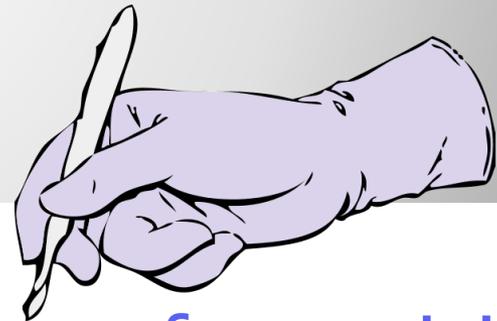


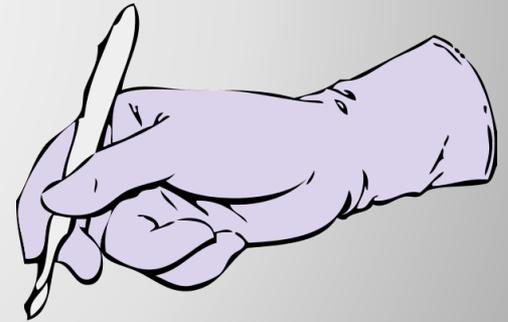
Dissection of the Retaliation Case...



The protected class born of exercising
protected rights.

**Stephanie Bostos Demers, Chief Legal Counsel
Ohio Civil Rights Commission**

STATISTICS



**Part One – The fastest
growing claim....**

"Sometimes we need to reinforce, through litigation, the message that workers should not be punished for opposing job discrimination."
EEOC Regional Attorney John C. Hendrickson.

<http://www.eeoc.gov/eeoc/newsroom/release/9-18-15.cfm>

Part 1 – Fastest Growing Claim

37,955

**Charges Filed with
the EEOC in 2014**

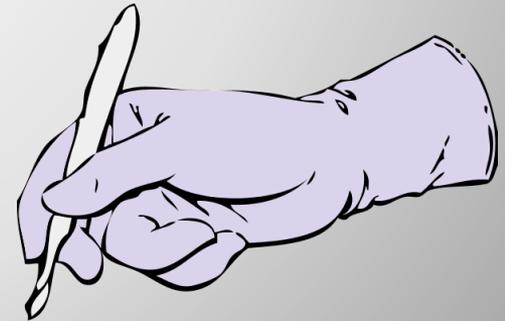
Part 1 – Fastest Growing Claim

36%

**of Total Charges Filed
with the OCRC in 2014
(Up from 28% in 2008)**

Part 1 – Fastest Growing Claim

THE LEGISLATIVE PROTECTIONS



Part Two – The Statutes

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.**

42 U.S.C.A. §2000e-3

Part 2 – The Statutes (Title VII)

It shall be an unlawful discriminatory practice

* * *

For any person to discriminate in any manner against any other person because that person has **opposed** any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or **participated in** any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

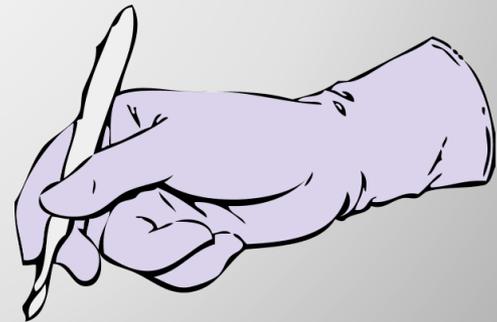
O.R.C. §4112.02(I)

“The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.* their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.”

Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63. (2006).

Part 2 - Class vs. Conduct

The Prima Facie Case



Part Three – The Elements

- (A) The employee engaged in a protected activity.
 - (1) Opposition
 - (2) Participation
 - (a) Complain
 - (b) Testify
 - (c) Assist
 - (d) Otherwise Participate
- (B) The activity was known to the employer.
- (C) The employer took adverse action against the claimant.
- (D) A (“but for”)causal connection between the protected activity and the adverse action exists.

Part Three – The Elements

Subjective + Objective Standard

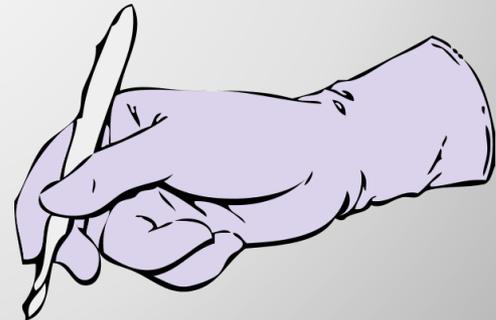
A plaintiff must show that s/he subjectively (in good faith) believed that the employer was engaged in unlawful discriminatory practices, and the belief was objectively reasonable, in light of the facts and record presented.

