Kentucky Retaliation: Safe Harbors and New Developments

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A. KRS 344.280 (and Title VII)

The Kentucky retaliation statute is part of the Kentucky Civil Rights Act, KRS 344.

344.280. Conspiracy to violate chapter unlawful.
It shall be an unlawful practice for a person, or for two (2) or more persons to conspire: (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter;

How is it similar to federal Title VII claims?

The Kentucky statute and its federal counterpart (42 U.S.C. 2000e-3) are construed the same despite significant differences in wording. Unlike Title VII retaliation claims, however, claims against individuals (supervisors, CEOs, etc.) can be brought under KRS 344.280. Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 801-02 (Ky. 2004).


B. Proving a Retaliation Claim - The Burden Shifting Analysis

Retaliation claims follow the general burden-shifting analysis first established by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

First, Plaintiff must establish a prima facie case. Then, employer has opportunity to articulate a legitimate, nondiscriminatory reason for the adverse action. Then plaintiff may rebut the defendant by proving that the alleged legitimate reason was actually pretext for retaliation.

Note that establishing a prima facie case is required in all retaliation cases, not merely claims based on circumstantial evidence. Contrast age discrimination claims, where a claimant is only required to prove a prima facie case in the absence of direct evidence. Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492 (Ky. 2005); Wexler v. White’s Fine Furniture, 317 F.3d 564 (6th Cir. 2003).
C. The Prima Facie Case

1. Plaintiff engaged in a protected activity (under Title VII or KCRA)
2. Defendant knew of this exercise of civil rights
3. Defendant took materially adverse employment action against Plaintiff
4. There was a causal connection between the adverse action and the protected activity

1. Protected Activity

Plaintiff must show that he or she either opposed discrimination or participated in some kind of proceeding meant to expose or remedy discrimination.

a. “Opposition” – includes making a charge or filing a complaint about employer actions reasonably believed to be discriminatory.

b. “Participation” – claimant has “testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.”

Note: A formal EEOC complaint is not required, just an assertion of statutory rights under the anti-retaliation statute. Fox v. Eagle Distributing Co., Inc., 510 F.3d 587, 591 (6th Cir. 2007). However, the manner of opposition must be reasonable (balance between importance of opposing discrimination and employer’s interest in maintaining ordered workplace) and opposition must be based on a reasonable and good faith belief that opposed practices are unlawful. See U.S. EQUAL OPPORTUNITY COMM’N COMPLIANCE MANUAL, § 8, at 13 (May 20, 1998); available at http://www.eeoc.gov/policy/docs/retal.pdf.

2. Defendant Knowledge

Basic principle: Defendant can’t be liable for retaliation if it had no knowledge of Plaintiff’s protected activity. An employer’s adverse employment action without prior knowledge of an employee’s protected activity cannot be said to be retaliatory.

3. Adverse Employment Action

Though the language of the Kentucky statute says “any manner” of discrimination or retaliation is unlawful, Plaintiff must prove that he or she suffered a materially adverse change in the terms or conditions of employment consistent with federal Title VII cases. Brooks v. Lexington-Fayette Urban County Hous. Auth.,
Examples include but are not limited to: termination, demotion, decrease in wages or salary, lesser title, loss of benefits, or diminished material responsibilities.

4. **Causation**

1) The “But For” Standard

“But-for” causation is required. There is no “mixed-motive” analysis in retaliation claims like in “status-based discrimination” claims under KRS 344.040 or Title VII. Both state and federal retaliation statutes use the word “because,” which the U.S. Supreme Court has construed to mean that “but for” is the proper analysis. *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

However, “but for” doesn’t mean that protected activity is the SOLE or ONLY reason for the adverse employment action. *Burrage v. United States*, 134 S.Ct. 881 (2014).

Scalia, in the *Burrage* decision, takes special care to re-frame the standard of “but for” from “the” reason to “a” reason. Therefore the “but for” standard is not as burdensome as often interpreted – there can be multiple causes for an adverse action, but as long as a protected activity was one of them, a retaliation claim can prevail.

2) Methods of Proof

A. **Direct evidence – “the smoking gun”**

Example: An email from Defendant to Plaintiff that says “I’m firing you because you filed an EEOC claim.” Direct evidence is rare – most cases must rely on circumstantial evidence.

B. **Circumstantial evidence – creates an inference of retaliation**

Example: Two employees have equally bad performance records, but only the employee who accused boss of racism is fired.

Elements of effective circumstantial evidence (from *Brooks*):

(1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and
(2) there is a close temporal relationship between the protected activity and the adverse action.

3) Temporal Proximity

Underlying premises:

1) An employer’s adverse action cannot be retaliatory if it occurred before the employee’s protected activity.

2) When an adverse action occurs long after the protected activity, time alone cannot create a sufficient inference of retaliation.

Brooks relies on Clark County School District v. Breeden, 532 U.S. 268 (2001) to establish that a “close temporal proximity” between protected activity and adverse action can create an inference of retaliation.

A. How close? “Very close.” Courts vary across the country, but anything more than six months is generally too long. The closer the better. A matter of days is ideal, but one or two months is generally acceptable. Very fact-specific.

