
Tamara A. Shockley, *United Nations*

Available at: https://works.bepress.com/tamara_shockley/5/

Tamara A. Shockley*

I. INTRODUCTION .......................................... 2

II. ESTABLISHMENT OF THE UNITED NATIONS ETHICS OFFICE .................................................. 3

A. Activities of the United Nations Ethics Office ........ 5

B. Ethics as a Key Tool for Corporate Governance of United Nations Staff Members .................. 7

C. Code of Ethics vs. Code of Conduct ................. 8

D. Value-Based Ethics in the United Nations .......... 9

E. Rule-Based Ethics in the United Nations .......... 11

III. UNITED NATIONS TRIBUNALS: WHAT CONSTITUTES WORKPLACE RETALIATION IN THE UNITED NATIONS… 13

A. The Ethics Office’s Determination Whether Retaliation has Occurred is an Administrative Decision Pursuant to the United Nations Staff Regulations and Rules .......................... 15

B. The Procedures for Reporting Retaliation Claims to the United Nations Ethics Office ................. 17

* Ms. Shockley is an Administrative Law Specialist with UNICEF and former Executive Secretary with the United Nations Administrative Tribunal. The views expressed in this article are solely those of the author.
I. INTRODUCTION

The United Nations (“UN” or the “Organization”) recognizes ethics as a foundation of the Organization creating an environment where staff members act with a shared purpose and mission. Ethics as a management tool builds organizational integrity. In the UN, the staff member’s moral basis for decision-making must not conflict with the Organization’s ethical standards and values. Ethics is composed of a set of principles which address a number of critical elements such as responsibility, loyalty, fairness, and equality. The mandate of the UN is to enhance organizational integrity, accountability, and efficiency which promote an ethical organization culture.
The Secretary-General has promulgated administrative policies to ensure that the UN operates in an ethical and transparent manner to enhance the protection of staff members who report misconduct. This Article analyzes the approach of the United Nations Dispute Tribunal (“UNDT”) and the United Nations Appeals Tribunal (“UNAT”) on one aspect of ethics—workplace retaliation. In a number of cases before the United Nations Judicial Tribunals, staff members have charged that their managers have taken action against them for otherwise complying with their ethical obligations or acting in furtherance of UN administrative policies underlying the UN Standards of Conduct of the International Civil Service.

This Article discusses workplace retaliation and offers an approach to claims of retaliation raised by UN staff members. This Article also suggests actions the UN can undertake to ensure that ethical violations by staff members do not occur in the Organization in the first place. Prior to discussing the obligations of the staff member and the UN in workplace retaliation cases, it is necessary to understand the institutional framework for managing ethics in the UN.

II. Establishing the United Nations Ethics Office

The General Assembly resolution, “2005 World Summit Outcome”1 reaffirming the United Nations Millennium Declaration, welcomed the Secretary-General’s efforts to ensure ethical conduct, more extensive financial disclosure for UN officials, and enhanced protection for those who reveal wrongdoing with the Organization.2 The World Summit urged the Secretary-General to scrupulously apply the existing standards of conduct and develop a system-wide code of ethics for all UN personnel.3

The General Assembly Resolution entitled “Implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General”4 addressed the initial overview of the functions of the Ethics Office. The objective of the Ethics Office would be to assist the Secretary-General in ensuring that all staff members observe and perform their functions in consistency with the highest standards

---

2. Id. at 34; see also PAUL VOCKER ET AL., INDEPENDENT INQUIRY COMMITTEE ON THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, at 8 (2005) (raising concerns about the ethics climate in the United Nations).
3. 2005 World Summit, supra note 1, at ¶ 161(d).
of integrity, as required by the Charter of the UN. The main responsibilities of the ethics office would be to administer the Organization’s financial disclosure programme; undertake the responsibilities for the protection of staff against retaliation for reporting misconduct; provide confidential advice and guidance to staff on ethical issues—such as conflict of interest; and develop standards, trainings, and education of ethical issues.

The Secretary-General’s Bulletin of 30 December 2005 established the Ethics Office within the United Nations Secretariat, which reported directly to the Secretary-General. Taking into consideration Article 101, paragraph 3, of the Charter of the United Nations, and paragraph 161 of the 2005 World Summit Outcome, pursuant to General Assembly resolution, the Secretary-General promulgated the establishment and terms of reference of the Ethics Office. The terms of reference of the Ethics Office, section 3, states the following:

a) Administering the Organization’s financial disclosure programme;

b) Undertaking the responsibilities assigned to it under the Organization’s policy for the protection of staff against retaliation for reporting misconduct;

c) Providing confidential advice and guidance to staff on ethical issues (e.g. conflict of interest), including administering an ethics helpline;

d) Developing standards, training and education on ethics issues in coordination with the Office of Human Resources Management and other offices as appropriate, including ensuring annual ethics training for all staff; and

e) Such other functions as the Secretary-General considers appropriate for the Office.

All offices and staff members are obligated to cooperate with the Ethics Office and provide access to all records and documents as requested by the Office. The Secretary-General’s Bulletin “United Nations system-wide application of ethics: separately administered

5. Id., Annex I, at ¶ 1.

6. Id.


organs and programmes” of 30 November 2007, created an Ethics Office for the separately administered programme and funds of the UN.

A. Activities of the United Nations Ethics Office

The role of the Ethics Office is to assist the Secretary-General with ensuring that all staff conduct themselves with “integrity and professionalism and uphold the Charter of the United Nations.”11 The mandate of the Ethics Office is to promote the highest standards of integrity and to foster a culture of ethics, transparency, and accountability within the Organization. Pursuant to the General Assembly resolution 63/250 of 10 February 2009, the Ethics Office must submit a report on its activities.

In the latest “Report of the Secretary-General; Activities of the Ethics Office” in General Assembly resolution A/66/319 of 23 August 2011, the Ethics Office presented statistics of the activities covered by the Office from 1 August 2010 to 31 July 2011. The current activities of the Ethics Office in 2011 have shown an increase in the use of its services by staff members from the creation of the Office in January 2006 to the last reporting period in 2011. The Ethics Office received a total of “766 requests for its services; a 78 percent increase as compared to the average for the preceding three reporting periods.” The requests received from staff members ranged from “permissibility of outside activities, gift acceptance, involvement in political activity, policy advice, support for standard-setting, protection against retaliation for reporting misconduct, and for cooperating with duly authorized audits or investigations.” The majority of the work of the Ethics Office responded to requests for advice (70%). Although the majority of requests emanate from the New York staff, the statistics show an

14. Id. at 4 (reporting the following figures: 153 requests by staff were filed from January 2006-July 2006; 287 requests were filed from August 2006-July 2007; 446 requests were filed form August 2007-July 2008; 434 requests were filed from August 2008-July 2009; and 412 requests were filed from August 2009-July 2010).
15. Id.
16. Id. at 5.
increase for advice from the field, either peacekeeping missions or UN Offices in Geneva, Vienna, and Nairobi. The increase from the field offices demonstrates the awareness by staff of the need for ethical guidance in their daily decision-making.

One of the mandates of the Ethics Office is to administer the financial disclosure programme which identifies and manages conflict of interest risks. Staff members, including staff at the D-1 level and above, as well as those involved in the procurement and investment, are obligated to file annual financial disclosure statements. The financial disclosure statements are reviewed to determine whether the staff member has a conflict of interest relating to financial holdings, outside activities, and family relationships. An external party reviews the financial disclosure statements and also issues recommendations to remedy any potential conflicts.

Pursuant to the Secretary-General’s bulletin ST/SGB/2005/21, the Ethics Office is also mandated to implement the UN’s policy on “[p]rotection against retaliation for reporting misconduct and for cooperation with duly authorized audits or investigations.” The Ethics Office receives complaints of retaliation and conducts preliminary reviews to determine whether the complainant engaged in a protected activity and, if so, whether the protected activity was a contributing factor to the alleged retaliation. If the Ethics Office determines that a prima facie case of retaliation exists, the matter is referred to the Office of Internal Oversight Services (“OIOS”) for formal investigation. The issue of workplace retaliation protection will be discussed further below. In the 2011 reporting period, the Ethics Office received fifty-five requests related to protection against retaliation.

