

## *Recent Developments in EEO*

“Retaliation”

“Non-Selection”

“Equal Pay Act”

Part 4 of 4

Presenter

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## Retaliation

- The Two Kinds
- More opposition retaliation cases recently
  - *Samuels v. DHS*, 0120093633 (May 9, 2012) (protected activity consisted of letter to supervisor complaining about disrespect for minorities in the workplace)
  - *Crawford v. Metropolitan*, 129 S.Ct. 846 (2009) (In response to questions during the agency's internal investigation into rumors of sexual harassment, the Complainant stated that she had been sexually harassed / Supreme Court held that opposition clause protects employee who responds to questions during an internal investigation of another employee)
  - Complainant v. FEC, 0120081073, 114 LRP 369 (2013) (EEO director who was terminated for allegedly doing her job and attempting to resolve a harassment complaint)

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## Retaliation / An Expansion

### The Supreme Court weighs in on Association Reprisal.

- *Thompson v. North American Stainless*, 562 U. S. \_\_\_\_ (2011) (Fired employee claimed fired in retaliation for his fiancé's filing of an EEO complaint / Sufficient association to claim reprisal / Court adopts a "zone of interests test," under which a complainant may not sue unless he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." / "[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.")

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## Retaliation / An Expansion

### *Uncertainty about who is within the "zone of interests":*

- *Smith v. Dept. of Agriculture*, 0120110535 (Apr. 25, 2011)(cause of action for a claim of reprisal discrimination based on his wife's EEO activity, An area director for Rural Development alleged that the agency subjected him to discrimination based on age (56), marital status (married), and reprisal for prior protected EEO activity and for his association with his wife's protected EEO activity. (EEOC: "We find that Complainant falls within the "zone of interests" sought to be protected by Title VII's anti-retaliation provision, in that a reasonable employee (Complainant's wife) could be dissuaded from engaging in protected activity if she had known that her husband (Complainant) could have been subject to an adverse action in retaliation for her protected activity.") / Reprisal not ultimately proven, though.)

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## Retaliation

### **A Generous Standard (i.e., a low threshold for per se reprisal)**

- Adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. EEOC Compliance Manual, Section 8: Retaliation (May20, 1998); *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S.\_\_\_\_\_, 126 S. Ct. 2405 (2006)"
- The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is "reasonably likely to deter the charging party or others from engaging in protected activity."

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## Retaliation / Per se cases

### So many per se reprisal cases:

- ❑ *Coronado v. Air Force*, 0120122196 (2012) (The supervisor told his subordinates that those who filed EEO complaints without going to him first were "not men and had no integrity" and had to see him before going to the EEO office).
- ❑ *Gunther v. USPS*, 0120110103 (2012) (Acting supervisor advised complainant to drop her EEO complaint against the acting manager).
- ❑ *Carson v. DOJ*, 0120100078 (2012) ("you choose to take your complaint outside the house, now you have to suffer the consequences")

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## Retaliation / Per se cases

- ❑ *Beckham v. Treasury*, 0120112323 (2013) (Supervisory Human Resources specialist complainant / After a manager was informed that the specialist filed an EEO complaint, she told him she would have to document what was said in meetings, which could result in "trust concerns." She also told him that his decision to file an EEO complaint made her feel "sad" and she would have to be more careful about what she said).

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## Retaliation / Per se cases

- *King v. International Boundary and Water Commission*, 113 LRP 14450, EEOC No. 0120112384 (2013).
  - Supervisor informing coworkers of complaint reasonably likely to deter protected activity.

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## Retaliation / Per se cases

- *Complainant v. Department of Defense*, 0120132212, 113 LRP 47683 (2013).
  - Supervisor's comments that "EEO's are crap," "EEO people are crazy," and "Don't be afraid of EEO's, they'll go away," found to be reasonably likely to deter protected activity.
  - Finding "per se" violation, EEOC rejects AJ finding of no unlawful retaliatory animus.

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## Retaliation / Per se cases

■ *Gordon v. Department of the Army*, 113 LRP 37004, 0720120040 (2013).

- Supervisor statement that complainant must use annual leave to file EEO complaint found by EEOC to be reasonably likely to deter protected activity.
- Remedy included \$16,000 damages.

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## Retaliation / Per se cases

*Complainant v. USPS*, 0120132266, 113 LRP 47067 (2013).

- EEOC reverses agency procedural dismissal, finding that allegation that agency attorney sent complainant threatening letter "is the kind of action that is reasonably likely to deter the Complainant or others from engaging in protected activity."

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## Retaliation / Cat's Paw

### "Cat's Paw" Theory Used to Prove Retaliation

□ *Complainant v. Department of Veterans Affairs*, 0120110544, 113 LRP 44905 (2013).

- EEOC finds retaliation in non-selection, notwithstanding selecting official's lack of knowledge of complainant's protected EEO activity, imputing retaliatory animus of complainant's supervisor to selecting official using "cat's paw" theory.

What do we mean by "cat's paw"?

