

DISABLING ADA RETALIATION CLAIMS

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TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION..... | 824 |
| I. ADA RETALIATION CASES | 826 |
| A. <i>The ADA’s Anti-Retaliation Provisions</i> | 827 |
| B. <i>Elements of an ADA Retaliation Claim</i> | 827 |
| 1. <i>Protected Activity</i> | 827 |
| 2. <i>Adverse Employment Action</i> | 831 |
| 3. <i>Causation</i> | 833 |
| II. COURTS CONTINUE TO DISABLE ADA RETALIATION CASES | 833 |
| A. <i>Methodology</i> | 833 |
| B. <i>The Results</i> | 836 |
| 1. <i>Continued Use of the Reasonable Belief Rule</i> | 837 |
| 2. <i>Misapplication of the “Materially Adverse” Standard</i> | 840 |
| 3. <i>Causation</i> | 842 |
| 4. <i>Pretext</i> | 846 |
| 5. <i>Not Fully Argued</i> | 848 |
| C. <i>Some Plaintiffs Survive</i> | 848 |
| 1. <i>Cases with Really Strong Facts</i> | 848 |
| 2. <i>Courts Construing Facts and Law in Plaintiffs’ Favor</i> | 849 |
| III. IMPLICATIONS | 851 |
| A. <i>A New Narrative</i> | 851 |
| B. <i>Room for Reform</i> | 852 |
| CONCLUSION | 855 |
| APPENDIX A: CASES WHERE EMPLOYER’S DISPOSITIVE MOTION IS GRANTED—NO ADVERSE EMPLOYMENT ACTION | 856 |

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| APPENDIX B: CASES WHERE EMPLOYER’S DISPOSITIVE MOTION IS GRANTED—NO CAUSATION | 858 |
| APPENDIX C: CASES WHERE EMPLOYER’S DISPOSITIVE MOTION IS GRANTED—NO PRETEXT | 863 |

INTRODUCTION

The ADA Amendments Act of 2008 (ADAAA)¹ dramatically expanded the definition of “disability” under the Americans with Disabilities Act (ADA).² Several scholars, including me, have been exploring the case law in this post-ADAAA era.³ One area that has not been explored, however, is the body of retaliation cases under the ADA, post Amendments. This article fills that gap. It is an empirical project aimed at exploring ADA retaliation cases decided after the Amendments went into effect.

Prior to the ADAAA, many courts dismissed plaintiffs’ retaliation claims based on an application of the “reasonable belief” rule. The reasonable belief rule states that if an employee opposes employer conduct that the employee reasonably believes violates the law, the employee has engaged in “protected activity” even if the employee was incorrect about whether the employer’s conduct actually violated the law.⁴ Although this rule might appear to be plaintiff friendly, prior to the Amendments in 2008, the rule operated to exclude many ADA retaliation claims. Before the Amendments, many employees requested an accommodation or complained about discrimination or harassment based on the belief that they had a disability protected by the ADA. But because courts had so narrowly interpreted the definition of disability, courts would often dismiss the retaliation claim, stating that the employee could not have reasonably believed that she had a disability; and therefore, could not have reasonably believed she was opposing unlawful behavior by the employer.⁵ Now that the definition of disability has been dramatically expanded by the ADAAA, one might expect that employees overcame a major hurdle to succeeding on their retaliation claims.

¹ ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 355.

² See generally Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 4 (2014) [hereinafter Porter, *Backlash*] (discussing the broadened definition of disability under the ADA Amendments Act).

³ See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2031 (2013); Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 189 (2010); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 224–28 (2008); Porter, *Backlash*, *supra* note 2, at 4; Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 941 (2012).

⁴ See *infra* Section I.B.1.

⁵ See *infra* Section I.B.1.

In this article, I set out to explore what effect the expansion of the definition of “disability” would have on the post-Amendments retaliation cases. What I discovered surprised me. Despite the common belief that retaliation cases are often more successful than cases alleging status-based discrimination,⁶ this did not prove to be true with respect to this dataset of ADA retaliation cases. In fact, as indicated by the title of this article, courts are continuing to disable employees’ retaliation claims under the ADA. Plaintiffs lost (i.e., did not survive a motion to dismiss or a motion for summary judgment) in three-quarters of all post-ADAAA retaliation cases in my dataset.⁷

In order to understand how courts are disabling ADA retaliation cases, a very brief primer on the requirements of proving retaliation is necessary. Proving retaliation under the ADA first requires the plaintiff to demonstrate her prima facie case. This requires her to prove: (1) that she engaged in protected activity—either participating in a lawsuit or a charge before the Equal Employment Opportunity Commission (EEOC), or that she opposed conduct by her employer that she believed violated the ADA; (2) that she suffered an adverse employment action; and (3) that her protected activity caused the adverse employment action.⁸ If she can meet this prima facie case, the burden shifts to the employer to demonstrate that it had a legitimate non-discriminatory reason for the adverse employment action.⁹ As this is a very easy burden to meet, the burden then shifts back to the plaintiff to prove that the reason given by the employer was pretextual and that the real reason was retaliation.¹⁰