The outreach activities of the Ethics Office are a crucial effort to broaden the awareness of ethics related concerns especially for staff in

---

17. Id.
19. Activities of the Ethics Office, supra note 11, at ¶ 15; see also G.A. Res. 60/238, supra note 18 (reporting that in 2011 of the 150 conflicts, “58 related to financial holdings, 50 to outside activities and 42 to family relationships”).
21. Id. at 3.
22. Id.
23. Activities of the Ethics Office, supra note 11, at ¶ 26 (reporting that preliminary review assessments were warranted in “14 of the 55 requests;” of these, one case was referred for investigation).
overseas field duty locations. In the 2011 reporting period, the Ethics Office conducted field visits to several peacekeeping missions which provided an opportunity for the Office to discuss openly with staff and management ethical issues and to achieve an understanding of ethical risk. Pursuant to its mandate to “ensure ethics training for all staff,” the Ethics Office organized learning activities for all staff, including the mandatory online learning programme and the general workshop on professional ethics.²⁴

One of the key roles of the Ethics Office is to provide an advisory function to staff and management. The Ethics Office provides confidential ethics advice and guidance to ensure decisions are made that are consistent with the values, principles, and rules of the Organization. This allows the Ethics Office to be involved on an ongoing basis to advise staff members on how to prevent, mitigate and resolve actual or perceived ethical issues which, in turn, enhances the integrity of the Organization.²⁵

B. Ethics as a Key Tool for Corporate Governance of United Nations Staff Members

Ethics can simply be described as the right way to behave. However, it is more complex as staff members must manage the impact of their decision and action in complex and conflicting situations. Ethical conflicts are related to cultural and sub-cultural beliefs, so actions affecting staff members of multiple cultures can have conflicting ethical demands. For example, in a Western corporation, the employment of one’s relative, such as a son or daughter, is considered to have the appearance of impropriety since it appears to favor a family member. In other cultures, a person is expected to hire a relative or friend to provide employment for a family member. To navigate these conflicting values within the diverse culture of the UN it must give staff mem-

²⁴. U.N. Secretary-General, Bulletin on Integrity Awareness Initiative, ST/SGB/2005/17 at 1 (Sept.12, 2005). In 2007 the Ethics Office developed a training program in collaboration with the Office of Human Resources Management called “Working Together: Professional Ethics and Integrity in our Daily Work,” and in 2010 a training module was undertaken for the Procurement Division called “Ethics and Integrity in Procurement.”

²⁵. See Activities of the Ethics Office, supra note 11, at 14 (reporting that the Ethics Office received 531 requests for advice ranging from outside activities (23 percent); allegations of misconduct (21 percent); other conflicts of interest (15 percent) personal investments and assets (10 percent); employment-related concerns (21 percent); gifts and hospitality (10 percent); and post-employment restrictions (1 percent)).
bers a clear sense of organization values to make the appropriate decisions.26

UN staff members must have awareness of their own values to make appropriate and ethical decisions. Value-based ethics refers to a set of principles applicable to a wide variety of situations which is beyond any particular rule.27 In the midst of the UN multicultural environment, managers and staff must make decisions based on ethical actions, sometimes with little time to analyze all the issues. Ethical values are essential to the success of the Organization. If the Organization does not strongly support and enforce ethical values, the Organization’s goals as well as its global reputation will fail.28 Value-based ethics must be distinguished from rule-based ethics. Rule-based ethics, discussed below, refers to a set of professional rules, such as a code of conduct, applicable to all levels of staff members.29 Rule-based ethics informs the employee what should not be done. Value-based ethics informs the employee what should be done.

C. Code of Ethics vs. Code of Conduct

Most organizations use these terms interchangeably. A code of ethics defines the broad principles of the Organization; a code of conduct provides guidance that relates to specific behaviors.30 Both are part of a larger mechanism to guide behavior within the Organization. However, having both a code of ethics and a code of conduct does not necessarily prevent ethical problems from arising in the Organization.

An Organization provides a code of ethics to staff to codify the values of the group. The code of ethics is a statement of broad principles providing staff members with a guide to decision-making within

27. See generally Andrea Giampetro-Meyer et al, Do We Really Want More Leaders in Business?, 17 J. Bus. ETHICS, 1127, 1130 (1998) (stating that value-based ethics applied to organizations requires that managers observe principles such as honesty, fairness, and integrity).
the Organization. Codes of ethics establish general principles, social or moral, that guide behavior. Ethical codes focus on broader issues and are generally framed as a belief statement regarding the Organization’s mission, values and expectations or its staff members.

Codes of conduct are specific rules designed to define practices and behaviors that are to be encouraged or prohibited under the ethical code. Codes of conduct establish guidelines and procedures to be used to determine whether violations of the code of ethics have occurred and delineate the consequences for such violations. A code of conduct translates the code of ethics into specific prohibitions and guidelines to promote adherence to the code of ethics.

Both code of ethics and code of conduct are designed to promote ethical behavior among staff members and help identify what is or is not acceptable behavior. Both establish a framework for evaluating behavior of the individual or group. If a behavior occurs which is not covered under the code of conduct, the Organization can refer to the code of ethics to address the behavior or situation.

D. Value-Based Ethics in the United Nations

On 22 May 2007, the Secretary-General launched a guide to the UN Secretariat staff entitled “Working Together, Putting Ethics to Work” (hereinafter “Guide”). The Guide reaffirmed the Organization’s core value of integrity. The Guide also linked the core values of impartiality, fairness, honesty and truthfulness as qualities which provide a basis for ethical decision-making. The Guide’s purpose is to help UN staff members understand and apply the provisions of the UN’s Code of Conduct. The core values for the UN staff member are integrity, professionalism, and respect for diversity. These qualities provide a basis for ethical decision-making when staff members face situations where professional and personal interests may conflict.

One of the important professional obligations imposed upon a staff member is to avoid conflict of interest situations. The Guide advises staff members to be aware of conflict of interest situations, such

32. See, e.g., U.N. Supplier Code of Conduct, supra note 30.
33. See Avshalom M. Adam & Dalia Rachman-Moore, The Methods Used to Implement an Ethical Code of Conduct and Employee Attitudes, 54 J. BUS. ETHICS, 225, 226 (2004) (stating that large unethical practices still occur in large corporations although code of conducts have been adopted and implemented).
35. Working Together, Putting Ethics to Work, supra note 26, at 3.
as acceptance of honors, gifts, and remuneration in connection with official duties.\textsuperscript{36} Staff members must be cognizant of situations where a perception may arise that a staff member could personally benefit, directly or indirectly, from a decision. The perception of others, not necessarily implying wrongdoing, but the interpretation of a staff member’s actions may compromise the work of the Organization. The Guide stresses the importance of maintaining independence and impartiality in official decisions.

The Guide advises staff members of their obligation to devote their time to the work of the Organization and limits employment and outside activities. External activities undertaken by staff members may be incompatible with their status as UN officials, presenting a conflict of interest, and for these reasons, outside activities cannot be undertaken unless the Secretary-General gives prior approval.\textsuperscript{37} UN staff members have access to privileged information through their position with the Organization and the disclosure of such privileged information can harm the Organization’s efficiency and credibility. The Guide sets forth the expectation that UN staff are obligated to be aware of the UN core values and standards of conduct and to demonstrate these values in their work.

On 20 August 2008, the Secretary-General launched the “Code of Ethics” for UN staff members.\textsuperscript{38} The “Code of Ethics” is a statement of the core values and principles based on the UN Charter, UN Staff Regulations and Rules, and the Code of Conduct for the International Civil Service. The “Code of Ethics” is not a legally binding document but states the fundamental values and principles by which all UN staff members are expected to discharge their office duties.\textsuperscript{39}

The “Code of Ethics” applies to all UN personnel, including volunteers, interns, international and local consultants, corporate contractors, and all UN peacekeeping mission personnel.\textsuperscript{40} The values and principles as contained in the “Code of Ethics” are reflected in the standards of conduct and the UN Staff Regulations and Rules. UN staff members are obligated to report any breach of the Organization’s regulations and rules to the officials whose responsibility is to take appropriate action.

\textsuperscript{36} Id. at 5.

\textsuperscript{37} Id. at 6.


\textsuperscript{39} Id. at 21.

