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Advanced Employment Retaliation Issues

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This paper will discuss three issues relating to retaliation claims in the private and public sectors: a) the use of union information demands with regard to potential retaliation claims; b) the anti-retaliation provisions contained in certain federal environmental laws and regulations; and c) the standards for establishing causation regarding an adverse personnel action in First Amendment retaliation claims by public employees.

I. Union Information Demands Can Aid Retaliation Claims

It is self-evident that most litigated retaliation claims arise from non-unionized work locations. In such settings, employees without tenure protections serve at will. Therefore, unorganized employees will rely on anti-discrimination and retaliation statutes as a means of challenging an adverse employment action through litigation and administrative complaints.

In contrast, one of the fruits of collective bargaining is the negotiated establishment of written standards and limitations on an employer's power to impose adverse actions. Disputes relating to the application of such standards and limitations are resolved under the grievance/arbitration procedure of the collective bargaining agreement.

Virtually all collective bargaining agreements contain standards and procedures for the imposition of discipline. In addition, many negotiated collective bargaining agreements mandate employers to follow or consider seniority in making promotion and transfer decisions.

Nevertheless, claims of unlawful discrimination or retaliation in a unionized setting are not always resolved through the processing of a grievance or the issuance of an arbitration award. The union and/or the employee may want to pursue a statutory claim to obtain supplemental relief that is unavailable in arbitration. For example, a union may decide to pursue a claim of retaliation based on union activities before the National Labor Relations Board (NLRB) or a similar agency in the public sector. An individual

¹ The opinions expressed in this paper do not necessarily reflect the views of CSEA Local 1000 AFSCME, AFL-CIO

grievant who believes that the adverse action constituted unlawful retaliation may retain outside counsel for purposes of exploring other possible statutory claims against the employer. The manner in which an outside attorney approaches the employer and the union may impact the handling of a pending grievance or arbitration.

In situations where the union and/or employee suspect that an adverse action violates the terms of the contract and may constitute unlawful retaliation, the union has a valuable tool for building an evidentiary case: an information demand. Under the National Labor Relations Act, 29 U.S.C. 158(a)(5), as well as similar state and federal statutes granting employees the right to organize, a union has the right to demand and receive information from the employer relevant to a contractual grievance being investigated or pursued in arbitration. *See, NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

In *NLRB v. Acme Industrial Co.*, *supra*, the Court endorsed the NLRB's conclusion that a private sector union had a statutory right under the NLRA to information to enable the union to evaluate intelligently the merits of a grievance prior to deciding to proceed to arbitration. In addition, it endorsed the NLRB's "discovery-type" standards toward union demands. Among the categories of information that the NLRB deems to be presumptively relevant is information relating to the terms and conditions of employment of bargaining unit members. *Bryant & Stratton Business Institute*, 323 NLRB 410, 155 LRRM 1033 (1997). However, the NLRB has ruled that the right to information does not extend to requiring the production of a list of witnesses and other evidence in advance of arbitration. *California Nurses Association*, 326 NLRB 1362, 164 LRRM 1064 (1998).

In *NLRB v. Federal Labor Relations Authority*, 952 F.2d 523 (D.C.Cir. 1992), the D.C. Circuit addressed the scope of information demands by federal sector unions under the Federal Service Labor-Management Relations Statute, 5 USC §7114(b)(4). In *NLRB v. FLRA*, the court upheld a ruling by the Federal Labor Relations Authority in favor of federal public sector unions that had sought to compel the management of various federal agencies, including the NLRB, to disclose information pertaining to employee grievances.

Union information demands can also result in the disclosure of an employer's investigation into allegations of employment discrimination. *See, County of Erie v. State of New York*, 14 A.D.3d 14, 785 N.Y.S. 2d 130 (3d Dept. 2004), *amended*, 2005 N.Y. App. Div. LEXIS 1547, 789 N.Y.S. 2d 453 (3d Dept. 2005). In *County of Erie v. State of New York*, a New York appellate court upheld a decision by the New York State Public Employment Relations Board finding that an employer engaged in an improper practice by failing to provide to the union in aid of a disciplinary arbitration documents relating to a sexual harassment investigation resulting in an employee's termination.