Courts are using each of these elements or steps to disable ADA retaliation cases. First, many courts continue to use the “reasonable belief” rule to limit ADA protection against retaliation. They often accomplish this by holding that the plaintiff did not have a reasonable belief that that the accommodation she was requesting was reasonable or required.¹¹ Second, some courts dismiss plaintiffs’ claims by limiting the scope of what constitutes an adverse employment action, holding that adverse actions alleged by the plaintiff were too minor or trivial to be actionable.¹² Third, many ADA retaliation case are dismissed on causation grounds, with courts often holding that the temporal proximity between the protected activity and the adverse employment action

⁶ See, e.g., Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 377 (2011) (noting that the Supreme Court often finds in favor of plaintiffs in retaliation cases—“a conclusion that would strike many commentators as odd given the Court’s decidedly mixed record of protecting employee rights”); David Sherwyn et al., *Experimental Evidence that Retaliation Claims Are Unlike Other Employment Discrimination Claims*, 44 SETON HALL. L. REV. 455, 478 (2014) (stating that, compared to discrimination, “retaliation is easier for employees to identify and juries to understand”).

⁷ See *infra* Section II.A–B (describing the methodology of the study and the results).

⁸ See *infra* Section I.B.

⁹ See *infra* Section II.B.4.

¹⁰ See *infra* Section II.B.4.

¹¹ See *infra* Section II.B.1.

¹² See *infra* Section II.B.2.

was not enough to prove causation.¹³ And fourth, many cases were dismissed because the courts held that the plaintiff could not prove pretext.¹⁴

This article proceeds in four additional parts. Part I will describe the law of ADA retaliation cases. Part II will describe the study, first explaining my methodology, and then providing the results of the study, including examples of the reasons courts dismissed so many ADA retaliation cases. This Part will also provide examples of successful cases that survived summary judgment. Part III will explore the implications of this study. Finally, this article will briefly conclude.

I. ADA RETALIATION CASES

Consistent with the other employment discrimination statutes,¹⁵ the ADA prohibits employers from retaliating against any individual who complains about disability discrimination, or files or participates in a claim alleging disability discrimination under the ADA.¹⁶ Retaliation cases under all of the employment discrimination statutes are very common.¹⁷ This is because, when an employee believes that he has been discriminated against or harassed because of a protected class, he often (but certainly not always) complains to his employer about it or files a charge with the EEOC (or its state equivalent). If the employer then takes an “adverse employment action” against the employee, he will likely claim retaliation in addition to the underlying discrimination claim. This can and does happen in the ADA context. What makes ADA retaliation cases perhaps even more prevalent is that an employee with a disability has the right to request a “reasonable accommodation” if needed to allow the employee to perform the essential functions of her job.¹⁸ And, as will be discussed below, requesting an accommodation under the ADA is “protected activity,” just as complaining to the employer is protected activity.¹⁹ Because many employees with disabilities request accommodations, and because these requests are considered protected activity, any adverse employment action taken by the employer because of the request for an accommodation can and will be seen as retaliation.

¹³ See *infra* Section II.B.3.

¹⁴ See *infra* Section II.B.4.

¹⁵ See 29 U.S.C. § 623(d) (2012) (prohibiting retaliation for filing a charge or opposing a practice made unlawful by the Age Discrimination in Employment Act (ADEA)); 42 U.S.C. § 2000e-3(a) (2012) (prohibiting retaliation for filing a charge or opposing a practice made unlawful under Title VII of the Civil Rights Act of 1964).

¹⁶ See *infra* Section I.A.

¹⁷ Craig Robert Senn, *Redefining Protected “Opposition” Activity in Employment Retaliation Cases*, 37 CARDOZO L. REV. 2035, 2040 (2016) (stating that, by 2014 the frequency of retaliation claims filed with the EEOC had increased to 42.8 percent and now are the single most popular claim filed with the EEOC).

¹⁸ 42 U.S.C. § 12111(9) (2012).

¹⁹ See Section I.B.1.

A. The ADA's Anti-Retaliation Provisions

The ADA's primary anti-retaliation provision provides that:

“(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.”²⁰

This provision is almost identical in language to the anti-retaliation provision in Title VII of the Civil Rights Act of 1964.²¹ The ADA is a bit unique in that it adds a second provision to its retaliation section, which states:

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, 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.²²

In my experience and perhaps surprisingly, the section quoted immediately above does not get litigated very much. Most of the ADA retaliation cases claim violations of the main anti-retaliation provision.

B. Elements of an ADA Retaliation Claim

The elements of an ADA retaliation claim are similar to retaliation claims under Title VII—in order to establish a prima facie case of retaliation, a plaintiff must establish: (1) that she engaged in protected activity, (2) that she suffered an adverse employment action, and (3) causation (that the protected activity caused the adverse employment action).²³

1. Protected Activity

The first element, engaging in protected activity, is said to encompass two different actions—opposition or participation. Participation is the more straight-forward of the two. It usually involves either filing a charge with the

²⁰ 42 U.S.C. § 12203(a) (2012).

