

THE RISK OF COMPLAINING—RETALIATION

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INTRODUCTION

Complaints made by those outside the power structure of an institution against those within the power structure can trigger retaliatory action. Retaliation is a deliberate action used to send a clear message that complaining is unwelcome and risky. It is employed to instill fear in others who might consider making a complaint in the future. Those with cause for complaining are frequently among the most vulnerable in an institution. Once they complain, they are labeled “troublemakers.” Retaliation, and the fear of retaliation, becomes a potent weapon used to maintain the power structure within the institution. It is extremely difficult to enforce laws, such as antidiscrimination laws, if the victims of discrimination and those with knowledge of it are afraid to complain. Congress recognized this and, as a result, several federal antidiscrimination laws include provisions making retaliation illegal.¹ In recent years, the Supreme Court has issued several decisions holding that retaliation is a form of discrimination and, as such, it is

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1. See *infra* Part I.

actionable under antidiscrimination laws that do not expressly prohibit retaliatory action.²

This Article will explore retaliation in educational institutions. In educational institutions, students are likely targets of discrimination. They are subject to retaliation by both teachers and the administration, because they are on the low end of the power spectrum. Teachers and other employees are subject to retaliation by the administration, including boards of trustees, because in that relationship teachers and employees have less power. Of course, lower level administrators may be subjected to retaliation by high-ranking administrators and board members, and high-ranking administrators are subject to retaliation by the board. As long as the target of a complaint has the authority to take an adverse employment action against the one complaining, or enough influence to cause someone else to take such action, the threat of retaliation is real. When the target of the complaint is the institution, there may be many individuals with both the incentive and authority to engage in retaliation.

While laws other than antidiscrimination laws, such as the Occupational Safety and Health Act³ and the Fair Labor Standards Act (FLSA),⁴ prohibit retaliation against those who complain or participate in enforcement proceedings, the focus of this Article is the more common retaliation claims that accompany efforts to enforce antidiscrimination laws and the Equal Protection Clause of the 14th Amendment to the Federal Constitution. Several of the antidiscrimination laws—including Title VII of the Civil Rights Act of 1964 (Title VII),⁵ the Age Discrimination in Employment Act (ADEA),⁶ the Americans with Disabilities Act (ADA),⁷ and the Equal Pay Act (EPA)⁸—expressly prohibit retaliation against those who oppose discrimination or participate in proceedings to enforce the statutes. Other federal antidiscrimination statutes, including federal financial assistance statutes such as Title VI of the Civil Rights Act of 1964 (Title VI),⁹ Title IX of the Education Amendments of 1972 (Title IX),¹⁰ Section 504 of the Rehabilitation Act (§ 504),¹¹ and the Age Discrimination

2. *See infra* Part I.E–F.

3. 29 U.S.C. § 660(c) (2006).

4. 29 U.S.C. § 215(a)(3) (2006). *See* *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (holding that the anti-retaliation provision in the FLSA, 29 U.S.C. § 215(a)(3), prohibiting discrimination against any employee who has “filed any complaint,” protects employees who file an oral complaint as well as those who file a written complaint).

5. 42 U.S.C. § 2000(e), et seq. (2006).

6. 29 U.S.C. § 621, et seq. (2006).

7. 42 U.S.C. § 12101, et seq. (2006).

8. 29 U.S.C. § 206 (2006).

9. 42 U.S.C. § 2000(d), et seq. (2006).

10. 20 U.S.C. § 1681, et seq. (2006).

11. 29 U.S.C. § 794 (2006).

Act,¹² as well as Reconstruction Era statutes that prohibit race discrimination in contracting and in property transactions,¹³ address retaliation as an aspect of discrimination. These statutes, as well as the enforcement options, proof schemes and remedies, are discussed in Part I. Some retaliatory actions, taken by government institutions, are subject to challenge based on the free speech clause of the First Amendment to the U.S. Constitution.¹⁴ Such claims are addressed in Part II. Next, Part III discusses whether current retaliation laws, and the First Amendment as currently interpreted in this context, actually encourage individual victims of prohibited discrimination to complain of such discrimination, to assist others who complain of discrimination, and to expose institutional corruption. This Part also includes a discussion of the psychology of retaliation, how retaliation or the fear of retaliation serves to suppress complaints and maintain the *status quo*, and addresses potential preventive measures institutions may take to avoid retaliation claims or at least place them in the best position to defend such claims. Finally, I suggest in this Part that any institution that is serious about preventing discrimination and achieving *actual* equality will actively promote complaints and protect those who have the courage to complain.

I. STATUTORY PROHIBITIONS OF RETALIATION

Several federal statutes that prohibit discrimination also prohibit retaliation against those who seek to enforce the antidiscrimination provisions or assist others in enforcing them. Some of these statutes expressly address retaliation, while others have been interpreted to address retaliation through the antidiscrimination provision itself.

A. Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination in employment based on race, color, national origin, religion, and sex, including discrimination based on pregnancy.¹⁵ This Act generally applies to government and private employers with fifteen or more employees.¹⁶ While it therefore applies to the vast majority of educational institutions as employers, some of those institutions may be exempt from claims of discrimination based on religion if the

12. 42 U.S.C. § 6101, et seq.. (2006).

13. These statutes, 42 U.S.C. §§ 1981–82 (2006), are utilized to address race discrimination in a variety of activities, including employment, admissions, and housing.

14. Cases addressing freedom of speech in the employment context include *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Bd. of Cnty. Comm’rs, v. Umbehr*, 518 U.S. 668 (1996); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

15. 42 U.S.C. §§ 2000e-2(a) & 2000e(k) (2006).

16. 42 U.S.C. § 2000e(b) (2006).

educational institution is owned “in substantial part” by a religious organization or “if the curriculum of such school . . . is directed toward the propagation of a particular religion.”¹⁷ Such religious institutions are subject to discrimination claims based on race, color, national origin, and sex, although there may be a limited “ministerial exception” based on the Religion Clause of the First Amendment.¹⁸ Title VII explicitly addresses retaliation, providing:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁹

The first clause is referred to as the “opposition” clause, while the second is referred to as the “participation” clause.²⁰ Neither of the clauses requires the party alleging retaliation to establish actual discrimination. Instead, the complaining party need only show a reasonable belief that there is a viable Title VII discrimination claim.²¹ The complaining party has the burden of showing a causal connection between the protected activity and the alleged retaliatory act.²² In addition, the complaining party must show that the challenged action by the employer constitutes an “adverse employment

17. 42 U.S.C. §§ 2000e-1(a) & 2000e-2(e) (2006).

18. The “ministerial exception” is currently before the Supreme Court in *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011) (in an action on behalf of a discharged teacher in an elementary school operated by a religious organization, alleging discrimination in violation of the ADA and retaliation, the Court held that the teacher was not a ministerial employee and rejected the school’s argument that the discrimination claim involved church doctrine, which should not be evaluated or interpreted by the courts).

19. 42 U.S.C. § 2000e-3(a).

20. *See, e.g., Crawford v. Metro.* 555 U.S. 271, 274 (2009).

21. *See, e.g., Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 46–49 (1st Cir. 2010); *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 441 (7th Cir. 2010). *See also Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (opposition is not protected where no reasonable person could have believed that the single incident in question constitutes actionable harassment).

22. *See, e.g., Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 147–48 (2d Cir. 2010); *Leonard v. E. Ill. Univ.*, 606 F.3d 428, 431–33 (7th Cir. 2010); *Corbitt v. Home Depot, Inc.*, 589 F.3d 1136, 1156–61 (11th Cir. 2009); *O’Neal v. City of Chicago*, 588 F.3d 406, 410 (7th Cir. 2009); *Stephens v. Erickson*, 569 F.3d 779, 788–89 (7th Cir. 2009); *Zokari v. Gates*, 561 F.3d 1076, 1081–82 (10th Cir. 2009); *Herschman v. City Univ. of N.Y.*, 2011 WL 1210200, at *12–13 & 16–19 (S.D.N.Y. Feb. 28, 2011); *Rodriguez-Monguio v. Ohio State Univ.* 2011 WL 335854, at *14–16 (S.D. Ohio Jan. 31, 2011).

action.”²³ This means some retaliatory actions taken by an employer will not be considered actionable under Title VII.

The Court, in *Burlington Northern & Santa Fe Railway Co. v. White*,²⁴ made several determinations that enhance the scope of the retaliation clauses. First, the Court indicated that the retaliatory action does not have to be employment related. For example, retaliatory criminal charges could violate the retaliation clauses.²⁵ Second, while the Court held that the anti-retaliation provision reaches only actions that are “materially adverse” to a reasonable employee or applicant, the victim of retaliation need only show that the challenged action “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”²⁶ Reassignment of a laborer to duties that were more “arduous and dirtier” could be viewed as “materially adverse” to a reasonable employee.²⁷ Similarly, a thirty-seven-day suspension was actionable retaliation even though the plaintiff was reinstated with back pay.²⁸ The emphasis on whether a reasonable employee would be deterred from engaging in protected activity seems entirely consistent with the purpose of the anti-retaliation clauses.

Applying its holding in *Burlington*, that Title VII’s “anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment” and reaches any employer action that “well might have dissuaded a ‘reasonable worker from making or supporting a charge of discrimination,’”²⁹ the Court in *Thompson v. North American Stainless, LP*,³⁰ held that firing Thompson in retaliation for his fiancé’s charge of sex discrimination against their employer would violate Title VII.³¹ Next, the Court held that Thompson is an “aggrieved” person for Title VII purposes, because he satisfies Article III’s standing requirements and therefore can sue the employer for a violation of Title VII.³²

In another case, *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,³³ the Court held that the “opposition clause” is not limited to employees who actually instigate or initiate a discrimination complaint; rather, it extends to an employee who disclosed a coworker’s

23. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54–60 (2006) (plaintiff must show “that the challenged action ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination’”) (quoting *Rochon v. Gonzalez*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

24. *Burlington*, 548 U.S. 53 (2006).

25. *Id.* at 61–64.

26. *Id.* at 68 (quoting *Rochon*, 438 F. 3d at 1219).

27. *Id.* at 71.

28. *Id.* at 71–73.

29. *Thompson v. N. Am. Stainless, L.P.*, 131 S. Ct. 863, 868 (2011).

30. *Id.* at 870.

31. *Id.* at 866.

32. *Id.*

33. *Crawford*, 555 U.S. 271 (2009).

sexually harassing conduct in response to questions posed to her during an internal investigation by the employer.³⁴ One can be in “opposition” to discrimination, without initiating a complaint, by simply responding to questions posed by someone else in a manner that discloses discrimination.³⁵ However, “opposition” is not protected by the antidiscrimination provision in Title VII where, for example, no reasonable person could have believed that a single incident in question constituted actionable sexual harassment.³⁶

When the alleged protected activity consists of illegal conduct, or conduct that is extremely violent or disruptive of the employer’s business, or conduct suggesting a breach of necessary loyalty, confidentiality, or cooperation, the activity may not be protected by Title VII. Such was the case in *McDonnell Douglas Corp. v. Green*,³⁷ where an employee was involved in a “stall in” that tied up traffic at the employer’s plants during rush hour,³⁸ the Court said “[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.”³⁹

The term “employee,” as used in the anti-retaliation provision, includes former employees. Therefore, a plaintiff who claimed his former employer provided a negative reference in retaliation for his having filed a complaint with the EEOC relating to his discharge has an actionable retaliation claim.⁴⁰ Like discrimination claims, retaliation claims can be proved using either the direct method or the indirect method established in *McDonnell Douglas*.⁴¹ Under the direct method, a retaliation plaintiff alleging a violation of Title VII can avoid a summary judgment ruling by showing: (1) she engaged in

34. *Id.* at 273.

35. *Id.*

36. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). *See also* *EEOC v. Go Daddy Software*, 581 F.3d 951, 963–64 (2009) (distinguishing *Breeden* where the evidence suggests that the plaintiff spoke out two or three times about comments that had been made regarding his religion and national origin and the comments were not “isolated” from the terms and conditions of his employment, but rather were made when the plaintiff was informed that his position had been eliminated and that he could avoid demotion only by appealing to the individual who made the derogatory comments).

37. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

38. *Id.* at 794–95.

39. *Id.* at 803.

40. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 347 (1997).

41. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Silverman v. Bd. of Educ. of the City of Chicago*, 637 F.3d 729, 740 (7th Cir. 2011) (indicating *Silverman* could defeat a motion for summary judgment by providing sufficient evidence of retaliation through either the direct or indirect method of proof, but holding that her evidence is insufficient under either method).

statutorily protected activity; (2) she suffered a materially adverse action by her employer; and (3) a causal link between the two.⁴²

Application of the direct method is demonstrated in *Silverman v. Board of Education of the City of Chicago*,⁴³ where the plaintiff satisfied the first element because she had filed a charge of discrimination with the EEOC, “the most obvious form of statutorily protected activity.”⁴⁴ Further, she satisfied the second element by showing negative evaluations of her teaching and by showing that her contract was not renewed in 2006.⁴⁵ However, Silverman did not present “evidence that reasonably suggests” a causal link between the two materially adverse actions and her protected activity.⁴⁶ Therefore, she could not avoid summary judgment using the direct method of proof.