\textsuperscript{40} Id. at 25.
E. Rule-Based Ethics in the United Nations

As stated above, rule-based ethics are specific regulations which inform the staff member of illegal actions prohibited by the Organization. The failure to obey the specific regulations may result in disciplinary consequences. The UN has both a “Code of Ethics” and a code of conduct called “Standards of Conduct for the International Civil Service.”

The Ethics Office recognizes that the UN already has a comprehensive standard of conduct. The United Nations Charter contains references to the conduct of the international civil servant. Chapter XV, Article 101 states that “the paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.” The UN Staff Regulations and Rules embody the fundamental conditions of service and the basic rights, duties, and obligations of staff members. The Staff Regulations are promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter; the Secretary-General, as the chief administrative officer, provides and enforces the Staff Rules.

UN Staff Regulation 1.1(b) states that all staff members must make an oath or declaration to exercise loyalty to the functions entrusted as an international civil servant of the UN and to regulate his or her conduct with the interests of the UN only in view. The UN Staff Regulations set out in specific terms the Organization’s requirements including: prohibition against accepting gifts or remuneration, outside activities that may be a conflict of interest with their position within the UN, and the prohibition of staff to use their official position for personal profit. The UN Staff Rules prohibit specific instances of

---

41. Working Together, Putting Ethics to Work, supra note 26, at 36.
42. Id. at 4.
43. U.N. Charter art. 101, para. 3.
44. “I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization..” I also solemnly declare and promise to respect the obligations incumbent upon me as set out in the Staff Regulations and Rules.” U.N. Secretary-General, Bulletin on Staff Rules and Staff Regulations of the United Nations, Art. 1, Reg. 1.1, U.N. Doc. ST/SGB/2013/3, at 2 (Jan, 1, 2013), available at http://www.un.org/hr_handbook/English/sourcedocuments_/fulltext.doc.
45. Id. at 4.
conduct. For example, a staff member cannot make public statements or participate actively in political activities.\textsuperscript{46}

There are a number of specific Secretary-General’s Bulletins issued relating to the conduct of a staff member. These Bulletins range from filing financial disclosures,\textsuperscript{47} reporting, retaining, and disposing of honors and gifts,\textsuperscript{48} approval of outside activities,\textsuperscript{49} post-employment restrictions,\textsuperscript{50} and others.\textsuperscript{51}

The Secretary-General must annually submit to the General Assembly, pursuant to resolution 59/287, all actions taken in disciplinary cases in accordance with the established procedures and regulations. Article X of the Staff Regulations provides in regulation 10.1(a) that the Secretary-General may “impose disciplinary measures on staff members who engage in misconduct.”\textsuperscript{52} The Secretary-General has broad discretion to determine what constitutes misconduct and in imposing disciplinary measures. The Secretary-General imposes disciplinary measures for various acts of misconduct by the staff member. These acts can include failure to file financial disclosure, fraud or misrepresentation, assault, computer-related misconduct, sexual exploitation, and sexual abuse.\textsuperscript{53}

\begin{thebibliography}{9}
\bibitem{46} Id. at 8.
\bibitem{47} Working Together, Putting Ethics to Work, supra note 26, at 22.
\end{thebibliography}
III. UNITED NATIONS TRIBUNALS: WHAT CONSTITUTES WORKPLACE RETALIATION IN THE UNITED NATIONS

In 2009 the UN created a new legal system of administration of justice to provide for the safeguard of rights of staff members and accountability by management. The new system of justice brought about sweeping changes in the legal system resulting in a formal system with competent, trained judges and a legal adversarial process.\(^{54}\) As created by the General Assembly, the internal justice system would be “independent, transparent, effective, efficient, and fair.”\(^{55}\) With the establishment of the new legal system, concurrently UN staff members have developed a nascent trust in the system to, at the very least, have their concerns heard and decided upon in a fair and just manner by the UN Judicial Tribunals.

One of the important and developing areas of concern by the UN Tribunals is workplace retaliation. Albeit a legally tested but evolving issue in jurisdictions of Member States, workplace retaliation is a real concern in an Organization where there are no other legal recourses except the UN Tribunals. The UN has staff members posted worldwide with varying degrees of responsibility in Peacekeeping Missions and specialized funds and programmes. UN staff members must feel secure that if an act of misconduct occurs, whether involving misappropriation of UN funds or unbecoming conduct of another UN staff member, their report of misconduct will be taken seriously and immediate action will be taken. In return that staff member must be assured that he or she will be protected from retaliation in the reporting of misconduct.

In accordance with the UN policy on ethics, “[p]rotection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations”—retaliation means—“any direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in an activity protected by the present policy”\(^{56}\) (hereinafter the “Ethics Policy”). A UN staff member has an obligation to report instances of unlawful activities, such as: harassment or discrimination, reporting of procurement fraud, or reporting

---


of intentional misapplication of UN Regulations and Rules. Retaliation occurs when another staff member, usually management, takes negative action against the staff member who has alleged or reported unlawful activities. Retaliatory action can be a poor performance evaluation report, workplace harassment, denial of a promotion, or dismissal of the staff member. If retaliation is proved, retaliation by itself is misconduct and action can be taken against the staff member who committed the retaliatory act.

To clarify this mandate, for example, a staff member may discover that a supervisor has committed misconduct by receiving a kickback from a supplier. Under the Ethics Policy, the staff member is obligated to report any breach of the Organization’s regulations and rules to officials whose responsibility is to take appropriate action. The staff member who makes the report in good faith has a right to be protected against retaliation. In this example, after the staff member reports the misconduct to the Ethics Office, the supervisor may then decide not to renew his contract. The staff member submits a complaint to the Ethics Office stating that the decision not to renew his contract was in retaliation for reporting the procurement irregularity. The Ethics Office will review the staff member’s complaint to determine whether the protected activity (reporting the misconduct) was a factor in the non-renewal of the contract (retaliation). The Ethics Office may recommend interim protection measures to the Secretary-General (reassignment to another office) to safeguard the interests of the complainant. If it appears prima facie that the act was retaliatory, the Ethics Office will refer the matter to the Office of Internal Oversight Services (“OIOS”) who will undertake a formal investigation. If OIOS recommends that retaliation against a staff member has been established, the Ethics Office will review the OIOS Report (a thorough review) and determine what appropriate measures should be taken to correct the retaliatory action.

Judicial consideration of workplace retaliation allegations is a new area of jurisprudence for the UNDT and the UNAT. The UNDT has held that in a case of alleged workplace retaliation, the burden of proof rests with the Administration to prove by “clear and convincing evidence that it would have taken the same action absent the pro-

57. Id.
58. Id. at 4.
tected activity."

Clear and convincing evidence is a higher level of burden of persuasion than a preponderance of the evidence. Black’s Law Dictionary defines clear and convincing evidence as “evidence indicating that the thing to be proved is highly probable or reasonably certain.”

Clear and convincing proof means that the evidence presented by a party during the trial must be highly and substantially more probable to be true than not and the tribunal must have a firm belief or conviction in its factuality. Since the UN Judicial Tribunals do not render judgments in criminal trials, the highest standard of proof—“beyond a reasonable doubt”—is not applicable to UN administrative proceedings. UN Judicial Tribunals have the legal competence to order remedies in an employment dispute either to reinstate the staff member or to order compensation.

Below are issues which have been considered by the UN Judicial Tribunals on workplace retaliation.

A. The Ethics Office’s Determination Whether Retaliation has Occurred is an Administrative Decision Pursuant to the United Nations Staff Regulations and Rules

One of the first issues to be considered by the UNDT is whether a determination by the UN Ethics Office in respect to a staff member’s complaint of retaliation is receivable and subject to appeal to the Tribunal. In Hunt-Matthes v. Secretary-General of the United Nations, the applicant contested the finding of the Ethics Office which acknowledged she had engaged in a protected activity when she reported misconduct of her supervisor, but found that there was no prima facie case of retaliation. The Ethics Office determined that there was no connection between her reporting of misconduct and the decision not to renew her contract.