²¹ 42 U.S.C. § 2000e-3(a) (2012) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”).

²² 42 U.S.C. § 12203(b) (2012).

²³ See, e.g., *Credeur v. Louisiana*, 860 F.3d 785, 797 (5th Cir. 2017); *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016); *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 632 (8th Cir. 2016); *Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108, 115 (1st Cir. 2013); *Henagair v. Utah Dep't of Corr.*, 587 F.3d 1255, 1265 (10th Cir. 2009); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1269 (9th Cir. 2009).

EEOC (or an equivalent agency at the state level), participating in an investigation by the EEOC, or filing a complaint in court.²⁴ Opposition activity encompasses less formal complaints of discrimination, usually made to a supervisor or a human resources representative.²⁵ Perhaps not surprisingly, these informal complaints (opposition) are much more prevalent than more formal complaints (participation).

As mentioned above, the one thing that distinguishes retaliation claims under the ADA from claims brought under Title VII is that under the ADA, in addition to informally complaining about discrimination or harassment, most courts hold that requesting an accommodation is protected activity under the ADA.²⁶

One of the first appellate courts to look at this issue was the First Circuit in *Soileau v. Guilford of Maine, Inc.*²⁷ The court stated:

It is questionable whether Soileau fits within the literal language of the statute: he filed no charge, nor participated in any investigation. Moreover, he did not literally oppose any act or practice, but simply requested an accommodation, which was given. It would seem anomalous, however, to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge. This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation. And so, without addressing the issue any further, we will assume *arguendo* that Soileau's request brings him within the coverage of 42 U.S.C. § 12203(a).²⁸

As the Third Circuit explained in *Shellenberger v. Summit Bancorp, Inc.*,²⁹ "The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC"³⁰

²⁴ See, e.g., Senn, *supra* note 17, at 2039 (stating that protected activity under the "participation clause encompasses *more formal* reports, protests, or related conduct, such as actually filing 'charges' or claims with the [EEOC], or otherwise testifying, assisting, or participating in ensuing investigations or proceedings").

²⁵ See *id.* at 2038–39.

²⁶ See, e.g., Dawson v. Akal Sec. Inc., 660 F. App'x 504, 506 (9th Cir. 2016); Foster v. Mountain Coal Co., 830 F.3d 1178, 1188 (10th Cir. 2016) (stating that requests for accommodation are protected activity); Kelley v. Corr. Med. Servs., Inc., 707 F.3d 108, 115 (1st Cir. 2013) (stating same); Hill v. Walker, 737 F.3d 1209, 1219 (8th Cir. 2013) (holding that requesting an accommodation is protected activity); Tabatchnik v. Cont'l Airlines, 262 F. App'x 674, 676 (5th Cir. 2008) (stating that requesting an accommodation is protected activity); Bryson v. Regis Corp., 498 F.3d 561, 571 (6th Cir. 2007) (holding that the plaintiff engaged in protected activity by requesting an accommodation); Mayers v. Laborers' Health & Safety Fund of N. Am., 478 F.3d 364, 369 (D.C. Cir. 2007); Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 190–91 (3d Cir. 2003) (stating that requesting an accommodation is protected activity); Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696, 706 (4th Cir. 2001) (stating same); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001).

²⁷ *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997).

²⁸ *Id.* at 16.

²⁹ *Shellenberger*, 318 F.3d at 183.

³⁰ *Id.* at 191.

However, not all courts agree that requesting an accommodation should be considered protected activity. For instance, in *Kirkeberg v. Canadian Pacific Railway*,³¹ the court seemed to disagree with the rule that an accommodation can be considered protected activity but felt bound to follow precedent.³² The court stated:

One might wonder how the theory behind Kirkeberg's retaliation claim can be squared with the text of the statute. An employee who asserts a right under [the ADA] to obtain reasonable accommodation for an alleged disability has not "opposed any act or practice made unlawful" by the ADA. Nor has he "testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the ADA.³³

But recognizing precedent to the contrary, the court stated: "although '[i]t is questionable' whether an employee who merely requests a reasonable accommodation 'fits within the literal language of the statute,' we are bound by [prior precedent] to conclude that making such a request is protected activity."³⁴ Despite this additional method of engaging in protected activity under the ADA, there is another, more significant hurdle to plaintiffs being able to establish that they engaged in protected activity—the reasonable belief rule.

In a line of cases brought under Title VII, if the employee is claiming opposition as her protected activity, courts established the "reasonable belief rule."³⁵ This rule requires that the employee establish that she had a good faith, reasonable belief that the conduct she was complaining of violated the law.³⁶

³¹ *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898 (8th Cir. 2010).

³² *Id.* at 908.

³³ *Id.* at 907.

³⁴ *Id.* at 908 (quoting *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997)).

³⁵ Participation activity receives more absolute protection. If the employee files a charge with the EEOC or state-equivalent agency, participates in an EEOC investigation, files a complaint in court, or provides testimony in a case, the employee will meet the "protected activity" element of the prima facie case even if her belief that she had experienced discrimination was not only incorrect but unreasonably so. *See, e.g.*, *Glover v. S.C. Law Enf't Div.*, 170 F.3d 411, 414 (4th Cir. 1999).