The most difficult hurdle for retaliation plaintiffs utilizing the direct method is showing a causal connection or link between the protected activity and the materially adverse employment action. Absent any remarks made by those responsible for the challenged decision, the most telling evidence may be the temporal proximity between the protected activity and the adverse action. While the courts generally recognize that temporal proximity can support an inference of retaliation, they differ on how close the protected activity and the adverse employment action must be to preclude summary judgment, absent any other evidence of a causal connection. For example, in a Title VII case where the plaintiff claims he was fired because he “opposed” the employer’s practice of favoring Hispanics over black workers,⁴⁷ the court indicated that “a suspicion” is not enough to get past a motion for summary judgment.”⁴⁸ Nevertheless, the court recognized that occasionally “an adverse action comes so close on the heels of a protected act that an inference of causation is sensible.”⁴⁹ Thus, the key is in the strength of the inference:

Deciding when the inference is appropriate cannot be resolved by a legal rule; the answer depends on context, just as an evaluation of context is essential to determine whether an employer’s explanation is fishy enough to support an inference that the real reason must be discriminatory. The District Court’s apparent belief that timing *never* supports an inference of

42. *Id.* (citing *Jones v. Res-Care, Inc.*, 613 F.3d 665, 671 (7th Cir. 2010)). See also *Benuzzi v. Bd. of Educ. of the City of Chicago*, 647 F.3d 652, 664–66 (7th Cir. 2011) (sufficient evidence of retaliation under the direct method); *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 784–87 (7th Cir. 2007).

43. *Silverman*, 637 F.3d at 740–41.

44. *Id.* at 740.

45. *Id.* at 740–41.

46. *Id.* at 741.

47. *Loudermilk v. Best Pallet Co.*, 636 F.3d 312 (7th Cir. 2011) (plaintiff relied on the direct method of proof).

48. *Id.* at 315.

49. *Id.* See also *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 273 (2001) (“very close” temporal proximity can suffice).

causation is untenable. The closer two events are, the more likely that the first caused the second. We think that an inference of causation would be reasonable here. A jury, not a judge, should decide whether the inference is appropriate.⁵⁰

Silverman also argued that she established a *prima facie* case utilizing the indirect method of proof, pursuant to which she must demonstrate: (1) that she engaged in a statutorily protected activity; (2) that she suffered a materially adverse action by her employer; (3) that she met the school board's legitimate expectation; and (4) she was treated less favorably than similarly situated employees who had not engaged in protected activity.⁵¹ Silverman satisfied the first three elements, but not the fourth. While the court's "similarly situated" inquiry is a "flexible, common-sense one,"⁵² "the comparators must be similar enough that any differences in their treatment cannot be attributed to other variables."⁵³ Where a plaintiff utilizing the indirect method establishes all the elements of a *prima facie* case, the burden shifts to the defendant to produce a legitimate, non-retaliatory reason for the adverse action.⁵⁴ If the defendant provides such evidence, then the burden shifts back to the plaintiff to show that the reason(s) advanced by the employer was a pretext for retaliating against her.⁵⁵

A major hurdle for a retaliation plaintiff utilizing the indirect method of proof is the "similarly situated" requirement for a *prima facie* case. In cases where the plaintiff has established a *prima facie* case and the defendant satisfies its burden by articulating a legitimate, non-retaliatory reason for the

50. *Loudermilk*, 636 F.3d at 315 (reversing summary judgment in favor of the employer). See also *Castle v. Appalachian Technical Coll.*, 631 F.3d, 1194, 1197–99 (11th Cir. 2011) (a student suspended from the nursing program alleged she was suspended in violation of the First Amendment because she reported one of her instructors for falsifying attendance records. Assuming there was a retaliatory motive for the suspension, the court found the school administrators also had a lawful motive for suspending the student, and therefore, they could have reasonably believed that suspending the student would not violate the First Amendment, thus establishing qualified immunity); *Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 675 (7th Cir. 2011) (holding that suspicious timing alone is almost always insufficient to survive summary judgment and here the plaintiff did not overcome that general rule); *Abuelyaman v. Ill. State Univ.*, 2009 WL 3837012, at #9 (C.D. Ill. Nov. 13, 2009) (sufficient evidence of suspicious timing to defeat a motion for summary judgment).

51. *Silverman v. Bd. of Educ.*, 637 F.3d 729, 742 (7th Cir. 2011).

52. *Henry v. Jones*, 507 F.3d 558, 564 (7th Cir. 2009). See also *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 688 (7th Cir. 2007) (similarly situated requirements should not be applied mechanically or inflexibly).

53. *Silverman*, 637 F.3d at 742.

54. *Id.* at 742.

55. *Id.*

challenged action, meeting the pretext requirement is an obstacle. A showing of pretext, combined with the *prima facie* case, is sufficient to support a finding of retaliation.⁵⁶ In *St. Mary's*, the Court held that:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination⁵⁷

There are circumstances in which the plaintiff can establish that an agent of the employer had a discriminatory or retaliatory animus, but may not be able to establish that the agent made the challenged employment decision. In *Staub v. Proctor Hospital*,⁵⁸ the Court considered "the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision."⁵⁹ The claim in *Staub* was based on the Uniformed Services Employment and Reemployment Rights Act (USERRA),⁶⁰ but its holding is applicable to discrimination and retaliation claims under the Acts addressed in this Article.⁶¹

Staub sued Proctor under USERRA, alleging that his discharge was motivated by hostility to his obligations as a military reservist. More particularly, Staub claimed that two of his supervisors, Mulally and Korenchuk, had such hostility. The hostility led them to make an unfavorable entry in his personnel record, which influenced the ultimate employment decision made by Buck.⁶² Under Staub's theory, the discriminatory animus of Mulally and Korenchuk was sufficient to establish his claim, even assuming they did not intend to cause his dismissal, because Buck decided to fire Staub based on that entry. The Court stated:

[T]he supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware

56. *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

57. *Id.* at 511. *See also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–48 (2000) (case involving age discrimination).

58. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

59. *Id.* at 1189. This is sometimes referred to as the "cat's paw" theory. *Id.* at 1190, n.1.

60. 38 U.S.C. § 4301, et seq. (2006)

61. Some lower courts have applied *Staub* in employment cases alleging retaliation. *See, e.g.*, *Gollas v. Univ. of Texas Health Sci. Ctr.*, 2011 WL 1834248 (5th Cir. May 12, 2011); *Baldwin v. Holder*, 2011 WL 2078614 (S.D. Tex. May 26, 2011); *Palermo v. Clinton*, 2011 WL 1261118 (N.D. Ill. March 31, 2011).

62. *Staub*, 131 S. Ct. at 1191–92.

of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.⁶³

Therefore, the Court held "that if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."⁶⁴ Applying this principle, the Seventh Circuit's holding that Proctor was entitled to judgment as a matter of law was reversed because Mulally and Korenchuk were acting within the scope of their employment when they took the actions that allegedly caused Buck to fire Staub; there was evidence that Mulally and Korenchuk's actions were motivated by hostility towards Staub's military obligations; there was evidence that Mulally and Korenchuk's actions were causal factors underlying Buck's decision to fire Staub; and there was evidence that both Mulally and Korenchuk had the specific intent to cause Staub to be discharged.⁶⁵ The Court left it to the Seventh Circuit to determine whether the jury verdict in favor of Staub should be reinstated or whether there should be a new trial because the jury instruction "did not hew precisely to the rule we adopt today."⁶⁶

Before filing a civil action alleging either discrimination or retaliation in violation of Title VII, the person alleging discrimination or retaliation must file a charge with the EEOC or a state deferral agency within 180 days after the "unlawful employment practice occurred," or within 300 days if the state where the alleged discrimination or retaliation occurred has a "deferral agency."⁶⁷ Because filing a timely charge of discrimination or retaliation with the EEOC is not a jurisdictional prerequisite to litigation, the requirement is subject to waiver, estoppel, and equitable tolling.⁶⁸ The timeliness of a charge often turns on whether the charging party complains of a "discrete act," such as discharge, failure to hire, failure to promote, or instead complains of a hostile or harassing work environment.⁶⁹ In the latter situation, where the unlawful employment practice is based on the cumulative effect of individual acts, it suffices that one act occurring within the filing period will trigger

63. *Id.* at 1193.

64. *Id.* at 1194.

65. *Id.*

66. *Id.*

67. See 42 U.S.C. § 2000e-5(e) (2006 & Supp III 2009).

68. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

69. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

liability for the entire period of the hostile environment.⁷⁰ Prior to the decision in *Morgan*, several circuits held that a separate retaliation charge does not need to be filed, provided the retaliation is reasonably related to the initial charge of discrimination.⁷¹ However, *Morgan* may have changed that because of its holding that discrete acts trigger a separate filing requirement.⁷² Even where the charging party alleges that the retaliatory action was triggered by an EEOC charge of discrimination, the safest course may be to file a separate retaliation charge.

The relief available under Title VII to a retaliation plaintiff who establishes liability is quite extensive and includes equitable relief, such as reinstatement, back pay, and front pay.⁷³ Since the 1991 amendments to Title VII, compensatory and punitive damages are available under Title VII,⁷⁴ but these damages are subject to the statutory cap, which varies depending on the number of employees.⁷⁵ Punitive damages are not available against government,⁷⁶ and the standard for punitive damages is malice or reckless indifference to the federally protected rights of the plaintiff.⁷⁷ An employer “may not be vicariously liable [for punitive

70. *Id.* at 120 (“a court’s task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period”). Cases have applied *Morgan* to § 1983 claims. *See, e.g.*, *Groesch v. City of Springfield, Ill.*, 635 F.3d 1020, 1027 (7th Cir. 2011); *Sharpe v. Cureton*, 319 F.3d 259, 267–68 (6th Cir. 2003); *RK Ventures, Inc. v. Seattle*, 307 F.3d 1045, 1061 (9th Cir. 2002).

71. *See, e.g.*, *Clockedile v. N.H. Dep’t of Corr.*, 245 F.3d 1, 4–6 (1st Cir. 2001); *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 603 (7th Cir. 1999); *Shah v. N.Y. State Dep’t of Civil Serv.*, 168 F.3d 610, 614 (2d Cir. 1999).

72. *See, e.g.*, *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 674 (8th Cir. 2006); *Horton v. Jackson Cnty. Bd. of Cnty. Comm’rs*, 343 F.3d 897, 899–900 (7th Cir. 2003); *Hazel v. Washington Metro. Area Transit Auth.*, 2006 WL 3623693 at *7–8 (D.D.C. 2006).

73. 42 U.S.C. § 2000e-5(g) (2006). Front pay is compensation for future economic losses stemming from present discrimination that cannot be remedied by traditional rightful-place relief, such as hiring, promotion, or reinstatement. While front pay is available under Title VII, as a form of equitable relief, it is matter of discretion for the trial court. *See, e.g.*, *Hildebrand v. Ill. Dep’t of Natural Res.*, 347 F.3d 1014, 1032 n.12 (7th Cir. 2003). Back pay was also viewed as a form of equitable relief, but if the Title VII plaintiff is seeking compensatory damages, some courts allow the issue to go to the jury along with compensatory damages. *See, e.g.*, *Broadnax v. City of New Haven*, 415 F.3d 265, 271–72 (2d Cir. 2005); *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 379–80 (1st Cir. 2004).

74. *See* 42 U.S.C. § 1981a (2006).

75. *See* 42 U.S.C. § 1981a(b)(3) (2006). Back wages and interest, available under Title VII prior to the 1991 amendments, are excluded from compensatory damages for purposes of determining the cap.

76. 42 U.S.C. § 1981a(b)(1) (2006).

77. *Id.*

damages] for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'"⁷⁸ In addition, the prevailing party may be awarded attorney fees and expert fees.⁷⁹

B. Age Discrimination in Employment Act

As suggested in the title, the ADEA⁸⁰ applies only to age discrimination in the employment context, and only to employers with twenty or more employees.⁸¹ Like Title VII, the ADEA includes a section that expressly addresses retaliation.⁸² The language in the ADEA is almost identical to that found in Title VII and, therefore, the cases interpreting these provisions are nearly interchangeable. However, there is a potential difference in interpretation based on *Gross v. FBL Financial Services, Inc.*,⁸³ where the Court held that an ADEA plaintiff alleging age discrimination must show that age was the "but-for" cause of the challenged decision, rather than a motivating factor. In contrast, Title VII provides for "mixed-motive" liability, allowing a plaintiff who establishes that a prohibited factor was a motivating factor in the challenged employment decision to hold the employer liable, even if the ultimate decision would have been the same without consideration of the impermissible factor.⁸⁴ If *Gross* is applied to retaliation claims under the ADEA, a mixed-motive claim of retaliation may not be available.⁸⁵

78. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999).

