



# **Protection from Retaliation and Interference in Employment under the Americans with Disabilities Act (ADA) Title I**

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# Introduction

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The Americans with Disabilities Act (ADA) protects individuals with disabilities from retaliation for, and interference in, exercising their rights under Title I, II and III of the law. Retaliation and interference are distinct forms of discrimination under the ADA and the rights of individuals to be free from retaliation and interference are in addition to the other rights under the law. This document focuses on retaliation and interference in employment under Title I of the ADA although as explained below, the statutory protections from retaliation and interference are the same for all Titles.<sup>1</sup>

When an individual exercises their rights under the ADA, those actions are protected activities. For example, a request for reasonable accommodation is a right under Title I and therefore a protected activity. A protected activity can also include opposing a practice the individual thinks is unlawful discrimination under Title I. Examples of opposition can be an internal complaint to human resources personnel or an individual's supervisor. It can also be filing formal complaints with the Equal Employment Opportunity Commission (EEOC). EEOC is the federal regulatory agency enforcing employment under the ADA and numerous other federal civil rights laws. In addition, opposition includes filing a complaint with a comparable state agency or a request for judicial review.

If an employer then takes adverse action against the employee making the request for an accommodation or opposing some practice by making a complaint, the employer's response is retaliation. Adverse action can include such things as firing an employee, denying a promotion, and giving negative evaluations that are unsupported. The EEOC has reported that in a significant number of their investigations, a claim of discrimination under Title I was not substantiated but the retaliation claim was.<sup>2</sup>

There has been a dramatic increase in the number of retaliation cases investigated by the EEOC since the ADA was enacted.<sup>3</sup> According to the EEOC, "retaliation has been the most frequently alleged basis of discrimination in the federal sector since 2008"<sup>4</sup> and was the most common type of employment discrimination finding after an EEOC investigation of all federal employee complaints in 2013.<sup>5</sup> Although the ADA was not the

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<sup>1</sup> The terms used are somewhat different in the Title II and III; see Title II: §35.134 Retaliation or coercion and Title III: §36.206 Retaliation or coercion.

<sup>2</sup> Retaliation – Making it Personal at [https://eoc.gov/laws/types/retaliation\\_considerations.cfm](https://eoc.gov/laws/types/retaliation_considerations.cfm)

<sup>3</sup> Craig Robert Senn. *Redefining Protected Opposition Activity in Employment Related Cases*. 37 Cardozo L. Rev 2035, 2040 (2016).

<sup>4</sup> [https://eoc.gov/laws/types/retaliation\\_considerations.f=cfm](https://eoc.gov/laws/types/retaliation_considerations.f=cfm).

<sup>5</sup> *Id.*

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only federal civil rights law included in these reports, they highlight the prevalence of retaliation complaints in employment generally. In some cases, the EEOC will settle a complaint charging retaliation through mediation between the employee and employer. When that is not successful, the EEOC will investigate the complaint to determine if there is “reasonable cause” to believe discrimination has occurred. If so, the agency will investigate and attempt to resolve the issue with the employer. If that is also unsuccessful, the EEOC may file a court action. If the agency decides not to file suit, it will issue “a right to sue” which allows the employee 90 days to file a court action.<sup>6</sup>

The federal courts often hear ADA employment cases in which the issues are both the employer’s denial of a right under Title I and retaliation or interference against the employee for exercising that right. Unlike the report from the EEOC regarding the substantiation of retaliation claims in employment cases referred to earlier, a recent review of all retaliation cases under Title I, since the amendments to the ADA became effective in 2009, found that in 75% of all federal cases the court found in favor of the employer.<sup>7</sup> Because the EEOC has pursued a growing number of employment retaliation complaints under the ADA and works vigorously to settle complaints, employers may not be challenging most complaints and those that are litigated are those with insufficient evidence to find retaliation. As discussed later in this document, it is difficult for individuals to prove retaliation and/or interference under Title I in court. However, there are indications that some federal courts are beginning to reevaluate the evidence required and lower the burden of proof.

The retaliation and interference clauses under the ADA and the remedies available for violations are described in the section below, followed by a discussion of extensive guidance from EEOC on these issues. The relevant United States Supreme Court and federal appellate circuit court decisions concerning retaliation and interference are summarized throughout. The paper concludes with information on the web-based EEOC resources available for retaliation and interference in employment under federal nondiscrimination law including the ADA

## **ADA Statutory Protections from Retaliation and Interference**

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This section begins with a brief review of the relationship between the ADA retaliation and interference clauses and other federal statutes addressing employment

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<sup>6</sup> EEOC Resources on Disability Discrimination at <https://www.eeoc.gov/laws/types/disability.cfm>

<sup>7</sup> Nicole B. Porter. *Disabling ADA: Retaliation Claims*, 19 Nev. L. J. 823 (Spring 2019).

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discrimination that also include protection from retaliation. These include Title VII of the Civil Rights Act of 1964 (Title VII) and the amendments enacted in 1991, and the Age Discrimination in Employment Act (ADEA) of 1967. The EEOC guidance as well as judicial decisions concerning retaliation under Title VII and ADEA have been instrumental in understanding this issue under the ADA.<sup>8</sup>

The intent of Title VII of the Civil Rights Act of 1964 is to address the widespread employment discrimination experienced by groups historically denied opportunities enjoyed by others in the United States. Title VII includes two broad prohibitions. First, covered employers cannot discriminate on the basis of race, color, religion, sex, or national origin in employment related matters.<sup>9</sup> In essence, this prohibits an employer from basing employment decisions on an individual's status. Second, covered employers cannot discriminate against any individual because they have complained of, opposed, or participated in a proceeding related to prohibited discrimination.<sup>10</sup> This section is referred to as the retaliation provision. It is considered the primary method of ensuring nondiscrimination because it protects an employee's right to complain about violations under the law and ensure that those complaints are addressed.