³⁶ *See, e.g.*, *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002) (stating that in order for a retaliation claim to be actionable, the opposition must be based on a reasonable and good faith belief that the opposed practices were unlawful); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 913 (9th Cir. 2001) (stating same); *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1195 (8th Cir. 2001) (stating same); *McMenemy v. City of Rochester*, 241 F.3d 279, 285 (2d Cir. 2001) (stating same); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 706–07 (7th Cir. 2000) (stating same); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000) (stating that in order for a retaliation claim to be actionable, the opposition must be based on a reasonable and good faith belief that the opposed practices were unlawful); *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (stating that "a claim concerning the opposition clause requires that the employee have a reasonable belief that the practice the employee is opposing violates Title VII"); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 865 (3d Cir. 1990) (stating that "a long line of Title VII cases hold that a plaintiff establishes a retaliation claim if she shows that she had a reasonable belief that her employer was engaged in an unlawful employment practice and that the employer retaliated against her for protesting against that practice"); *Parker v. Balt. & Ohio R.R.*

To be clear, the Supreme Court has never affirmatively adopted this rule. In *Clark County School District v. Breeden*,³⁷ the Court had the opportunity to determine if the anti-retaliation provision of Title VII applies only to opposed acts that are actually unlawful under Title VII, or whether a plaintiff's good-faith, reasonable belief should suffice.³⁸ The Court recognized that the Court of Appeals below (the Ninth Circuit) had applied the reasonable belief rule but the Court stated that it had "no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident [the employee complained about] violated Title VII."³⁹ Despite the lack of clarity by the Supreme Court, the reasonable belief rule has prevailed.

Virtually all courts have adopted this rule in ADA cases. For instance, in *Hegre v. Alberto-Culver USA, Inc.*,⁴⁰ the plaintiff suffered from bipolar disorder and a heart condition.⁴¹ She requested time off as an accommodation in order to acclimate to new medication.⁴² Her employer refused, and she was eventually terminated.⁴³ Applying pre-Amendments law on the interpretation of the definition of disability, the court held that the plaintiff did not have an objectively reasonable belief that her bipolar disorder or her heart condition were disabilities.⁴⁴ Even though the court recognized that her conditions were permanent, and even though she was hospitalized twice for her disabilities, the court said that because she was able to continue to perform her job functions, she did not have a reasonable belief that she was disabled.⁴⁵ Therefore, she could not meet the first element of her retaliation claim.

Similarly, in *Robinson v. Hoover Enterprises, Inc., LLC*,⁴⁶ the plaintiff suffered a stroke that caused difficulty concentrating.⁴⁷ He was fired shortly after he requested an accommodation, but the employer alleged it was because of alleged dishonesty as the result of an accounts receivable audit.⁴⁸ In determining whether the plaintiff could prove that he engaged in protected activity, the court noted that the plaintiff must have a good faith and reasonable belief that he had

Co., 652 F.2d 1012, 1019–20 (D.C. Cir. 1981) (agreeing with the standard that a plaintiff claiming retaliation need only have a reasonable and good faith belief that the underlying conduct violated Title VII).

³⁷ *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).

³⁸ *Id.* at 270.

³⁹ *Id.*

⁴⁰ *Hegre v. Alberto-Culver USA, Inc.*, 508 F. Supp. 2d 1320 (S.D. Ga. 2007).

⁴¹ *Id.* at 1328.

⁴² *Id.* at 1329, 1331.

⁴³ *Id.* at 1331.

⁴⁴ *Id.* at 1335–36.

⁴⁵ *Id.*

⁴⁶ *Robinson v. Hoover Enters. LLC*, No. 1:03-CV-2565-TWT, 2004 WL 2792057, at *1 (N.D. Ga. Oct. 20, 2004).

⁴⁷ *Id.* at *1.

⁴⁸ *Id.*

a disability.⁴⁹ In making this determination, the court stated that “[t]he objective reasonableness of a belief must be assessed in terms of the applicable substantive law. In doing so, this Court must assume Robinson knows the substantive law.”⁵⁰

The court held the following evidence was not good enough to establish that the plaintiff had a reasonable belief that he was disabled: (1) medical diagnosis of long-term impairment, (2) handicapped parking sticker, (3) certification of disability by the Georgia Dept. of Labor Rehabilitation Services, and (4) his own testimony that he suffers from many serious symptoms and is limited in his ability to perform basic life functions.⁵¹ These are just a few of the many cases, pre-ADAAA, where courts held that the plaintiff’s ADA retaliation claim fails because he did not have a reasonable belief that he had a disability when he attempted to engage in protected activity.