The scope of a union information demand must be both relevant and necessary to a union's representational role and rests on the circumstances of a particular case. In addition, the NLRB may require negotiations between the employer and union aimed at

protecting the confidentiality of certain information. *Detroit Edison Co. v. NLRB*, 440 U.S. at 315; *NLRB v. Item Company*, 220 F. 2d 956 (5th Cir. 1955), *cert. denied*, 350 U.S. 836 (1955); *Roseburg Forest Products Co.*, 331 NLRB 999, 164 LRRM 1044 (2000). In such situations, the burden is on the employer to formulate an accommodation to meet its substantial confidentiality needs. *Borgess Medical Center*, 2004 NLRB LEXIS 521, 342 NLRB No. 109, 175 LRRM 1549 (2004).

In *Detroit Edison Co. v. NLRB*, *supra*, the Court vacated and remanded a judgment enforcing an NLRB order requiring an employer to disclose information to the union relating to psychological tests used by the employer in making adverse employment decisions that were being challenged in arbitration. The Court found that the NLRB abused its discretion by ordering the employer to deliver to the union copies of the test battery and answer sheets based on the confidentiality of the tests. In addition, the Court held that the employer did not engage in an unfair labor practice by failing to provide the union with the test scores without the consent from individual employees. In *Roseburg Forest Products Co.*, *supra*, the NLRB, relying on an EEOC opinion letter, ruled that an employer engaged in an unfair labor practice when it refused to turn over confidential medical information relating to a reasonable accommodation challenged by the union under the terms of the collective bargaining agreement. However, as part of its remedy, the NLRB ordered the employer to negotiate with the union to create appropriate safeguards to protect the confidential nature of the medical information under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*

An employer's non-confidential response to a detailed union information demand, in addition to assisting in evaluating a grievance or preparing for arbitration, can shed substantial light on the possible unlawful motivation underlying an adverse action. An employer's response to a union's early information demand setting forth the specific reason for an adverse action can lock the employer into a particular purported non-discriminatory reason for the employment action. This information can help in evaluating the strength of a potential retaliation claim. Furthermore, the early employer response can assist in establishing pretext if the employer attempts to assert an alternative reason during subsequent litigation.

Finally, it should be noted that the pursuit of a statutory retaliation claim could be impaired by the terms of a collective bargaining agreement or the results of an arbitration or administrative hearing. See, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998)(unanimous decision left open whether a collective bargaining agreement's clear and unmistakable waiver of statutory rights is enforceable); *University v. Tennessee v. Elliott*, 478 U.S. 788 (1986)(application of issue preclusion to a federal statutory discrimination claim based on the results of a state administrative agency determination); *Morel v. American Building Maintenance Co.*, 2005 U.S. App. LEXIS 1336 (2d Cir. 2005); *Collins v. New York City Transit Authority*, 305 F. 3d 113 (2d Cir. 2002)(Second Circuit held that an adverse arbitration decision is highly probative evidence of an employer's lack of unlawful motivation).

II. Retaliation Claims Under Federal Environmental Laws

Congress has enacted seven major federal environmental laws containing provisions protecting employees against retaliation for engaging in various protected activities:

- a. Energy Reorganization Act of 1974, 42 U.S.C. §§5801, 5851;
- b. Clean Air Act, 42 U.S.C. §§7401, 7622;
- c. Safe Drinking Water Act, 42 U.S.C. §§300f, 300j-9(i);
- d. Toxic Substances Control Act, 15 U.S.C. §§2601, 2622;
- e. Solid Waste Disposal Act, 42 U.S.C. §§6901, 6971;
- f. Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. §§9601, 9610;
- g. Clean Water Act, 33 U.S.C. §§1251, 1367

Complaints of retaliation in employment under each of these environmental laws must be pursued within the United States Department of Labor's administrative process. An important resource for researching environmental retaliation claims is the website established by United States Department of Labor's Office of Administrative Law Judges (OALJ): www.oalj.dol.gov. The website provides access to administrative law judge decisions regarding procedural and substantive issues. In addition, OALJ prepares and distributes a Whistleblower Newsletter that is a valuable research tool in finding prior administrative rulings.

In the public sector, environmental whistleblowers have the additional right to pursue directly in federal court retaliation claims under the First Amendment and 42 U.S.C. §1983. See, *Charvat v. Eastern Ohio Regional Wastewater Authority*, 246 F.3d 607, *rehearing en banc den*, 2001 U.S. LEXIS 11227 (6th Cir. 2001).