The Age Discrimination in Employment Act (ADEA) was enacted in 1967 to address discrimination on the basis of age in employment and to promote employment of persons based on their ability, not their age.<sup>11</sup> Like Title VII, it applies to employers, private and public, labor organizations, and employment agencies.<sup>12</sup> It is unlawful under the law "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age."<sup>13</sup> The ADEA protects individuals over age 40 and, like Title VII, prohibits retaliation against an individual for filing a charge or opposing a practice made unlawful by the ADEA.<sup>14</sup>

Congress enacted the ADA to address systemic societal discrimination of individuals with disabilities in this country, including in employment. The stated purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>15</sup> This is similar to the intent of Title VII of the Civil Rights Act and the ADEA for individuals protected under those laws. Although the ADA has unique aspects when compared with these earlier

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<sup>8</sup>Other federal nondiscrimination statutes that protect individuals from retaliation, and in some cases interference, when exercising their rights include the Fair Labor Standards Act (FLSA), Equal Pay Act (EPA), Occupational Safety and Health Act (OSHA), and Genetic Information Nondiscrimination Act (GINA).

<sup>9</sup> 42 U.S.C. §2000e(2)(a).

<sup>10</sup> 42 U.S.C. §2000e-3(a).

<sup>11</sup> 29 U.S.C. §621(b) (2012).

<sup>12</sup> 29 U.S.C. §630(b)-(d). Note: public employers added in 1974.

<sup>13</sup> 29 U.S.C. §623(a)(1).

<sup>14</sup> 29 U.S.C. §623(d) (2012).

<sup>15</sup> 42 U.S.C. §12101(b)(1).

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nondiscrimination statutes, it also mirrors these laws in many ways. One way the ADA is similar concerns the general protection from retaliation when exercising one's rights under the ADA. However, the ADA also adds an additional protection from interference that is not included in Title VII or ADEA. Protection from interference is mentioned in the Fair Housing Act (FHA), Family and Medical Leave Act (FMLA), and the National Labor Relations Act (NLRA).

As stated earlier, these rights extend across three titles of the ADA. These are Title I (employment), Title II (programs and services of local and state government), and Title III (public accommodations). However, there is no specific mention of retaliation or interference in Titles I, II, or III. Instead, protection from retaliation and interference is included in Title V of the ADA, the title that addresses miscellaneous issues relevant across the other titles of the statute.<sup>16</sup> There are three clauses in Title V relevant to retaliation and interference as discussed below.<sup>17</sup>

## Retaliation Clause

The retaliation clause prohibits discrimination against an individual because the individual has opposed something unlawful under the ADA or has been involved in some type of complaint activity.

### (a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. §12203(a).

There is no definition of retaliation in the ADA itself. However, the EEOC has defined retaliation as an adverse action against a covered individual because he or she engaged in a protected activity.<sup>18</sup> Retaliation includes both oppositional and participatory activities. First, retaliation includes activities that oppose any practice unlawful under the ADA. The EEOC has expanded on this to explain that oppositional activities "include[s] the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination."<sup>19</sup> The EEOC states that

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<sup>16</sup> Relevant issues include state immunity, regulations by the Architectural and Transportation Barriers Compliance Board, attorney's fees, and technical assistance. See 42 U.S.C. §12201-12213.

<sup>17</sup> [Pub. L. 101-336, title V](#), §503, July 26, 1990, [104 Stat. 370](#).

<sup>18</sup> [EEOC Enforcement Guidance on Retaliation and Related Issues](#). No. 915.004 (August 25, 2016) at 4. <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>

<sup>19</sup> *Id.* at 6.

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the manner of opposition must be reasonable and the opposition must be based on a reasonable belief that the conduct opposed is unlawful.

Participatory activities are also included in the definition of retaliation. Those activities have been defined as “having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under the ADA. It may “include filing or serving as a witness in an administrative proceeding or lawsuit alleging discrimination.”<sup>20</sup> To help illustrate what behaviors in the workplace would be considered retaliation—both oppositional and participatory—the EEOC Enforcement Guidance on Retaliation and Related Issues (hereafter EEOC Enforcement Guidance) as well as settlement agreements are good resources.<sup>21</sup>

The language of the ADA retaliation clause is almost identical to that of Title VII and the ADEA. There was a fair amount of litigation under these earlier laws to help define retaliation; however, the federal Circuit Courts of Appeals could not agree on what employer actions constituted retaliation under the nondiscrimination laws. In 2006, the United States Supreme Court provided some guidance in *Burlington N. & Santa Fe R.R. Co. v. White*.<sup>22</sup> The Court addressed the retaliation standard under Title VII of Civil Rights Act in that case. Because of the similarity between the anti-retaliation protections in Title VII and the ADA, courts after *Burlington* applied the standard announced in that case to retaliation claims under Title I.

Three holdings from the *Burlington* decision are incorporated into the analysis of ADA retaliation decisions. First, the *Burlington* Court held that retaliatory action does not have to be employment or workplace-related to be actionable. For example, if an employer files false criminal charges against an employee that could be actionable retaliatory action.<sup>23</sup> Second,

A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.<sup>24</sup>

Finally, the Court stated that to determine whether a certain action was likely to deter an employee from complaint activities would often depend on the particular

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<sup>20</sup> *Id.* at 5.

<sup>21</sup> See Section V. Resources of this paper.

<sup>22</sup> 548 U.S. 53 (2006).

<sup>23</sup> *Id.* at 64, citing *Berry v. Stevinson Chevrolet*, 74 F.3d. 980 (CA10 1996).

<sup>24</sup> *Id.* 68, citing *Rochon v. Gonzales*, 438 F.3d 1211 (DDC 2006).

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circumstances—in other words—context matters.<sup>25</sup> The example given in the case was that a work schedule change may not adversely impact most employees, but it may well do so if the employee is a mother with young children.<sup>26</sup> Despite the application of the *Burlington* standard to retaliation in disability discrimination complaints, there continues to be mixed results in the federal courts as discussed later in the paper.

