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Timing Isn't Everything: Why Temporal Proximity May Be Enough to Win the Battle But Not the War in a Title VII Retaliation Case

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Introduction

Jackie is the only female civil engineer at a large engineering firm. Jackie is not particularly good or bad at her job. She has never received a raise. On the morning of her third anniversary with the firm, Jackie attempted to negotiate a higher salary with her supervisor. Jackie's supervisor denied her request, informing her that he had no power to authorize a raise due to the recession. On her way out of his office, Jackie's supervisor patted Jackie on the shoulder and told her that the economy would pick up eventually. Jackie immediately complained to the firm's Human Resources director that she was denied the pay increase solely because of her gender and that her supervisor made an unwanted sexual advance at her. Jackie threatened to file a complaint with the Equal Employment Opportunity Commission (EEOC). HR investigated the matter and concluded that Jackie's allegations were false. HR determined that the firm had not given a raise to an engineer at Jackie's level in over four years and the supervisor's shoulder pat was benign.

Behind the scenes, the firm's top executives have been planning a series of cut-backs for months. Over three months ago, Jackie's name was put on the chopping block list. One week after Jackie reported the alleged incident of discrimination, she was terminated in connection with the firm's company-wide reduction in force.

Jackie immediately filed an unlawful retaliation charge of discrimination against her former employer with the EEOC based on Title VII of the Civil Rights Act of 1964 (Title VII). After receiving a right-to-sue letter from the EEOC, Jackie filed suit against her former employer in federal district court. Jackie's only evidence of retaliation is the two-week passage of time between her complaint to HR and subsequent termination. On these facts, can Jackie survive her former employer's motion for summary judgment?

In recent years, employers have been blitzed by a disproportionate rise in the amount of retaliation claims filed.[1] Indeed, in 2010, retaliation claims accounted for 36.3 percent of all charges filed with the EEOC.[2] This represents a 60 percent increase in the number of retaliation claims filed since 1997.[3] As a natural consequence of this barrage of retaliation claims, the body of retaliation law has expanded and evolved at a rapid pace. A key issue at the forefront of this evolution is the significance of evidence relating to the time between an employee's exercise of a protected right and an employer's adverse employment action (known as "temporal proximity" evidence). Many courts, mediators, arbitrators, and lawyers assume that

evidence of temporal proximity—standing alone—is sufficient to create a triable issue of fact. This assumption is wrong.

Title VII Retaliation: The Basics

Title VII prohibits employers from retaliating against an employee who has previously opposed an unlawful employment practice or exercised a right under any anti-discrimination law in an administrative proceeding.[4] To survive summary judgment on a claim of retaliation based on indirect, circumstantial evidence, a plaintiff must run the three-step, evidentiary burden-shifting gauntlet the United States Supreme Court set forth in *McDonnell Douglas Corp. v. Green* and clarified in *Burdine v. Texas Department of Community Affairs*.[5] Under this burden-shifting framework, the plaintiff must first establish a *prima facie* case of retaliation by demonstrating that (1) she engaged in a protected activity, (2) the employer took an adverse employment action against her, and (3) a causal link existed between the protected activity and the adverse action.[6] The Supreme Court has explained that the plaintiff's burden of establishing a *prima facie* case is "not onerous."[7] If a plaintiff is successful in establishing a *prima facie* case of retaliation, a presumption of retaliation arises and the burden shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for the alleged adverse employment action.[8] If the defendant meets its burden of production, to avoid summary judgment, the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the employer's proffered reason is not true, but instead, is a pretext for intentional retaliation.[9]

The Battle and the War: Temporal Proximity Evidence at the Prima Facie and Summary Judgment Stages of a Retaliation Claim

The Causal Link Requirement

The causation standard applicable to retaliation claims is derived from Title VII, which mandates that a plaintiff must demonstrate that she was discriminated against "*because*" she "opposed an unlawful employment practice" or "*because*" she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."[10] Accordingly, this provision creates a "but-for" causation standard; that is, the plaintiff must establish that the alleged adverse employment action would not have occurred but for the alleged protected activity.[11] Due to the burden-shifting framework applied to Title VII retaliation claims, defendants wind up actually having two cracks at showing a plaintiff's causation evidence is insufficient—once at the less onerous *prima facie* stage and again at the pretext stage.[12]

The Significance of Temporal Proximity Evidence

The causation proof in many retaliation cases goes no further than the mere number of days, weeks, months, or years between the alleged protected activity and the ultimate adverse employment action. Thus, whether temporal proximity—standing alone—constitutes sufficient causation evidence is often the central issue in a retaliation case.[13] In *Clark County School District v. Breeden*, the United States Supreme Court had the chance to adopt a bright-line rule or establish a framework for courts to deal with temporal proximity evidence.[14] Instead, the Court simply recognized that "courts that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be very close."[15] Apart from noting that time periods of three and four months had been found by the appellate courts to be very close, the Court did not explain what constitutes very close proximity, nor did the Court delve into whether very close temporal proximity alone is sufficient to survive summary judgment or is sufficient to sustain the plaintiff's burden at the *prima facie* stage.[16] Rather, the Court simply held that the adverse employment action taken by the employer *20 months* after the

plaintiff filed an EEOC complaint "suggests, by itself, *no causality at all*."[17]