The United States Secretary of Labor has promulgated comprehensive regulations consistent with the congressional intent expressed in these environmental statutes. 29 CFR §24.1(b). Although the federal environmental laws contain varying statutory provisions, the regulations tend to blur these distinctions except with respect to the Energy Reorganization Act of 1974, 42 U.S.C. §5801.

Pursuant to 29 CFR §24.2(a), in response to protected an employee's activities, an employer subject to federal environmental laws may not "discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because the employee, or any person acting pursuant to the employee's request."

Although unstated in the regulations, the Solid Waste Disposal Act, 42 U.S.C. §6971(a) and the Federal Water Pollution Control Act, 33 U.S.C. §1367(a) also prohibit discrimination by an employer against “any authorized representative of employees” for engaging in protected activities under those statutes.

In addition, the regulations provide that an employer violates the applicable statute and regulation if the “employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee” for engaging in protected activities. 29 CFR §24.2(b).

Consistent with the language contained in these federal environmental statutes, the regulations prohibit retaliation against an employee because he or she has:

1. Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the federal statutes or a proceeding for the administration or enforcement of any requirement imposed under such federal law;
2. Testified or is about to testify in any such proceeding; or
3. Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such federal law.

Pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. §5851(a)(1), the Secretary of Labor’s regulations provide that an employer violates that particular law and related regulations if the employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because he or she has:

1. Notified the employer of an alleged violation of such federal statute or the AEA of 1954;
2. Refused to engage in any practice made unlawful by such federal statute or the AEA of 1954, if the employee has identified the alleged illegality to the employer; or
3. Testified before Congress or at any federal or state proceeding regarding any provision (or proposed provision) of such federal statute or the AEA of 1954.

Complaint Procedure

An employee or another person acting on the employee’s behalf may file administrative retaliation complaints under the federal environmental laws. 29 CFR §24.3(a). A complaint must be in writing and contain a full statement of the specific

conduct that forms the basis for the alleged violation. 29 CFR §24.3(c). Labor unions, as “representatives of employees,” are granted explicit statutory authority to file administrative complaints under the Solid Waste Disposal Act, 42 U.S.C. §6971(b) and the Federal Water Pollution Control Act, 33 U.S.C. §1367(b).

Complaints must be filed with the local OSHA office within 30 days after occurrence with the exception of complaints under the Energy Reorganization Act of 1974 that can be filed within 180 days. 29 CFR §24.3(b). Complaints that are filed by mail are deemed filed on the date of mailing. 29 CFR §24.3(c).

These administrative timeframes for the filing of a complaint are not considered jurisdictional and may be extended when fairness requires. *Hall v. United States Department of Labor*, 198 F.3d 257, 1999 U.S. App. LEXIS 25568 (10th Cir. 1999)(complainant’s mental capacity did not warrant equitable tolling); *Hill v. United States Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995)(statute of limitations will be tolled when it is established that the employer wrongfully concealed its actions and the plaintiff did not discover the applicable facts within the limitations period despite due diligence).

In general, the applicable time period begins to run from the date that the employee learns of the adverse employment decision. *Connecticut Light & Power Co. v. Secretary of the United States Dept. of Labor*, 85 F.3d 89, 96 (2d Cir. 1996); *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988). In *Connecticut Light & Power Co. v. Secretary of the United States Dept. of Labor*, *supra*, the Second Circuit applied the standards for a continuing violation to actions taken by an employer aimed at negotiating an unlawful settlement agreement in an environmental retaliation claim that imposed a gag rule on the employee. In order to meet the continuing violation standard, the complainant must establish an underlying discriminatory policy or practice and an action taken pursuant to that policy during the applicable timeframe. 85 F.3d at 96. *See also*, *Bell v. Chesapeake & Ohio Ry. Co.*, 929 F.2d 220, 223 (6th Cir. 1991).

Investigations

Investigations regarding employment retaliation in violation of federal environmental laws are supposed to be conducted on a priority basis and completed within thirty days. 42 U.S.C. §5851(b)(2)(a); 42 U.S.C. §7622(b)(2); 42 U.S.C. §9610(b); 29 CFR §§24.4(b), (d)(1). The regulations grant investigators the authority to enter and inspect property and compel the release of documents relevant to the investigation. 29 CFR §24.4(b). In addition, investigators may interview other employees and witnesses on a confidential basis. 29 CFR §§24.4(b) and (c).