Numerous cases since *Burlington* have focused on how to define “reasonable” and “materially adverse” in retaliation cases. Reasonable in the retaliation analysis under the ADA means the individual must have a “reasonable good faith belief” that the conduct opposed violates the ADA or “could do so if repeated.”<sup>27</sup> Even if the ADA has not been violated, if it is understandable that a person would think it had been, the individual is protected from any retaliation. The EEOC opines that without this protection, although the individual is not actually opposing or participating in complaint activity or opposing discrimination, because no discrimination has occurred, the person is protected by simply making a complaint or requesting an accommodation.<sup>28</sup>

The EEOC has defined “materially adverse” to mean “any action that *might deter a reasonable person from engaging in protected activity.*”<sup>29</sup> The agency clarified that such actions can include those that “can be challenged directly as employment discrimination.”<sup>30</sup> Those actions can be outside the work place “as long as it may deter a reasonable person from engaging in protected activity.”<sup>31</sup> The only requirement is that the employer’s action was reasonably likely to stop the individual from exercising their ADA rights, not that the individual was, in fact, prevented from doing so.<sup>32</sup>

As noted in the *Burlington* decision, the EEOC reiterates that whether an action is “materially adverse” will depend on the facts and circumstances of the particular case. Actions that would not be considered materially adverse are “a petty slight, minor annoyance, trivial punishment, or any other action that is not likely to dissuade an employee from engaging in protected activity in the circumstances.”<sup>33</sup> An employer’s brief delays in issuing refund checks to employees was deemed insufficient to rise to the level of materially adverse action in *Fanning v. Potter*.<sup>34</sup> However, revoking the flex-time

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<sup>25</sup> *Id.* at 69.

<sup>26</sup> *Id.*

<sup>27</sup> EEOC Enforcement Guidance at 8.

<sup>28</sup> EEOC Enforcement Guidance at 11.

<sup>29</sup> EEOC Questions & Answers: Enforcement Guidance on Retaliation and Related Issues, Question 8.

*Italics* in original.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 614 F.3d 845 (8<sup>th</sup> Cir. 2010).

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schedule of an employee who received permission to vary her schedule in order to provide care for her disabled child was considered materially adverse in *Washington v. Illinois Dep't of Revenue*.<sup>35</sup>

The second relevant section in Title V is referred to as the interference clause.<sup>36</sup>

## Interference Clause

The interference clause makes certain employer behaviors unlawful under the ADA. These behaviors include the following: coercion, intimidation, threatening behavior, interference with an individual exercising one of his or her rights under the ADA, or for aiding or encouraging someone else to enjoy these same rights.

### (b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter. 42 U.S.C. §12203(b).

The ADA and implementing regulations do not define the specific terms within the interference clause. However, the terms used—i.e., coerce, intimidate, threaten and interfere—have been “interpreted [by the EEOC] to include at least certain types of actions which, whether or not they rise to the level of unlawful retaliation, are nevertheless actionable as interference.”<sup>37</sup> The EEOC has provided additional guidance in this area including a list of examples of conduct that would be interference under Title I and therefore prohibited by ADA. These include:

- Coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
- Intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- Threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;
- Issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");

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<sup>35</sup> 420 F.3d 658 (7<sup>th</sup> Cir. 2005).

<sup>36</sup> 42 U.S.C. §12203(a) is generally known as the retaliation prohibition clause and 42 U.S.C. §12203(b) as the interference prohibition clause. EEOC Enforcement Guidance.

<sup>37</sup> EEOC Enforcement Guidance at 22.



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- Interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
  - Subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.<sup>38</sup>

Interference does not include all conduct (or statements) that might be intimidating to an individual. The ADA only “prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights.”<sup>39</sup> An employer’s action may be both retaliation and interference according to the EEOC and “may [also] overlap with unlawful denial of accommodation.”<sup>40</sup> The agency has clarified that a “threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.”<sup>41</sup> This is similar to the guidance regarding the retaliation clause.

The appellate case law addressing the interference clause in the ADA is somewhat limited but the following case offers some guidance. The Ninth Circuit 2003 decision in *Brown v. City of Tucson*<sup>42</sup> relied on the FHA case law to determine the scope of the ADA interference clause rather than Title VII. The court’s rationale was that Title VII does not have an interference prohibition, but FHA does and therefore the reliance on Title VII retaliation standards was not appropriate for ADA interference cases.

There was no effort by the *Brown* Court to define any of the terms used in that clause but the justices did rule that, “[f]or whatever else that provision may prohibit, it clearly makes it unlawful to “*threaten...any individual in the exercise of enjoyment of...any right granted or protected by this statute.*”<sup>43</sup> The Court continued by clarifying that threat alone is not sufficient to create ADA liability. An employee “must then demonstrate that she has suffered ‘a distinct and palpable injury’ as a result of the threat.”<sup>44</sup> The injury could be giving up an ADA right, another injury resulting from refusing to give up the right, or even from the threat itself.<sup>45</sup> The employee argued that her rights were violated when she was questioned inappropriately about her disability and then threatened.

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<sup>38</sup> EEOC Enforcement Guidance at 19.

<sup>39</sup> *Id.* at 22.

<sup>40</sup> EEOC Questions and Answers: Enforcement Guidance on Retaliation and Related Issues, Question 19.

<sup>41</sup> *Id.*

<sup>42</sup> 336 F.3d. 1181 (9<sup>th</sup> Cir. 2003).

<sup>43</sup> *Id.* 1193 (italics in original).

<sup>44</sup> *Id.*

<sup>45</sup> The *Brown* Court cited *Bachelder v. Am. West Airlines, Inc.*, 259 F.3d 1112, 1124 (9<sup>th</sup> Cir. 2001).

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However, the court ruled she did not show evidence of a threat or that she had given up any right so there was no violation of the interference clause.<sup>46</sup>

It is important to note that the Title V interference provision covers a wider range of behaviors than the retaliation provision. However, in both clauses, the law does not state that the individual has to be an “individual with disability” or “qualified” in order to bring a retaliation or interference complaint under the ADA. An employee without disability who is retaliated against and/or faces interference because of complaint activity regarding workplace behavior towards an individual with a disability also has protections under Title V. A recent district court case filed in Mississippi by the EEOC on behalf of both an individual with a disability and her co-worker illustrates the protection from retaliation available to nondisabled individuals under the ADA. Both employees claimed their employer had retaliated against them because they had complained about disability discrimination under the ADA Title I and the EEOC investigators agreed. Because the agency’s attempt to reach a pre-litigation conciliation agreement with the company failed, the case has been filed in the Northern District of Mississippi and will be scheduled for trial.<sup>47</sup>

It is reported that retaliation claims are more often litigated than interference ones.<sup>48</sup> However, regardless of whether both or only one of the two clauses is the basis for a complaint, the question is what remedies are available for a successful employee. Title V addressed this only by reference to Titles I, II and III of the ADA as outlined below.