As a result of the questions left unanswered by the *Breeden* decision, lower courts vary in regard to the significance they attribute to evidence of temporal proximity at the *prima facie* stage and, ultimately, at the summary judgment stage.[18] So long as the employer can establish a legitimate, non-discriminatory basis for the adverse action, these variances are really distinctions without a difference because—absent rare, extreme situations—mere temporal proximity evidence will not create a genuine issue of material fact at the summary judgment stage.[19]

The Battle: "Very Close" Temporal Proximity May Be Enough to Establish the Plaintiff's Prima Facie Case

In certain, limited scenarios, federal appellate courts have held that temporal proximity—and nothing more—can be sufficient to win the *prima facie* battle.[20] Generally, these cases point to the fact that the plaintiff's initial burden at the *prima facie* stage is intended to be light and not onerous.[21] The courts that have ruled that mere temporal proximity suffices as evidence of causation at the *prima facie* stage are generally consistent in not stretching the "very close" timing language in *Breeden* too far.[22]

The Sixth Circuit recently confronted the extreme temporal proximity situation of adverse action that occurs instantaneously on the heels of protected activity.[23] In *Mickey v. Ziedler Tool & Die Co.*, the plaintiff was a 67 year-old man who had worked for the defendant for 33 years.[24] For approximately two years, the owner of the company had been approaching Mickey about his plans to retire, but Mickey had no plans of retiring.[25] In response, the owner decreased Mickey's pay and job duties. Consequently, Mickey filed a charge of age discrimination with the EEOC.[26] Mickey filed an additional charge based on unlawful retaliation and received right to sue letters on both charges.[27]

The district court awarded summary judgment to the employer on Mickey's retaliation claim on the basis that mere temporal proximity was not enough to establish a causal nexus between Mickey's termination and the filing of his EEOC charge.[28] The Sixth Circuit disagreed and held that summary judgment was improper.[29] Specifically, the court held:

> Where an adverse employment action occurs *very close* in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a *prima facie* case of retaliation. But where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.[30]

Although Mickey's only retaliation evidence was temporal proximity, the Court not only held that he had established a *prima facie* case, but that he also had produced sufficient evidence to survive summary judgment at the pretext stage.[31] The Court seemed to infer that the instantaneous temporal proximity alone might be sufficient to carry Mickey past summary judgment, but the Court backed off of this position by concluding that Mickey had satisfied his pretext burden by offering evidence of disparate treatment that occurred *before* Mickey ever exercised a protected right by filing his charge of discrimination.[32] It is simply not logical to allow conduct that occurred prior to an employee's exercise of a protected right to serve as evidence of retaliation. The extreme temporal proximity facts of *Mickey* combined with the Sixth Circuit's inexplicable recognition of pre-protected activity discrimination as evidence of retaliation render the *Mickey* decision an outlier. Indeed, just four years earlier the Sixth Circuit specifically held that temporal proximity alone could not establish the requisite causal connection to sustain a retaliation claim.[33]

The War: Temporal Proximity Alone Is Not Enough to Survive Summary Judgment

Even if a plaintiff can win the initial causation battle at the *prima facie* stage in some jurisdictions, there is still a war to fight over whether the plaintiff can survive summary judgment. Evidence of temporal proximity—standing alone—is too weak to create a triable issue of fact.[34] Indeed, "suspicious timing alone is generally insufficient to establish a genuine issue of material fact for trial."[35]

In *Strong v. University Healthcare System*, the Fifth Circuit held that temporal proximity is insufficient to prove but-for causation in a retaliation case, and without more than mere timing allegations, summary judgment is proper.[36] The *Strong* court noted that the U.S. Supreme Court has stated that very close temporal proximity might be used to establish a causal connection between the exercise of statutory rights and an adverse action, but the court pointed out that this analysis was only for purposes of establishing a *prima facie* case of retaliation.[37] The *Strong* court also recognized that only if the plaintiff establishes a *prima facie* case, must the employer even offer a legitimate, non-discriminatory reason for its actions, and the plaintiff can only survive summary judgment if she demonstrates that the employer's reasons are pretextual and that it would not have acted but for the employee's exercise of protected rights.[38] The court specifically stated that allowing evidence of temporal proximity—standing alone—to establish but for causation would "unnecessarily tie the hands of employers."[39] Moreover, the court explained that employers have legitimate reasons for removing employees from the workplace and should not be prevented from doing so "simply because" an employee engaged in protected activity "months prior" to an incident that warrants discipline.