At the conclusion of the investigation the United States Department of Labor Assistant Secretary is required to issue a notice of determination setting forth the basis for the findings and conclusions. If a violation is found, the notice of determination must also contain an appropriate order to abate the violation. 29 CFR §§24.4(b).

Investigations Under Energy Reorganization Act

In 1992, the Energy Reorganization Act was amended to require the Secretary of Labor to dismiss a complaint, without further investigation, if the complainant fails to establish a *prima facie* case that the protected activity was a contributing motivating factor behind the adverse personnel action. 42 U.S.C. §5851(b)(3)(A); 29 CFR §24.5(b)(1); *Hasan v. United States Department of Labor*, 298 F.3d 914 (10th Cir. 2002). The Eleventh Circuit has explained this gatekeeper test is a purposefully difficult statutory standard imposed by Congress based on its conclusion that the nuclear industry was being inundated by retaliation claims from whistleblowers. *Stone & Webster Engineering Corporation v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)

Before an investigation will be commenced under the Energy Reorganization Act, a complainant must establish through facts and evidence that: a) he or she engaged in protected activity; b) the employer knew that the employee engaged in the protected activity; c) the employee has been subjected to an adverse employment action; d) the facts create an inference that the protected activity was a contributing factor in the adverse action. 29 CFR §24.5(b)(2). Complainant's initial pre-investigation burden can be met by the written complaint and supplemented through interviews of the complainant as long as the evidence establishes an interference of retaliation. 29 CFR §24.5(b)(3).

After a complainant establishes the initial pre-investigation burden, the law mandates that "no investigation" take place if the employer responds to the complaint demonstrating through clear and convincing evidence that it would have taken the same adverse action in the absence of the employee's protected behavior. 42 U.S.C. §5851(b)(3)(B); 29 CFR §24.5(c)(1). If the employer fails to meet its burden by submitting clear and convincing evidence within five (5) days after receipt of the complaint, the investigation can proceed to determine whether the protected activity was a contributing factor in the adverse action. 42 U.S.C. §5851(b)(3)(C); 29 CFR §24.5(c)(1); *Stone & Webster Engineering Corporation v. Herman*, 115 F.3d at 1572.

If the complaint is dismissed under the Energy Reorganization Act without the completion of the investigation, a notice of dismissal is issued setting forth a statement of reasons for the dismissal. 29 CFR §24.5(d). If the Assistant Secretary determines, after the investigation, that a violation of the Energy Reorganization Act has taken place, a notice of determination will be issued setting forth the reasons for the determination. 29 CFR §24.4(d).

Requests for Administrative Review

Along with the notice of determination, following the investigation, the parties are sent a notice informing them that if they wish to have the determination reviewed, they must file a request for a hearing with the Chief Administrative Law Judge within five business days after receipt of the determination. 29 CFR §§24.4(d)(2). Timely receipt of

a request for a hearing stays the applicability of the notice of determination. 29 CFR §§24.4(d)(2) and (3), §24.5(d).

Administrative Hearings

Within seven (7) days of the filing of the request for an administrative hearing, the assigned administrative law judge is required to send a written notice to the parties scheduling the hearing. 29 CFR §24.6(a). When possible, hearings are held within seventy-five (75) miles of the complainant's residence. 29 CFR §24.6(c). Requests for adjournments will not be granted except for compelling reasons or with the consent of the parties. 29 CFR §24.4(d)(2). Pre-hearing discovery is permissible. *Hall v. United States Department of Labor, supra*. Administrative hearings are conducted based on a full record and the parties are permitted to file pre-hearing and post-hearing briefs. 29 CFR §24.6(c). Following the administrative hearing, the administrative law judge issues a recommended decision containing findings, conclusions and a recommended order. 29 CFR §24.7(a).