79. 42 U.S.C. § 2000e-5(k) (year). While prevailing plaintiffs are generally entitled to fees, prevailing defendants may recover fees "only where the action brought is found to be unreasonable, frivolous, meritless, or vexatious." See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

80. 29 U.S.C. § 621, et seq. (2006).

81. 29 U.S.C. §§ 631(c)(1) & (2) (2006). The ADEA does not provide an exemption for religious institutions; at one time it provided an exemption allowing compulsory retirement of a tenured faculty member "who has attained seventy years of age." That exemption expired December 31, 1983. See Pub. L. No. 99-592, § 6(b), 100 Stat. 3342 (1986).

82. 29 U.S.C. § 623(d) (2006).

83. *Gross v. FBL Financial Serv, Inc.*, 557 U.S. 167 (2009). The Court essentially overruled *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holding a different result under the ADEA is justified by the fact that Congress, when it amended Title VII in 1991 to include the mixed-motive provision, did not amend the ADEA.

84. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The decision in *Price Waterhouse* was codified in part and modified in part by the 1991 amendments to Title VII, 42 U.S.C. § 2000e-2(m) (2006) and § 2000e-5(g)(2)(B) (2006). However, where the employer demonstrates that the same decision would have been made in the absence of the impermissible factor, relief is limited. *Id.*

85. See, e.g., *Materra v. JPMorgan Chase Corp.*, 740 F.Supp.2d 561, 578 n. 13 (S.D.N.Y. 2010) (discussing the issue); *Rasic v. City of Northlake*, 2009 WL

As with Title VII retaliation cases, ADEA plaintiffs alleging retaliation may utilize the indirect proof scheme under *McDonnell Douglas* and establish a *prima facie* case by showing (a) they engaged in protected activity, (b) an adverse employment action followed the protected activity, and (c) a causal link between the protected activity and the adverse employment action.⁸⁶ If the defendant articulates a legitimate, non-retaliatory reason for the challenged action,⁸⁷ then the plaintiff must show that the articulated reason was a pretext for retaliation.⁸⁸ A plaintiff alleging retaliation in violation of the ADEA can also utilize the direct method by presenting direct or circumstantial evidence of retaliation.⁸⁹

The enforcement scheme for retaliation cases based on the ADEA is similar to that for Title VII cases. A victim of retaliation should file a charge with the EEOC.⁹⁰ The charging party has ninety days after receipt of notice from the EEOC, indicating the charge has been dismissed or otherwise terminated, to file a civil action.⁹¹ The charging party does not have to wait for the notice of right-to-sue or notice of dismissal from the EEOC before filing a lawsuit.⁹² The ADEA authorizes civil actions “for such legal or equitable relief as will effectuate [its] purposes,”⁹³ and it provides that it “shall be enforced in accordance with the powers, remedies, and procedures provided in [the Fair Labor Standards Act].”⁹⁴ While the ADEA does not

3150428 at *17 (N.D. Ill. Sept. 25, 2009) (*Gross* requires but-for causation in ADEA retaliation cases). *But see* *Smith v. Xerox Corp.*, 602 F.3d 320, 328-30 (5th Cir. 2010) (holding *Gross* does not control a Title VII retaliation claim).

86. *See, e.g.*, *Horowitz v. Bd. of Educ.*, 260 F.3d 602, 612 (7th Cir. 2001); *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 n.8 (5th Cir. 1998). Plaintiffs frequently attempt to establish the causal link by showing temporal proximity between the protected activity and the retaliatory action. *See, e.g.*, *Spengler v. Worthington’s Cyclinders*, 615 F.3d 481, 492–95 (6th Cir. 2010) (in some circumstances, temporal proximity combined with other evidence of retaliation is sufficient to establish a causal connection).

87. *See, e.g.*, *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 546–51 (6th Cir. 2008).

88. *Id.* *See also* *Bayless v. Ancilla Domini Coll.*, 2011 WL 690273, at *20 (N.D. Ind. Feb. 15, 2011).

89. *See, e.g.*, *Wright v. Southland Corp.*, 187 F.3d 1287, 1305-06 (11th Cir. 1999).

90. 29 U.S.C. § 626(d)(1) (2006 & Supp. III 2009).

91. 29 U.S.C. § 626(e) (2006).

92. 29 U.S.C. § 626(d)(1) (2006 & Supp. III 2009); 29 C.F.R. § 1626.18(b) (2011) However, one must wait until sixty days after filing a charge with the EEOC. *Id.*

93. 29 U.S.C. § 626(c)(1) (2006).

94. 29 U.S.C. § 626(b) (2006), which incorporates 29 U.S.C. §§ 211(b) (2006), 216 (except subsection a) (2006 & Supp. III 2009), and 217 (2006).

provide for the full range of compensatory damages,⁹⁵ consequential damages may be available in ADEA cases alleging retaliation.⁹⁶ Reinstatement is the preferred remedy under the ADEA, but trial courts have the discretion to award front pay where reinstatement is impracticable or impossible.⁹⁷ Liquidated damages may be awarded in cases of willful violations.⁹⁸ A prevailing plaintiff under the ADEA may obtain an award of attorney fees.⁹⁹

A separate section of the ADEA¹⁰⁰ addresses age discrimination in federal employment, but the section does not address retaliation. Recently the Court, in *Gomez-Perez v. Potter*,¹⁰¹ held that § 633a(a) prohibits retaliation against a federal employee who complains of age discrimination. After indicating that the “key question in this case is whether the statutory phrase ‘discrimination based on age’ includes retaliation based on the filing of an age discrimination complaint,”¹⁰² the Court relied upon its reasoning in *Sullivan*¹⁰³ and *Jackson*¹⁰⁴ and the similarity of the statutory language involved in those two cases when compared with the provision of the ADEA at issue.¹⁰⁵

C. Americans with Disabilities Act

The ADA is similar to Title VII and the ADEA in that it includes a broad prohibition of retaliation, with both opposition and participation clauses.¹⁰⁶ This broad prohibition of retaliation, found in Title IV of the ADA, applies to efforts to enforce all three of the substantive titles of the ADA, which prohibit discrimination in employment (Title I),¹⁰⁷ public services provided by public entities (Title II),¹⁰⁸ and public accommodations provided by private entities

95. See, e.g., *Collazo v. Nicholson*, 535 F.3d 41, 44–45 (1st Cir. 2008); *Moskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279, 283–84 (7th Cir. 1993).

96. See, e.g., *Moskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279, 283–84 (7th Cir. 1993); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111–12 (7th Cir. 1990).

97. See, e.g., *Abuan v. Level 3 Commc’ns, Inc.*, 353 F.3d 1158, 1176–80 (10th Cir. 2003); *Julian v. City of Houston, Tex.*, 314 F.3d 721, 728–30 (5th Cir. 2002); *Cox v. Dubuque Bank & Trust Co.*, 163 F.3d 492, 498–99 (8th Cir. 1998).

98. 29 U.S.C. § 626(b) (2006). See also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

99. 29 U.S.C. § 216(b) (2006), incorporated by 29 U.S.C. § 626(b) (2006).

100. 29 U.S.C. § 633a (2006 & Supp. III 2009). While this section is unlikely to be the basis for a claim against educational institutions, it is included here because of the decision in *Gomez-Perez, infra*, n.101.

101. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).

102. *Id.* at 479.

103. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

104. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

105. *Gomez-Perez*, 553 U.S. at 479–80.

106. 42 U.S.C. § 12203(a) & (b) (2006).

107. 42 U.S.C. § 12111, et seq. (2006 & Supp. III 2009).

108. 42 U.S.C. § 12131, et seq. (2006).

(Title III),¹⁰⁹ but the enforcement scheme may be different for each of the Titles.¹¹⁰ Due to the broad scope of the ADA, the anti-retaliation provision is available to address protected activity arising in a variety of circumstances in colleges or universities.

Title I of the ADA defines “discriminate” in employment contexts to include “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.”¹¹¹ Neither Title VII nor the ADEA contains a comparable provision. The scope of this provision is demonstrated by the relevant EEOC regulation,¹¹² which uses as an example an employer that refuses to hire an applicant, whose spouse has a disability, because the employer believes the applicant would have to miss work or frequently leave work early to care for the spouse. While § 12112(b)(4) is part of the prohibition against discrimination, since it addresses any actions taken based on one’s “relationship or association,” it can also be viewed as addressing a form of retaliation.

The enforcement scheme for employment-related retaliation under the ADA adopts the Title VII “powers, remedies, and procedures.”¹¹³ Enforcement of Title II of the ADA, which addresses discrimination and retaliation in public services, is in accordance with the “remedies, procedures, and rights set forth in section 794a.”¹¹⁴ Enforcement of Title III of the ADA, which addresses discrimination and retaliation in public accommodations and services operated by private entities, is in accordance with the “remedies and procedures set forth in section 2000a-3(a),”¹¹⁵ which provides for “preventive relief” but not damages. Only Title I of the ADA, which adopts the Title VII enforcement scheme, is enforced by the EEOC. One who alleges retaliation

109. 42 U.S.C. § 12181, et seq. (2006 & Supp. III 2009).

110. *See* 42 U.S.C. § 12203(c) (2006). This provision adopts the “remedies and procedures” available to address discrimination under each of the Titles. *See also* Datto v. Harrison, 664 F. Supp. 2d 472, 486–92 (E.D. Pa. 2009).

111. 42 U.S.C. § 12112(b)(4) (2006 & Supp. III 2009).

112. 29 C.F.R. § 1630.8 (2010).

113. 42 U.S.C. § 12117 (2006 & Supp. III 2009) (referring to several sections of Title VII).

114. 42 U.S.C. § 12133 (2006), which refers to 29 U.S.C. § 794a. *See infra* Part I.E.3.

115. 42 U.S.C. § 12188(a) (2006), which refers to 42 U.S.C. § 2000a-3(a) (Title II of the Civil Rights Act of 1964). A civil action under § 2000a-3(a) cannot be brought until thirty days after written notice has been given to the “appropriate State or local authority,” if there is such an authority. 42 U.S.C. § 2000a-3(c) (2006).

for employment-related protected activity will have to file a retaliation charge with the EEOC before litigating the claim.¹¹⁶

D. Equal Pay Act

While the EPA applies to all employers that have employees “engaged in commerce” or “in the production of the goods for commerce,”¹¹⁷ it addresses only sex discrimination in wages.¹¹⁸ Because the EPA is part of the FLSA, the retaliation provision of the FLSA applies.¹¹⁹ Since 1979, the EEOC has had the power to enforce the EPA.¹²⁰ However, unlike Title VII, the ADEA, and the ADA, an employee challenging wage discrimination based on the EPA is not required to file a charge with the EEOC before pursuing litigation.¹²¹ The FLSA makes it unlawful for any person:

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.¹²²

Until recently, it was not clear whether internal, informal complaints made to a supervisor constitute protected activity under § 215(a)(3).¹²³ This was clarified when the Court in *Kasten* interpreted the provision more broadly and held it applies to oral as well as written complaints.¹²⁴ All appropriate legal

116. *See, e.g.*, *Farlin v. Library Store, Inc.*, 2010 WL 375236 at *5 (C.D. Ill. Jan. 25, 2010); *Lesikar v. Frymaster, LLC*, 2005 WL 3359178 at *3–4 (W.D. La. Dec. 8, 2005).

117. 29 U.S.C. § 206(a) (2006 & Supp. III 2009).

118. 29 U.S.C. § 206(d)(1) (2006).

119. 29 U.S.C. § 215(a)(3) (2006).

120. *See* 43 Fed. Reg. 19807 (1978), and P.L. No. 98-532, 98 Stat. 2705 (1984) (passed to address constitutional concerns about the Reorganizational Plan of 1978).

121. 29 U.S.C. § 216(b) (2006). *See also* *Washington Cnty. v. Gunther*, 452 U.S. 161, 168 (1981).

122. 29 U.S.C. § 215(a)(3) (2006). *See, e.g.*, *E.E.O.C. v. SunDance Rehab. Corp.*, 466 F.3d 490, 496 (6th Cir. 2006); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 547–48 (7th Cir. 1991); *E.E.O.C. v. White & Son Enter.*, 881 F.2d 1006, 1010 (11th Cir. 1989); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984).

123. *See, e.g.*, *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (anti-retaliation provision does not encompass informal complaints made to a supervisor). *Compare* *Moore v. Freeman*, 355 F.3d 558, 563–64 (6th Cir. 2004), *with* *E.E.O.C. v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. (1992).

124. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (holding that the anti-retaliation provision in the FLSA, 29 U.S.C. § 215(a)(3), prohibiting discrimination against any employee who has “filed any

and equitable relief, including liquidated damages, is available to a plaintiff who proves retaliation.¹²⁵

E. Federal Financial Assistance

Here I discuss four federal provisions—Title VI of the Civil Rights Act of 1964,¹²⁶ Title IX of the Education Amendments of 1972,¹²⁷ Section 504 of Title V of the Rehabilitation Act of 1973,¹²⁸ and the Age Discrimination Act¹²⁹—of significance to institutions of higher education that are recipients of federal financial assistance. Unlike Title VII, the ADEA, and the EPA, the federal financial assistance laws are not limited to employment discrimination. Title VI prohibits discrimination on the basis of race, color, or national origin by any recipient of federal financial assistance. It has been used extensively in the context of higher education, although its application to employment discrimination is limited to situations where the primary purpose of federal financial assistance is to provide employment.¹³⁰ Title IX prohibits sex discrimination by educational institutions receiving federal financial assistance. Section 504 provides that “[n]o otherwise qualified individual with a disability” can be excluded from or denied the benefits of any program or activity receiving federal financial assistance “solely by reason of her or his disability.”¹³¹ The Age Discrimination Act states “no person . . . shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”¹³²

These provisions are an important part of the antidiscrimination landscape because most higher education institutions receive federal financial assistance. None of these statutes expressly addresses retaliation, although the Rehabilitation Act refers to § 12203¹³³ of the ADA in stating that the “standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the [ADA].”¹³⁴

complaint,” protects employees who file an oral complaint as well as those who file a written complaint).

125. 29 U.S.C. § 216(b) (2006).

126. 42 U.S.C. § 2000d, et seq. (2006).

127. 20 U.S.C. § 1681, et seq. (2006).

128. 29 U.S.C. § 794, et seq. (2006).

129. 42 U.S.C. § 6101, et seq. (2006).

130. 42 U.S.C. § 2000d-3 (2006).

131. 29 U.S.C. § 794(a) (2006).

132. 42 U.S.C. § 6102 (2006).

133. 42 U.S.C. § 12203 (2006).

134. 29 U.S.C. § 794(d) (2006).

1. Title VI of the Civil Rights Act of 1964

The U.S. Department of Education adopted a regulation providing that: [n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act . . . , or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.¹³⁵

At least one court has held that this regulation is an interpretation of Section 601's core antidiscrimination mandates.¹³⁶ As a result, Section 601 provides a private right of action to enforce this anti-retaliation provision.¹³⁷ In *Alexander v. Sandoval*,¹³⁸ the Court held that there is no private right of action to enforce disparate impact regulations designed to implement Title VI because Title VI does not "display an intent to create a freestanding private right of action to enforce regulations promulgated under section 602."¹³⁹ Applying *Sandoval*, the court in *Peters* concluded that the retaliation regulations found in § 100.7(e) are enforceable through Section 601 *only* to the extent that "they forbid retaliation for opposing practices that one reasonably believes are made unlawful by section 601," *i.e.*, intentional discrimination.¹⁴⁰ Thus, according to *Peters*, to the extent the regulation forbids retaliation for opposing actions with a disparate impact, "the regulations may not be enforced either via the section 601 private right of action or § 1983."¹⁴¹

In sum, based on *Sandoval* and *Peters*, victims of retaliation by institutions of higher education have a private right of action, based on Section 601 of Title VI, to enforce Section 100.7(e) of the DOE regulations, but only if the retaliatory acts were in response to opposition to or participation in efforts aimed at addressing intentional discrimination in violation of Title VI. There may be other avenues of relief based on *Jackson*¹⁴² or on the First

135. 34 C.F.R. § 100.7(e) (2011). *See also* 34 C.F.R. § 106.71 (2011) (incorporating § 100.7(e) by reference to enforce Title IX).

136. 42 U.S.C. § 2000d (2006) (stating, "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.").

137. *Peters v. Jenney*, 327 F.3d 307, 316–21 (4th Cir. 2003).

138. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

139. *Id.* at 293, referring to 42 U.S.C. § 2000d-1.

140. *Peters*, 327 F.3d at 319.

141. *Id.* at 319. According to the Court in *Peters*, the Court in *Sandoval* did not decide whether Title VI regulations could be enforced through § 1983.

142. *See infra* Part I.E.2. (discussing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)).

Amendment,¹⁴³ that apply to public colleges and universities. Because of the limited number of cases alleging retaliation in violation of Title VI,¹⁴⁴ the method of proof is not well established. However, the court in *Peters* provided some guidance for the lower court on remand, relying heavily on Title VII precedent.

According to *Peters*, the plaintiff “most show (1) that she engaged in protected activity; (2) that [the defendants] took a material adverse employment action against her, and (3) that a causal connection existed between the protected activity and the adverse action.”¹⁴⁵ The court recognized that retaliation plaintiffs may utilize either the indirect, burden-shifting scheme adopted in *McDonnell Douglas* or the direct method.¹⁴⁶ As in retaliation claims under other civil rights statutes, Title VI plaintiffs must show only that they “opposed an unlawful employment practice which [they] reasonably believed had occurred or was occurring,” i.e., the inquiry is whether plaintiffs have a good faith belief that the defendant engaged in a practice that violates Section 601 of Title VI and whether the belief was objectively reasonable in light of the circumstances.¹⁴⁷ The court also noted that “[o]ppositional activities are not protected unless they are proportionate and reasonable under the circumstances.”¹⁴⁸

Victims of retaliation by educational institutions may file a written complaint with the U.S. Department of Education (DOE), Office of Civil Rights (OCR), within 180 days from the date of the alleged discrimination or retaliation.¹⁴⁹ Such complaints will be investigated and, if the investigation reveals a failure to comply with Title VI and implementing regulations, the OCR will attempt to resolve the matter by informal means.¹⁵⁰ If that fails, formal enforcement proceedings can be initiated in accordance with DOE

143. See *infra* Part II.

144. *But see* *Hickey v. Myers*, 2010 WL 786459 (N.D.N.Y.). See also *Kimmel v. Gallaudet University*, 639 F. Supp. 2d 34, 42–43 (D.C. Cir. 2009); *Bisong v. Univ. of Houston*, 493 F. Supp. 2d 896, 911–15 (S.D. Tex. 2007); *Johnson v. Galen Health Inst., Inc.*, 267 F. Supp. 2d 679, 690 (W.D. Ky. 2003) (recognizing there is an implied private cause of action for retaliation under Title VI of the Civil Rights Act of 1964); *Franks v. Ross*, 293 F. Supp. 2d 599, 605 (E.D. N.C. 2003) (recognizing there is an implied private cause of action for retaliation under Title VI); *Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017, 1018 (D. S.D. 2003) (recognizing there is an implied private cause of action for retaliation under Title VI).

145. *Peters*, 327 F.3d at 320.

146. *Id.* at 321 n.15.

147. *Id.* at 320–21.

148. *Id.* at 321 n.16.

149. 34 C.F.R. § 100.7(b) (2011).

150. 34 C.F.R. § 100.7(c) (2011). Such complaints are not limited by the *Peters* private right of action analysis, i.e., they may include retaliation for opposing disparate impact discrimination.

regulations.¹⁵¹ Ultimately, these proceedings can result in loss of federal financial assistance,¹⁵² but before that happens the institution is entitled to a hearing¹⁵³ and it may seek judicial review if it is not satisfied with the results of the hearing.¹⁵⁴

Exhaustion of the administrative remedies described above is not required.¹⁵⁵ Instead, individuals alleging discrimination or retaliation in violation of Title VI can go directly to court based on an implied right of action, initially recognized by the Court in a Title IX case¹⁵⁶ and subsequently extended to Title VI.¹⁵⁷ The proof scheme is discussed above¹⁵⁸ and the court may award equitable relief,¹⁵⁹ compensatory damages upon a showing of intentional discrimination,¹⁶⁰ as well as attorney fees.¹⁶¹

151. 34 C.F.R. § 100.8 (2011).

152. 34 C.F.R. § 100.8(b) (2011).

153. 34 C.F.R. §§ 100.8(c)–100.9 (2011).

154. 42 U.S.C. § 2000d-2 (2006); 34 C.F.R. § 100.11 (2011).

155. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 706 (1979) (Title IX); *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1015 (6th Cir. 1989) (Title VI).

156. *Cannon*, 441 U.S. at 699 (interpreting Title IX, 20 U.S.C. § 1681, et seq.).

157. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610–11 (1983). *See also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (holding that only Congress, not administrative agencies, can authorize causes of action; absent such congressional authorization there is no implied right of action to enforce a Title VI regulation); *Peters v. Jenney*, 327 F.3d 307, 316–19 (4th Cir. 2003) (applying *Sandoval*; concluding there is an implied right of action to enforce 34 C.F.R. § 100.7(e) insofar as the institution retaliated “for opposing practices that one reasonably believes are made unlawful by § 601” of Title VI).

158. *See supra* text accompanying notes 144–48.

159. *Guardians Ass'n*, 463 U.S. at 604–06 (allowing prospective, noncompensatory equitable relief in a disparate impact case); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (allowing equitable relief in the form of back pay upon a showing of intentional discrimination in violation of § 504 of the Rehabilitation Act); *Adams v. Richardson*, 480 F.2d 1159, 1165–65 (D.C. Cir. 1973) (affirming broad injunctive relief against federal agency).

160. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992) (Title IX case stating the general rule that absent clear direction to the contrary by Congress, where there is a cause of action under a federal statute the federal courts have the power to award any appropriate relief). *See also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198 (11th Cir. 2007) (non-economic compensatory damages are available for intentional violations of the Rehabilitation Act § 504 claims); *Rodgers v. Magnet Cove Pub. Sch.*, 34 F.3d 642, 643–44 (8th Cir. 1994) (applying *Franklin* and holding that money damages are available for § 504 violations); *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994) (finding that *Franklin* permitted compensatory damages for § 504 claims). A later § 504 case, *Barnes v. Gorman*, 536 U.S. 181, 187–88 (2002), precluded punitive damages against public entities, indicating such damages should not be implied because it is doubtful the funding recipients “would have *accepted the funding* if

2. Title IX of the Education Amendments of 1972

Title IX prohibits sex discrimination in any education program or activity receiving federal financial assistance.¹⁶² In *Jackson v. Birmingham Board of Education*,¹⁶³ the Court concluded “that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.”¹⁶⁴ Therefore, Jackson, a teacher who alleged the school board retaliated against him because he had complained of sex discrimination in the high school’s athletic program, was allowed to proceed with his retaliation claim based on Title IX. Rejecting an argument based on *Sandoval*, the Court said “[i]n step with *Sandoval*, we hold that Title IX’s private right of action encompasses suits for retaliation, because retaliation falls within the statute’s prohibition of intentional discrimination on the basis of sex.”¹⁶⁵ The Court also rejected the board’s argument that Jackson could not rely on Title IX because he is an indirect victim of the alleged sex discrimination, holding that Title IX “does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.”¹⁶⁶

In reaching its conclusion, the Court pointed to four previous Title IX decisions—*Cannon v. University of Chicago*,¹⁶⁷ holding Title IX implies a

punitive damages liability was a required condition.” *Id.* See also *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1191 (11th Cir. 2007) (finding that punitive damages are not available under the Rehabilitation Act under *Barnes*); *Bell v. Bd. of Educ. of Albuquerque Pub. Sch.*, 652 F. Supp. 2d 1211, 1212–14 (D. N.M. 2008) (emotional stress damages, like punitive damages, are not compensatory, therefore, they are not available under Title VI); *Singh v. Superintending Sch. Comm. for City of Portland*, 601 F. Supp. 865, 867 (D. Me. 1985) (punitive damages claim based on Title VI dismissed).

161. See 42 U.S.C. § 1988(b) (2006).

162. 20 U.S.C. § 1681, et seq (2006).

163. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

164. *Jackson*, 544 U.S. at 174. See also 34 C.F.R. § 106.71 (2011) (incorporating 34 C.F.R. § 100.7(e) by reference to enforce Title IX); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (Title IX regulations incorporate Title VI regulation prohibiting retaliation); *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247–54 (5th Cir. 1997) (Title IX regulation creates implied right of action for retaliation under Title IX where retaliation is for allegations of noncompliance with substantive provisions of Title IX, such as systematic misallocation of resources among male and female athletes, and teacher/coach who complained of this misallocation has standing to challenge the alleged retaliation against her).

165. *Jackson*, 544 U.S. at 178. See also *Atkinson v. Lafayette Coll.*, 460 F.3d 447, 451–52 (3d Cir. 2006) (based on *Jackson*, the court reversed the dismissal of the plaintiff’s Title IX retaliation claim).

166. *Id.* at 179.