The applicant, a Senior Investigation Officer, reported in October 2003 that during her investigation of an alleged case of rape, she was subjected to obstruction by senior UNHCR representatives. The applicant reported the obstruction to her supervisor and other senior UNHCR representatives. The
members. In April 2004, the applicant received a critical mid-term assessment of her performance and in August 2004 the Inspector General of the UNHCR did not recommend the extension of her contract based on her unsatisfactory performance appraisal. In March 2006, the applicant wrote to OIOS seeking protection against retaliation under the UN Ethics Policy. In April 2006, she wrote to the Ethics Office requesting protection from retaliation alleging that the negative performance report and the decision not to renew her contract constituted retaliation. In December 2006, the Director of the Ethics Office informed the applicant that there was no connection between her reporting of misconduct and the decision not to renew her contract finding that there was no prima facie case of retaliation. The applicant filed an application to the UNDT.

In Hunt-Matthes, the legal position of the UN Administration was that the UNDT was not competent to hear the application because the Ethics Office determinations were advisory and did not encompass the Director of the Ethics Office to make administrative decisions on behalf of the Secretary-General. The applicant contended that the Tribunal was competent to hear the application because decision-making functions have been conferred on the Ethics Office by the Secretary-General. A decision by the Ethics Office was directly determinative of the rights of an individual as it brings the complaint to an end and prevents any further redress. The UNDT framed the legal issue as to whether the decision of the Ethics Office is an administrative decision which can be challenged before the formal recourse procedures in the UN.

The UNDT held in Hunt-Matthes, that pursuant to the Ethics Policy, ST/SGB/2005/21, section 1.1., UN staff members have a duty to report any breach of the Organization’s Staff Regulations and Rules, and when such reports are made in good faith staff members are entitled to protection against retaliation. Pursuant to section 5.2(c),

---

64. Id. at ¶ 8.
65. Id. at ¶ 16.
66. Id.
67. Id. at ¶¶ 17-18.
68. Id. at ¶ 20.
69. Id. at ¶ 23.
70. Id.
71. Id. at ¶ 25.
72. Id. at ¶ 27.
73. Protection Against Retaliation, supra note 20, at ¶ 1.1.
74. Id. at ¶ 5.2(c): “The functions of the Ethics Office with respect to protection against retaliation for reporting misconduct or cooperating with a duly authorized audit or investigation
upon receipt of a complaint from a staff member, who believes that retaliatory action has been taken for reporting misconduct, the Ethics Office must conduct a preliminary review of the complaint to determine two issues: (1) if the complainant engaged in a protected activity; and (2) whether there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation. The UNDT reasoned that the Ethics Office has the authority to decide whether or not an alleged retaliatory act constitutes a prima facie case of retaliation and such determination by the Ethics Office has direct consequences upon the applicant’s rights. The UNDT held that the decision of the Ethics Office effectively brings the complaint process to an end and prevents the applicant from pursuing any redress for the protected activity. The Tribunal concluded as follows:

40) . . . The Tribunal finds therefore that when a claim relates to issues covered by ST/SGB/2005/21, a staff member is entitled to certain administrative procedures and that if he or she is dissatisfied with the outcome, he or she may request judicial review of the administrative decisions taken.

41) In light of the foregoing, the Tribunal finds that the decision of the Ethics Office what was communicated to the Applicant in the memorandum of 18 December 2006 was an administrative decision.

*Hunt-Matthes* is an important case in UN Tribunals’ jurisprudence on workplace retaliation. The UNDT held that the decision of the Director of the Ethics Office, in determining whether or not an alleged retaliatory act constitutes a prima facie case of retaliation, is receivable and can be challenged before the UN Tribunals.

### B. The Procedures for Reporting Retaliation Claims to the United Nations Ethics Office

UNAT enunciated the procedures for reporting a claim of retaliation in *Koumoin v. Secretary-General of the United Nations*. In this are as follows: . . . (c) to conduct a preliminary review of the complaint to determine if (i) the complainant engaged in a protected activity and (ii) there is a *prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.

75. Id.


77. Id. at ¶ 39.

78. Id. at ¶ 41.

79. Id. at ¶¶ 40-41.

case, the staff member reported that he refused to act unethically on
behalf of his supervisors.81 He received a performance rating of “par-
tially met expectations”82 and contended that the performance rating
and the decision to separate him from service were retaliatory because
of his refusal to act unethically on behalf of his superiors.83 UNAT
held that a staff member has a duty to report any breach of the Organ-
ization’s Regulation and Rules in good faith or to cooperate in good
faith with duly authorized audits or investigations.84 When a staff
member acts in accordance with his duties in good faith, he or she is
entitled to protection against retaliation which is considered a “pro-
tected activity.”85

In Koumoin,86 UNAT reviewed the Secretary-General’s Bulletin
on “Protection Against Retaliation for Reporting Misconduct and for
Cooperating with Duly Authorized Audits or Investigations.” UNAT
interpreted the procedures to report a retaliation claim under the Eth-
ics Policy as follows. Once a staff member has reported to the Ethics
Office allegations of retaliation, the Ethics Office must undertake cer-
tain procedural steps as mandated by the Ethics Policy.87 The Ethics
Office must conduct a preliminary review after receiving the com-
plaint of retaliation.88 According to the Ethics Policy, the complainant
must show that: “(i) the complainant engaged in a protected activity;
and (ii) there is a prima facie case that the protected activity was a
contributing factor in causing the alleged retaliation or threat of retali-
ation.”89 The Ethics Office must undertake a preliminary review of
the complaint within forty-five days of receiving the complaint of retaliation.90

If the Ethics Office finds that there is a credible case or prima
facie case of retaliation or threat of retaliation, the Office must refer
the matter in writing to the OIOS for further investigation into the
complaint.91 The Ethics Office will notify the complainant in writing
that the matter has been referred to the OIOS.92 Pending the OIOS’s

81. Id. at ¶ 2.
82. Id. at ¶ 7.
83. Id. at ¶ 9.
84. Id. at ¶ 26.
85. Id.
86. Id.
87. Protection Against Retaliation, supra note 20.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
investigation, the Ethics Office may recommend to the Secretary-General to take appropriate measures to safeguard the interests of the complainant. This action could include temporary suspension of the action reported as retaliatory, such as not to separate the complainant from service, to reassign the complainant, or to place the complainant on administrative leave.

In cases where the Ethics Office determines that a prima facie case of retaliation has been shown, the case is referred to the OIOS for investigation. The OIOS will conduct an investigation of the complaint, including interviews, review of documents, and requests for additional information. Upon receipt of the OIOS’s investigation report, which contains a recommendation on whether workplace retaliation has occurred, the Ethics Office informs the complainant in writing the outcome of the investigation. The Ethics Office makes its recommendation to the head of department or office concerned and the Under-Secretary-General for Management as to its final decision whether the complainant’s case is considered workplace retaliation. If the Ethics Office finds that there is no credible case of retaliation, but a case of interpersonal or managerial problems, the Office will advise the complainant of the Office of the Ombudsman or other informal means of conflict resolution within the UN. If the Ethics Office determines that retaliation is established, it may recommend to the head of the department or office concerned, appropriate measures to correct the negative consequences as a result of the retaliatory action.