## Remedies Available

### (c) Remedies and procedures

The remedies and procedures available under sections 12117 (Title I,) 12133 (Title II,) and 12188 (Title III) of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively. 42 U.S.C. §12203(c).

The remedies clause does not specify the remedies available for retaliation and/or interference violations. Instead, it incorporates the specific provisions of Titles I, II and III and states that the remedies available in each title are relevant to claims under retaliation and/or interference. For employment related issues under Title I, the powers,

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<sup>46</sup> *Frakes v. Peoria School District No. 150*, 872 F.3d 545 (7<sup>th</sup> Cir. 2017). Note: this case was litigated under Section 504 of the Rehabilitation Act but applied the ADA law on interference.

<sup>47</sup> *EEOC v. Valley Tool*, Civil Action No. 3:19-cv-00140 and *EEOC v. Valley Tool*, Civil Action No. 3:19-cv-00141

<sup>48</sup> Nicole B. Porter. *Disabling ADA: Retaliation Claims*. 19 Nev. L. J. 823, 827 (Spring 2019).

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remedies, and procedures provided for in the Civil Rights Act of 1964 are available to enforcement under Title I.<sup>49</sup>

Title I enforcement powers include: investigation by the EEOC, a state comparable agency, or litigation once the employee has received a “right-to-sue” letter from EEOC or the relevant state agency, authorizing litigation. The EEOC Enforcement Guidance states that the agency also has the authority to seek temporary or preliminary relief before a final decision in an investigation when there is belief that it is necessary to prevent additional retaliation.<sup>50</sup> The Attorney General’s Office can also take legal action against employers covered by ADA who have a pattern or practice of discrimination.

Congress adopted the enforcement (including remedies available) provisions of the Civil Rights Act for the ADA and therefore, the remedies available under that law are applied to employment discrimination under Title I.<sup>51</sup> The Civil Rights Act of 1964 allowed only equitable damages for successful employees; equitable damages include back and front pay or job reinstatement. The result of the equitable awards limitation meant that employees suing under Title VII had no right to a jury trial. When Congress amended the Civil Rights Act in 1991 it added legal damages, which include compensatory and punitive damages, as available awards in Title VII cases.<sup>52</sup> This addition meant that a right to a jury trial for the plaintiff would be available.

The additional damages also became available to individuals with disabilities by reference to the ADA in the Civil Rights Act. However, the amendments addressing remedies in the 1991 Civil Rights Act only added legal damages for the violation of rights under the ADA broadly.<sup>53</sup> The amendments did not specifically mention the right to legal damages as a remedy to charges of retaliation or interference found in Title V of the ADA.<sup>54</sup> This has caused confusion in the courts as to whether legal damages are in fact available for a successful retaliation or interference claim under Title I.

The EEOC Compliance Manual 8-21 published in 1998 endorsed the idea that individuals who experienced retaliation and/or interference were eligible for legal damages under

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<sup>49</sup> 42 U.S.C. §2000e-4-9.

<sup>50</sup> EEOC Enforcement Guidance at 24.

<sup>51</sup> *Id.*

<sup>52</sup> Compensatory damages compensate for nonpecuniary damages including humiliation, pain and suffering, etc. Punitive damages are available when the plaintiff can establish that the defendant engaged in discrimination with malice or reckless indifference to the rights of the plaintiff. Compensatory and punitive damages are capped at amounts depending on the defendant's number of employees. In addition, there is a "good faith" exception to the award of damages for defendants found to have failed to provide reasonable accommodation. See <https://www.everycrseport.com/reports/R43845.html#>

<sup>53</sup> Section 1981 a(a)2 of Civil Rights Act 1991.

<sup>54</sup> 42 U.S.C. §12203.

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Title I of the ADA. A year after the publication of this manual, the Fourth Circuit Court of Appeals weighed in on whether legal damages were in fact available in Title I cases as a result of the amendments to the Civil Rights Act in 1991. In *Baird v. Rose*, the court agreed with the EEOC interpretation and held that remedies available under Title I are specified in 42 U.S.C. §12117 and clearly “makes the remedies available under Title VII applicable to actions under the ADA.”<sup>55</sup> Numerous other federal Circuit Courts of Appeal also allowed legal damages and jury trials for claims of employment related retaliation and/or interference after the Civil Rights Act of 1991 amendments.<sup>56</sup>

However, in 2004 the Seventh Circuit Court of Appeals ruled differently in *Kramer v. Banc of America*<sup>57</sup> based on their “close reading of the plain language”<sup>58</sup> of the Civil Rights Act amendments that earlier courts had not done directly.<sup>59</sup> The justices acknowledged that the additional damages for violations under the Civil Rights Act of 1991 were also available for violations under Title I.<sup>60</sup> However, the 1991 amendments added legal damages for violations under Title I generally but did not specifically address “retaliation and coercion (interference)” complaints in Title V. From the court’s reading of the amendments, the expanded damages available for employment under Title I were only for violations of rights such as reasonable accommodation, prohibitions against not being hired when qualified, or disparate impact treatment.<sup>61</sup> Therefore, legal damages were not available for the violations of retaliation and/or interference under Title V.

*Kramer* began a trend in the courts of applying a limited interpretation of the damages available under the ADA Title V—i.e., only equitable relief. Although there is a split in the courts related to whether compensatory and punitive damages (legal damages) are available for retaliation and interference under Title V of the ADA, there is no legal debate that equitable damages are available for violations under the ADA.

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<sup>55</sup> 192 F.3d 462 at 471-2 (4<sup>th</sup> Cir. 1999).

<sup>56</sup> *Shellengerger v. Summit Bancorp, Inc.* 318 F.3d 183 (3<sup>d</sup> Cir. 2003); *Stafne v. Unicare Homes*, 266 F.3d 771 (8<sup>th</sup> Cir. 2001); *Muller v. Costello*, 187 F.3d 298 (2<sup>nd</sup> Cir. 1999).

<sup>57</sup> *Kramer v. Banc of America*, 355 F.3d 961 (7<sup>th</sup> Cir. 2004)

<sup>58</sup> *Id.* at 965

<sup>59</sup> Katie M. Mueting. *A Case for Allowing Victims of ADA Retaliation and Coercion in Employment to Recover Legal Damages*, 92 Iowa L. Rev 1493 (May 2007).