167. 441 U.S. 677 (1979).

private right of action to enforce the prohibition on intentional sex discrimination; *Franklin v. Gwinnett County Public Schools*,¹⁶⁸ holding that Title IX authorizes private parties to seek damages for intentional violations of Title IX; *Gebser v. Lago Vista Independent School District*,¹⁶⁹ holding that the private right of action under Title IX “encompasses intentional sex discrimination in the form of a recipient’s deliberate indifference to a teacher’s sexual harassment of a student”;¹⁷⁰ and *Davis v. Monroe County Board of Education*,¹⁷¹ holding that the private right of action under Title IX reaches a recipient’s deliberate indifference to sexual harassment of one student by another student—as support for a broad interpretation of Title IX’s prohibition on discrimination on the basis of sex.¹⁷² The Court stated that retaliation constitutes discrimination “on the basis of sex” because it is an intentional response to the nature of the complaint, i.e., an allegation of sex discrimination.¹⁷³

Jackson is consistent with several other decisions holding that retaliation is a form of discrimination. Just before Title IX was enacted in 1972, the Court in *Sullivan v. Little Hunting Park, Inc.*,¹⁷⁴ held that § 1982,¹⁷⁵ which prohibits race discrimination in property-related transactions, provides a cause of action for anyone, regardless of his or her race, who alleges retaliation “for the advocacy of [the black person’s] cause.”¹⁷⁶ More recently, in *Gomez-Perez v. Potter*,¹⁷⁷ the Court held that § 633a(a)¹⁷⁸ of the ADEA prohibits retaliation against a federal employee who complains of age discrimination because “the statutory phrase ‘discrimination based on age’ includes retaliation based on the filing of an age discrimination complaint.”¹⁷⁹ In reaching this conclusion, the Court relied upon *Sullivan* and *Jackson*. Finally, in *CBOCS West, Inc. v. Humphries*, the Court held that § 1981,¹⁸⁰ which prohibits race discrimination in contracting, also prohibits retaliation against one seeking to enforce § 1981 rights.¹⁸¹

168. 503 U.S. 60 (1992).

169. 524 U.S. 274 (1998).

170. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005).

171. 526 U.S. 629 (1999).

172. *Jackson*, 544 U.S. at 173–74.

173. *Id.* at 174. See also *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 91–93 (2d Cir. 2011); *Atkinson v. LaFayette Coll.*, 460 F.3d 447, 452 (3d Cir. 2006); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 374 (W.D. Pa. 2008).

174. 396 U.S. 229 (1969).

175. 42 U.S.C. § 1982.

176. *Sullivan*, 396 U.S. at 237.

177. 553 U.S. 474 (2008).

178. 29 U.S.C. § 633a(a) (2006).

179. 553 U.S. at 479 (2008).

180. 42 U.S.C. § 1981 (2006).

181. 553 U.S. 442 (2008).

Jackson is important, not only for its recognition that Title IX addresses retaliation, but also because it recognizes the importance of prohibiting retaliation as a means of encouraging enforcement of antidiscrimination provisions. The Court indicated that “if retaliation were not prohibited, Title IX’s enforcement scheme would unravel,” and that, without such protection from retaliation, “individuals who witness discrimination would likely not report it.”¹⁸² Because the Title IX enforcement scheme depends on individual reporting as a means of placing recipients of federal financial assistance on “actual notice” of discrimination, to allow recipients to avoid such notice by retaliating against those who dare complain would subvert enforcement of the statute. The Court was unwilling to “assume that Congress left such a gap in its scheme.”¹⁸³

While the Court in *Jackson* did not have to address the proof scheme, it did note that “*Jackson* will have to prove that the Board retaliated against him *because* he complained of sex discrimination.”¹⁸⁴ There is no reason to believe that plaintiffs will not be allowed to use both the direct method of proof and the indirect method established in *McDonnell Douglas* in attempting to establish retaliation claims.¹⁸⁵ In general, the enforcement scheme as well as the available relief is consistent with the Title VI scheme and relief.¹⁸⁶

3. Section 504 of the Rehabilitation Act of 1973

As pointed out above,¹⁸⁷ Section 12203 of the ADA expressly prohibits retaliation.¹⁸⁸ Section 504 provides that the “standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I

182. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

183. *Id.* at 181.

184. *Id.* at 184.

185. *See, e.g., Atkinson v. Lafayette Coll.*, 653 F. Supp. 2d 581, 594–611 (E.D. Pa. 2009).

186. *See supra* Part I.E.1. *See also* *Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 728–30 (7th Cir. 2009) (holding that a teacher’s reassignment from twelfth-grade English to seventh-grade English would not dissuade a reasonable teacher from bringing a discrimination charge against the school corporation and, therefore, the reassignment is not a materially adverse employment action); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995) (by analogy to Title VII cases, the court finds allegations of retaliation, lacking in particular circumstances supporting inference of retaliation, insufficient to state a claim). *Compare* *Bolla v. Univ. of Haw.*, 2010 WL 5388008, at *9–14 (D. Haw. Dec. 16, 2010) (court looks to Title VII cases for guidance).

Title IX regulations adopted by the U.S. Department of Education incorporate Title VI regulations. 34 C.F.R. § 106.71 (2011).

187. *See supra* Part I.C.

188. 42 U.S.C. § 12203 (2006).

of the [ADA].”¹⁸⁹ The courts interpret this reference to Section 12203 of the ADA as incorporating by reference the substantive ban on retaliation found in Section 12203(a) and (b).¹⁹⁰ Assuming this is a fair reading of Section 794(d), the incorporation of Section 12203 of the ADA is limited to employment.¹⁹¹ Parties litigating claims alleging retaliation in violation of § 504 should look to cases interpreting Section 12203 of the ADA, which often rely on cases interpreting the anti-retaliation provision in Title VII.¹⁹² Courts addressing claims of retaliation in violation of § 504 have applied *Burlington Northern*¹⁹³ to such retaliation claims.¹⁹⁴

Retaliation claims based on § 504 are not limited to the employment context. A regulation adopted pursuant to § 504¹⁹⁵ incorporates the Title VI regulation¹⁹⁶ that prohibits retaliation. The all-inclusive language of the regulation, as well as § 504, supported a determination that a special education teacher had standing to challenge retaliation against her for voicing concerns that the County Office of Education was not complying with federal and state laws requiring special education services for children with a disability.¹⁹⁷ In addition, the teacher was allowed to pursue her retaliation claim based on Title II of the ADA.¹⁹⁸ In an action brought by a parent on

189. 29 U.S.C. § 794(d) (2006) specifically refers to §§ 12201–12204 and 12210 of the ADA and one of those sections, § 12203, addresses retaliation.

190. *See, e.g.*, *Reinhardt v. Albuquerque Pub. Schs. Bd.*, 595 F.3d 1126, 1132 (10th Cir. 2010); *Jarvis v. Potter*, 500 F.3d 1113, 1125–27 (10th Cir. 2007) (holding that although the Rehabilitation Act’s prohibition on discrimination does not explicitly mention retaliation, because of the references to the ADA in § 504, the Rehabilitation Act prohibits retaliation).

191. *See* 29 U.S.C. § 794(d) (2006), which refers to “a complaint alleging employment discrimination.”

192. *See, e.g.*, *Blazquez v. Bd. of Educ. of City of Chicago*, 2006 WL 3320538, at *5 (N.D. Ill.) (teacher alleging § 504 retaliation claim against private individuals was dismissed, but upheld against Board of Education); *Smith v. District of Columbia*, 430 F.3d 450, 455 (D.C. Cir. 2005); *Cisneros v. Wilson*, 226 F.3d 1113, 1132–34 (10th Cir. 2000).

193. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

194. *See, e.g.*, *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166 (D.C. Cir. 2010); *Reinhardt v. Albuquerque Pub. Schs. Bd. of Educ.*, 595 F.3d 1126, 1131–35 (10th Cir. 2010).

195. 34 C.F.R. § 104.61 (2011).

196. 34 C.F.R. § 100.7(e) (2011).

197. *See* *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824–26 (9th Cir. 2009) (Congress did not intend to limit standing to only those with a disability).

198. *Id.* at 826–28 (the anti-retaliation provision of Title II of the ADA is found in a regulation, 28 C.F.R. § 35.134). *See also* *P.N. v. Greco*, 282 F.Supp.2d 221, 242–44 (D.N.J. 2003) (relying on the ADA retaliation provision, 42 U.S.C. § 12203, in an action by parents alleging retaliation for advocacy on behalf of their child and other students and requesting accommodations for their child).

behalf of her son with a disability, alleging retaliation in violation of § 504, the court indicated that she had to prove her son had engaged in protected activity, that the actions of the defendant were “sufficient to deter a person of ordinary firmness from exercising his rights,” and that a causal connection between the protected activity and the retaliatory action.¹⁹⁹ Thus, § 504 is available to anyone affiliated with a college or university who challenges action taken in retaliation for efforts to address discrimination based on a disability.

4. Age Discrimination Act of 1975

The purpose of this Act is “to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance.”²⁰⁰ More specifically, the Act provides that “no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”²⁰¹ An exemption provides that it is not a violation of the Act:

[f]or any person to take any action otherwise prohibited by the provisions of § 6102 . . . if, in the program or activity involved—
(A) such action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity; or (B) the differentiation made by such action is based upon reasonable factors other than age.²⁰²

There is also an exclusion for employment practices.²⁰³ Consistent with the federal financial assistance acts discussed above, the federal agencies providing the financial assistance have enforcement power.²⁰⁴ In addition, the Act provides for civil actions in a United States district court, at least for injunctive relief after exhaustion of administrative remedies.²⁰⁵

199. *See* S.L.M., ex rel. Liedtke v. Dieringer School Dist., 614 F. Supp. 2d 1151, 1162 (W.D. Wash. 2008) (quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) (requesting accommodation is protected activity)).

200. 42 U.S.C. § 6101 (2006).

201. 42 U.S.C. § 6102 (2006). *See also* 45 C.F.R. § 90.12 (2011).

202. 42 U.S.C. § 6103(b)(1) (2006). *See also* 45 C.F.R. §§ 90.14 & 90.15 (2010).

203. 42 U.S.C. § 6103(c) (2006). *See also* 45 C.F.R. § 90.3(b)(2) (2010); *Tyrell v. City of Scranton*, 134 F. Supp. 2d 373, 381–82 (M.D. Pa. 2001).

204. 42 U.S.C. § 6104(a)–(c) (2006). *See also* 45 C.F.R. §§ 90.42–90.45 & 90.47 (2010).

205. 42 U.S.C. § 6104(e)–(f) (2006). *See also* 45 C.F.R. § 90.50 (2010); *Rannels v. Hargrove*, 731 F. Supp. 1214, 1221 (E.D. Pa. 1990). However, there is no private right of action for damages. *See Tyrell*, 134 F. Supp. 2d at 383–84 (interpreting 42 U.S.C. § 6104).

While the statute does not address retaliation, it is addressed in a federal regulation, which says:

Each agency shall provide in its regulations that recipients may not engage in acts of intimidation or retaliation against any person who: (a) attempts to assert a right protected by the Act; or (b) cooperates in any mediation, investigation, hearing, or other part of the agency's investigation, conciliation, and enforcement process.²⁰⁶

Consistent with *Jackson v. Birmingham Board of Education*,²⁰⁷ a victim of retaliation can argue that such retaliation constitutes discrimination in violation of § 6102.²⁰⁸ Litigants should look to retaliation cases based on the other federal financial assistance statutes discussed above in Part I.E.1–3.

F. Race Discrimination in Contracting and Property Transactions (§§ 1981–1982)

These two Reconstruction Era provisions address only race discrimination, and “race” is defined broadly, but it does not include discrimination based solely on one’s place or nation of origin or religion.²⁰⁹ Section 1981(a) provides that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”²¹⁰ In *Runyon v. McCrary*,²¹¹ the Court held that § 1981 prohibits private schools from excluding qualified children solely because of their race. Section 1982 provides that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase,

206. 45 C.F.R. §90.46 (2010). Whether there is a private right of action to enforce such a regulation is discussed in Part I.E.1, *supra*.

207. 544 U.S. 167 (2005). See discussion in Part I.E.2, *supra*.

208. 42 U.S.C. § 6102 (2006).

209. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (holding that the discriminatory animus must be “directed towards the kind of group that Congress intended to protect when it passed the statute”); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987). See also *Torgerson v. City of Rochester*, 605 F.3d 584, 600 (8th Cir. 2010) (noting that § 1981 does not encompass discrimination claims based on national origin); see also *Bachman v. St. Monica’s Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990) (Jewish couple’s claim of discrimination while attempting to buy property was not actionable under § 1981 solely because being Jewish is also a race when the claim was obviously rooted in discrimination based on religion); *Anooya v. Hilton Hotels Corp.*, 773 F.2d 48, 50 (7th Cir. 1984) (noting that § 1981 does not protect against religious discrimination); *Ahmed v. Mid-Columbia Med. Ctr.*, 673 F. Supp. 2d 1194, 1204 (D. Or. 2009) (§ 1981 protects individuals only from discrimination based on race and was not applicable to plaintiff’s claims based on religion; specifically, comments made about halal food were not actionable).