2. *Adverse Employment Action*

The second element of the prima facie case is that the plaintiff has to demonstrate that she suffered an adverse employment action. The Supreme Court’s decision in *Burlington Northern & Santa Fe Railway v. White*⁵² announced the standard for determining whether a retaliatory employment action is sufficiently severe to qualify as an adverse employment action.⁵³ Although this is a Title VII case, courts apply the same standard in ADA cases.⁵⁴ The Court held that in order to meet the standard, the plaintiff has to demonstrate that the action “would have been materially adverse to a reasonable employee . . .”⁵⁵ The action must be “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.”⁵⁶

Although this seems like a fairly broad standard, the lower courts have held many actions to not be “materially adverse.”⁵⁷ For instance, lower courts have found discipline, reprimands, and negative evaluations to not be materially adverse.⁵⁸ Changes to an employee’s schedule or work assignments were also

⁴⁹ *Id.* at *3.

⁵⁰ *Id.* at *4.

⁵¹ *Id.* at *5.

⁵² *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

⁵³ *Id.* at 57.

⁵⁴ *Adams v. Anne Arundel Cty. Pub. Schs.*, 789 F.3d 422, 431 (4th Cir. 2015) (relying on the “analogous Title VII context”).

⁵⁵ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 57.

⁵⁶ *Id.*

⁵⁷ See Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2041–42 (2015).

⁵⁸ See, e.g., *Adams*, 789 F.3d at 431 (stating that “reprimands and poor performance evaluations” are insufficient to qualify as adverse actions); *Rivera v. Rochester Genesee Reg’l Transp. Auth.*, 743 F.3d 11, 26 (2d Cir. 2014) (stating that two citations for insubordination insufficient to constitute adverse action); *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 568, 571 (2d Cir. 2011) (deciding that three investigations into plaintiff’s con-

found not to be materially adverse.⁵⁹ Courts have held that administrative leaves or paid suspensions do not meet the materially adverse standard.⁶⁰ Moreover, courts almost uniformly hold that “shunning,” “ostracizing,” and being harassed does not rise to the level of an adverse employment action.⁶¹ Even an employer threatening termination is not an adverse employment action.⁶² As we will see below, this standard remains a problem in post-ADA retaliation claims.

duct, counseling, and “empty” termination threats were not materially adverse); *Bhatti v. Trs. of Bos. Univ.*, 659 F.3d 64, 74 (1st Cir. 2011) (holding that reprimands not material because of absence of tangible consequences); *Jones v. Res-Care, Inc.*, 613 F.3d 665, 671 (7th Cir. 2010) (determining that corrective action unaccompanied by tangible job consequence was not sufficient to constitute materially adverse action); *Baloch v. Kempthorne*, 550 F.3d 1191, 1198–99 (D.C. Cir. 2008) (holding proposed suspensions not carried out, letters of counseling and reprimand, and unsatisfactory performance review not materially adverse actions); *Haynes v. Level 3 Commc’ns, LLC*, 456 F.3d 1215, 1224 (10th Cir. 2006) (placing employee on performance improvement plan was not adverse employment action); *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1079 (8th Cir. 2006) (determining that multiple written admonitions that did not result in change in compensation was not adverse employment action); *Mlynczak v. Bodman*, 442 F.3d 1050, 1061 (7th Cir. 2006) (holding that negative performance appraisals did not qualify as adverse employment actions).

⁵⁹ *See, e.g.*, *Ahern v. Shinseki*, 629 F.3d 49, 56–57 (1st Cir. 2010) (threatening change to employees’ schedule was not materially adverse); *Fercello v. Cty. of Ramsey*, 612 F.3d 1069, 1078–79, 1084 (8th Cir. 2010) (reassigning parking place and a less desirable office were not actionable); *Morales-Vallellanes v. Potter*, 605 F.3d 27, 37–38 (1st Cir. 2010) (granting of less favorable break times and temporary assignment to post office window duty not adverse employment actions); *Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 729 (7th Cir. 2009) (holding that teacher’s reassignment to teach seventh grade rather than high school not materially adverse employment); *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 485 (5th Cir. 2008) (determining transfer to another department not materially adverse); *Higgins v. Gonzales*, 481 F.3d 578, 591 (8th Cir. 2007) (deciding that transfer to another district not materially adverse); *Jones v. D.C. Dep’t of Corr.*, 429 F.3d 276, 281 (D.C. Cir. 2005) (stating that transfer that did not result in reduction in pay or benefits not adverse employment action).

⁶⁰ *See, e.g.*, *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015) (holding suspension with pay not an adverse employment action); *Joseph v. Leavitt*, 465 F.3d 87, 91–93 (2d Cir. 2006) (determining that placement on administrative leave with pay for almost a year not adverse employment action).

⁶¹ *See, e.g.*, *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1107 (7th Cir. 2012) (holding that being called a “cry baby” and “trouble maker” by supervisor was not adverse action); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657–58 (5th Cir. 2012) (holding that co-worker harassment, including name-calling, physical intimidation, false accusations, vandalizing belongings, and verbal threats, not retaliatory); *Stephens v. Erickson*, 569 F.3d 779, 790 (7th Cir. 2009) (stating that supervisors yelling at plaintiff and physically isolating him from other employees was not sufficient to rise to level of adverse employment action).