In Koumoin, the UNAT considered that the objective of the Ethics Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity as required by the UN Charter. The Ethics Policy creates safeguards against retaliation to ensure that no staff member shall be subject to reprisals for bringing a matter to the attention of the Ethics Office. The UNAT stated that the Ethics Policy does not make specific mention of “whistle-blowers,” defined by the UNAT as a person who reports an act of wrongdoing on the

---

93. Protection Against Retaliation, supra note 20.
94. Id.
95. Id.
96. Protection Against Retaliation, supra note 20, at ¶ 5.5.
97. Koumoin, supra note 80, at ¶ 28.
98. Id. at ¶ 29.
99. Id. at ¶ 28.
100. Id.
part of a colleague in his department to the higher authorities.\textsuperscript{101} The UNAT determined that although in Koumoin the applicant claimed to be a “whistle-blower,” he was actually a victim of retaliation.\textsuperscript{102}

The UNAT reviewed the issues presented in the appeal taking into consideration the procedures and mandate of the Ethics Policy. The applicant alleged that he had refused to take unethical steps on behalf of his supervisor and as a result became a victim of retaliation when his supervisors gave him a poor performance assessment and subsequent non-renewal of his appointment.\textsuperscript{103} The applicant reported the alleged misconduct in March 2006 after he received his 2005 performance appraisal (retaliation) and was informed of the non-renewal of his contract.\textsuperscript{104}

The applicant’s allegations of alleged misconduct by his superiors were investigated by the UNDP Ethics Office and the Office of Audit and Performance Review (“OAPR”).\textsuperscript{105} The Tribunal held that there was no evidence that the investigation was not conducted in a professional manner and did not show a failure to properly investigate the allegations of misconduct and retaliation.\textsuperscript{106} The Tribunal noted that the applicant did not produce any evidence of his supervisors’ unethical behavior before he was informed that his contract would not be extended.\textsuperscript{107} The Tribunal found that no evidence was shown that this was a case of retaliation following a report of possible misconduct.\textsuperscript{108} The Tribunal held that the decision of non-renewal was based on Koumoin’s poor performance and the non-renewal of the appellant’s contract was not retaliatory.\textsuperscript{109}

It is important to note a crucial issue in this case that arises in workplace retaliation cases—timing of the reporting of the complaint to the Ethics Office and the timing of the retaliatory conduct. If the applicant had reported the misconduct of his supervisors before the alleged retaliatory conduct of a poor performance report and subsequent non-renewal of his contract, UNAT may have rendered a different ruling. The issue of timing in regards to reporting of the retaliation is discussed further below.

\begin{flushright}
101. Id. at ¶ 29.
102. Id. at ¶ 30.
103. Id. at ¶ 31.
104. Id.
105. Id. at ¶ 32.
106. Id.
107. Id. at ¶ 33.
108. Id. at ¶¶ 33-34.
109. Id. at ¶ 34.
\end{flushright}
C. Absent the Protected Activity, the Burden of Proof Rests with the Administration to Prove by Clear and Convincing Evidence that it Would have Taken the Same Alleged Retaliatory Action

In Wasserstrom v. the Secretary-General of the United States,\(^{110}\) the UNDT acknowledged that in carrying out a judicial review of the administrative decision taken by the Ethics Office, the Tribunal would not conduct its own investigation for the purpose of determining whether or not there was in fact retaliation.\(^{111}\) The Tribunal may legitimately express its view as to whether or not there had been retaliation. The UNDT held that pursuant to the Ethics Policy, where a staff member has made a report of possible misconduct in good faith, the burden of proof rests with the Administration to “prove by clear and convincing evidence that it would have taken the same action absent the protected activity.”\(^{112}\) The issue is whether the Administration can show by clear and convincing evidence that it would have taken the same alleged retaliatory action absent the protected activity.\(^{113}\) Clear and convincing proof means that the evidence presented by the Administration must be highly and substantially more probable to be true than not, a greater degree of believability must be met than the “preponderance of the evidence” standard of proof.\(^{114}\)

As discussed, in Koumoin, the Tribunal held that the Organization bears the burden of proof by showing clear and convincing evidence that it would have taken the same action absent the protected activity, i.e., the staff member’s performance appraisal would have shown poor performance absent the protected activity of refusal to undertake unethical activities.\(^{115}\)

The Ethics Office must find a prima facie case of retaliatory conduct in order to proceed with a formal investigation of the case. In Shkurtaj v. Secretary-General of the United Nations, the UNDT defined prima facie as based on the information available to the Ethics Office—whether there is an arguable case as distinct from proven that the applicant was retaliated against.\(^{116}\) If the analysis shows that there

\(^{111}\) Id. at ¶ 28.
\(^{112}\) Id. at ¶ 27.
\(^{113}\) Id. at ¶ 37.
\(^{114}\) See id. at ¶ 38.
\(^{115}\) Koumoin, supra note 80, at ¶ 22.
is an arguable case, then there are grounds to investigate the matter further.

In *Zhang v. Secretary-General of the United Nations*, the applicant reported her allegations of retaliation to the Ethics Office based on actions taken against her since reporting that a previous supervisor assaulted her in 1997. Since the assault, the applicant was assigned to another office. In *Zhang* the applicant was informed on 28 May 2009 that her contract would not be renewed beyond 30 June 2009. On 17 June 2009 the applicant lodged a complaint of retaliation with the Ethics Office pursuant to the Ethics Policy, stating that she had reported possible corruption in the Procurement Division and harassment by her supervisors to a member of the Panel of Counsel. She alleged that the unfair evaluation of her performance and the decision not to renew her contract were retaliatory actions taken as a result of her having reported misconduct. The Tribunal did not find clear and convincing evidence to support a finding that the reported harassment was a contributing factor to either the allegedly unfair performance evaluation or the decision not to renew her contract. Further, the complaint of corruption was alleged after the notice of non-renewal of her contract.

The UNDT has held that the burden of proof rests upon the Administration to determine whether the Administration had by clear and convincing evidence established that it would have taken the same alleged retaliatory action absent the protected activity.

D. The Ethics Office has a Duty to Carry Out an Independent Review of the Office of Internal Oversight’s Investigation Report to Determine Whether Workplace Retaliation has Occurred

In *Wasserstrom*, the applicant, a former staff member with the United Nations Interim Administration Mission in Kosovo (“UNMIK”) complained to the Ethics Office that he had been retaliated against for “whistleblowing” pursuant to ST/SGB/2005/21. The applicant contended that he reported to and cooperated with the OIOS

118. *Id.*
119. *Id.* at ¶ 6.
120. *Id.* at ¶¶ 7, 9.
121. *Id.* at ¶ 13.
122. *Id.* at ¶ 25.
and that the UNMIK senior officials retaliated against him by the closure of his office; ending his assignment with the UNMIK. 124 The applicant lodged his complaint with the Director of the Ethics Office. 125

On 29 July 2007, the Ethics Office concluded its review of the applicant’s complaint and found that there was a prima facie case of retaliation against him. 126 The Ethics Office found that the actions taken by the UNMIK against the applicant, such as the closure of his office, ending his assignment, and conducting an unwarranted investigation against him, were disproportionate to his allegations against the UNMIK. The UNMIK’s retaliatory actions were linked to the applicant’s cooperation with OIOS; a protected activity pursuant to Section 5 of ST/SGB/2005/21. 127

In accordance with the procedures under the Ethics Policy, the Ethics Office submitted the case to the OIOS for further investigation. 128 On 29 July 2008, the OIOS forwarded its investigation report, with annexes, to the Director of the Ethics Office. The OIOS found that the decisions for the closure of the applicant’s office and the non-extension of his contract with the UNMIK were both made prior to the applicant’s cooperation with the OIOS investigation. The OIOS concluded that the UNMIK’s actions could not be considered as retaliation. 129 The OIOS did find that some of the actions taken against the applicant, such as being stopped at the border, having his passport taken away, being escorted back to his apartment, and having his office cordoned off at the UN, appeared to be excessive. 130 However, the OIOS found no evidence that these actions constituted retaliation. 131

In Wasserstrom the Ethics Office initially determined that there was a preliminary finding of prima facie retaliation prior to submission to the OIOS for investigation. When the Ethics Office received the OIOS report which contradicted its initial findings, it was the responsibility of the Ethics Office to assess whether there was material in the OIOS’s Investigation Report, including the attached annexes to the Report, which pointed to “specific significant contradictions.” 132

---

124. Id. at ¶ 2.
125. Id. at ¶ 3.
126. Id. at ¶¶ 3-4.
127. Id. at ¶ 7.
128. Id.
129. Id. at ¶ 8.
130. Id.
131. Id. at ¶ 31.
132. Id. at ¶ 28.
The UNDT noted that upon receipt of the OIOS report, the Ethics Office did not review the attachments to the OIOS Investigation Report.\textsuperscript{133} The UNDT questioned whether the Ethics Office failed to conduct a proper review of the complaint as required under ST/SGB/2005/21.\textsuperscript{134} In this case, the Ethics Office and the OIOS agreed that the applicant had made the complaint in good faith and his actions were considered as a protected activity under ST/SGB/2005/21.\textsuperscript{135} Yet, the OIOS found no retaliatory action against the staff member.\textsuperscript{136}