Similarly, the Second Circuit has recently ruled that temporal proximity alone will not pass muster at the pretext stage.[40] In *El Sayed v. Hilton Hotels Corp.*, three weeks after complaining about being called a "terrorist Muslim Taliban," the plaintiff was terminated.[41] The employer claimed the plaintiff was fired for violating policy by omitting required employment history from his job application.[42] The plaintiff produced no other evidence than the temporal proximity between his complaint and termination.[43] Accordingly, the court held that:

> The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a *prima facie* case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy appellant's burden to bring forward some evidence of pretext. Indeed, a plaintiff must come forward with some evidence of pretext in order to raise a triable issue of fact.[44]

Conclusion

In a Title VII retaliation case, *very close* temporal proximity between the employee's exercise of protected activity and the employer's subsequent adverse employment action may be sufficient to establish the causal link necessary to establish a *prima facie* case of retaliation. However, temporal proximity—standing alone with no evidence of pretext—is not sufficient to survive summary judgment. Thus, a plaintiff who is armed with mere temporal proximity evidence may win the battle but will not win the war. Drawing our attention back to Jackie's case, if she has no other evidence than the mere passage of time between her complaint to HR and ultimate termination, she may satisfy her initial burden at the *prima facie* stage, but she should lose on summary judgment.

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1 *See* EEOC Charge Statistics FY 1997 through FY 2010, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

2 *Id.*

3 *Id.*

4 *See* 42 U.S.C. § 2000e-3(a).

5 *See* 450 U.S. 248 (1981); 411 U.S. 792, 802-04 (1973).

6 *See, e.g., Septimus v. University of Houston*, 399 F.3d 601, 608-09 (5th Cir. 2005); *Amrhein v. Health Care Service Corp.*, 546 F.3d 854, 858-59 (7th Cir.).

7 *Burdine*, 450 U.S. at 253.

8 *Id.*

9 *Id.* at 253.

10 42 U.S.C. § 2000e-3(a) (emphasis added).

11 *Strong v. University HealthCare System, L.L.C.,* 482 F.3d 802, 808 (5th Cir.2007) (noting that there is "no doubt that the but-for standard controls" in a Title VII retaliation case).

12 *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271 (3d Cir. 2000).

13 *See, e.g., Clark County School District v. Breeden,* 532 U.S. 268, 273-74 (2001).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 274 (emphasis added).

18 *Id.* at 274.

19 *Burdine v. Texas Department of Community Affairs*. 450 U.S. 248 (1981) ("The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.")

20 *See, e.g., Pomales v. Celulares Telefónica, Inc.*, 447 F.3d 79 (1st Cir. 2006) ("Temporal proximity can create an inference of causation in the proper case.").

21 *DeCaire v. Mukasey*, 530 F.3d 1, 19 (1st Cir. 2008) ("[T]emporal proximity alone can suffice to 'meet the relatively light burden of establishing a prima facie case of retaliation.").

22 *See Breeden*, 532 U.S. at 273-74 (noting the Tenth Circuit has ruled that a 3-month period is insufficient evidence of causation and the Seventh Circuit has ruled a 4-month period insufficient) (internal citations omitted); *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (holding temporal proximity must be very close, and three to four months is not close enough); *Lewis v. St. Cloud State University*, 467 F.3d 1133 (8th Cir. 2006) ("We have held that an interval as brief as two months did not show causation for purposes of establishing a retaliation claim, and that a two-week interval was 'sufficient, but barely so.'") (internal citations omitted); *Drago v. Jenne*, 453 F.3d 1301 (11th Cir. 2006) (holding three month proximity between a protected activity and an adverse employment action is not sufficiently proximate to show causation); *Fasold v. Justice*, 409 F.3d 178 (3d Cir. 2005) ("[W]hen only a short period of time separates an aggrieved employee's protected conduct and an adverse employment decision, such temporal proximity may provide an evidentiary basis from which an inference of retaliation can be drawn.").

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

24 *Id.* at 520.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 527-28.

29 *Id.*

30 *Id.* at 525. (emphasis added).

31 *Id.*

32 *Id.*

33 "The law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim." *See Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 321 (6th Cir. 2004).

34 *Strong v. University HealthCare System, L.L.C.,* 482 F.3d 802, 808 (5th Cir.2007); *Lewis v. City of Chicago*, 496 F.3d 645, 655 (7th Cir. 2007) ("[T]he mere fact that one event preceded another does nothing to prove that the first event caused the second; the plaintiff also must put forth other evidence that reasonably suggests that her protected speech activities were related to her employer's discrimination.").

35 *Amrhein v. Health Care Service Corp.,* 546 F.3d 854, 859 (7th Cir. 2008).

36 *Strong*, 482 F.3d at 808 (noting that while temporal proximity alone is not enough to prove *but-for* causation, "temporal proximity alone, *when very close,* can in some instances establish a *prima facie* case of retaliation").

37 *Id.*

38 *Id.*

39 *Id.*

40 *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 932-33 (2d Cir. 2010).

41 *Id.* at 932.

42 *Id.*

43 *Id.* at 933.

44 *Id.*

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