<sup>60</sup> *Id.*

<sup>61</sup> *Disparate treatment* is considered intentional discrimination and is contrasted with *disparate impact* which is considered unintentional discrimination that results when policies or practices that appear to be neutral have a disproportionate impact on a protected group.

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# Title I Regulations and Interference (Harassment) under Title I

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The Title I implementing regulations regarding retaliation and interference under Title V provide little additional guidance in understanding the type of employer behavior that is discriminatory.<sup>62</sup> However, the language is somewhat different between the statutory interference clause in Title V and the same clause in the regulations implementing Title I. Specifically, the Title I regulations add harassment as an example of interference in employment, as below:<sup>63</sup>

(b) Coercion, interference or intimidation – it is unlawful to coerce, intimidate, threaten, *harass* or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.<sup>64</sup>

The EEOC has published a definition of harassment applicable to all nondiscrimination laws that it enforces as follows:

Unwelcome conduct that is so frequent or severe that it objectively creates a hostile or offensive work environment or results in a negative employment action (such as being fired or demoted). For example, assault, threats, insults or offensive graffiti may be illegal harassment.<sup>65</sup>

In addition, the agency has published guidelines to help employers and employees understand the term in disability discrimination as below.

Harassment can include, for example, offensive remarks about a person's disability. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or

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<sup>62</sup> See 29 C.F.R. §1630.12 and 28 C.F.R. §35.134, 36.206.

<sup>63</sup> EEOC Enforcement Guidance footnote 177. Harassment is not a term used in the Title I statute although it is in Title III.

<sup>64</sup> 29 C.F.R. §1630.12(b). *Italics* added.

<sup>65</sup> Glossary available at <https://www.eeoc.gov/employers/smallbusiness/glossary.cfm#harassment>

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when it results in an adverse employment decision (such as the victim being fired or demoted).<sup>66</sup>

The EEOC clarifies that the harasser can be the employee's supervisor, another supervisor, co-worker or even a client or customer of the employer.<sup>67</sup> The issue is not only who is doing the harassing but also the environment that results from the harassing behavior and how that affects the employee. The EEOC guidance above seems to indicate there are various types of harassment including those that create a "hostile work environment" or that result in an adverse employment decision.

In addition to filing a complaint under the Title V interference clause for harassment in the workplace, an individual could claim harassment in the workplace under the prohibition on discrimination in the "terms, conditions, and privileges of employment"<sup>68</sup> under Title I. Whether a complaint of harassment in the workplace is based on a violation of Title I or Title V, few individuals have been successful in convincing the courts that he or she had experienced harassment on the basis of disability under either Title. The primary barrier has been that the same level of proof required to prove a "hostile work environment" under Title VII of the Civil Rights Act<sup>69</sup> has been applied to disability harassment.<sup>70</sup> To prove hostile work environment under Title VII, the behavior must be severe and pervasive. This is a very heavy burden to meet and difficult for plaintiffs to prove.

To complicate the analysis of disability harassment, the EEOC has taken the position that the proof necessary for a "retaliatory harassment" claim under the ADA's retaliation prohibition in Title V is different from a claim of "hostile work environment." A hostile work environment claim under nondiscrimination law must meet the "severe and persuasive" standard as above but a retaliatory harassment claim only requires conduct that deters protected activity in a given context.<sup>71</sup>

Despite the difficulties in proving harassment on the basis of disability in the workplace, increasing numbers of courts have allowed a claim under the ADA that the employer

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<sup>66</sup> Disability Discrimination available at <https://www1.eeoc.gov/laws/types/disability.cfm?renderforprint=1>

<sup>67</sup> *Id.*

<sup>68</sup> 42 U.S.C. §12112(a).

<sup>69</sup> See also Title IX, which prohibits discrimination on the basis of sex.

<sup>70</sup> See Mark Weber. *Workplace Harassment Claims under the Americans with Disabilities Act: A New Interpretation*, 14 Stan. L. Pol'y Rev 241 (2003).

<sup>71</sup> EEOC Enforcement Guidance at 17.

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created a “hostile work environment.”<sup>72</sup> *Fox v. Costco Wholesale Corp.*<sup>73</sup> is a recent ADA decision from the Second Circuit on workplace harassment that illustrates the severe and pervasive standard in disability harassment. Mr. Fox sued Costco for hostile work environment, disparate treatment, failure to accommodate, and retaliation. The district court ruled for Costco on a summary judgment motion, dismissing all claims, and Mr. Fox appealed. Specifically on the hostile work environment claim, the district court was not convinced that the harassing behavior was severe and pervasive.

However, on appeal, the Second Circuit Court found sufficient evidence for the hostile work environment claim to go forward and remanded the case to the district court for trial. The Circuit Court made it clear that the intent of the ADA supported a claim of harassment on the basis of disability under the prohibition against discrimination on the basis of disability in regard to “terms, conditions, and privileges of employment.”<sup>74</sup> Further, the court held that the severe and pervasive standard must be considered as to whether it was “objectively abusive” and sufficient to effect or change an employee’s working conditions. The evidence presented in this case included joking about the employee’s disability, mimicking his behaviors, and degrading personal comments. These examples were sufficient to convince the Second Circuit Court that Costco employees were mocking the employee’s impairments which raised an issue of fact as to whether the workplace environment was “objectively hostile.”<sup>75</sup> Further, the court weighed the fact that Costco supervision had been aware of the behavior and did not stop it from occurring. The decision seemed to suggest that joking about an individual’s characteristics that are part of the disability is per se abusive and, if frequent enough, may well satisfy the severe and pervasive standard required for the hostile work environment claim, as it did in this case.

Disability harassment under Title I is a developing area of the law. Numerous retaliation and/or interference cases also include evidence of hurtful, stigmatizing, and/or cruel verbal or physical mimicking of an individual’s impairment that creates a hostile workplace environment. When that type of harassment rises above simple teasing and continues, the courts are increasingly finding an ADA violation. Depending on the facts of a specific case, an individual might bring a complaint of harassment as a violation of different treatment under the “terms and conditions” language of Title I. The individual might also bring a complaint under the interference clause of Title V arguing a hostile work environment. Finally, the EEOC has also recognized “retaliatory harassment” as a prohibition under Title V which the agency suggests does not require proof of the severe

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<sup>72</sup> *Fox v. Costco Wholesale Corp.*, 918 F.3d 65 (2<sup>nd</sup> Cir. 2019); *Lanman v. Johnson Cty.*, 393 F.3d 1151 (10<sup>th</sup> Cir. 2004); *Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8<sup>th</sup> Cir. 2003); *Flowers v. S. Reg’l Physician Servs.*, 247 F.3d 229 (5<sup>th</sup> Cir. 2001); *Fox v. Gen. Motors Corp.*, 247 F.3d 169 (4<sup>th</sup> Cir. 2001).