⁶² *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 681 (7th Cir. 2010) (determining that dealership threat to discharge plaintiff for discrimination complaint against another dealership not an adverse employment action).

3. *Causation*

The third hurdle in bringing a successful retaliation claim is that the plaintiff must prove causation—i.e., she must prove that her complaint (“protected activity”) was the cause of the adverse employment action she suffered.⁶³ Employers are often savvy enough to hide any retaliatory motive. Moreover, unless a plaintiff has been a perfect employee, an employer can easily generate a legitimate, non-retaliatory motive for the adverse employment action. Often the only evidence plaintiffs have that the adverse employment action was in retaliation for the complaint is the temporal proximity between the two events. Thus, if an employee complains about discrimination one day and is terminated the next, that is pretty strong evidence that retaliation was at play.⁶⁴ But most employers are savvy enough to avoid such a close temporal proximity. And some courts hold that even a two or three-month temporal proximity is too long to be indicative of a retaliatory motive.⁶⁵

II. COURTS CONTINUE TO DISABLE ADA RETALIATION CASES

When I set out to research this topic, I suspected that the expanded definition of disability in the ADA Amendments Act would lead to a robust percentage of successful ADA retaliation cases. To be clear, this is not a comparison of pre- and post-ADAAA retaliation cases. I was unable to find a study that covered ADA retaliation claims in the pre-ADAAA era.⁶⁶ Nevertheless, I did set out to determine whether the expanded definition of disability in the ADAAA would lead to successful ADA retaliation claims. This Part will explain my methodology, describe my results using examples where courts found against plaintiffs in ADA retaliation claims, and illustrate what a successful ADA retaliation case looks like.

A. *Methodology*

For this article, I researched all of the ADA retaliation cases brought after the ADA was amended. Specifically, I used this search—“retaliation /s ADA”—in the Westlaw “all federal cases” database. I attempted to narrow the search in a couple of ways. Specifically, I only wanted “reported” cases. I am

⁶³ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) (requiring but-for causation in retaliation cases under Title VII).

⁶⁴ *See, e.g., Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 564 (7th Cir. 2016) (explaining that termination two days after protected expression was sufficiently suspicious, unless other evidence showed that plaintiff would have been terminated anyway).

⁶⁵ *See, e.g., Sherris v. City Colls. of Chicago*, No. 15 C 9078, 2018 WL 999902, at *8–*10 (N.D. Ill. Feb. 21, 2018) (holding that even a seven-week time gap between plaintiff’s initial report of harassment and termination was too long to support a finding of retaliation).

⁶⁶ There are studies discussing the abysmal success rates of ADA disability discrimination cases, but not ADA retaliation cases. *See, e.g., RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 96–125 (2005)* (discussing the federal courts’ backlash against the ADA).

well aware that many important cases can get buried in unpublished opinions but focusing on reported cases allowed me to keep the dataset within manageable bounds.⁶⁷ I also limited it by date, searching only for cases after January 1, 2009. This is the date that the ADA Amendments Act became effective.⁶⁸ The reason I chose that date was because I wanted to see if the broadened definition of “disability” after the Amendments would affect the substantive claim of ADA retaliation. Most of my recent research has focused on what is happening in the law since the ADA was amended. Even though a plaintiff does not have to be disabled in order to bring a retaliation claim,⁶⁹ many plaintiffs bring an anti-discrimination claim or a failure-to-accommodate claim along with a retaliation claim, so one might expect more substantive claims to be successful after the ADA Amendments.

Finally, I attempted to limit the dataset by clicking on the “topic” button of “Employment & Labor,” although that was not foolproof, as I ended up finding 118 cases that were not employment cases. The search resulted in 1,191 cases as of the date that I finished my review of all of them, which was November 10, 2017. Any cases decided or published to Westlaw’s website after that date will not be included in this article’s dataset.

I excluded many cases from this initial set of 1,191 cases. First, even though I set the beginning date for my search as January 1, 2009, many cases were excluded because they were pre-ADAAA cases. This happened because the ADA Amendments Act was not retroactive,⁷⁰ so there were many cases that were decided after January 1, 2009, but the facts of the case that led to liability occurred prior to that date. In total, there were 312 cases of the initial 1,191 where the facts occurred prior to the date the ADA Amendments became effective.⁷¹

Second, as mentioned above, I excluded 118 cases that were not employment cases, even when they made it through my attempt to filter them out by checking the “Employment & Labor” button on the Westlaw search.

Third, I also excluded 37 cases where the plaintiff only survived a motion to dismiss (rather than surviving a motion for summary judgment). My rationale for this exclusion was that surviving a motion to dismiss is not a big

⁶⁷ I also did not think that reported cases and unreported cases would lead to significantly different results. However, some studies have found that reported opinions overstate plaintiff’s win rates. *See, e.g.,* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 910 (2006).

⁶⁸ Befort, *supra* note 3, at 2029.

⁶⁹ *See, e.g.,* Anderson v. Nat’l Grid, PLC, 93 F. Supp. 3d 120, 146 (E.D.N.Y. 2015) (noting that even if a plaintiff is not disabled, they are still protected under the ADA’s anti-retaliation provision).