Part 3(A) – Protected Activity

- A prerequisite to protection under the **participation clause** is initiation of formal proceedings (filing a complaint or charge).
- If the activity engaged in occurs prior to the initiation of statutory proceedings, it is to be considered under **the opposition clause**.
- Conversations about others receiving light-duty work prior to filing a discrimination charge was opposition, not participation.
Coch v. Gem Indus., 2005-Ohio-3045, ¶¶ 30-31 (6th Dist. Lucas 2005).

Part 3(A) – Protected Activity

Opposition



Part 3(A) – Protected Activity

“[T]o resist or antagonize;...to contend against; to confront; resist; withstand;...to be hostile or adverse to, as in opinion.***
When an employee communicates to her employer a belief that the employer has engaged in...a form of employment discrimination, that communication virtually always constitutes the employee's *opposition* to the activity.”

DeMasters v. Carilion Clinic, 796 F.3d 409, 416-17 (4th Cir. 2015), citing, *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009), quoting Webster's New International Dictionary 1710 (2nd Ed. 1958).

Part 3(A)(1) – What is oppose?

- Taking an “overt stand” against suspected illegal discriminatory action
- Concerns about behavior that is actually unlawful or the employee “reasonably believes” is unlawful
- Vague charges of discrimination do not invoke legal protection
- General complaints concerning unfair treatment, without basing on protected class are insufficient

Comiskey v. Automotive Industry Action Group, 40 F.Supp.2d 877, 898 (E.D. Mich. 1999);
Weaver v. Ohio State Univ., 71 F.Supp.2d 789 (S.D. Ohio 1998).

Part 3(A)(1) – What is oppose?

- Utilizing informal grievance procedures
- Staging informal protests
- Verbal and nonverbal conduct
- Voicing opinion to bring attention to discrimination
- Complaining to a manager or other employees
- Complaining to the union
- Informal protests of discriminatory practices
- Endeavoring to obtain an employer's compliance
- Resisting sexual advances

Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253 (4th Cir. 1998); *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39 (1st Cir. 2010); *Barrett v. Whirlpool Corp.*, 556 F.3d 502 (6th Cir. 2009); *Moore v. City of Philadelphia*, 461 F.3d 331 (3rd Cir. 2006); *DeMasters v. Carilion Clinic*, 796 F.3d 409, 417 (4th Cir. 2015).

Part 3(A)(1) – What is oppose?

“James Whiteman had nothing to gain and everything to lose by standing up for female teachers that were afraid to do it themselves.”

Whiteman, accreditation chair of a preparatory school in North Ridgeville, Ohio, was fired after requesting information from the Head of Schools and the Chief Financial Officer regarding possible pay inequity when he noted males were being paid more than females with similar education, work history, and experience.

Lake Ridge Academy to pay nearly \$1 Million for Retaliatory Discharge, Jury Rule in EEOC Suit, 2008 WL 4868877.

Part 3(A)(1) – What is oppose?

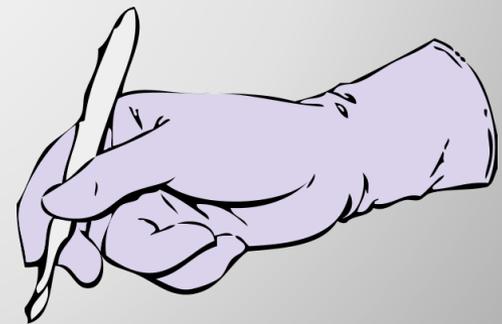
“[N]othing in the language of Title VII indicates that the statutory protection accorded an employee’s oppositional conduct turns on the job description...”

DeMasters was called to a meeting with managers, the vice president of human resources and corporate counsel. They questioned DeMasters about Doe’s sexual harassment complaint and specifically whether he told Doe he was sexually harassed. When DeMasters acknowledged his view that Doe was a victim of sexual harassment, the managers asked DeMasters why he had not taken “the pro-employer side” and if he understood the magnitude of the liability the company could face!

DeMasters v. Carilion Clinic, 796 F.3d 409, 417 (4th Cir. 2015).

Part 3(A)(1) – What is oppose?

Participation



Part 3(A)(2) – Protected Activity

The Catch All Provision

Making charges, testifying, assisting, or participating in enforcement proceedings protects the employee, who utilizes the tools provided by Congress to protect civil rights.

Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

Part 3(A)(2) – What is Participate?

Williams reported racially offensive comments to the president and chief operating officer. The company investigated the complaints and, as a result, discharged the manager. Less than a month after he reported the comments, Williams was fired after he was falsely accused of misconduct before any investigation. The HR manager stated in an e-mail that *Williams should be immediately fired and reminded his readers that Williams had recently complained about racial comments.*

Maverick Tube to Pay \$175,000 to Settle EEOC Retaliation Lawsuit, 2009 WL 1356835.

Part 3(A)(2)(a) – Complain

- Those testifying in discrimination matters are granted “exceptionally broad protection.”
- “All testimony in a Title VII proceeding is protected against punitive employer action.”
- Protection applies to complainants and witnesses.
- Testifying in a grievance, trial or hearing
- Giving deposition testimony (even non-voluntarily)
- Providing an affidavit or statement supporting the complaining party
- The testimony need not occur

Glover v. South Carolina Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999); *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185 (9th Cir. 2003); *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001); *Merritt v. Dillard Paper Co.*, 120 F.2d 1181 (11th Cir. 1997); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166 (2nd Cir. 2005).

Part 3(A)(2)(b) – Testify

By using the phrase “assisted in any manner,” Congress intended to cover persons who assist other persons who directly engage in protected activity and those who assist with activity that could lead to investigation or proceedings.

This includes:

- Reporting discriminatory treatment of others
 - Writing letters or emails
 - Providing information
 - Giving advice
- Driving another to file a charge
- And otherwise participating...

In the Matter of Robert Cameron v. S & S Mfg., Inc., No. 9185 (OCRC 7/9/2002);
E.E.O.C. v. Bojangles Restaurants, Inc., 284 F.Supp.2d 320 (M.D.N.C. 2003);
Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997).

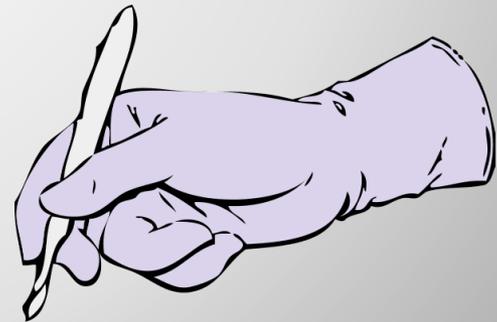
Part 3(A)(2)(c) – Assist

- ❖ Participating in the employer's process of gathering information
- ❖ Participating in an investigation (internal, OCRC, EEOC or other)
- ❖ Discussing a complaint or allegations
- ❖ Cooperating with an investigative body
- ❖ Refusing to cooperate with management may constitute protected activity.

Miller v. Washington Workplace, Inc., 298 F. Supp. 2d 364 (E.D. Va. 2004); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544 (4th Cir. 1999); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3d Cir. 2002).

Part 3(A)(2)(d) – Otherwise Participate

The Prima Facie Case



Part 3(B) – Knowledge

- The knowledge prong requires a showing that the defendant knew that the employee specifically had engaged in a protected activity.
- (i.e. knowledge of a complaint based on protected status and/or knowledge of opposition or participation)

Coch v. Gem Indus., 2005-Ohio-3045, ¶ 38 (6th Dist. Lucas 2005); *Crable v. Nestle, Inc.*, 2006-Ohio-2887, ¶46 (8th Dist. Cuyahoga 2006).

Part 3(B) - Knowledge

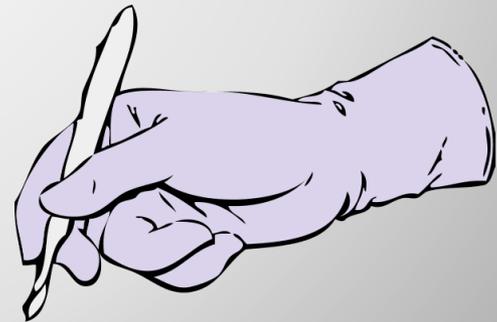
Does “cat's paw” apply in retaliation cases?

- Retaliation cases invoke a higher standard of proof (but for factor) than discrimination cases (motivating factor). Yet, federal courts have held that the higher standard does not preclude the application of *Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011) (applying cat’s paw theory in a USERRA case).
- An employee must show that the supervisor's discriminatory animus was a “but-for” cause of, or a determinative influence on, the unbiased supervisor’s decision.