<sup>73</sup> *Fox v. Costco Wholesale Corp.*, 918 F.3d 65 (2<sup>nd</sup> Cir. 2019).

<sup>74</sup> 42 U.S.C. §12112(a).

<sup>75</sup> *Fox v. Costco Wholesale Corp.*, 918 F.3d 65 at 76 (2<sup>nd</sup> Cir. 2019).

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and pervasive conduct required under a hostile work environment claim based on the “terms and conditions” language in Title I.

Although the regulations implementing Title I do not add significantly to the retaliation and interference clauses, the EEOC has issued extensive guidance on retaliation and interference in employment, including harassment. The web-based resources and electronic locations are outlined in the final section of this paper.

## Proving Retaliation and/or Interference under ADA Title I

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Numerous equal employment opportunity federal laws include anti-retaliation clauses modeled after the Title VII Civil Rights Act of 1964 as mentioned earlier. Like Title VII, an individual charging an employer with retaliation and/or interference in the workplace under Title I of the ADA must first prove that three elements are satisfied:

1. The individual was engaged in prior protected activities and/or opposition to what a reasonable person would believe was ADA discrimination or participated in an ADA proceeding;
2. The employer took a materially adverse employment action after, or contemporaneously with, the opposition; and
3. There is a causal connection between these two events, specifically the protected activity and the adverse action.<sup>76</sup>

### Protected Activity

An individual does not have to be “correct” that he or she was engaged in protected activities to satisfy the first element. Only a reasonable and good faith belief that he or she was engaged in protected activities is required. For example, a person may believe he or she meets the statutory definition of disability under the ADA and request a reasonable accommodation. Even if the individual is not disabled under the ADA definition or their request for an accommodation is not ultimately determined to be reasonable, the individual has a right to be free from retaliation or interference if he or she acted reasonably and in good faith.

### Materially Adverse Employment Action

Evidence of the second element, materially adverse employment action, can include obvious actions such as firing a person from their job. However, it also includes other actions that a “reasonable employee” would consider materially adverse in the context

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<sup>76</sup> EEOC Enforcement Guidance at 5.



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and might dissuade the person from filing a complaint or otherwise opposing the employer's action. The EEOC has taken a broad view of materially adverse action and provided examples of both work related actions and those outside the workplace. In determining the "reasonable employee" standard, consideration must be given to the specific context of the case. The EEOC has stated that no action is ever categorically not "significant enough to deter protected activity" because that would violate the Supreme Court requirement for content specific analysis of materially adverse.<sup>77</sup>

## Causation

The final element requires that the plaintiff prove that the employer's adverse action was in response to the individual's protected activity. This connection between the adverse action and the protected activity is referred to as "causation." Evidence of a causal connection includes evidence of the temporal proximity<sup>78</sup> between the protected activity and the alleged retaliatory action or pattern of antagonism.<sup>79</sup> The EEOC Enforcement Guidance provides numerous examples of the type of evidence that can help support the causation standard. These include evidence of suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the employer's proffered reason for the adverse action, or any other pieces of evidence which, when viewed together, may permit an inference of retaliatory intent.<sup>80</sup>

There are two causation standards applied under federal nondiscrimination law; these are the "but-for" and the "motivating factor"<sup>81</sup> standards. The debate under the ADA has been whether the law requires the "but-for" causation or allows the "motivating factor" standard.<sup>82</sup> The "but-for" causation standard requires that an employee prove that the adverse action by the employer was depended on an impermissible factor and that "but-for" the impermissible factor, the adverse action would not have occurred. Impermissible factors are unlawful ones; an example would be refusal to provide a reasonable accommodation under the ADA. The "motivating factor" standard only requires the impermissible factor be one of potentially many factors that led to the

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<sup>77</sup> EEOC Enforcement Guidance at 15, references *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

<sup>78</sup> Temporal proximity refers to how close in time events occur

<sup>79</sup> *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3<sup>rd</sup> Cir. 2007). NOTE: case litigated under IDEA.

<sup>80</sup> See EEOC Enforcement Guidance at 19, cites *Ortiz v. Werner Enterprises, Inc.*, No 15-2574, 2016 WL 4411434 (7<sup>th</sup> Cir 2016).

<sup>81</sup> Also referred to as the "mixed motive" standard.

<sup>82</sup> Christian J. Meyers. *Untangling Causation Under the Americans with Disabilities Act: Is it But-For Causation or the Motivating Factor Standard?* 38 Rev. Litig. 95 (Fall 2018).

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adverse action. The “but-for” causation standard is harder to prove than the “motivating factor” standard as discussed below.

The United States Supreme Court has addressed the appropriate causation standard for retaliation and interference several times under Title VII and the ADEA, but has not addressed the issue specifically for the ADA. In *Price Waterhouse v. Hopkins*,<sup>83</sup> the Court was asked to determine the appropriate causation standard under Title VII in a case arguing sex discrimination in an employment context. The Justices held that due to the language of Title VII prohibiting discrimination “because of” the sex of the individual, and not “solely because of” the sex of the individual, “motivating factor” was the appropriate standard. Congress codified that interpretation in the Civil Rights Act amendments in 1991.<sup>84</sup> When the EEOC Guidance Manual was released in 1998, it referenced the Title VII of the Civil Rights Act amendments in 1991 to state that the causation standard was “motivating factor” under that law, and therefore, “motivating factor” would also be the standard under the ADA.