Burden of Proof

The burden shifting standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) are applicable to retaliation claims under federal environmental statutes. See, *Doyle v. U.S. Department of Labor*, 285 F.3d 243, 250 (2002); *Kahn v. United States Secretary of Labor*, 64 F.3d 271 (7th Cir. 1995). Therefore, a complainant must establish initially a *prima facie* case of retaliation: a) the employer is governed by the statute; b) the employee engaged in protected activity under the statute; c) because of the protected activity, the employee was subjected to an adverse employment action. *Williams v. Administrative Review Board*, 376 F.3d 471, 479 (5th Cir. 2004).

Temporal proximity is sufficient to raise the inference of causation in a whistleblower case. *Bechtel Construction Company v. Secretary of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989). However, in *Bartlik v. United States Department of Labor*, 73 F.3d 100, 103 (6th Cir. 1996) the Sixth Circuit concluded that timing alone is insufficient to create the inference in a non-discharge case.

Courts have recognized that an employee who has been subject to a hostile work environment, without a tangible adverse action, can establish a violation of federal environmental laws. See, *Williams v. Administrative Review Board, supra* (applying Title VII hostile work environment standards to an environmental whistleblower case).

After the complainant establishes a *prima facie* case, the burden shifts to the employer to produce evidence demonstrating that it was motivated by a legitimate non-discriminatory reason. After the employer meets that burden, the burden of persuasion shifts to the employee to establish that the employer's asserted reason was pretextual. *Doyle v. U.S. Secretary of Labor, supra*; *Bechtel Construction Company v. Secretary of Labor, supra*.

In cases where the employee establishes that whistleblowing played some part in motivating the adverse action, circuits have applied the dual motive test set forth in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). *Pogue v. United States Department of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *Mackowiak v. University Nuclear Systems, Inc.* 735 F. 2d 1159, 1162 (9th Cir. 1984). Under *Mt. Healthy*, after the employee establishes that an unlawful motivation played a part in the adverse action, the burden shifts to the employer to establish that the adverse employment action would have been imposed even if the employee had not engaged in protected activity. See, *American Nuclear Resources v United States Department of Labor*, 134 F.3d 1292 (6th Cir. 1998); *Simon v. Simmons Foods Inc.*, 49 F.3d 386 (8th Cir. 1995).

Informal internal complaints have been found to constitute protected activity under most of the federal environmental laws. *Bechtel Construction Company v. Secretary of Labor*, *supra*; *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993), *cert. denied*, 510 U.S. 964 (1993); *Pogue v. United States Department of Labor*, *supra*.

Administrative Review Board

A party dissatisfied with a recommended decision by an administrative law judge has the right to file a petition for review with the Administrative Review Board (ARB). The Secretary of Labor has delegated to ARB the authority to issue final decisions in environment retaliation cases. 29 CFR §24.8(a). A petition for review must be received no later than ten (10) business days from the date of the recommended decision. A final decision by ARB must be issued within ninety (90) days of the receipt of the complaint. 29 CFR §24.8(c).

Settlements

The settlement of a retaliation complaint between an employer and complainant is subject to mandatory ARB review and approval. See, *Beliveau v. United States Department of Labor*, 170 F.3d 83 (1st Cir. 1999). The applicable standard for the approval of a settlement is whether the settlement is fair, adequate and reasonable. *Thompson v United States Department of Labor*, 885 F.2d 551, 557 (9th Cir. 1989). Consideration of a party's subsequent bad faith behavior is one factor that can be considered regarding whether an agreement meets that standard. See, *Ruud v. Westinghouse Hanford Company*, 80 Fed. Appx. 12 (9th Cir. 2003)

Remedies For Retaliation Under Federal Environmental Laws

If ARB concludes that an employer has violated an anti-retaliation provision, the ARB can order reinstatement along with back wages and compensatory damages. Under the Safe Drinking Water Act and the Toxic Substances Control Act exemplary damages can also be awarded. 29 CFR §24.8(d)(1). Finally, if requested, ARB is required to assess against the employer all reasonable costs, including attorneys' fees and expert witness fees, incurred by the complainant in bringing the complaint. See, 42 U.S.C.

§5851(b)(2)(B)(ii); 42 U.S.C. §7622(b)(2)(B)(ii); 42 U.S.C. §300j-9(i)(2)(B)(ii); 15 U.S.C. §2622; 42 U.S.C. §6971(c); 42 U.S.C. §9610(c); and 33 U.S.C. §1367(c). There is a split in the Circuits whether attorneys' fees can be awarded for the cost of an appeal seeking review of an ARB determination. *Blackburn v. Reich*, 79 F.3d 1375 (4th Cir.1996); *DeFord v. Secretary of Labor*, 715 F.2d 231 (6th Cir. 1983).