B. Is a close temporal proximity alone enough to establish an inference of retaliation?

The Sixth Circuit has issued conflicting decisions:

Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000) – “Temporal proximity alone will not support an inference of retaliatory discrimination when there is no other compelling evidence.”

BUT

DiCarlo v. Potter, 358 F.3d 408, 421-22 (6th Cir. 2004) – Court ruled that a temporal proximity of 21 days was enough, by itself, to support an inference of retaliatory discrimination.

Brooks does not specifically address this dispute, so it’s unclear if temporal proximity alone is sufficient for KCRA retaliation claims – but the strongest claims are those where the proximity is “very close.”
4) *Breeden*’s Safe Harbor of “Contemplation”

In retaliation claims, courts have expressed concern about employees making bogus claims of discrimination to avoid unrelated adverse actions.

“[A]n employee may not insulate herself from termination by covering herself with the cloak of Title VII’s opposition protections after committing non-protected conduct that was the basis for the decision to terminate.” *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130 (3d Cir. Del. 2006)

To combat this perceived problem, the Supreme Court in *Breeden* created an apparent safe harbor for employers:

> “Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.”

At about the same time, the Second Circuit articulated the same general rule a little more clearly:

> “Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.” *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001)

The general premise of this rule is sound: if an employer was already going to terminate, or demote, or reassign an employee before that employee engaged in a protected activity, then the adverse action cannot be retaliatory.

Note however, that the *Breeden* rule does not require:

1) That the employer have made the actual decision to act adversely prior to the employee’s protected activity, or

2) That the employee have notice that adverse activity was contemplated prior to the protected activity.

*Breeden* also dismisses the possibility that even though an adverse action may have been *contemplated* by an employer before an employee engaged in a protected activity, that protected activity may still have been the “final straw” that pushed the employer into action. If no final decision had yet been made by the
employer, the “but for” cause of the adverse action could certainly still have been the protected activity.

Two instructive, contrary cases of the Breeden rule in action:


see also: http://juryverdicts.net/MaryBankerVerdict.pdf

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<td><strong>Facts</strong></td>
<td>Plaintiff, 59 year old executive officer of hotel company given ultimatum: relocate or be demoted. D fired P immediately after receiving state discrim. complaint from P</td>
<td>Plaintiff, contract coach for track team at University of Louisville, made complaint of discrim. just before her contract renewal was denied</td>
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<td>Jury verdict for P</td>
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<td><strong>Basis of Appeal</strong></td>
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<td><strong>D’s argument</strong></td>
<td>D contemplated adverse action prior to P’s protected activity, therefore under Breeden, no inference of causation possible</td>
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<td><strong>P’s argument</strong></td>
<td>P was not aware of possible adverse action (termination), and decision was not formally made by D prior to protected activity – at any rate, sufficient dispute for jury consideration</td>
<td>P was not aware of possible adverse action (non-renewal of contract), and decision was not formally made by D prior to protected activity – at any rate, sufficient dispute for jury consideration</td>
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<td><strong>Appellate court holding</strong></td>
<td>Conflicting accounts of timing and motivation between contemplated adverse action and protected activity sufficient to create inference of retaliation, and at any rate, proper domain of a jury to decide whom to believe. Verdict affirmed.</td>
<td>D proved that it had at least contemplated adverse action prior to protected activity, so no inference of retaliation possible based on close temporal proximity. Not proper domain of jury. Verdict reversed.</td>
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Further reading on the *Breeden* rule:

*Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R.*, 671 F.3d 49 (1st Cir. 2012) – Defendant argued that adverse action was contemplated prior to protected activity, but court upheld verdict for plaintiff as reasonable. “All told, the evidence presented at trial was enough to support the jury’s finding of retaliation. Although that finding was not inevitable on this record, we are not permitted to second-guess the jury's assessment.”

*Smith v. Xerox Corp*, 371 Fed. Appx. 514 (5th Cir. 2010) – Breeden distinguished because Plaintiff relied upon more than just temporal proximity.

*Mauder v. Metro. Transit Auth. of Harris County*, 446 F.3d 574 (5th Cir. 2006) – Plaintiff was well aware of ongoing disciplinary action prior to engaging in protected activity.

*Reynolds v. Extendicare Health Servs.*, 257 Fed. Appx. 914 (6th Cir. 2007) – “Applying the Breeden rationale, it is not appropriate to view placing Reynolds on the PIP as being causally related to her filing of the complaint because the PIP decision had been made prior to the protected action.”

*Cichon v. Exelon Generation Co., LLC*, 401 F.3d 803 (7th Cir. 2005) – “In spite of the fact that Exelon did not inform Cichon of its decision to remove him from the position until after he filed his FLSA suit, the record clearly establishes that Exelon had been ‘contemplating [Cichon’s removal] before it learned of the suit [and] employers need not suspend previously planned [employment actions] upon discovering that [an FLSA] suit has been filed, and their proceeding along lines previously contemplated . . . is no evidence whatever of causality.’”

*Vinnett v. GE*, 271 Fed. Appx. 908 (11th Cir. 2008) – Court relies on the fact that employer actually made the decision to act adversely before the protected activity occurred. Employer had not merely contemplated adverse action.

*Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1232 (11th Cir. 2006) – Court points out that employee was well aware of impending work reduction before protected activity occurred.