210. 42 U.S.C. § 1981(a) (2006).

211. 427 U.S. 160 (1976).

lease, sell, hold, and convey real and personal property.”²¹² Like the funding statutes discussed above, neither of these two statutes includes an express prohibition of retaliation.

The Court first considered the retaliation issue under these statutes in *Sullivan v. Little Hunting Park, Inc.*, an action based on § 1982, noting that to permit the corporation to punish Sullivan “for trying to vindicate the rights of minorities protected by § 1982” would give “impetus to the perpetuation of racial restrictions on property.”²¹³ Later, in *Jackson v. Birmingham Board of Education*, the Court said “in *Sullivan* we interpreted a general prohibition on racial discrimination [in § 1982] to cover retaliation against those who advocate the rights of groups protected by that prohibition.”²¹⁴ When the Court first considered a retaliation claim based on § 1981, in *CBOCS West, Inc. v. Humphries*, the Court indicated it had consistently construed §§ 1981 and 1982 similarly because of the “common language, origin, and purposes.”²¹⁵ The Court concluded by saying “that considerations of *stare decisis* strongly support our adherence to *Sullivan* and the long line of related cases where we interpret §§ 1981 and 1982 similarly. . . . We consequently hold that [§ 1981] encompasses claims of retaliation.”²¹⁶

The combination of *Sullivan* and *CBOCS* makes it apparent that both § 1981 and § 1982 address retaliation as a form of race discrimination. There is no requirement that plaintiffs alleging a violation of either of these sections exhaust administrative remedies. Generally, the relevant state’s personal injury limitations period governs litigation under §§ 1981 and 1982.²¹⁷ However, in employment-related cases, because most retaliation claims arise after the formation of the employment contract, the four-year statute of limitations set forth in 28 U.S.C. § 1658 will govern retaliation claims under § 1981.²¹⁸

212. 42 U.S.C. § 1982 (2006).

213. 396 U.S. 229, at 237 (1969). A few years later, in *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 410 U.S. 431, 439–40 (1973), where an action was challenging the operation of a community swimming pool, the use of which was limited to white members and their guests, the Court noted the common origin of §§ 1981 and 1982 and saw no reason to construe the two sections differently in rejecting the Association’s argument that it was exempt from those sections as a “private club.”

214. 544 U.S. 167, at 176 (2005).

215. 553 U.S. 445, 448 (2009).

216. *Id.* at 457. In *Delgado-O’Neil v. City of Minneapolis*, 745 F. Supp 2d. 894 (D. Minn.), the court held that *CBOCS* did not involve a state actor and, therefore, where the employer is a state actor a retaliation claim under § 1981 must be brought pursuant to § 1983.

217. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

218. See *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369 (2004); *Johnson v. Lucent Technologies*, 6353 F.3d 1000, 1006–08 (9th Cir. 2011) (plaintiff’s §1981 retaliation claim is governed by the four-year limitations period in § 1658).

Private colleges and universities are subject to the restrictions imposed by §§ 1981 and 1982 because there is no government action requirement in either of those statutes.²¹⁹ Officials of such colleges and universities can be sued under these sections; however, they may be able to establish a qualified immunity defense that protects them from an award of damages unless there was a violation of clearly established rights.²²⁰ Whether *respondeat superior* can be utilized to impose liability on private colleges or universities is not clear, but several lower court decisions hold that such liability is available.²²¹

Suits against state universities and colleges, under §§ 1981 and 1982, are complicated by the decision in *Jett v. Dallas Independent School District*, holding that § 1983²²² provides the exclusive remedy for violation of the rights protected by § 1981 when a claim is brought against a state actor.²²³ *Jett* also precludes *respondeat superior* liability in a § 1981 claim against state institutions, meaning such entities can be held responsible for the actions of their officials and agents only upon a showing that the individuals' actions were taken pursuant to entity policy or custom.²²⁴ Section 1981(c), which was added by a 1991 amendment, states that "the rights protected by this Section are protected against impairment by nongovernmental discrimination and impairment under color of state law."²²⁵ It is not clear whether the ruling in *Jett* was affected by this amendment to § 1981.²²⁶ In short, the safe course for plaintiffs to follow when suing public colleges and universities alleging violations of § 1981 is to utilize § 1983 as the source of a cause of action to enforce the substantive rights provided by § 1981.

As in discrimination cases alleging violations of §§ 1981 and 1982, courts facing retaliation claims based on these two statutes generally look to Title

219. 42 U.S.C. § 1981(c) (2006). *See also* Runyon v. McCrary, 427 U.S. 160, 179 (1976) (applying § 1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) (applying § 1982).

220. *See, e.g.*, Lockridge v. Bd. of Trs. of Univ. of Ark., 315 F.3d 1005, 1010 (8th Cir. 2003); Felton v. Polles, 315 F.3d 470, 483–88 (5th Cir. 2002).

221. *See, e.g.*, Cabrera v. Jakobovitz, 24 F.3d 372, 385–88 (2d Cir. 1994); City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1096–97 (7th Cir. 1992). *Compare* Daniels v. Dillard's, Inc., 373 F.3d 885, 888 n.4 (8th Cir. 2004). *See also* Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) (assuming, without deciding, that *respondeat superior* liability is available under § 1981).

222. 42 U.S.C. § 1983 (2006).

223. 491 U.S. 701, 731–35 (1989).

224. *Id.* at 735–36.

225. 42 U.S.C. § 1981(c) (2006).

226. *See, e.g.*, Burn v. Bd. of Cnty. Comm'rs of Jackson Cnty., 330 F.3d 1275, 1288 n.10 (10th Cir. 2003) (noting a split in the circuits). *See also* McGovern v. Philadelphia, 554 F.3d 114, 117–21 (3d Cir. 2009) (noting that five of six circuits that have considered the issue concluded that Congress did not intend to reject the ruling in *Jett*).

VII cases for guidance.²²⁷ One significant difference, however, is that there is no need to exhaust administrative remedies before proceeding in court.²²⁸ Another difference is the absence of a statutory cap on damages awarded under §§ 1981 and 1982.²²⁹

II. FREEDOM OF SPEECH—FIRST AMENDMENT

A complaint is a form of speech.²³⁰ Therefore, the First Amendment is in play when government retaliates against one who complains, but the Court has discounted substantially the value of speech by “insiders”²³¹ who complain about government institutions. For example, government employees, officials, and contractors, as well as applicants for employment and contracts, have limited protection when they speak on matters of public concern in their capacity as citizens, rather than pursuant to their official duties, and become the targets of retaliatory action because of their speech.²³² Additionally, public college and university²³³ students’ speech may be protected.²³⁴ Where such claims are appropriate, the statutory authorization for litigation is found in § 1983.²³⁵

227. *See, e.g.*, Hicks v. Baines, 593 F.3d 159, 164–70 (2d Cir. 2010); Butler v. Ala. Dep’t of Transp., 536 F.3d 1209, 1213–14 (11th Cir. 2008).

228. *See, e.g.*, Tyson v. Gannett Co., Inc., 538 F.3d 781, 783 (7th Cir. 2008).

229. *See* 42 U.S.C. § 1981a(a)(1) (capping the limits on damages to actions brought under Title VII).

230. Konits v. Valley Stream Cent. High Sch. Dist., 394 F.3d 121, 124–25 (2d Cir. 2005) (complaint filed in court); Wolfel v. Bates, 707 F.2d 932, 933–34 (6th Cir. 1983) (suppression of prisoner’s complaint was unlawful absent a showing that the complaints were enticing dangerous activities).

231. By this, I mean individuals connected to an institution as, e.g., employees or students.

232. Garcetti v. Ceballos, 547 U.S. 410 (2006); Board of Cnty. Comm’rs. v. Umbehr, 518 U.S. 668 (1996); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

233. Generally, private colleges and universities are not subject to such claims because the First Amendment restricts only government action.

234. *See, e.g.*, Castle v. Appalachian Technical Coll., 631 F.3d, 1194, 1197–99 (11th Cir. 2011) (student alleged she was suspended in violation of the First Amendment because she reported one of her instructors for falsifying attendance records; school administrators had a lawful motive for suspending the student, and could have reasonably believed that suspending the student would not violate the First Amendment). *Compare* Salehpoor v. Shahinpoor, 358 F.3d 782, 787–88 (10th Cir. 2004) (for a student concern, complaint, or grievance to be protected by the First Amendment it must be related to a public concern); Heenan v. Rhodes, 757 F. Supp. 2d 1229, 1239–1241 (M.D. Ala. 2010) (nursing student’s self-serving challenge to university grading and disciplinary policy did not constitute freedom of speech). The Supreme Court has substantially limited the First Amendment rights of elementary and secondary students. *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel

First Amendment claims are frequently brought by public college and university employees, such as faculty members, but students who experience retaliatory action due to speech may also assert such a claim. Free speech claims brought by faculty members often raise academic freedom issues as well,²³⁶ including the question of whether the First Amendment protects academic freedom.²³⁷ The extent of the protection provided by the First Amendment to college and university employees depends on the circumstances. As a starting point, plaintiffs must establish that they were speaking as citizens, rather than pursuant to their official duties as employees of the college or university. This limitation became a major hurdle when the

Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). Those limitations should, however, not be extended to college and university students. *See, e.g.*, McCauley v. Univ. of the Virgin Islands, 618 F.3d 232, 242–43 (3d Cir. 2010) (the pedagogical differences between elementary or secondary education and post-secondary education require greater leeway in the restriction of speech, but it is not an infinite protection); DeJohn v. Temple Univ., 537 F.3d 301, 315 (3d Cir. 2008) (the court recognized a limited right to control free speech in university classroom); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 260 (3d Cir. 2002) (recognizing a difference in regulating student speech in elementary and high schools compared to public universities).

235. 42 U.S.C. § 1983.

236. *See, e.g.*, *Garcetti*, 547 U.S. at 425.

237. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools’” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (noting that a governmental inquiry into the contents of a scholar's lectures at a state university “unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread”); *Hardy v. Jefferson Community College*, 260 F.3d 671, 679–82 (6th Cir. 2001) (recognizing a robust tradition of academic freedom in the classroom and concluding that a professor's racially offensive terms were germane to the subject matter and protected); *Bishop v. Arnov*, 926 F.2d 1066, 1073–77 (11th Cir. 1991) (university has authority to reasonably control curriculum and content imparted during class time without violating professors right to academic freedom and free speech); *Parate v. Isibor*, 868 F.2d 821, 828 (6th Cir. 1989) (professor's refusal to alter the grade of a student at the university's request, which resulted in his termination, was a violation of his academic freedom and right to free speech).

Court, in *Garcetti v. Ceballos*,²³⁸ determined that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²³⁹ The Court recognized that its analysis in *Garcetti* may not, however, control speech in an academic setting:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.²⁴⁰

Since *Garcetti*, the lower courts have been inclined to treat “pursuant to their official duties” broadly, thereby precluding many First Amendment claims.²⁴¹ There is much uncertainty because the Court indicated that it had

238. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

239. *Id.* at 421.

240. *Id.* at 425. See also *Adams v. Trs. of the Univ. of N.C. Wilmington*, 640 F.3d 550, 561 (4th Cir. 2011) (holding that *Garcetti* did not control the First Amendment speech claim of an associate professor alleging he was denied the position of tenured professor because of his speech reflecting conservative and Christian viewpoints). Cf. *Gorum v. Sessoms*, 561 F.3d 179, 186 n. 6 (3d Cir. 2009) (recognizing *Garcetti*’s reference to speech related to scholarship or teaching and the lack of clarity in applying the language, and concluding the speech at issue was completely unrelated to such activity); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 670–74 (7th Cir. 2006) (college may direct its instructor to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic).

241. See, e.g., *Bonn v. City of Omaha*, 623 F.3d 587, 592–93 (8th Cir. 2010) (public safety auditor’s report criticizing the police department is not protected under *Garcetti* because of her admission in response to an interrogatory that her report was “prepared as a function or official duty of [her] position as the Public Safety Auditor of the City of Omaha”; further, her comment to the media about the report was also made pursuant to her official duties); *Abcarian v. McDonald*, 617 F.3d 931, 935–38 (7th Cir. 2010) (*Garcetti* reaches claims against co-employees, at least where their actions directly advance the employer’s interest in maintaining an orderly workplace; plaintiff physician, who was the service chief of the Department of Surgery at the University of Illinois Medical Center, as well as head of the Department of Surgery at the University of Illinois College of Medicine, spoke pursuant to his official duties when he addressed risk management, fees charged to physicians, and surgeon abuse of prescription medications); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 348–50 (6th Cir. 2010) (a teacher’s complaints to her supervisors about the size of her teaching caseload were made as a public employee rather than as a citizen and, therefore, were not protected); *Gorum v. Sessoms*, 561 F.3d 179, 185–86 (3d Cir. 2009) (plaintiff-

“no occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate,” and it rejected “the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions.”²⁴² This limitation, and the uncertainty surrounding it, chills much government employee speech and deprives the public of information about public institutions that is available only to employees.