Nebozuk v. Abercrombie & Fitch Co., 2014-Ohio-1600, ¶ 45 (10th Dist. Franklin 2014).

Part 3(B)- Knowledge

Adverse Action



Part 3 – The Elements

- Generally, an “adverse employment action” is a materially adverse change in the terms and conditions of employment.
Canady v. Rekau & Rekau, Inc., 2009-Ohio-4974, ¶ 25 (10th Dist. 2009);
Michael v. Caterpillar Fin. Servs. Corp., 496 F.3d 584, 593(6th Cir. 2007).
- The action must constitute “a significant change in employment status.”
Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
- Actions resulting in inconvenience or alteration of job responsibilities are not typically disruptive enough to be adverse.
Mitchell v. Vanderbilt Univ., 389 F.3d 177, 182 (6th Cir. 2004).

Part 3(C) - Adverse Action

Adverse Actions are things such as:

- Termination
- Suspension
- Other discipline with monetary impact
- Failure to promote
- Demotion
- Reassignment with significantly different duties
- Denial of raise/bonus based upon a job evaluation
- Failure to hire (re-hire)
- Failure to accommodate employees & applicants
- Decisions causing a significant change in benefits
- Denial of training opportunities
- Cutting work hours significantly
- Taking away a company vehicle
- Severe and/or pervasive retaliatory harassment

Part 3(C) - Adverse Action

And this thing:

"[R]eassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. Almost every job category involves some duties that are less desirable than others. ***Here, the jury had considerable evidence that the track laborer duties were more arduous and dirtier than the forklift operator position, and that the latter position was considered a better job by male employees who resented White for occupying it.*** [A] jury could reasonably conclude that the reassignment would have been materially adverse to a reasonable employee."

Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 55 (2006).

Part 3(C) – Adverse Action

And other things...

- Tarhini learned that management stated she would never be a manager or considered for management because of her earlier pregnancy discrimination charge.
- Phillips hired Jake Lee Velasquez to work as a security guard, but the company terminated him on his first day of work after recognizing him to be the **grandson** of a former employee with a pending discrimination suit.
- McWhite retaliated against a former employee, who filed an EEOC charge, by providing negative references to her prospective employers. He also retaliated against another employee, who refused to provide a supportive statement for him in the EEOC investigation by reducing her hours and attempting to tamper with her probation.

University of Phoenix to Pay \$32,500 to Settle EEOC Retaliation Lawsuit, 2009 WL 1641219;
EEOC Sues Philips Lighting for Retaliating Against Employee www.eeoc.gov/eeoc/newsroom/release/9-30-15i.cfm;
EEOC Files Suit Against McWhite Funeral Home for Retaliation, www.eeoc.gov/eeoc/newsroom/release/9-22-15i.cfm.

Part 3(C) - Adverse Action

And really “other things”...

- A Mingo County, West Virginia mine worker claimed in a lawsuit that a foreman twice painted his testicles white after he complaining about exposure to excessive amounts of coal dust.
- “Within one month of Plaintiff’s complaints about being required to work in areas where he was exposed to amounts of coal dust in excess of what is allowed by Mine Safety and Health regulations, Plaintiff’s employment was willfully, wantonly, and egregiously terminated.”
- This claim arises under the MSHA, but, could it apply in Title VII cases? I can imagine so!

<http://www.courthousenews.com/2015/07/16/miner-says-foreman-painted-his-testicles>.

Part 3(C) – Adverse Action

The harm does not have to be an adverse *employment* action.

*** The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their status, while the anti-retaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. To secure the first objective, Congress needed only to prohibit employment-related discrimination. But this would not achieve the second objective because it would not deter the many forms that effective retaliation can take***."

Burlington, citing, Robinson v. Shell Oil Co., 519 U.S. 337 (1996).

Part 3(C) – Adverse Action

- The filing of a lawsuit or a counterclaim can constitute an adverse employment action for proving a retaliation claim under federal anti-discrimination laws and O.R.C. §4112.02(I).

EEOC v. Virginia Carolina Veneer Corp., 495 F.Supp. 775 (W.D.Va. 1980) (employer filed defamation suit based on the allegations contained in the filed EEOC charge); *Atkinson v. Oliver T. Carr Co.*, 40 Fair Empl. Prac. Cases 1041 (D.D.C. 1986) (allegations of criminal activity brought in retaliation for filing EEOC charge).

- Employers are not strictly prohibited from suing employees for defamation, but the complaint must be filed in good faith.

