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Beware the Desire for Revenge: The Scope of Retaliation Claims Against Individuals Under Pennsylvania and Philadelphia Law Is Broader Than You Might Think

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Back in the days when I defended employers, I developed an appreciation for how an accusation of discrimination or harassment could shake a decision maker's sense of themselves as fair, unbiased, and well-intentioned at home as well as at work. Should a manager accused of discrimination by a team member take a look at their potential unconscious biases or just deny and defend? In some situations, a decision maker who denies the accusation may still react with thoughtful reflection. In other situations, the decision maker or an alleged harasser might react with fury to defend their sense of self: how dare they accuse me? Workers who otherwise like and respect the accused might also get defensive. What if a peer accuses your high performing and inspirational leader of sexual harassment and you cannot imagine it might be true? Before you act on that desire for revenge, keep in mind that the scope of retaliation claims against individuals under Pennsylvania and Philadelphia law is broader than you might think.

In recognition of what we might consider a "natural" (or at least unsurprising) reaction to an accusation of discrimination, the law prohibits employers from retaliating against an employee for making a good faith complaint of discrimination. In *Burlington Northern & Sante Fe Ry. Co. v. White*, 548 U.S. 53 (2006), the Supreme Court confirmed two aspects of the law's protections against retaliation that differ from a typical discrimination claim. First, unlike a discrimination claim that usually applies only to "adverse employment actions" impacting the terms and conditions of employment, a retaliation claim may be based on any "materially adverse action" against an employee for making a good faith complaint of discrimination or otherwise engaging in protected conduct. A "materially adverse action" can be anything that might have "dissuaded a reasonable worker" from engaging in the protected action in the first place. Second, the Court concluded that the scope of the anti-retaliation provisions of the law extends beyond employment-related retaliatory acts and harm.

Under federal law, an employee's claims for discrimination and retaliation are limited to those against the employer. The federal anti-discrimination statutes do not recognize claims against individual decision makers or others, such as co-worker harassers, whose actions give rise to the potential for legal liability. However, both the Pennsylvania Human Relations Act (PHRA) and the Philadelphia Fair Practices Ordinance (PFPO) recognize individual liability of two types. First, an individual may be liable for "aiding or abetting" the illegal acts of the employer. 43

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P.S. § 955(e); Phila. Code § 9-1103(1)(h). Such claims are typically limited to the supervisors at the plaintiff's employer as only they can be said to "aid or abet" the employer's discrimination or retaliation. See, e.g., *Dici v. Commonwealth of Pa.*, 91 F.3d 542 (3d Cir. 1996). Based on the same analysis, an individual decision maker cannot be held liable for aiding or abetting if the employer is exonerated for the alleged act of discrimination. However, the anti-retaliation provisions contained in both the PHRA and the PFPO extend to "any person" who engages in retaliation. 43 P.S. § 955(d); Phila. Code § 9-1103(1)(g). As a result, an individual may be liable for retaliation even if they are not a supervisor or even employed by the plaintiff's employer.

At this intersection between an expanded scope of retaliation claims and the statutory authority to hold "any person" liable for their direct acts of retaliation under state and local law, individuals face liability for retaliation under the PHRA and/or the PFPO in a wide variety of circumstances. As a result, anyone who feels the impulse to seek revenge in response to an accusation of discrimination must beware of the potential consequences of acting on that impulse both in and outside of the workplace.

For example, in *Doe v. Schuylkill Cnty. Courthouse*, a case that is pending in federal court in the Middle District of Pennsylvania, the court considered retaliation claims against a former County Commissioner accused of sexually harassing several women employed by the County and a County Human Resources manager. In denying the accused harasser's motion to dismiss, the court found that the plaintiffs had a valid retaliation claim against him individually based on their allegations that he retaliated against them for reporting his discriminatory conduct. *Doe*, Civ. A. No. 3:21-477 (M.D. Pa. May 6, 2022). In denying the Human Resources manager's motion to dismiss, the court found that the plaintiffs had sufficiently pled a claim of direct retaliation against her based on denied requests for time off, denied requests to work from home, suspensions, reprimands, and demotions that followed their complaints of sexual harassment. *Doe*, Civ. A. No. 3:21-477 (M.D. Pa. May 11,

2022); see also *Wein v. Sun Co.*, 936 F. Supp. 282 (E.D. Pa. 1996) (individual defendants may be liable for retaliation under Section 955(d) of PHRA).

In *Abdurahman v. Prospect CCMC, LLC*, et al, the court permitted a plaintiff to amend her complaint to add a retaliation claim against an individual under the PHRA where the plaintiff alleged that she complained during a workplace investigation into allegations of sexual harassment against her that her accuser was the one who had subjected her to sexual harassment. *Abdurahman*, Civ. A. No. 20-3609 (E.D. Pa. Nov. 15, 2022). Specifically, the plaintiff alleged that in response to the counter-allegations of sexual harassment, the initial accuser filed false criminal charges of sexual assault against her for which she was later acquitted. According to the court, such action would plausibly "dissuade a reasonable worker" from making a sexual harassment complaint to her employer.

As noted above, and as the *Abdurahman* case makes clear, the actions that give rise to individual liability for retaliation are not limited to the workplace. The situations that may give rise to retaliation claims against individuals are arguably endless, constrained only by the burden to prove causation, that is, did the person take a "materially adverse action" against someone because they engaged in protected conduct? For example, what if a supervisor gives a negative employment reference about his former subordinate because she complained about a peer's sexual harassment? What if a co-worker accused of harassment, who would not otherwise be liable for the initial sexual harassment, subsequently threatens or attempts to intimidate his accuser? What if that accused harasser files a lawsuit against his accuser for defamation? What if a prospective hiring manager or a recruiter refused to work with someone because they filed a discrimination lawsuit? Based on the plain language in both the PHRA and PFPO, all of these acts may expose an individual to liability. Moral of the story: understand the legal ramifications of your actions and think twice before acting on that desire for revenge.



JULIE UEBLER works on behalf of individuals seeking to protect their rights or maximize their employment opportunities in the workplace. For more information, visit ueblerlaw.com.