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## Retaliation / EEO Director's Activity

□ *Complainant v. FEC*, 0120081073, 114 LRP 369 (2013)

- EEO Director suspended and then terminated for violating employee's request for anonymity by informing alleged accused and another and by failing to inform the commissioner's
- Opposition reprisal claim rejected / agency's action not pretextual

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## A Supreme Court Case on Retaliation

### *Retaliation Claims Narrowed:*

- *University of Texas Southwestern Medical Center v. Nassar*, 113 LRP 26086, No. 11-484 (U.S. June 24, 2013) (Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action / rejection of mixed-motive approach for retaliation claims).

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## Non Selection

- *Jones v. SSA*, 0520110682, 113 LRP 18219 (2013): Agency reconsideration request denied / applicant for a contact representative position for the Social Security Administration alleged that the agency subjected him to discrimination based on disability (brain injury) / hiring process involved an interview and telephone assessment in which the interviewer role-played a customer to judge the applicant's ability to problem solve / complainant requested that interview questions be provided in writing as a reasonable accommodation / agency refused

**What result?**

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## Non Selection

- Complainant v. Nat'l Labor Relations Bd., 0720110017, 113 LRP 20816 (2013)

- Complainant Senior Field Attorney applied for Supervisory General Attorney position / race discrimination in non selection / among others, hiring pattern in region evidenced no non-white professional or supervisory employees and that African Americans treated less favorably in promotional and award opportunities

- While claiming that Complainant was merely average and in constant need of monitoring, management never informed Complainant about the seriousness of his allegedly poor work performance and continued to give him laudatory evaluations ("The AJ found not credible testimony that the Agency was doing Complainant a favor to rate his work as commendable while actually believing that Complainant was merely an average employee")

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## Non Selection

(Case cont'd)

- Evidence that certain key opportunities were afforded to the selectee to prepare him for the position of Supervisory Attorney that were not afforded to any African American attorney in the region

- Selection process irregularities: Regional Director decided that he would choose the selectee two weeks before he actually received the Rating and Ranking Memorandum from the Assistant Regional Director and the Regional Attorney and that the two officials did not follow the directives for Evaluating and Ranking Applicants as outlined in the Notice of Vacancy / The AJ also found that in 2007, the Agency's EEO Director had to conduct sensitivity training concerning a remark in which the Regional Attorney referred to an Asian American attorney as "Gunga Din" because she was carrying water.

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## Non Selection

- *Complainant v. Department of Interior (BIA)*, 0720120037, 113 LRP 46897 (2013).
  - EEOC AJ finds agency supervisor, who had been previously named as RMO by complainant, intentionally modified the PD to prevent complainant from qualifying for a Supervisory Highway Engineer position (i.e., requiring a professional engineer certificate) / record did not reflect that human resources approved such a change in accordance with agency policy.
  - Remedies included placement in the position, backpay and \$25,000 in damages.

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## Non Selection

- **Some of the reasons Agencies lose Non Selection cases:**
  - Direct evidence of age discrimination. *Doerman v. VA*, 0120101426 (July 27, 2010), recon. den. 0520110001 (2010).
  - Inadequate records / age discrimination. *Lingle v. Department of Transportation* (Federal Aviation Administration), 0120082276 (2010).
  - Departure from typical procedures for merit promotion / vague selection criteria (e.g., leadership, supervision. *Moresi v. Department of Homeland Security*, 0720090049 (March 29, 2010).

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## Non Selection

- Subjective Scoring / different scores for substantially the same answers. **Watson v. DHS**, 0720090029 (2010).
- Insufficient evidence / age / no sworn affidavit from SO because he had retired / other supervisor's affidavits described why selectee was picked but said little about Complainant. **Harris v. Department of Labor**, 0120102099 (2010), recons.den. 0520110064 (December 10, 2010).
- Exaggeration by SO / SO minimized the qualifications of the Complainant and exaggerated qualifications of selectee / "The AJ found that SO read SE's application in great detail and gave her credit for experience and training that she said others did not have, but when Complainant showed the same experience or training, SO gave her no credit." **Bowers v. Dept. of Transportation**, 0720100034 (2011).

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## Equal Pay Act and Title VII as to Sex Discrimination in compensation

- ▣ What are the differences between these two

laws?

Process?

Proof?

Remedy?

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## Equal Pay Act and Title VII as to Sex Discrimination in compensation

### □ Some recent cases:

- *Gervais v. DVA*, 0120070063 (2009): GS-9 male Kinesiologist paid less than GS-11 female, who performed same work / complainant only alleged EPA violation but Commission found both EPA and Title VII, relying on its regulations / Complainant entitled to whichever benefit is higher
- *Harvey v. DVA*, 012008222 (2009): GS-7 Male Computer Assistant failed to prove paid less than GS-12 Computer Operator / allegation of both Title VII and EPA

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## Equal Pay Act

### □ *Complainant v. Ray Mabus, Secretary, Department of the Navy, Agency*, 0120113489, 114 LRP 14866 (2014)

- A contract specialist for the Navy alleged that the agency subjected her to discrimination based on race (African-American) and sex (female) when it did not pay her at a GS-13 grade, did not promote her to a GS-13, and gave her a 2 percent increase when she was reassigned to a supervisory position.
- EEOC found that the agency did not subject her to discrimination. The EEOC noted that the specialist's claim that she was only given a 2 percent increase while male employees were given 5 percent increases alleged a claim under the Equal Pay Act. However, the agency showed that the difference in pay increases was attributable to a factor under than sex. The male employees had superior qualifications and performed more complex work.

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