Greer-Burger v. Temesi, 116 Ohio St.3d 324 (2007); *Baker v. Summit Unlimited, Inc.*, 855 F.Supp. 375 (N.D.Ga. 1994); *Equal Emp. Opp. Comm. v. Levi Strauss & Co.*, 515 F. Supp. 640. (N.D.Ill. 1981).

Part 3(C) – Adverse Action

- “Employment actions that result in mere inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions.”
- “If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure.”

Primes v. Reno, 190 F.3d 765, 767 (6th Cir. 1999); *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004); *Crable v. Nestle USA, Inc.*, 2006-Ohio-2887, ¶ 50 (8th Dist. 2006).

Part 3(C) – Adverse Action? (Not)

- Verbal reprimands and criticism

Canady v. Rekau & Rekau, Inc., 2009-Ohio-4974 (10th Dist. Franklin 2009).

- Written warning & loss of 15 minute break

Howard v. Bd. of Ed. Memphis City Schools, 70 Fed.Appx. 272, 281 (6th Cir. 2003).

- Counseling and write ups

Handshoe v. Mercy Med. Ctr., 34 Fed.Appx. 441, 446 (6th Cir. 2002).

- Dress code enforcement

Veal v. Upreach, L.L.C., 2011-Ohio-5406, ¶ 24 (10th Dist. Franklin 2011).

- Contesting unemployment

Baker v. Summit Unlimited, Inc., 855 F. Supp. 375 (N.D.Ga. 1994).

- Written reprimand & dock of 1/2 hour leave

Fernandez v. City of Pataskala, S.D.Ohio, No. 2:05-CV-75 (Nov. 9, 2006).

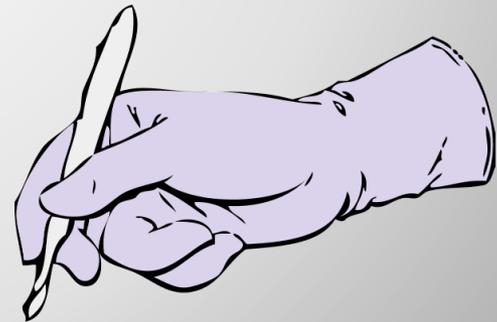
Part 3(C) – Adverse Action (Not)

“The receipt of used uniform shirts is, at most, an inconvenience. While the addition of other maintenance-related duties to Canady's regular duties made Canady unhappy, such a minor alteration of job responsibilities does not result in an adverse employment action. Finally, *** verbal criticism of Canady's job performance is not an adverse employment action.”

Canady v. Rekau & Rekau, Inc., 2009-Ohio-4974, ¶¶ 25-28 (10th Dist. Franklin 2009), citing, *Weigold v. ABC Appliance Co.*, 105 Fed.Appx. 702, 708 (6th Cir. 2004).

Part 3(C) – Adverse Action? (Not)

Causation



Part 3 – The elements

- The causation standard imposed in retaliation cases (but-for) is a higher standard than that applied in USERRA or Title VII claims (motivating factor).
- A plaintiff must show that retaliation is a determinative factor in the employer's decision to take an adverse action.
- This standard has been applied to cases brought under R.C. §4112.02(I).

Univ. of Texas Southwestern Med. Ctr. v. Nassar, 133 S.Ct. 2517 (2013); *Smith v. Superior Prod., L.L.C.*, 2014-Ohio-1961, ¶ 32 (10th Dist. 2014); *Nebozuk v. Abercrombie & Fitch Co.*, 2014-Ohio-1600, ¶ 45 (10th Dist. Franklin 2014).

Part 3(D) – Causation (But For)

- Timing alone can work if “very close.”

Clark Cty. School Dist. v. Breedon, 532 U.S. 268 (2001).

- Immediate action will suffice!

Southeastern Telcom Retaliated Against Account Executive, EEOC Charges in Suit, 2009 WL 3044512.

- Two days will work.

Payton v. Receivables Outsourcing, Inc., 163 Ohio App.3d 722 (8th Dist. 2005).

- Three weeks may too.

Goodwill Industries of Akron, 117 Ohio App.3d 525 (9th Dist. 1997) .

- Lack of temporal proximity does not kill a claim.

Smith v. Superior Prod., L.L.C., 2014-Ohio-1961, ¶ 33 (10th Dist 2014).

- Retaliation was found when termination was over a year after protected activity.

Mickey v. Zeidler Tool and Die Co., 516 F.3d 516, 525 (6th Cir. 2008).