The UNDT found that the Administration had not properly proven, by clear and convincing evidence, that retaliation had not occurred and that before dismissing the applicant’s complaint, the Ethics Office should have ensured that clear and convincing evidence actually existed either by examining the Annexes or by sending the Investigation Report back to the OIOS.\textsuperscript{137} The UNDT noted that since the Ethics Office originally found a prima facie retaliation, it should have been diligent in determining that retaliation did not take place.\textsuperscript{138} The UNDT noted that the Ethics Office was under a duty to carry out an independent review of the OIOS’ Investigation Report.\textsuperscript{139} If in the course of its review, the Ethics Office identified inconsistencies or believed further enquiries should have been made, this should have been communicated back to the OIOS.\textsuperscript{140}

The Tribunal placed the burden upon the Ethics Office to thoroughly review the OIOS Investigation Report and not to “rubber stamp” the findings of the OIOS.\textsuperscript{141} In Wasserstrom, the Ethics Office initially determined that the case presented a preliminary finding of prima facie retaliation and received an OIOS Investigation Report which did not find evidence of retaliation. The Ethics Office has a duty to the staff member to thoroughly review the case to determine whether retaliation did or did not actually occur.\textsuperscript{142}

\textsuperscript{133} Id. at ¶ 34.
\textsuperscript{134} Id. at ¶ 28.
\textsuperscript{135} Id. at ¶ 34.
\textsuperscript{136} Id. at ¶ 37.
\textsuperscript{137} Id. at ¶ 38.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at ¶¶ 38-39.
\textsuperscript{140} Id. at ¶ 38.
\textsuperscript{141} Id. at ¶ 23.
\textsuperscript{142} Id. at ¶ 48.
E. Timing, Timing, Timing: Timing of the Protected Act and Timing of Retaliation

One of the major considerations by both the UNAT and the UNDT in workplace retaliation cases is the timing of the report of misconduct and the act of retaliation against the applicant. In a complaint of retaliation, the complainant must prove two conditions. First, the staff member has, in good faith, reported that a person has committed a breach of UN Staff Regulations and Rules. This is a protected act under ST/SGB/2005/21 and is a fundamental obligation of a UN staff member.143 Second, the staff member has to show that the reported illegal activity or misconduct has a nexus or connection to the alleged retaliation and was filed before the retaliatory act.144

The UNAT case of Appellant v. Secretary-General of the United Nations145 relied upon Koumoin as a precedent. The UNAT addressed two issues. Whether the UNDT correctly determined that a decision not to renew the applicant’s contract was not retaliatory and whether the Tribunal erred in rejecting the notion of “institutional prejudice.”146 The appellant reported the wrong-doing of his colleague in Fall 2005 to his Regional Director and in March 2006 to the Office of Audit and Performance Review (“OAPR”).147 In April 2006, the appellant was advised to hand over his portfolio and informed that he would be relocated to Copenhagen; if he did not accept, he would be separated from service.148 On 15 May 2006, he submitted his claim of retaliation to the Ethics Office. A preliminary report by the Ethics Office dated 15 June 2006 stated that there was no link between the appellant’s removal as portfolio manager and his reporting of his colleague’s wrongdoing.149 The appellant’s contract was not renewed on 30 November 2008.

The Ethics Office’s Report stated that the decision to move the Argentinean portfolio pre-dated the appellant’s complaint and was based on the management’s decision that clients were unsatisfied with the appellant. The Ethics Report stated that while his reporting of the colleague’s misconduct was a protected activity, the decision to re-

143. Id. at ¶ 23.
144. Id. at ¶ 23(d).
146. Id. at ¶ 12.
147. Id. at ¶ 5.
148. Id. at ¶ 6.
149. Id. at ¶ 7.
move the portfolio was taken before his allegations of misconduct.\textsuperscript{150} The Ethics Office did not find a credible link between the disclosure of wrongdoing and the alleged retaliation.\textsuperscript{151}

The UNAT examined the pleadings of the parties and reviewed the UNDT judgment.\textsuperscript{152} The UNAT did not find any reason to disagree with the UNDT’s Judgment. As stated by the UNAT:

Whistle-blowing and concomitant retaliation may not be easy to prove, though tempting for a staff member to plead to challenge the non-renewal of his or her contract. The UNDT has gone through all aspects of the case, the testimonies of various witnesses, the documents and the Secretary-General’s bulletins, but has found against the Appellant.\textsuperscript{153}

Workplace retaliation cases rely on factual determinations by the tribunals. In this case, the UNAT relied upon the factual considerations of the UNDT. The UNAT held that the retaliatory act, the decision to take the appellant’s portfolio away from him, had been taken before he had made any report of wrongdoing. Therefore, the non-renewal of the appellant’s contract was valid and not a retaliatory measure against him on account of his reporting of certain wrongdoings by his colleague.

In \textit{Checa-Meedan v. Secretary-General of the United Nations},\textsuperscript{154} the UNDT considered the applicant’s allegations of retaliation as non-receivable. The Tribunal noted that the Ethics Office conducted a preliminary review of the applicant’s allegations and found that there was no connection between the expiry of the applicant’s appointment in 2006 and her reporting of certain payment irregularities in 2002.\textsuperscript{155} The applicant has the burden to establish a nexus between the reporting of the illegal action and the subsequent alleged retaliatory action.\textsuperscript{156} In \textit{Checa-Meedan} the reporting of the payment irregularities was in 2002; the decision not to renew her contract was in 2006.\textsuperscript{157}

\textsuperscript{150}. \textit{Id.} at ¶ 23.
\textsuperscript{151}. \textit{Id.}
\textsuperscript{152}. \textit{Id.} at ¶ 28.
\textsuperscript{153}. \textit{Id.}
\textsuperscript{155}. \textit{Id.} at ¶ 17.
\textsuperscript{156}. \textit{Id.} at ¶ 48.
\textsuperscript{157}. \textit{Id.} at ¶ 53.
In *Jennings v Secretary-General of the United Nations*, the applicant raised numerous claims alleging that the decision not to renew her contract was due to a conspiracy against her and in retaliation for filing complaints with the Office of Human Resources Management and the Ethics Office. The UNDT found that the applicant’s complaints were filed after she had been informed that her contract would not be renewed, and therefore could not have affected the contested decision. The UNDT held that the decision not to renew the applicant’s contract was not a result of retaliation, but instead based on the management’s evaluation of the applicant’s performance. In *Jennings v. Secretary-General of the United Nations*, the UNAT upheld the UNDT judgment that the complaints filed by the applicant addressed to the Office of Human Resources Management and the Ethics Office were filed after she had been informed that her contract would not be renewed; further, that the complaints were unsubstantiated.

Both the UN Dispute Tribunals and the UN Appeals Tribunal will thoroughly review the facts of the case to determine the timing of the report of the misconduct and the act of retaliation against the applicant. The burden is upon the applicant to establish the nexus between the report of misconduct and the retaliatory act.

F. A Successful Claim of Workplace Retaliation Before the United Nations Tribunals: Alauddin v. the Secretary-General of the United Nations

In *Alauddin v. the Secretary-General of the United Nations*, a UNDP staff member appealed the decision of 17 September 2007 advising him that his contract would not be extended beyond its expiry date of 31 December 2007. The staff member raised allegations that the decision not to renew his contract was in retaliation to his

---


159. *Id.* at ¶ 46.

160. *Id.*


162. *Id.* at ¶¶ 23, 25, 26, 28.


allegations of wrongdoing in the UNDP County Office in Pakistan. 165 The UNDP Ethics Office submitted the allegations to the UNDP Office of Audit and Investigations (“OAI”) for investigation.

The OAI report concluded that the ant had engaged in protected activities of reporting wrongdoings by a colleague. 166 The appellant’s complaint was lodged prior to the decision of the UNDP not to renew her contract. 167 The UNDP Ethics Office concurred with the OAI investigation report. The UN Dispute Tribunal held that UNDP failed to provide clear and convincing evidence that it would have taken the same action in the absence of the protected activity. Further, the decision not to renew the applicant’s contract was arbitrary and capricious. 168 The Ethics Office stated that, considering the totality of the circumstances, it was possible that the applicant’s numerous allegations of wrong-doing against the Country Office may have caused retaliation. The Country Office decision not to renew his contract was taken in response to his allegations of mismanagement. 169 In this case, the complaint was lodged with the Ethics Office and the UNDP retaliatory action was taken after the filing of the complaint. The UNDT held that retaliation had occurred against the applicant. 170

The question of compensation was considered by the UNDT in Alauddin v. the Secretary-General of the United Nations. 171 Alauddin is one of the few cases where the Tribunal has acknowledged the “whistleblower” status of a staff member and that the applicant should have been afforded whistleblower protection. Since the retaliatory act was a non-renewal of contract, the UNDT considered the following as components of compensation: evidence of reinstatement, whether the applicant’s appointment may have been extended to a specific date, loss of salary and emoluments for the balance of the probable appointment, and compensation for non-economic loss (emotional harm).