If the government employee survives the *Garcetti* hurdle, the next question is whether the speech at issue addresses a matter of public concern. The “public concern” inquiry is also filled with substantial uncertainty, further chilling speech by government employees. While some speech, such as speech disclosing public corruption, certainly addresses a matter of public concern, speech alleging discrimination may or may not fit within this category, depending upon whether a court determines it primarily involves a personal grievance rather than a broader challenge to institutional practices.²⁴³

professor’s assistance to a student facing disciplinary problems fell within the scope of his official duties because his experience with the university’s disciplinary code made him a *de facto* advisor to all students with disciplinary problems and because he used university resources to assist students; further, his revocation of the university president’s invitation to speak at a fraternity breakfast fell within the responsibility of professors aiding faculty and alumni involvement with student organizations and clubs as mentors and advisors).

242. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

243. *See, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979); *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 181–84 (6th Cir. 2008) (plaintiff program coordinator’s conversations with a newspaper reporter, during which he primarily discussed allegations of sexual harassment against the executive director of the agency, addressed a matter of public concern); *Charles v. Grief*, 522 F.3d 508, 514–15 (5th Cir. 2008) (speech relating to racial discrimination almost always involves a matter of public concern); *Campbell v. Galloway*, 483 F.3d 258, 266–70 (4th Cir. 2007) (while complaints of sexual harassment in the workplace are not per se matters of public concern, viewing the plaintiff’s complaints in the light most favorable to her, the court concludes that her complaints addressed a matter of public concern; similarly, her complaints about inappropriate conduct directed toward her as a female officer and conduct directed at members of the public raised a matter of public concern); *Konits v. Valley Stream Cent. High Sch. Dist.*, 394 F.3d 121, 124–26 (2d Cir. 2005) (plaintiff’s prior lawsuit against these defendants, alleging retaliation for assisting another employee of the school district in her suit alleging gender discrimination, constitutes speech on a matter of public concern; “any use of state authority to retaliate against those who speak out against discrimination suffered by others, including witnesses or potential witnesses in proceedings addressing discrimination claims, can give rise to a cause of action under [Section 1983]”). *Compare Phelan v. Cook Cnty.*, 463 F.3d 773, 790–91 (7th Cir. 2006) (because the plaintiff did not allege or introduce evidence showing that she expressed concerns about sexual harassment in the workplace beyond concerns specifically related to

The requirement can apply to claims based on the Petition Clause of the First Amendment.²⁴⁴

Next, the plaintiff also has to show a causal connection between the speech and the challenged adverse employment action. While it is clear that action short of discharge may constitute an adverse employment action, less drastic retaliatory actions may not satisfy the requirement. This situation involves essentially the same issue that arises in retaliation claims based on the statutes discussed above in Part I.²⁴⁵ In determining causation, some courts have adopted the “but-for” standard from *Gross v. FBL Financial Services, Inc.*,²⁴⁶ a case interpreting the antidiscrimination provision in the ADEA.²⁴⁷

her treatment, her speech did not address a matter of public concern); *Richardson v. Sugg*, 448 F.3d 1046, 1061–63 (8th Cir. 2006) (basketball coach’s comment characterizing what other coaches were telling athletes who were considering the University of Arkansas was made in the course of his explaining recruiting challenges caused in part by an NCAA investigation; while matters of racial discrimination are inherently of public concern, neither the content nor context of the statement here indicates the coach was addressing racial matters).

244. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488 (2011).

245. The “Burlington Northern standard,” i.e., the victim of retaliation need only show that the challenged action “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination,’” should apply to First Amendment claims. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). *See, e.g.*, *Dillon v. Morano*, 497 F.3d 247, 254–55 (2d Cir. 2007) (the proper test in determining whether an employment action is adverse is whether the alleged acts “would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights”).

246. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

247. *See, e.g.*, *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 400–03 (6th Cir. 2010) (interpreting “substantial or motivating factor” as “essentially but-for cause,” the court held that temporal proximity is rarely sufficient to establish causation, and here the temporal proximity plus other evidence was not sufficient to show that the adverse employment actions were taken against the plaintiff, at least in part, by a desire to retaliate for his speech); *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490, 502–09 (7th Cir. 2010) (applying the “but-for” standard adopted in *Gross*, the court concluded there was sufficient direct evidence, including the chief’s comment that he did not like unions because “you have to live and die by the rules,” for a reasonable jury to conclude that the plaintiff’s speech caused the discharge; however, because the Board of Trustees made the challenged decision, the chief’s anti-union comment had to be connected to the Board, and the court concluded that the plaintiff’s evidence would satisfy the “singular influence” standard as well as a less demanding standard, and, therefore, summary judgment against the plaintiff was improper); *Waters v. City of Chicago*, 580 F.3d 575, 584–86 (7th Cir. 2009) (applying the decision in *Gross*, the court stated that the plaintiff must prove that his speech “was the ‘reason’ that the employer decided to act,” and the defendant was entitled to judgment as a matter of law because the plaintiff presented no evidence showing he was discharged in retaliation for his refusal to campaign for his general foreman); *Fairley v.*

Assuming the plaintiff successfully establishes the three elements described above, a defendant can still prevail by showing that it would have taken the adverse employment action even in the absence of the protected conduct,²⁴⁸ or by showing that the *Pickering* balance²⁴⁹ weighs in its favor.

Pickering requires consideration of the following factors:

- (1) The need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.²⁵⁰

The stronger an employee's showing that the statements at issue address a matter of public concern, the greater the burden on government to justify its adverse action.²⁵¹ However, it is difficult for an employee to predict whether a court will apply the *Pickering* balance in favor of the employer; so employee speech is chilled by the lack of a better-defined standard.

Retaliation claims brought by college or university students alleging a violation of the First Amendment are not as common as retaliation claims by employees. A recent example of such a case is *Castle v. Appalachian Technical College*.²⁵² A former nursing student alleged that her suspension from the licensed practical nursing program was in retaliation for reporting one of her instructors for falsifying attendance records. The court held she could establish a First Amendment retaliation claim by showing that "(1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech."²⁵³ To establish the causal connection, the court indicated the plaintiff would have to show that the defendant "was subjectively motivated to take the adverse action because of the protected speech."²⁵⁴ If the plaintiff establishes the elements of a claim, the court held that the burden shifts to the defendant "to show that she would have taken the

Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009) (holding that the Gross standard applies to employees' freedom of speech claims against their coworkers). Compare *Greene v. Doruff*, 660 F.3d 975, 978–80 (7th Cir. 2011) (explaining the 7th Circuit decisions above in an attempt to reconcile them with *Mt. Healthy*, *infra* n. 248).

248. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

249. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

250. *Breuer v. Hart*, 909 F.2d 1035, 1039–40 (7th Cir. 1990).

251. *Connick v. Myers*, 461 U.S. 138, 152 (1983); *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 192–97 (5th Cir. 2005).

252. *Castle v. Appalachian Technical Coll.*, 631 F.3d 1194, 1197–99 (11th Cir. 2011).

253. *Id.* at 1197.

254. *Id.*

same action in the absence of the protected conduct.”²⁵⁵ Here, the plaintiff’s claim failed because the individual defendants were entitled to qualified immunity.²⁵⁶

If a retaliation plaintiff establishes a violation of the First Amendment, both equitable relief and compensatory and punitive damages are available. However, if the college or university is a state institution, the First Amendment claim must be brought against the responsible officials, in their official capacity for injunctive relief and in their individual capacity for damages, because the institution is not a “person” for purposes of § 1983.²⁵⁷ The prevailing party in a § 1983 action can obtain attorney fees if certain conditions are fulfilled.²⁵⁸

III. ACHIEVING THE PURPOSE OF ANTI-RETALIATION PROVISIONS

The purpose of anti-retaliation provisions is to encourage victims of discrimination to report discrimination, internally or externally or both, without fear of retaliation. In a college or university setting, the mere possibility of retaliation against employees or students who complain of discrimination can have a substantial chilling effect on their willingness to complain. Of course, if the victims of discrimination do not complain, discrimination is likely to continue unchecked.²⁵⁹ Discrimination complaints against institutions are generally viewed negatively by their leaders and, therefore, as something that should be discouraged. However, enlightened educational institutions should view complaints of discrimination as an opportunity to improve the environment for faculty, staff, and students. In

255. *Id.* (citing *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

256. *Id.* at 1199. *See also* *Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474, 499–501 (4th Cir. 2005) (plaintiff alleging retaliation against her after she complained about a professor’s constitutional law exam and the university grade appeals process stated a First Amendment claim).

257. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989). Independent of Will, the Eleventh Amendment can protect state institutions from an award of damages against them in federal court, absent their consent to suit. *See, e.g.*, *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425 (1997); *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *but see Alden v. Maine*, 527 U.S. 706 (1999).

258. 42 U.S.C. § 1988(b). A prevailing plaintiff is ordinarily entitled to attorney fees “unless special circumstances would render such an award unjust,” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), while prevailing defendants recover fees “only where the suit was unreasonable, frivolous, meritless, or vexatious.” *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421 (1978).

259. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (“[r]eporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel”).

other words, enlightened institutions will encourage discussion, including complaints, about their culture and environment. Institutions that take this approach understand the long-term benefit of being made aware of discrimination, as well as perceived discrimination, and taking affirmative steps to remedy the situation. Such institutions will want to create an atmosphere that encourages complaints and discourages retaliation. Because such conduct is contrary to human nature, it will take extraordinary and courageous leadership to create the appropriate atmosphere. Before suggesting steps that educational institutions might take, I will explore briefly the psychology of retaliation.

A. Psychology of Retaliation

In the employment context, only individuals with authority in the workplace can take adverse, discriminatory employment actions against employees. However, coworkers can engage in harassing actions that create a hostile work environment. Retaliation law addresses adverse employment actions taken against individuals who have questioned what they reasonably believe to be illegal discrimination directed at them or others. As with discriminatory actions, generally only individuals with authority in the workplace can take adverse, retaliatory employment actions.²⁶⁰ But within the hierarchy of an institution, there can be several supervisory levels. Supervisors can discriminate and retaliate against those below them and can be the victims of discrimination and retaliation at the hands of those above them in the hierarchy.²⁶¹ Therefore, the least powerful members of a workforce are most likely to be the victims of illegal discrimination, and as such, the most likely to have reason to complain of discrimination. Of course, when they complain, they are the most vulnerable to retaliatory action.

Because most employers dislike complaints of discrimination, retaliation or the threat of retaliation may be viewed by employers as an important means of discouraging complaints. Current employees who feel they have been the victim of illegal discrimination are most vulnerable to retaliation, so they are most likely to be deterred from complaining about the discrimination. Those who are discriminated against in hiring or firing generally²⁶² are not subject to

260. Of course those who complain can face a hostile work environment created by other workers. Even coworkers who agree with the complaints may be afraid to support, or appear to support, those who complain because they fear retaliation if they show the slightest understanding.

261. Recall the “cat’s paw” theory that recognizes employer liability where one without actual authority to make an adverse employment decision has a discriminatory animus and influences the person with authority to make the challenged decision. *See supra* notes 58–66 and accompanying text.

262. I say “generally” because the Court, in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 61–64 (2006), recognized that retaliation made

retaliation by the employer because, by definition, they are not affiliated with that employer.

Social science helps us understand the psychology of retaliation and offers some insights on how to go about eradicating, or at least reducing, retaliation. Professor Brake, in her article on retaliation,²⁶³ says the social science literature “shows retaliation to be a powerful weapon of punishment for persons who challenge the hierarchies of race and gender.”²⁶⁴ More specifically, she discusses research that shows (1) “retaliation operates against a backdrop of widespread reluctance to acknowledge and report discrimination,” (2) “persons who challenge discrimination are often disliked by the beneficiaries of the social structure,” and (3) “the threat of retaliation functions as a powerful silencer,” thus “functioning to preserve the social order.”²⁶⁵ None of this is surprising, at least not to anyone who has faced discrimination and retaliation, or represented victims of discrimination and retaliation.

How do social scientists explain the reluctance to acknowledge and report discrimination? Studies conducted by researchers show that “[a]voiding attributions of discrimination enabled the subjects to preserve their socially oriented self-esteem and their feelings of control over their destiny.”²⁶⁶ The “threat that acknowledging discrimination poses to an individual’s sense of control and invulnerability” imposes a “psychological resistance to perceiving [yourself] as [a victim] of discrimination.”²⁶⁷ Even if victims of discrimination overcome this psychological resistance, there is an additional obstacle—“the influence of social constraints and the fear of negative judgments if they [confront] the offender.”²⁶⁸ This exists despite the victims’ expectation that they would confront discrimination if they did not report discrimination; there is a “striking gap between expected and actual responses to bias.”²⁶⁹ In short, there is “an acute perception of the social costs” of publicly confronting discrimination.²⁷⁰ The research relied upon by Professor Brake looked at the reluctance to acknowledge race and gender bias, but “it is consistent with other general psychological phenomena.”²⁷¹

unlawful by Title VII does not have to be employment related. So, for example, retaliatory criminal charges against a former employee may be actionable.

263. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005).

264. *Id.* at 25.

265. *Id.* See also Linda K. Johnsrud, *Higher Education Support Professionals: The Fear of Speaking Out*, THE NEA 2003 ALMANAC OF HIGHER EDUCATION, 109 (2003).

266. Brake, *supra* note 263, at 27.

267. *Id.* at 28.

268. *Id.* at 30.

269. *Id.*

270. *Id.* at 32.

271. *Id.* at 26 n.11.

Next Professor Brake asks why people retaliate and says a “disturbing body of research demonstrates a high propensity for men and white persons to dislike women and people of color when they claim discrimination, even when the claim is meritorious.”²⁷² If those who confront discrimination with a complaint are disliked and viewed as “troublemakers” and “hypersensitive,” then complaining carries a social cost or penalty. “The greatest social penalty imposed on persons who claim discrimination is inflicted by social groups in a position of privilege with respect to the discrimination in question.”²⁷³ Since males are usually in a position of privilege with respect to sex discrimination, and white persons are in the same position with respect to race discrimination, it is not surprising that females and people of color bear the brunt of the social penalty. This means they either choose not to complain or, if they complain, they are likely to face retaliation. “When women and persons of color identify and object to discrimination . . . they are perceived as transgressing the social order, setting in motion a dynamic that sets the stage for retaliation.”²⁷⁴

According to Professor Brake, “[r]etaliatio[n] performs important work in institutions” because it suppresses (chills) complaints about perceived inequality, and it preserves “institutional power structures.”²⁷⁵ As to the former, an institutional climate that causes a general fear of retaliation allows the threat of retaliation, without actual retaliation, to perform the chilling function. This is the perfect situation for an institution that does not care about either its employees or its customers (students)—it does not have to face discrimination claims because everyone is afraid to complain; therefore, there is no need to actually retaliate.

The second function, preserving “institutional power structures,” is served well by actual retaliation or an institutional atmosphere that creates fear of retaliation. Not surprisingly, “retaliation preys on the most vulnerable persons in institutions” and “simultaneously magnifies the power of high-status persons to engage in discrimination.”²⁷⁶ Common sense suggests that those in power in an institution are in a position to engage in discrimination and create an atmosphere in which the victims of discrimination are unlikely to complain about it. Absent unusually courageous individuals who find the strength to complain about discrimination, the institutional norms are not likely to change.

In sum, retaliation, like discrimination, “is a product of an organization’s existing climate and structures. It is more likely to occur in organizations with a high tolerance for, and incidence of, discrimination.”²⁷⁷ An “existing

272. *Id.* at 32.

273. *Id.* at 34–35.

274. *Id.* at 36.

275. *Id.* at 36–39.

276. *Id.* at 40.

277. *Id.* at 41.

climate and structure” that utilizes the threat of retaliation to suppress complaints is entirely inconsistent with the purpose of an institution of higher education. Such institutions should strive to create an environment in which the free exchange of ideas, including reporting and complaining, is encouraged. Understanding the psychology of retaliation informs efforts to create such an environment.

B. Creating a Tolerance for and Appreciation of Complaints

Presumably, academic institutions are interested in promoting the free exchange of ideas. Ideas come in many forms, including complaints. Members of an institution who really care about the institution and want it to improve must raise questions about deficiencies in it, both actual and perceived. Discrimination in violation of federal statutes is an obvious deficiency in any educational institution. The following list enumerates steps an educational institution might consider if it wants to eliminate discrimination and provide an equal opportunity to everyone—administrators, faculty, staff, and students—associated with the institution.²⁷⁸

1. Clearly Establish/Confirm Its Commitment to *Actual* Equality.

An institution committed to *actual* equality is very different than an institution committed to legal or formal equality. The latter commitment simply means the institution will state, in all the appropriate places, that it does not engage in illegal discrimination, including harassment, and identify the person(s) to whom those who believe they have experienced discrimination may report it. An institution’s commitment to *actual* equality goes much further and assures its constituents that it will, for example, examine the impact²⁷⁹ of its neutral practices and policies; that it is aware of the possibility of unconscious discrimination and implicit bias²⁸⁰ and will engage in affirmative steps to address it; that it regularly will look at the results²⁸¹ of its nondiscriminatory hiring and student recruitment policies to

278. Cf. Lisa Cooney, *Understanding and Preventing Workplace Retaliation*, 88 MASS. L. REV. 3, 14–17 (2003).

279. Some neutral policies and practices with a disparate impact may violate Title VII. See 42 U.S.C. § 2000e-2(k). However, disparate impact alone does not violate all anti-discrimination statutes or the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Title VI); *Washington v. Davis*, 426 U.S. 229 (1976) (Equal Protection).

280. See, e.g., Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 99–107 (2008).

281. What might be one of the most successful anti-discrimination laws, Title IX, is interpreted by the U.S. Department of Education to require certain measurable results in athletic opportunities available to males and females. See

determine whether those policies yield a diverse faculty, staff and student body; that it regularly will examine promotion and tenure decisions to determine whether the faculty is diverse at all ranks; and that it regularly will review academic achievement to determine whether there is an equal opportunity to succeed. Further, this commitment to *actual* equality should be prominently and proudly displayed in the institution's publications and website, not buried with legally-required notices.

2. Publish an Invitation to Report/Complain of Discrimination.

As part of the commitment to *actual* equality, educational institutions should publicly emphasize the important role of reporting discrimination, and perceived discrimination, in the effort to achieve *actual* equality. Such an invitation demonstrates that an institution is serious about the commitment referred to above in item one. As stated by the Court in *Jackson*, “[r]eporting incidents of discrimination is integral to Title XI enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.”²⁸² Of course, the invitation to report discrimination must be accompanied by a strong anti-retaliation policy, which includes enforcement procedures designed to instill confidence that retaliation will not be tolerated.

3. Establish and Commit Resources to an Independent Office of Equal Opportunity.

If an educational institution is committed to equal opportunity, it will make it a priority and fund it accordingly. While it takes much more than money to have an effective enforcement office, the amount of money allocated to the office says much about the institution's level of commitment. Obviously, enforcement cannot be in the hands of those with the authority to engage in discrimination and retaliation, i.e., those with the greatest incentive to avoid vigorous enforcement of policies aimed at promoting *actual* equality. This situation gets very difficult because of an inherent tension. One wants to establish an office outside of the normal power structure with the responsibility of policing those in the power structure. To whom will those in the enforcement office report? The Board, the President, the General Counsel, or an independent body with representatives of all constituents of the

Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71,418 (1979); Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, <http://www2.ed.gov/print/about/offices/list/ocr/docs/clarific.html> (1996); Dear Colleague Letter, http://www2.ed.gov/print/about/offices/list/ocr/letters/colleagu_e-20100420.html (2010). These interpretations and clarifications are entitled to deference. See *Mansourian v. Regents of University of California*, 602 F.3d 957, 965 n.9 (9th Cir. 2010).

282. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

institution? Actual independence, as well as the appearance of independence for the enforcement office, is critical to assure that the people the institution wants to report will in fact feel confident they can report discrimination without retaliation. Confidence in the enforcement office will be enhanced if the constituents are convinced that the institution is sincere about creating an environment in which the free exchange of ideas, including complaints, is appreciated. Another way to enhance confidence in an enforcement office is to show that the office disciplines those who engage in discrimination or retaliation, instead of “disciplining” those who report or complain.

4. Establish and Communicate Equal Opportunity Goals.

As stated in item one, the ultimate institutional goal is to achieve *actual* equality, but that aspiration is too general. Achieving such equality is a long-term goal that will require continuing effort and monitoring. In other words, this objective is not something that an institution achieves, then closes its enforcement office, assuming that equality will sustain itself. It is important to have interim goals so that progress can be measured. The goals must be communicated to the institution’s constituents so they can assist in implementation and understand that their participation, through reporting and complaining, is a critical aspect of the endeavor.

5. Evaluate Regularly and Make Appropriate Adjustments.

This step is an important part of a commitment to *actual* equality because it demonstrates the institution’s commitment and provides an incentive to those responsible for implementing the commitment discussed in item one. In addition to regular self-evaluation, institutions should consider hiring an independent, outside evaluator, at least every few years. Like a financial audit by an independent auditor, this can avoid a cozy relationship between the evaluators and those whose effort is being evaluated. Outside evaluators, if selected on the basis of their detachment and expertise, can provide valuable insights and advice. The results of the evaluation should be made public, not only within the institution, but to the outside world as well. A commitment to *actual* equality can be a selling point for an educational institution, but only if the institution views it as a plus and promotes it accordingly. If an institution’s commitment to *actual* equality includes benign race-conscious actions, regular evaluations and adjustments become particularly important if such actions are challenged in court.²⁸³

283. Institutions are often reluctant to promote their affirmative efforts to achieve equality because they are afraid it may be viewed negatively or lead to a challenge in court. Of course, that outcome is a possibility, but respectable institutions do not allow the threat of litigation to stand in the way of taking what they believe is the proper course of action. Following the steps outlined above should help in defending litigation, if the need arises. *See, e.g.*, Ivan E.

6. Discipline Those Who Engage in Discrimination and Retaliation.

If an institution is serious about its commitment to *actual* equality, it must deal with those who stand in the way of achieving such equality. All too frequently, institutional administrators get defensive upon receipt of a complaint of discrimination and assume the complaint is without merit. Such a response discourages internal complaints and encourages victims to seek assistance outside the institution, from the EEOC or a state or local “deferral” agency.²⁸⁴ Once that happens, the institution goes into “litigation mode,” and, to some extent, it loses the opportunity to use the complaint as an incentive to make improvements.²⁸⁵ The point is simply this—an institution that earns a reputation for taking complaints seriously, conducting prompt investigations without a pre-determined outcome, taking effective corrective action against offenders, and avoiding retaliation, is far more likely to avoid costly, protracted litigation than is one that fails to do those things.

7. Discipline but Don’t Demean.

Those who are disciplined for discriminating or retaliating are potential plaintiffs alleging discrimination or retaliation. Discipline, including discharge, can be imposed in a way that preserves the dignity of the individual being disciplined. Human nature suggests that one who feels demeaned, embarrassed, or unfairly treated is more likely to contest the adverse action than is one who feels respected. Institutions are at risk when they discipline an individual after he or she has reported or complained of discrimination. In this situation, it is particularly important to have and follow a process that is uniformly enforced.²⁸⁶ Here, the prior steps may serve an institution well because there may be a presumption that an institution with a culture that promotes reporting and complaining is less likely to retaliate against one who acts in accordance with the culture promoted by the institution.

Bodensteiner, *Although Risky After Ricci and Parents Involved, Benign Race-Conscious Action is Often Necessary*, 22 NAT’L BLACK L.J. 1 (2009).

284. See 42 U.S.C. § 2000e-5(c) & (e); 29 C.F.R. § 1601.74; E.E.O.C. v. Commercial Office Prods., Co., 486 U.S. 107 (1988) (discussing “work sharing” agreements between the EEOC and deferral agencies).

285. Of course, conciliation is a goal of both the EEOC and deferral agencies, but the lines may be more firmly drawn when a formal, outside complaint has been filed. The EEOC frequently offers mediation services to the parties.

286. It would not make sense to have a special process utilized to discipline individuals who have reported or complained of discrimination because subjecting them to a special process may itself be viewed as retaliatory.

8. Continuing Education and Training of Persons in a Position to Discriminate or Retaliate.

Inherent in all of the steps listed above is the need to communicate the “program” and give people in a position to make decisions the information and support needed. For example, a person who has never heard of unconscious discrimination is not in a good position to take steps to avoid it; a person who is inclined to see a complaint as a threat is more likely to engage in retaliation.

Encouraging complaints and reporting seems counterintuitive until one views complaints as a valuable source of information and fear as the antithesis of a learning environment. There are many talented people who attend and work for educational institutions. Why not invite them to participate in the exchange of information and ideas about how to achieve *actual* equality?

IV. CONCLUSION

There are ample laws addressing retaliation by colleges and universities. But, just as prohibiting discrimination does not necessarily result in equality, prohibiting retaliation does not necessarily remove the fear that prevents people from reporting and complaining about discrimination. If an institution is serious about ending discrimination, it has to encourage reporting and complaining. An institution that tolerates retaliation is not serious about ending discrimination and certainly lacks a commitment to achieving *actual* equality.