May 2015

My message this month is about the ***fear of retaliation***.  I hear about this often in my position as Ombud.  I have no real test to determine with the fear is rational and easy to prove by factual evidence, or if it’s completely irrational and borders on paranoia.  My stance with each visitor is neutral and I do believe that *they believe that what they are telling me is try or likely to be true*.  Here is a brief list of the retaliation fears I have heard:

* If I don’t agree with the senior professor, she won’t approve my promotion and tenure
* If I point out this problem (ethics issue, policy violation, etc.) I am afraid I will lose support of my colleagues
* If I try to confront or report the bullying-type behaviors, it’s going to get worse
* I told the Chair about my colleagues inappropriate behavior with students, and now I’m being ostracized
* I voted against an issue my Chair wanted to pass, and I’m afraid my contract won’t be renewed
* I have been outspoken about protecting women, LBGT colleagues, others, and I think my partner is being targeted as a result
* I went to the Dean with a concern, and have learned that the Dean and Chair are “close” and fear retaliation
* I was given one set of explicit expectations, but didn’t understand unspoken expectations, and my colleagues are retaliating

I could list others (and so could you) but this is a start.  I am most concerned about how and why these feelings, perceptions, and behaviors happen.  There are certain causes I believe I can identify but there may be others.  Some causes include:

* lack of open communication;
* lack of transparency about intent and motivations;
* poor self-management, e.g., flippant comments, gossip, angry outbursts, etc.;
* lack of appropriate and professional boundaries;
* allowance of conflicts of interest to exist;
* lack of awareness or ownership of one’s own power and misuse or abuse of that power;
* lack of transparency about how power is experienced by others (empathy);
* poor emphasis on building connections, relationships, and collegiality in a department/college;
* unwillingness to stand up for others (bystander)
* lack of policies and procedures that prevent unfair practices

The good news is that this list contains issues that are easy to remedy with attention and intention.  We can create the climate we want to work in by taking steps that support the ideals we carry with us into the workplace.  I would encourage each of you to consider how you can develop conversations around climate, add simply items to agendas that could offer a chance for connection, communication, and relationship-building to reduce the fears that naturally occur for many.  It could even reduce the likelihood of a grievance or other formal action in the long run.  If you want to talk about some strategies, give me a call.

\*Below is a link to an article that talks about illegal retaliation that may be helpful to you and is related to my message this month.  <http://everydaypsychology.com/2012/03/what-is-workplace-retaliation-its-about.html#.VUunTPlVhdF>

**What is workplace retaliation?**

It is not what most people think it is.  Retaliation is not the same as harassment or “hostile workplace,” and it is not about people getting revenge or “getting back" at anyone.

Retaliation is about making people afraid to complain or to assert their rights.  *It is a subtle, but important distinction*.

In a retaliation case, the law is not concerned with why something happened or why someone did something.  That is the issue in harassment and workplace hostility cases: did they do it because they don’t like certain people?  Was it a matter of discrimination?

In a retaliation case, the only concern is whether an "adverse action" (following from a complaint or "*protected activity*") would tend to discourage other people from complaining. It doesn't matter what the motive or intent was. It also doesn't matter whether the original complaint was valid.  You cannot be punished for standing up.  If they can punish you, who is ever going to speak out?

The common sense meaning of the term "retaliation" is not useful in Court because it is difficult to prove that someone did something because they were carrying a grudge or feeling resentment.   When someone is suddenly treated differently at work, or assigned different responsibilities, or excluded from meetings or discussions, there is always some excuse or explanation.   There is always some pretext, whether true or not.

The Supreme Court decided (*see footnote*) that to protect employees from retaliation, there needed to be a an ***objective test***,  one that does not depend on arguments about intent or purpose,  or about who was mad at whom,  or whose feelings were hurt,  or whether the organization's reasons were honest or not.

Those things are always difficult to prove, because as the Supreme Court said:  "***the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships.***"  In other words, it is difficult to tell whether some action was actually malevolent.   How something is viewed depends on the particular situation.

The Supreme Court has made it clear that the law does not seek to establish a "*general code of civility*" for the American workplace.  Employment law is not like an etiquette manual where you can just look up the answer and find out how people are supposed to behave.   As an example, “*colorful language*” is offensive in an office, but it may seem ordinary on an offshore oil rig.

In distinguishing between breeches of etiquette and significant harms, and in emphasizing the need to consider context, the Court was focusing on the test for harassment complaints.  It makes sense that it is not harassment *every*time someone has a bad word at work.

***Harassment and discrimination are different than retaliation.***

Harassment is about *abusive* work conditions.  In general, if someone at work abuses *everyone*, that doesn’t amount to harassment.  However, it may be bullying(which is *another* topic).

If people get picked on because of their gender or color (etc.), that is discrimination, and that is what Title VII of the Civil Rights Act of 1964 prohibits: *discrimination*.
In creating an *objective*test for acts of retaliation, the Supreme Court linked the definition of "retaliation" to the actual purpose of the law prohibiting it.

***The prohibition against retaliation is not for the purpose of protecting people from abuse***, or even discrimination.  Acts of retaliation will certainly involve "*abuse,*" but what the anti-retaliation law is concerned about is protecting the individual's right to complain or to seek grievance.

What the Supreme Court said was that if people are afraid to report violations of the Civil Rights Act, or if they are afraid to offer witness, the law cannot effectively be enforced. Enforcement depends on the courage and cooperation of individuals.