165. Id. at ¶ 14.
166. Id. at ¶ 16.
167. Id.
168. Id.
169. Id.
170. See id; see also Alauddin, Judgment No. UNDT/2010/114 at ¶¶ 1, 2, 4, 11 (U.N. Dispute Trib. June 25, 2010).
In the appeal of Alauddin v. the Secretary-General of the United Nations, the UNAT upheld the determination of the merits and compensation as ordered by the UNDT.  

G. The Conditions for an Actionable Workplace Retaliation Case Before the United Nations Tribunals

Based on the above UN Judicial Tribunals’ jurisprudence and United Nations Administrative issuances, the following are the conditions for workplace retaliation in the UN:

a) Duty to report breach of Organization’s Regulations and Rules. Pursuant to the Ethics Policy, UN staff members have a duty to report any breach of the Organization’s regulations and rules. When such reports are made in good faith, staff members are entitled to protection against retaliation. A report by the staff member of an illegal act or misconduct is a protected activity.

b) Complaint must be made in good faith. A staff member must file a complaint in good faith based upon the information which he formed the belief that there were either actual or potential breaches of regulations and rules.

c) Retaliation against the individual who reported the misconduct. Retaliation is any direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in an activity protected by the Ethics Policy. A manager or a co-worker can affect the working conditions of the complainant who reported the misconduct. These actions can include the non-renewal of contract, a hostile working environment, or a poor performance evaluation report. The retaliatory act must be taken after the staff member reports the misconduct.

d) The Ethics Office must determine whether there is a prima facie case of retaliation. Upon submission of the complaint of retaliation to the Ethics Office, the Office must conduct a preliminary review of the facts to determine whether a prima facie case exists to determine that the protected activity (i.e., reporting misconduct) was a contributing factor in causing the alleged retaliation (non-renewal of contract). Shkurtaj v. Secretary-General of the United Nations defines prima facie as based on the information available to the Ethics

---


173. Protection Against Retaliation, supra note 20, at ¶ 1.1.

174. Id. at ¶ 2.2.

Office that there is an arguable case (as distinct from proven) of retaliation.176
e) The Ethics Office finds that there is no credible case of retaliation or threat of retaliation. The Ethics Office can find that there are interpersonal problems between a supervisor and supervisee. In those cases, it can advise the complainant to contact the Office of the Ombudsman or other informal mechanisms for conflict resolution.177
f) The Ethics Office finds that there is a prima facie case of retaliation. If the Ethics Office finds a prima facie case of retaliation, the matter can be referred in writing to the OIOS for investigation. The Ethics Office must notify the complainant in writing of the referral to the OIOS. OIOS has 120 days to respond (4 months).178
g) Pending the completion of the OIOS formal investigation, the Ethics Office can take interim measures. The Ethics Office may make recommendations to take appropriate interim measures to safeguard the complainant from harm or retaliation.179
h) The Ethics Office must conduct an independent review of the OIOS Report. Upon receipt of the OIOS’ Investigation Report, the Ethics Office must exercise due diligence and conduct an independent review of the OIOS Report and make recommendations to independently determine whether workplace retaliation has occurred.180
i) The final determination by the Ethics Office is an administrative decision. A determination by the Ethics Office whether workplace retaliation has occurred is an administrative decision in accordance with UN Staff Regulations and Rules. A staff member is entitled to request a judicial review of the administrative decision before the UN Dispute Tribunal and UN Appeals Tribunal.181
j) If the retaliation case is appealed to the UN Dispute Tribunal, the Administration has the burden of proof of showing clear and convincing evidence. The Administration must prove by clear and convincing evidence that it would have taken the same action, i.e., the non-renewal of contract, absent the protected activity (i.e., reporting of misconduct).182

177. Protection Against Retaliation, supra note 20, at ¶ 5.8.
179. See Protection Against Retaliation, supra note 20, at ¶ 5.6.
182. See Alauddin, Judgment No. UNDT/2010/114 (June 25, 2010).
k) If the retaliation is established, the UN Tribunals can award compensation. The UN Tribunals can order reinstatement or compensation (such as a non-renewal contract) based upon whether the applicant’s appointment may have been extended to a specific date, loss of salary and emoluments for the balance of the probable appointment, and compensation for non-economic loss (emotional harm).\textsuperscript{183}

H. A Comparator of United States Supreme Court Rulings in Workplace Retaliation Cases

It is interesting to note the status of workplace retaliation in a national jurisdiction such as the United States. The United States Equal Employment Opportunity Commission (“EEOC”) has considered workplace retaliation for a number of years. The EEOC has reported that retaliation is the fastest growing claim within its jurisdiction.\textsuperscript{184} The EEOC reported that retaliation charges comprise over twenty-five percent of the charges filed in 2005.\textsuperscript{185} The EEOC noted that the underlying discrimination or harassment claim may be dismissed; however, the retaliation claims often survive and result in costly settlements.\textsuperscript{186}

The leading case rendered by the United States Supreme Court is the \textit{Burlington Northern & Santa Fe Railroad Company v. White}.\textsuperscript{187} In \textit{Burlington Northern}, the Court held that any employer action that “likely would have dissuaded a reasonable worker” from complaining about workplace retaliation could constitute illegal retaliation.\textsuperscript{188} The Supreme Court used the same standard applied to other discrimination claims, namely, the employer’s action would have to be adverse enough to affect the “terms and conditions of employment,”\textsuperscript{189} and found that in \textit{Burlington} the employee’s job transfer and suspension without pay met that standard.\textsuperscript{190} This interpretation broadens the application of workplace retaliation from concrete actions, such as ter-

\begin{itemize}
\item \textsuperscript{183} See Alauddin, Judgment No. 2011-UNAT-181 (Oct. 21, 2011).
\item \textsuperscript{185} EEOC, FY 2012 Congressional Budget Justification (2012), \textit{available at} http://www.eeoc.gov/eeoc/plan/upload/2012budget.pdf.
\item \textsuperscript{186} See Winfield, \textit{supra} note 184, at 53.
\item \textsuperscript{188} See \textit{id.} at 68.
\item \textsuperscript{189} See \textit{id.} at 67.
\item \textsuperscript{190} See \textit{id.} at 70.
\end{itemize}
mination, failure to promote, and poor performance reports, to actions which *may appear* to be retaliation.\textsuperscript{191}

It may only be a matter of time that a staff member can file a cause of action for indirect “third-party” retaliation. This would occur when a staff member supports another staff member who has filed a claim of retaliation and management retaliates against the third party. The U.S. Supreme Court unanimously decided that this was a viable cause of action in *Thompson v. North American Stainless, L.P.*\textsuperscript{192} The U.S. Supreme Court held that an employee who was fired shortly after his fiancée filed a bias charge against her employer may sue under Title VII of the Civil Rights Act of 1964 for third-party retaliation.\textsuperscript{193} According to the Supreme Court, the employee could be considered an “aggrieved person” under Title VII because he was “well within the zone of interests sought to be protected by Title VII.”\textsuperscript{194}

It is noted that the UN Judicial Tribunals have not ventured in this direction, as this is a new area of developing jurisprudence. Workplace retaliation can occur in many different circumstances. The UN Judicial Tribunals must first establish the legal standards which will address all types of retaliation claims in a fair, just, and equitable manner.