Part 3(D) – Causation (Proximity)

- However, where events are separated by more than a few weeks, other evidence is necessary.

Ningard v. Shin Etsu Silicones, 2009–Ohio–3171 (9th Dist. 2009).

- Additional evidence may be required after a month.

Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751 (3rd Cir. 2004);
Dautartas v. Abbott Laboratories, 2012–Ohio–1709 (10th Dist. Franklin 2012).

- And obviously years will not cut it!

Crabbe v. Nestle, Inc., 2006–Ohio–2887, ¶46 (8th Dist. 2006).

Part 3(D) – Causation (Proximity)

- Employment decisions made prior to knowledge of the employee's protected activity are not illegal!
- Employers need not suspend contemplated employment actions upon learning of an employee's protected activity.

Lindsay v. Children's Hosp. Med. Ctr. of Akron, 2009-Ohio-1216, ¶ 20 (9th Dist. Summit), citing *Warren v. Ohio Dept. of Pub. Safety*, 24 Fed.Appx. 259, 266 (6th Cir. 2001).

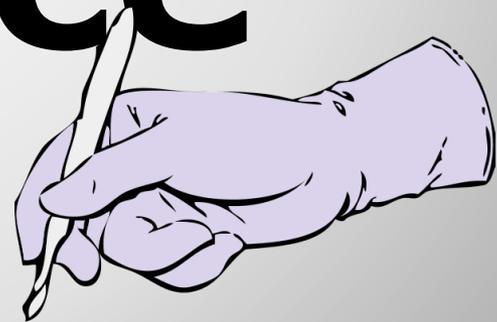
Part 3(D) – (Egg or Chicken?)

- The US Supreme Court recognizes third-party retaliation.
- This means one engages in protected activity, and another suffers harm as a result.
- The court refused to define the type of relationship necessary. *"We expect that firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."*
- Instead, the significance of an act of retaliation will depend upon the particular circumstances.

Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 175 (2011).

Part 3(D) – Third-Party Retaliation

The Employer's Chance



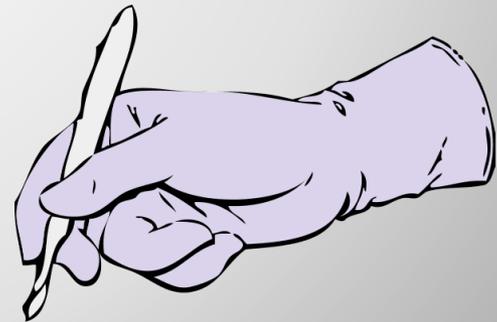
Part 4 – Legitimate Reason?

- Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to “articulate a legitimate, nondiscriminatory reason” for its actions.
- “Even if it could properly be inferred that the layoffs occurred as a result of [the employee’s] conversations concerning light duty with [his supervisor], GEM has articulated a legitimate reason for its action: it was made pursuant to a reduction in force due to a decreasing workload.”

McDonnell Douglas, 411 U.S. 792 (1993); *Veal v. Upreach, L.L.C.*, 2011-Ohio-5406, ¶ 17 (10th Dist. 2011); *Coch v. Gem Indus.*, 2005-Ohio-3045, ¶ 41 (6th Dist. 2005).

Part 4 – Legitimate Reason?

The Final Burden



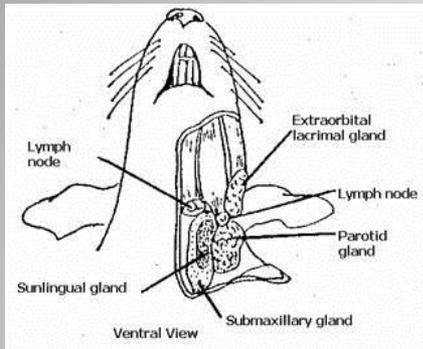
Part 5 – Pretext

Once an employer has articulated a legitimate, nondiscriminatory reason, the burden-shifting framework disappears, leaving the plaintiff with the ultimate burden of proving that the employer intentionally discriminated.

A plaintiff satisfies this burden by presenting evidence from which a jury could conclude that the employer's proffered reason was false and that discrimination was the real reason for the adverse employment action.

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993);
Brock v. Gen. Elec. Co., 125 Ohio App.3d 403, 408 (1st Dist. 1998);
Jelinek v. Abbott Labs., 2013-Ohio-1675 (10th Dist. Franklin 2 013).

Part 5 – Pretext



The End!



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