⁷⁰ *See, e.g.,* Carreras v. Sajo, Garcia & Partners, 596 F.3d 25, 33 (1st Cir. 2010) (not applying the ADAAA where the conduct occurred prior to the amendments); EEOC v. Argo Distrib., LLC, 555 F.3d 462, 470 (5th Cir. 2009) (noting ADAAA does not apply retroactively).

⁷¹ List of cases on file with the author. *See, e.g.,* Dickerson v. Bd. of Trs. of Cmty. Coll. Dist. No. 522, 657 F.3d 595, 598 (7th Cir. 2011).

feat. Such a motion is decided based on only the pleadings and before there has been any discovery; many plaintiffs who survive a motion to dismiss may nevertheless lose on a motion for summary judgment. I did, however, include cases where the plaintiff did not survive a motion to dismiss for the same reason. If a plaintiff cannot even survive a motion to dismiss, this is significant evidence that either the claim was really meritless or the courts are using rules and standards in such a way that limits the number of successful cases.

Fourth, I excluded 46 cases where the ADA retaliation issue was not fully fleshed out because the courts only addressed the issue of whether the plaintiff adequately exhausted her remedies under the ADA. Under the ADA, plaintiffs have to exhaust their remedies by filing a charge with the EEOC before they can file a lawsuit in federal court.⁷² Sometimes, plaintiffs file a charge that does not specifically mention ADA retaliation; in these cases, the courts have to decide whether the facts mentioned in the EEOC charge adequately put the defendant-employer on notice that the plaintiff planned to pursue an ADA retaliation claim.⁷³ For cases in this category, the courts only discussed whether or not the plaintiffs adequately exhausted their remedies and did not include a discussion of the merits of the ADA retaliation claim.⁷⁴

Similarly, I excluded a whopping 294 cases that did not include a discussion of an ADA retaliation claim. This was somewhat surprising given that my search terms included “retaliation /s ADA.” Some of these cases only discussed state-law claims and were referencing the ADA as a comparison point.⁷⁵ Some are excluded because they simply mention the ADA’s retaliation provisions but do not discuss them.⁷⁶

I also excluded 114 cases that discussed procedural issues unrelated to a dispositive motion. For instance, many cases discussed a state employer’s Eleventh Amendment immunity defense.⁷⁷ Others discussed discovery issues.⁷⁸

⁷² 42 U.S.C. § 12117(a) (2012); *see also, e.g.*, *Gomez v. N.Y.C. Police Dep’t*, 191 F. Supp. 3d 293, 299 (S.D.N.Y. 2016).

⁷³ *Gomez*, 191 F. Supp. 3d at 299 (“[C]laims not raised in an EEOC complaint . . . may be brought in federal court if they are ‘reasonably related’ to the claim filed with the agency. A claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made.”) (citation omitted).

⁷⁴ *Id.* at 300 (holding that plaintiff’s ADA retaliation claim was not reasonably related to her EEOC charge).

⁷⁵ *See, e.g.*, *Soto v. Texas Dep’t of Family & Protective Servs.*, 197 F. Supp. 3d 930, 932 (S.D. Tex. 2016) (discussing the plaintiff’s claim under a Texas anti-retaliation statute).

⁷⁶ *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) (holding that, for Title VII retaliation claims, plaintiffs must prove that retaliation was the but-for cause of the adverse employment action); *Id.* at 377 (Ginsburg, J., dissenting) (discussing ADA retaliation simply to point out that, under the ADA, Congress included ADA retaliation in a separate provision from the status-based discrimination).

⁷⁷ *See, e.g.*, *Levy v. Kansas Dep’t of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1168 (10th Cir. 2015) (discussing employer’s 11th Amendment immunity argument).

Finally, I excluded eight cases that only discussed damages issues or attorney's fees.⁷⁹ These cases, along with all of the other excluded cases, were excluded because they did not engage in a discussion of a post-Amendments ADA retaliation claim.

B. *The Results*

After all of the exclusions, I was left with 262 cases. Of those, in 196 or almost 75% of them, the plaintiff lost, and the employer's dispositive motion was granted. Plaintiffs only won in 66 or just over 25% of the cases. And by "won" I mean that the plaintiff only survived a motion for summary judgment. As most employment lawyers know, surviving a motion for summary judgment is good news for an employment discrimination plaintiff, because it drastically increases the settlement potential and value as most employers prefer to avoid the expenses of a trial.⁸⁰ But certainly, surviving a motion for summary judgment cannot be said to be the equivalent of a plaintiff "win," whereas the grant of a defendant's summary judgment motion is very much a win for the employer and an unmitigated loss for the plaintiff. Given this reality, employers winning these dispositive motions in more than 75% is a shockingly high number.