The Supreme Court revisited the issue ten years later in *Gross v. FBL Financial Services, Inc.*<sup>85</sup> The issue before the Court was whether the causation standard was also “motivating factor” under the ADEA because it did not include any language in the law itself regarding motivating factor. The ADEA does include the “because of” language similar to the Civil Rights Act. However, based on a textual analysis of the ADEA, the Justices held that because the law did not include a motivating factor provision, Congress must have been intentional in not amending the ADEA to clarify that motivating factor was the standard, as it did with the Civil Rights Act. Therefore, the “but-for” standard would apply to ADEA cases. According to *Gross*, “but-for” causation under the ADEA means that the employer must use age as a reason for the adverse action but it does not have to be the only reason. If the employer would have made the same adverse decision without consideration of age, then age was not the “but-for” cause.<sup>86</sup>

However, following *Hopkins* and *Gross*, there was some debate as to whether the “motivating factor” standard change was effective for violations of retaliation or only for violations of status complaints.<sup>87</sup> The Supreme Court weighed in on this issue in *University of Texas Southwestern Medical Center v. Nassar*,<sup>88</sup> a case litigated under Title VII in 2013.

The *Nassar* majority based its decision on the appropriate causation standard for retaliation on the specific wording of the Civil Rights Act. First, the Court held that

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<sup>83</sup> 490 U.S. 228 (1989).

<sup>84</sup> 42 U.S.C. §2000e-2(m).

<sup>85</sup> 557 U.S. 167 (2009).

<sup>86</sup> *Id.* at 176.

<sup>87</sup> Status claims under ADA are violations of discrimination on the basis of disability under Titles I, II, and III.

<sup>88</sup> *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013).

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Congress had written into the law that “motiving factor” was the factor for status-based discrimination under the 1991 amendments to the Civil Rights Act but had not done so specifically for the retaliation provision. Second, the Court compared the ADEA statutory language prohibiting discrimination because of age (status discrimination) with the Title VII retaliation provision. The Justices found no difference in the language between these two provisions and therefore, extended the *Gross* holding that “but-for” was the appropriate standard in retaliation complaints under Title VII. In addition, the majority stated that the stricter standard was required because of the increasing numbers of retaliation claims filed.<sup>89</sup> According to the majority, if the standard were lowered to “motiving factor” for retaliation claims, it would lead to an increased number of frivolous lawsuits and overload the courts.<sup>90</sup>

As noted by the *Nassar* Court, the EEOC Guidance Manual published in 1998 did state that the “motiving factor” standard was applicable to all federal nondiscrimination laws it enforced.<sup>91</sup> The Court addressed that guidance and was critical of the lack of thoroughness of the EEOC in its discussion of the difference between the “status based discrimination” language of Title VII and the anti-retaliation sections as justification for using the “motiving factor” standard. Ultimately, the Justices concluded that the EEOC’s guidance lacked the “persuasive force” necessary to receive deference.<sup>92</sup> However, the *Nassar* opinion seemed to leave the door open for the EEOC to develop stronger guidance and/or regulations to clarify the causation standard under federal nondiscrimination laws.<sup>93</sup>

*Nassar* was a very close decision with four Justices in the minority. The very critical dissent was authored by Justice Ruth Bader Ginsburg. Her first argument was that the intent of the specific incorporation of the “mixed motive” or “motiving factor” standard in the Civil Rights Act amendments of 1991 was to expand anti-discrimination protection. The “mixed motive” standard was intended to provide for “additional protections against unlawful discrimination in employment” and to “respond to a number of decisions by [the] Court that sharply cut back on the scope and effectiveness of antidiscrimination laws.”<sup>94</sup> Second, Justice Ginsburg thought that the Court should apply the same causation standard to both status and retaliation claims under Title VII. Because status claims of discrimination explicitly required the “mixed motive” standard under the Civil

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<sup>89</sup> *Id.* at 358.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 360.

<sup>92</sup> *Id.* at 361.

<sup>93</sup> August Johannsen. *Mitigating the Impact of Title VII’s New Retaliation Standard: the Americans with Disabilities Act after University of Texas Southwestern Medical Center v. Nassar*. 56 Wm. & Mary L. Rev. 301 (October 2014).

<sup>94</sup> *Nassar* at 369 quoting H.R. Rep. No 102-40, pt 2, pp 2-4.

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Rights Act, she would also apply that standard to retaliation claims. Finally, she was concerned that the “but-for” standard in employment discrimination cases cannot address the mind-related characteristics that constitute motive.<sup>95</sup> She argued that for retaliation claims, mixed methods is the only standard that makes sense in lieu of getting into the mind of the employer to determine the motive behind the adverse action.

In response to the critique from the Supreme Court Majority, the EEOC reversed its earlier position in the revised EEOC Enforcement Guidance on Retaliation and Related Issues released three years after *Nassar*. In its updated guidance, the EEOC stated that for the private sector and state and local governments, the appropriate causation standard for retaliation is “but-for.”<sup>96</sup> The guidance clarifies that under this standard retaliation does not have to be the “sole cause” of the action—i.e., it can be one of many reasons an employer takes adverse action against an employee.<sup>97</sup>

The Supreme Court in *Nassar* clearly stated that the “but-for” standard must be applied in Title VII retaliation cases and EEOC guidance was updated to reflect that. However, the federal Circuit Courts have been split in whether to apply the but-for or motivating factor standard in ADA cases.<sup>98</sup> The Fourth and Sixth Circuits apply the “but-for” causation standard under the ADA as do the First, Seventh, and Eleventh Circuits with some cases in those circuits decided before *Nassar*.<sup>99</sup> The “motivating factor” standard has been adopted in the Fifth, Eighth, and Ninth Circuits based on these courts reading of the ADA and the EEOC guidance prior to *Nassar*.<sup>100</sup> Based on the updated EEOC guidance, and the many Circuits following *Nassar* for ADA retaliation cases, it seems unlikely that the “motivating factor” standard will continue to be applied unless there are statutory or regulatory changes to the ADA.

Despite the *Nassar* decision, updated EEOC Enforcement Guidance, and the many federal circuits following *Nassar*, there have been proposals to reconsider the causation standard for the ADA. The argument is based primarily on the 2008 ADA amendments

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<sup>95</sup> *Id.* at 385 quoting *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 at 190 Breyer Dissent.

<sup>96</sup> The causation standard remains “motivating factor” in federal employment under Title VII and ADEA cases under the reissued guidance. EEOC Enforcement Guidance at 18.

<sup>97</sup> EEOC Enforcement Guidance at 18.