Retaliation is prohibited so that people can enjoy full access to the protection of the Civil Rights Act. It is prohibited so that people will not be afraid or feel terrorized at work.

The Supreme Court’s *objective test*for retaliation complaints was set forth in ***Burlington Northern v. White.***It can be stated in simple terms:

If you engage in some protected activity (e.g., like blowing a whistle or filing a complaint) and then your job is changed in some way that is has a negative impact (a *materially adverse*change), and if you and other reasonable people take that as a warning or even a disincentive to complain,  it’s retaliation.

In a retaliation complaint, the law is not concerned about whether or not it was meant to be a threat or meant to chill free speech**.**The *objective test*has to do with how people experience or respond to the events they observe.

How people would respond is knowable, measurable and a matter of common sense and common experience.  That is what makes it *objective.*

Intuitively, people know what retaliation looks like. Everyone knows that if you complain, there is a good chance you are going to be punished, and everyone knows about pretend excuses from management.

***Retaliation is illegal, irrespective of the excuse.***  Even if they patch things up afterwards, it is still illegal.  If they give you back the office or put you back on the forklift, the harm has already been done.  In the case of *Burlington Northern,* the Supreme Court said that it didn’t matter that the railroad compensated Sheila White with back-pay.  The “*no-harm, no-foul*” rule does not apply.

The prohibition against retaliation is not just a matter of law.  It is not just a fair employment and Civil Rights issue.  Making certain that employees feel empowered to voice their concerns is a test of organizational leadership.

***An organization cannot function effectively when workers are afraid.***  People won't ask questions they should ask, they won't report things they should report, and they won't stand up to authority when necessary.  If management is the last to know when something is wrong, that is a problem.

Somewhere in every workplace, there is a poster or a pamphlet that says *retaliation* is unlawful and prohibited.  Hardly anywhere will you find something telling you exactly what retaliation actually consists of.  It seems to be a matter of common sense, and clarity in the law has only existed for a half dozen years.

While management may not yet have gotten the message, they certainly will.  Ignoring employee complaints is a huge risk.  In March 2012 in Sacramento, a jury made an award of $167 million in a retaliation case against a Catholic Hospital.  There was no mercy for the Sisters of Mercy.

Retaliation is workplace terrorism,  and juries know it when they see it.  That is the objective test that defines retaliation.

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 ***footnote***:  The Supreme Court rulings on retaliation law can be understood by reading just three cases,  each of which was decided by a unanimous vote:  [*Oncale v. Sundowner Offshore Services (1998)*:](http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=523&page=75)

An opinion delivered by Justice Antonin Scalia,  *Oncale*is best known for having established that men can be victims of gender discrimination,  just like women.

Of equal importance,  the decision said that context matters,  not every workplace tribulation is a matter of harassment.  It depends on the “*constellation of surrounding circumstances,  expectations and relationships.”*The law is not an etiquette book or *general civility code*.

These are conservative opinions,  and they provided a foundation for a conservative interpretation of the anti-retaliation provision.

[*Burlington Northern v. Sheila White (2006):*](http://www.law.cornell.edu/supct/html/05-259.ZO.html)

*Burlington Northern* established an objective test for retaliation claims:  if you are somehow treated badly after voicing a complaint,  and if that would make people think twice about speaking up,  that’s retaliation.

The Court ruled that even if an employer tries to make it up to the employee,  the harm has been done when the adverse action was taken.

*Burlington Northern* also resolved a series of outstanding legal arguments about retaliation law.  Before this,  different Federal District Courts had different opinions about how to interpret the law.

From the decision:

 The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, 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.’ ”*Rochon*, 438 F. 3d, at 1219 (quoting *Washington*, 420 F. 3d, at 662).

    We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth “a general civility code for the American workplace.” *Oncale* v. *Sundowner Offshore Services, Inc.,* [523 U. S. 75](http://www.law.cornell.edu/supct-cgi/get-us-cite?523+75), [80](http://www.blogger.com/blogger.g?blogID=11837009) (1998) ; see *Faragher*, 524 U. S., at 788 (judicial standards for sexual harassment must “filter out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing’ ”). An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that “courts have held that personality conflicts at work that generate antipathy” and “ ‘snubbing’ by supervisors and co-workers” are not actionable under §704(a)). The anti-retaliation provision seeks to prevent employer interference with “unfettered access” to Title VII’s remedial mechanisms. *Robinson*, 519 U. S., at 346. It does so by prohibiting employer actions that are likely “to deter victims of discrimination from complaining to the EEOC,” the courts, and their employers. *Ibid*. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual §8, p. 8–13.

    We refer to reactions of a *reasonable*employee because we believe that the provision’s standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*,*Suders,* 542 U. S., at 141 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.,* [510 U. S. 17](http://www.law.cornell.edu/supct-cgi/get-us-cite?510+17), [21](http://www.blogger.com/blogger.g?blogID=11837009) (1993) (hostile work environment doctrine).

    We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” *Oncale*, *supra*, at 81–82. A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. Cf., *e.g.*, *Washington, supra,*at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual §8, p. 8–14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an “act that would be immaterial in some situations is material in others.” *Washington*, *supra*, at 661.

[*Thompson v. North American Stainless (2011):*](http://www.supremecourt.gov/opinions/10pdf/09-291.pdf)

Re-affirms Burlington Northern and decides that you cannot retaliate against someone at work because of something their spouse or family member did somewhere else.

Accessed on 5/7/15: <http://everydaypsychology.com/2012/03/what-is-workplace-retaliation-its-about.html#.VUunTPlVhdF>