Court Review of Final Retaliation Determinations

The applicable judicial standard in a petition for review of a final administrative action by the Secretary of Labor regarding an environmental retaliation complaint is whether there is substantial evidence to support the decision and whether the decision is arbitrary, capricious or otherwise not in accordance with law. See, *Varnadore v. Secretary of Labor*, 141 F.3d 625, 630 (6th Cir. 1998); *Pogue v. United States Department of Labor*, *supra*.

Final administrative actions taken by the Secretary of Labor under the Clean Air Act is subject to challenge in the United States Court of Appeals for the circuit where the violation or alleged violation took place. 42 U.S.C. §7622(c). In contrast, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9610(b) and 9613(b) provides that the United States District Court has original jurisdiction for a challenge to the Secretary of Labor under that law. In *Ruud v. U.S. Department of Labor*, 347 F.3d 1086 (9th Cir. 2003), an employee filed a retaliation complaint under both the Clean Air Act and the Comprehensive Environmental Response, Compensation and Liability Act resulting in an administrative settlement. After the settlement was accepted, over the objection of the employee, the employee commenced a proceeding in the Ninth Circuit consistent with 42 U.S.C. §7622(c). The Ninth Circuit held that for purposes of judicial economy it would accept original jurisdiction of a consolidated petition under both statutes. 347 F.3d at 1090.

III. Establishing Causation In First Amendment Retaliation Cases

Under the First Amendment, it is unlawful, in general, for a public employer to retaliate against a public employee for speaking out on an issue of public concern and/or retaliate against a non-policymaking employee for engaging in partisan political activity. However, public employee complaints regarding working conditions are unprotected under the First Amendment. See, *City of San Diego v. Roe*, __U.S.__, 125 S.Ct. 521, 2004 U.S. LEXIS 8165 (2004); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Waters v. Churchill*, 511 U.S. 661 (1994); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Connick v. Myers*, 461 U.S. 138 (1983); *Erod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Education*, 391 U.S. 563 (1968).²

² See, Herbert, "The First Amendment and Public Sector Labor Relations," *The Labor Lawyer*, Vol.19, No. 3 (BNA 2004) for a more extensive discussion on protected activity for public employees under the First Amendment.

In addition, a private actor may be found liable when it is a willful participant in a joint activity with a public employer in retaliating against a public employee for First Amendment activities. *Dossett v. First State Bank*, ___F.3d___, 2005 U.S. App. LEXIS 3391 (8th Cir. 2005); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

Late last year, the Supreme Court conceded that the “boundaries of the public concern test are not well-defined.” *City of San Diego v. Roe*, 125 S.Ct at 526. The Court reframed the public concern test in the following manner: “something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” *supra*. In addition, the Court reiterated that private remarks made by public employees can also meet the public concern standard. See, *Rankin v. McPherson*, 483 U.S. 378 (1987).

Various circuits have held that public employee speech relating to public safety and the violations of environmental regulations touch upon matters of public concern. *Charvat v. Eastern Ohio Regional Wastewater Authority*, 246 F.3d at 617-618 (letters sent to state environmental agency about sewage treatment facility’s violations of environmental regulations touched upon matter of public concern); *Wagner v. Wheeler*, 13 F.3d 86 (4th Cir. 1993)(complaints to state officials regarding alleged environmental violations may touch upon a matter of public concern); *Myers v. Hasara*, 226 F.3d 821 (7th Cir. 2000)(statements regarding violations of local laws touched upon matter of public concern); *Wallace v. County of Comal*, ___F.3d___, 2005 U.S. App. LEXIS 2394 (5th Cir. 2005). Furthermore, whistle blowing will be given greater weight than other forms of public employee speech when the balancing test, established in *Pickering v. Board of Education*, *supra*. and *Connick v. Myers*, *supra*, is applied. See, *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130 (2d Cir. 1999).

