retaliation for McNeel's complaints about Patrick's "unlawful and discriminatory conduct directed against her and other females." McNeel subsequently abandoned her age discrimination claim.

Citation moved for summary judgment on McNeel's claims. With respect to McNeel's retaliation claim, Citation argued that (1) there was no evidence that McNeel engaged in a protected activity or McNeel did not engage in a protected activity as a matter of law; (2) there was no causal connection between McNeel's complaints about Patrick's conduct and Citation's decision to terminate McNeel's employment; and (4) there is no evidence that Citation's reason for terminating McNeel's employment was pretextual. The trial court granted Citation's motion without specifying the grounds on which it ruled.

On appeal, the Fourteenth Court of Appeals affirmed the trial court's dismissal. With respect to whether McNeel engaged in protected activity, McNeel alleged that she opposed Patrick's "unlawful and discriminatory conduct directed against her and other females" by: (1) meeting with Phelps to report Patrick's comments about overweight female employees, his conduct in slamming his phone and yelling, and his excessive coughing; (2) meeting with Anglin to report Patrick's comment that he would kill himself if his subordinates made mistakes in their work; (3) threatening Patrick that she would report him if he continued to comment on a female employee's weight; (4) admonishing Patrick not to yell at her after he yelled at her once in 2006; and (5) complaining to Phelps about a message Patrick left on McNeel's voicemail in 2010, in which Patrick yelled, "how dare you, how dare you question my authority."

In affirming the trial court's grant of summary judgment, the Fourteenth Court of Appeals noted that McNeel never specified the discriminatory nature of Patrick's conduct, and noted that "[n]ot every incident of rude or offensive behavior implicates Title VII or the TCHRA." The Court found that McNeel failed to demonstrate a good-faith, reasonable belief that Patrick's alleged actions violated the TCHRA or otherwise amounted to "discrimination."

The Court went on to state that even if it were to construe McNeel's retaliation claim as premised on an argument that she engaged in protected activity by reporting sexual harassment, her claim would still fail. McNeel's opposition would still have to be based on a good-faith reasonable belief that the underlying sexual harassment violated the TCHRA, and McNeel's subjective belief of sexual harassment, alone, would be insufficient to raise a fact issue as to whether the employee's ostensible opposition constituted a protected activity. Therefore, the Court concluded that no reasonable person would believe that Patrick's conduct, as described by McNeel, amounted to sexual harassment actionable under the TCHRA.

E. *Henry v. Doctor's Hosp. at Renaissance, Ltd.*, 2017 WL 1549230 (Tex. App.—Corpus Christi Apr. 27, 2017, no pet.)

In April 2017, the Thirteenth Court of Appeals in Corpus Christi-Edinburg affirmed the trial courts grant of summary judgment dismissing the plaintiff's claims of race discrimination, retaliation, and intentional infliction of emotional distress.

Orpha Henry was employed as a nurse at Doctor's Hospital at Renaissance ("DRH"). Henry alleged that she suffered an adverse employment action when she was "demoted" from a "Level III" nurse to a "Level II" nurse. In her Petition, Henry alleged three negative interactions with DHR personnel: (1) she was denied a request for re-assignment of a difficult patient she had nursed for several days; (2) she was falsely accused of causing an IV burn to a patient; and (3) DHR allegedly accused Henry of falsifying the patient's medical records in relation to the IV-burn incident. After the IV-burn incident, Henry was moved from "Level III" in the neonatal intensive care unit (NICU) to "Level II," also in the NICU.

After her reassignment, Henry filed suit against DRH. The opinion from the Thirteenth Court of Appeals does not discuss what type of protected activity Henry engaged in prior to her alleged "demotion," and instead, focuses solely on whether Henry suffered an adverse action sufficient to support a TCHRA claim. Henry contended that she was "demoted" from Level III to Level II, and pointed to a "loss of prestige" in support of her contention. Specifically, Henry alleged that she had been "removed from NICU Level III (intensive care), one of the highest levels of care that can be administered at a community hospital, to NICU Level II (intermediate care)." In support of this allegation, Henry referenced a printout from DHR's website, which provides: "Our NICU offers two levels of care: intensive care (Level III) and intermediate care (Level II), both designed to assist with your baby's healthcare treatment and development."

DHR alleged that Henry was "transferred," and pointed to Henry's receipt of the same pay, benefits, and opportunities in support of its proposition.

The Court looked to the Fifth Circuit Court of Appeals for guidance regarding when a transfer or reassignment can be considered a demotion. According to the Fifth Circuit, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new

position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement. *See Alvarado v. Tex. Rangers*, 492 F.3d 605, 613 (5th Cir. 2007). The Court noted that a transfer may constitute an adverse action even without an accompanying cut in pay or other tangible benefits. Whether the new position is "worse" is an objective inquiry and does not take into account a plaintiff's subjective perception that a "demotion" occurred. Rather, the plaintiff must produce evidence that the transfer objectively caused her harm.

In this case, the Court found there was no evidence, other than Henry's own subjective opinion, of how other's viewed the transfer, how the prestige, working hours, and interest of the work performed in Level II and differed with respect to Level III, or whether Level III was considered an "elite" unit. The Court also noted that Henry's "demotion" theory was not supported by the website printout she referenced, which provides that "both [Level II and Level III care units]" are designed to assist the healthcare treatment and development of infants.

Therefore, the Court of Appeals held that the trial court did not err in granting DHR's no-evidence motion for summary judgment.