<sup>98</sup> Christian J. Myers. *Untangling Causation Under the Americans with Disabilities Act: Is it But-For Causation or the Motivating Factor Standard?* 38 Rev. Litig. 95 (Fall 2018). Author argues that the standard under the amended ADA should be “motivating factor” for retaliation cases.

<sup>99</sup> *Gentry v. E.W. Partners Club Mgmt. Co., Inc.*, 816 F.3d 228 (4<sup>th</sup> Cir. 2016); *Palmquist v. Shinseki*, 689 F.3d 66 (1<sup>st</sup> Cir. 2012); *Lewis V. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6<sup>th</sup> Cir. 2012). *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7<sup>th</sup> Cir. 2010); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11<sup>th</sup> Cir. 1996).

<sup>100</sup> *Dillard v. City of Austin*, 837 F.3d 557 (5<sup>th</sup> Cir. 2016); *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537 (8<sup>th</sup> Cir. 2018); *Pillips v. Victor Cmty. Support Servs., Inc.*, 692 F.App’x 920 (9<sup>th</sup> Cir. 2017).

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that changed the language in the original ADA from prohibiting discrimination “because of” a disability to prohibiting discrimination “on the basis of disability.” The argument is that the amended ADA language prohibiting discrimination on the basis of disability allows for the “motivating factor” standard. Based on this, as well as legislative history, there have been calls for Congress or the Supreme Court to clarify that the justification for the “but-for” causation standard announced in *Nassar* under Title VII is not applicable to the amended language of the ADA.<sup>101</sup> Whether the Congress or the courts will reconsider the causation standard for retaliation and interference under the ADA remains to be seen.

## Burden of Proof

An individual’s burden of proof required to prove Title I retaliation is preponderance of the evidence that he or she was engaged in a protected activity to oppose ADA discrimination and the employer took an adverse action that was causally related to the protected activity. Preponderance of the evidence is defined as more likely than not that retaliation has occurred. If the individual is successful in meeting this burden, then the burden shifts to the employer who must articulate a legitimate, non-retaliatory reason for the adverse action—e.g., termination of employment.<sup>102</sup> If the employer is successful in presenting a legitimate reason for the adverse action, then the individual can respond with arguments that show the employer’s reasons were pretextual and that the real reason was retaliation. One court characterized this as the “discriminatory reasons more likely than not motivated the employer or that the employer’s reasons are unworthy of credence.”<sup>103</sup>

A recent study of retaliation cases under Title I since the ADA 2008 amendments found that the three elements and the burden of proof required to prove retaliation are the basis for many courts to rule in favor of employers.<sup>104</sup> The author of this study reported that courts often use the “reasonable belief” standard to hold that the employee in the case did not or could not have reasonably believed that their requested accommodation was reasonable under the ADA. Courts are also finding that the “adverse action” claimed by an employee was not sufficiently adverse – i.e., it was too minor or trivial. Regarding the third element, courts often found that the proximity between the protected activity and the adverse action was too distant to show a causal relationship necessary to satisfy the “causation” standard. Post-ADA 2008 amendments, courts have regularly held that

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<sup>101</sup> Christian J. Myers. *Untangling Causation Under the Americans with Disabilities Act: Is it But-For Causation or the Motivating Factor Standard?* 38 Rev. Litig. 95 at 130. (Fall 2018).

<sup>102</sup> EEOC Questions and Answers: Enforcement Guidance on Retaliation and Related Issues, Question 14.

<sup>103</sup> *Cisneros v. Wilson*, 226 F.3d 1113 (10<sup>th</sup> Cir. 2000).

<sup>104</sup> Nicole Porter. *Disabling ADA Retaliation Claims*, 19 Nev. L. J. 823 (Spring 2019).

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plaintiffs failed to prove that an employer’s stated reason for the adverse action was pretextual.<sup>105</sup>

## V. Resources for Additional Information

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The Civil Rights Act has raised awareness of the discriminatory practices and attitudes towards employees because of their race, color, religion, sex or national origin, and required changes in the workplace. The ADA is designed to do the same concerning discrimination on the basis of disability by protecting employees with disabilities in exercising their rights under Title I such as asking for reasonable accommodation. It also ensures employees have a right to be free from retaliation and/or interference, including a workplace free of harassment, in exercising those rights under Title V.

The legal elements and standards required to prove retaliation and/or interference, including hostile work environment, under the ADA are complicated. Perhaps because of the lack of helpful regulatory or statutory language and the interplay between the ADA and Title VII of the Civil Rights Act and the ADEA, the EEOC has published extensive guidance for employers. These resources include many workplace examples to help illustrate and define the legal standards. In addition, in an effort to help employers be proactive, there are “promising practices” and other recommendations employers can take to minimize the likelihood of retaliation and/or interference violations.

Although retaliation and/or interference in employment are difficult claims to prove in court, the EEOC has been actively pursuing them, resulting in recent settlement agreements and court decisions favorable to employees. Summaries of the EEOC settlements are helpful in understanding workplace behaviors that constitute retaliation and/or interference. These settlements are available in a searchable database on the EEOC website.

Employees and employers both have access to the EEOC for technical assistance regarding any ADA Title I issue. For retaliation and/or interference, the resources are both generic to all federal nondiscrimination laws that the EEOC enforces as well as specific ones related to Title I. The EEOC guidelines and settlements as well as court decisions are valuable resources on nondiscrimination broadly and ADA Title I specifically.

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<sup>105</sup> *Id.* at 824.

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The following list includes the web based EEOC resources referenced in this document as well as additional ones that may be of interest. The link to the EEOC settlement agreements and summaries of litigation is also included.

## EEOC Resources

Disability Discrimination: <https://www.eeoc.gov/laws/types/disability.cfm>

Enforcement Guidance on Retaliation and Related Issues:  
<https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors: <https://www.eeoc.gov/policy/docs/harassment.html>

Questions and Answers: Enforcement Guidance on Retaliation and Related Issues:  
<https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm>

Small Business Fact Sheet: Retaliation and Related Issues:  
<https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm>

Small Business Resource Center:  
<https://www.eeoc.gov/employers/smallbusiness/index.cfm>

Case Settlements (Newsroom – searchable database):  
<https://www.eeoc.gov/eeoc/newsroom/index.cfm>

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