In order to establish a First Amendment retaliation claim, it must be demonstrated that the constitutionally protected activity was a substantial or motivating factor underlying an adverse personnel action. *Mt. Healthy City School District v. Doyle*, *supra*. The burden then shifts to the employer, to demonstrate by a preponderance of evidence that it would have imposed the adverse employment action even if the plaintiff had not engaged in the protected activity. *supra*. *Click v. Copeland*, 970 F.2d 106, 113 (5th Cir. 1992). The plaintiff can then seek to refute the employer’s assertion by demonstrating that the non-retaliatory reason for the adverse action was a mere pretext. 970 F.2d at 113.

The standard for establishing an adverse employment action under the First Amendment and 42 U.S.C. §1983 differs between the various Circuits. In *Coszalter v. City of Salem*, 320 F. 3d 968, 975 (9th Cir. 2003), the Ninth Circuit noted that “a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden.” Similarly, the Seventh Circuit has stated that “(a)ny deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable, even something as trivial as making fun of an employee for bringing a birthday cake to the office to celebrate another employee's birthday.” *Power v. Summers*, 226 F.3d 815, 820-821 (7th Cir. 2000). Lawsuits brought

pursuant to 42 U.S.C. § 1983 do not require an adverse employment action within the meaning of Title VII. 226 F.3d at 820. The Fifth Circuit has found that a transfer with a raise constituted an adverse action noting “(m)oney alone, however, does not buy happiness.” *Click v. Copeland*, 970 F.2d at 110. However, the Eighth Circuit, in *Okruhlik v. University of Arkansas*, 395 F.3d 872 (8th Cir. 2005), recently concluded that in order to establish an adverse employment action a plaintiff must suffer an employment action that results in a “material employment disadvantage” including termination, reduction in pay or benefits, and other changes in employment that significantly impact future career prospects

The applicable causation standard under *Mt. Healthy* burden shifting remains in dispute. The Third, Seventh and Tenth Circuits have found that a plaintiff does not have to demonstrate “but for” causation. *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000); *Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004); *Copp v. Unified School District*, 882 F.2d 1547, 1553 (10th Cir. 1989). In contrast, the Fourth Circuit has described the First Amendment causation standard as being “rigorous” requiring evidence establishing “but for” causation. *Huang v. Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990).

In general, causation is a factual issue to be determined by a jury. *Urlich v. San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002); *Click v. Copeland*, *supra*; *Matulin v. Village of Lodi*, 862 F.2d 609, 613 (6th Cir. 1988); *Lunow v. City of Oklahoma City*, 61 Fed. Appx. 598 (10th Cir. 2003) (summary judgment affirmed based on plaintiff’s failure to meet minimal burden of establishing that the protected activity preceded the adverse action); *Bailey v. Floyd County Board of Education*, 106 F.3d 135, 144 (6th Cir. 1997) (summary judgment may be appropriate if plaintiff fails to present evidence to create a genuine issue regarding causation).

To meet this factual burden, a plaintiff must present specific, non-conclusory allegations reasonably linking the protected activity to the adverse action. *Bailey v. Floyd Board of Education*, *supra*.

Among the elements needed to establish causation includes evidence that the employer or the supervisor making the final decision knew of the protected activity. *Tharlig v. City of Port of Lavaca*, 329 F.3d 422, 428 (5th Cir. 2003); *Doyle v. Harris County*, 74 Fed. Appx. 302, 307 (5th Cir. 2003). If a personnel board or a civil service commission has final decision-making authority regarding adverse actions, causation may be difficult to establish. See, *Hitt v. Connell*, 301 F.3d 240 (5th Cir. 2002). Other evidence that can establish causation include the proximity between the protected activity and the adverse action, the quality and nature of employee’s work history, evidence of the employer’s opposition to the activity and/or other evidence demonstrating that the purported non-discriminatory reason for the adverse action was pretextual. *Urlich v. San Francisco*, *supra*. *Copp v. Unified School District*, 882 F.2d 1547, 1553-1554; *Spiegla v. Hull*, *supra*; *Collins v. Illinois*, 830 F.2d 692, 704-705 (7th Cir. 1987). The Ninth Circuit has concluded that three to eight months between the protected activity and the adverse action is within the timeframe to create an inference of retaliation. *Coszalter v. City of*

Salem, supra. Even an eleven-month gap was found sufficient to establish the inference of retaliation. *Allen v. Iranon*, 283 F.3d 1070, 1078 (9th Cir. 2002).