I. *Actions the United Nations Can Undertake to Ensure Protection Against Workplace Retaliation*

The UN does not, and probably will not, have such a broad application of workplace retaliation as the United States judicial system. However, the UN can take remedial actions to prevent workplace retaliation:

a) Strictly enforce policies prohibiting any kind of retaliation.\textsuperscript{195}

b) Diligently review staff members’ complaints of misconduct filed in good faith and determine whether there were or were not legitimate, non-retaliatory reasons for the manager’s action.\textsuperscript{196}

c) If warranted, the Ethics Office should recommend immediate interim measures to safeguard the interests of the complainant.\textsuperscript{197}

d) Follow up with staff members who have filed complaints with the Ethics Office and, if prima facie evidence shows that retaliation

\textsuperscript{191}. See *id.* at 71.


\textsuperscript{193}. See *id.* at 868.

\textsuperscript{194}. See *id.* at 869-70.

\textsuperscript{195}. See *Protection Against Retaliation*, supra note 20, at ¶ 1.3.

\textsuperscript{196}. *Id.* at ¶ 5.2.

\textsuperscript{197}. *Id.* at ¶¶ 4-6.
may have occurred, refer the allegations to a formal investigation by the OIOS.\textsuperscript{198}
e) Upon receipt of the OIOS’s Investigation Report, conduct an independent and diligent review of the OIOS Investigation Report to ensure that retaliation did or did not occur.\textsuperscript{199}
f) Apprise the staff member in a timely manner of investigative findings and the final decision of the Director of the Ethics Office.\textsuperscript{200}
g) Support appropriate disciplinary action with the Office of Human Resources Management, including termination, of staff members/managers who have retaliated against other staff members.\textsuperscript{201}

IV. BUILDING AN ETHICAL CULTURE IN THE UNITED NATIONS

Workplace retaliation poses a risk for the Organization. It is important for the UN that staff members raise ethical concerns or report misconduct observed at the workplace. The UN Dispute Tribunals and the UN Appeals Tribunal render a judicial judgment only at the end of the process.\textsuperscript{202} The UN must ensure that staff members are protected from retaliation from the beginning.

Generally, staff members will fear retaliation from managers due to the possible loss of employment; but managers need to address and eliminate retaliation systematically. Workplace retaliation begins when a UN staff member conducts himself or herself in an unethical manner. The staff member’s conduct demonstrates a lack of integrity falling well below the standards expected of an international civil servant. The conduct of the UN staff member is of such a serious nature that another staff member feels an obligation to report the unethical conduct to UN management.

What is the ethical culture in the UN? To understand the ethical culture in the UN one must begin with the staff member. Character plays an important role in ethical decision-making and behavior. Each staff member has his or her own personal motivations, personal mission, values, character, and moral reasoning which they bring to the Organization. Personal moral values serve as guiding principles in each person’s life. The chances of a staff member making a wise ethical decision and following through on these choices are based upon

\textsuperscript{198} See Wasserstrom, Judgment No. UNDT/2012/092 (June 21, 2012).
\textsuperscript{199} See Protection Against Retaliation, supra note 20, at ¶ 5.7.
\textsuperscript{200} Id. at ¶ 5.7.
\textsuperscript{201} Id. at ¶ 5.7.
\textsuperscript{202} Id. at ¶ 5.7.
positive moral traits of character. A staff member with these virtuous character traits should make ethical decisions on behalf of the Organization. The valued priorities of the staff member and the Organization must agree with the organizational commitment.

Teams or groups play a significant role in the UN. In the UN most of the important organizational decisions are made by teams. As a team member, the staff member is required to be ethically responsible and to ensure that the team behavior acts in an ethical manner. Team members have an ethical duty to behave in a cooperative manner and to be committed to the success of the group.

Managers are critical to the ethical foundation of the Organization. Managers are responsible for determining the mission and values and creating the ethical climate of the Organization. Senior managers lead the ethical direction of the Organization. Senior managers are responsible for shaping the Organization and play a key role in reinforcing the values and standards of the Organization. Senior managers must consistently speak about the importance of ethical behavior, act ethically, and take disciplinary action against those who fall short of the standards. As a role model, senior managers must develop their own ethical problem-solving skills which embody the values of the Organization.

All of the above components in the UN culture contribute to the formation of an ethical environment. Staff members must be encouraged to make ethical choices following the established core principles. In order to create and sustain an ethical environment, factors such as engaged leadership, ethics training, and incorporation of an ethical process in decision-making must be sought by the Organization. The following are recommendations the UN can undertake to create shared beliefs and values to ensure the formation of an ethical environment.

A. Recruitment

The first step is to ensure that ethics is included in the recruitment stage of prospective staff members. The Organization should recruit new staff members who share the ethical values of the UN. The UN’s values and ethical climate should be stated in the employment

205. Id. at 65-66.
interview. To assess the suitability of a prospective staff member, interview questions must include those which assess the ethical character of the applicant, for example, the inclusion of a competency-based question with ethical implications. These questions will not only be a factor for whether this is the right employee for the Organization, but they will inform the prospective employee that ethics is a high priority within the Organization.

B. Orientation

Upon selection of the successful candidate into the Organization, the newly recruited staff member must adapt to the shared values of what will be ethically correct behavior in the Organization. The newly recruited staff should participate in training and orientation sessions designed to integrate them into the Organization. New staff members will be given the Organization’s code of conduct, code of ethics, UN Staff Regulations and Rules, and administrative policies to learn the Organization’s values. Based on initial ethics training and orientation sessions, the staff member will understand the Organization’s core values and mission statements; while the code of ethics should be introduced to potential ethical dilemmas. In turn, new staff members can contribute by introducing new concepts and values from their experiences which will help to shape and reinforce the UN ethical culture.

C. Career Development

As a staff member’s career progresses in the Organization, his or her performance must be measured and evaluated. A reward system can be a powerful determinant of ethical behavior. In certain situations, senior managers are usually focused on results-based delivery and establish demanding performance goals for their staff, regardless of how these objectives should be reached. A staff member may feel pressured to “cut corners” and make an unethical decision. In order to avoid the temptation of making an unethical decision to accomplish result-based objectives, the Organization must encourage cooperative behavior and set realistic performance goals.

To ensure that ethical behavior is reinforced rather than undermined, the Organization can pursue several strategies. Managers can evaluate whether their current reward system provides incentives for moral behavior and disincentives for unethical actions. Different ethical climates may vary between departments and field locations within an organization. By creating an environment whereby the staff mem-
ber shares the values and the commitment of the Organization, the staff member will be productive to achieve the Organizational goals and objectives.

V. A Higher Standard of Ethical Responsibility: The United Nations Staff Member as Part of the Global Community

Does the UN staff member have a higher standard of ethical responsibility than employees in government public sectors and in corporate private sectors? Yes.

The UN wields more global power than ever before. This power extends beyond Headquarters duty stations to Peacekeeping Missions to influential UN presence in local communities in developing countries. As an international organization it must seek to do what is right and just for the global community. Recognizing the concerns of Member States as stakeholders in the UN, Member States’ social, economic, and legal interests are given priority by the UN. There will be times when a staff member has to choose whether to offend an external Member State in order to achieve a higher organizational value or goal. The UN’s staff member must manage these on-going relationships with Member States, external partners, and UN management to respond to changing political and economic conditions. The decisions of the UN staff member influence the Organization’s impact on the global community. The Organization must ensure that UN staff members have the ethical values of honesty, transparency, and integrity considering that a staff member’s inappropriate or unethical decision will have an impact on the UN’s credibility and reputation.

VI. Conclusion

Workplace retaliation in the UN should not occur. A UN staff member should not be placed in a position where he or she feels obligated to report the unethical behavior of another staff member. Ethics involves judgments about the rightness or wrongness of behavior. All UN staff members face some common ethical temptation or dilemma at some point in their career. An ethics-based perspective is necessary which recognizes the moral dimension of the everyday decision of each staff member in his or her organizational life which effects the reputation of the Organization. The ethics-based approach will lead to significant improvement in the ethical performance of each staff member.
When an individual joins the UN it should be his or her intent to make that Organization a better place with their knowledge and skills. The UN, in turn, must provide the staff member with a workplace that is committed to the ethical principles of integrity, impartiality, and honesty. The UN Dispute Tribunals and the UN Appeals Tribunal are the independent institutional safeguards of basic human rights for staff members in the UN. By rendering decisions that are fair and equitable for both the UN and the staff member on workplace retaliation, the UN Tribunals will significantly alter organizational attitudes, communications, behaviors, and ensure respect for the rule of law in the UN.