To put this number in perspective, in Professor Befort's post-ADAAA empirical study, in ADA discrimination claims (as opposed to retaliation claims that I am studying), plaintiffs in his post-Amendments dataset had a success rate of 40% (out of a much smaller dataset than mine here).⁸¹ In another study of plaintiff win rates of all discrimination and retaliation claims, plaintiffs were successful in 32.2% of retaliation claims (under all anti-discrimination statutes).⁸²

The next question is: why? What is causing plaintiffs to lose so many post-Amendments ADA retaliation cases? The answer can be explained partly by referring to the three elements of the plaintiff's prima facie case. In other words, courts are using the rules described above—the reasonable belief rule, the adverse employment action requirement, and the rule regarding close temporal proximity—to dismiss plaintiffs' ADA retaliation claims. But courts are also interpreting the facts of the case in a way that allows the courts to hold that the plaintiff cannot prove that the employer's asserted reason for its adverse employment action was pretextual. I will explore all of these in turn.

⁷⁸ See, e.g., *Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983, 985 (N.D. Ill. 2010) (discussing motion to compel discovery).

⁷⁹ See, e.g., *Watson v. Cty. of Yavapai*, 240 F. Supp. 3d 996, 1001 (D. Ariz. 2017) (discussing attorney fees).

⁸⁰ See, e.g., Befort, *supra* note 3, at 2067 (stating that most ADA plaintiffs who survive summary judgment are able to negotiate some type of positive settlement).

⁸¹ *Id.* at 2069.

⁸² Parker, *supra* note 67, at 944; see *infra* Appendix A.

1. Continued Use of the Reasonable Belief Rule

As discussed above, before the ADA was amended to dramatically expand the definition of disability, many courts held that a plaintiff's retaliation claim failed because she did not have a reasonable belief that she was disabled. Naturally, because the definition of disability is so much broader after the Amendments, we would expect to see fewer courts dismissing plaintiffs' claims based on the argument that the plaintiffs did not have a reasonable belief that they were disabled. That is mostly true. But there are still a couple of cases where the court held that the plaintiff could not establish that she had a reasonable belief that she was disabled under the ADA. One was *Isley v. Aker Philadelphia Shipyard, Inc.*,⁸³ where the plaintiff suffered an injury to his finger at work and asked for a temporary light duty assignment as an accommodation, and the employer refused.⁸⁴ He was eventually terminated, and in analyzing his retaliation claim, the court stated that there was no protected activity. Even though a request for an accommodation could be protected activity, in this case, he did not have a reasonable belief that his temporary finger impairment was a disability so requesting light duty as an accommodation does not qualify as protected activity.⁸⁵

Even though there are not as many cases post-ADAAA where courts use the reasonable belief rule with regard to the definition of disability, courts continue to use the reasonable belief rule regarding other allegations in the plaintiff's ADA retaliation claim. For instance, in *Jenkins v. Medical Laboratories of Eastern Iowa, Inc.*,⁸⁶ the plaintiff was harassed by coworkers after she injured herself at work and filed a worker's compensation claim.⁸⁷ After her back injury, she had to use a stool at work and could only work while sitting.⁸⁸ This caused her coworkers to sometimes have to pick up the slack for her, which led to them harassing her.⁸⁹ They would not speak to her for hours, would ignore her work-related questions, snap at her, slam doors in her face, and act like she wasn't there.⁹⁰ She was eventually fired after she complained about the harassment.⁹¹ With regard to the first element of her prima facie case, that she engaged in protected activity when she complained about the harassment, the plaintiff argued that she had a reasonable belief that she was complaining about harassment that violated the ADA, because she experienced daily harassment

⁸³ *Isley v. Aker Phila. Shipyard, Inc.*, 91 F. Supp. 3d 466 (E.D. Pa. 2016).

⁸⁴ *Id.* at 468–69.

⁸⁵ *Id.* at 470.

⁸⁶ *Jenkins v. Med. Labs. of E. Iowa, Inc.*, 880 F. Supp. 2d 946 (N.D. Iowa 2012).

⁸⁷ *Id.* at 953.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 955 (stating employer terminated plaintiff after she refused to meet with an Employee Assistance Plan representative to work on her interpersonal skills).

by her coworkers.⁹² But the court held that, in light of substantive law where courts have taken a restrictive approach to harassment claims, a reasonable person would not have found that giving her the silent treatment, acting annoyed by her, failing to answer her questions, and slamming doors was anything more than rude, abrasive, unkind, or insensitive conduct.⁹³ Therefore, the court held that the plaintiff did not prove that she had engaged in protected activity because the plaintiff's belief that the harassment violated the ADA was unreasonable.⁹⁴

This issue also arose in *Kimbrough v. Cincinnati Association for the Blind & Visually Impaired*,⁹⁵ where the plaintiff was advocating on behalf of one of her subordinate employees, who took leave of absence for a heart surgery, and wanted to return.⁹⁶ The plaintiff became upset that the employer was considering terminating the employee who was on leave and that the employer was asserting that the heart condition was not a disability.⁹⁷ When the plaintiff continued to advocate on behalf of the other employee, the plaintiff was terminated for insubordination.⁹⁸ The plaintiff alleged that her protected activity was opposing the employer's failure to engage in the interactive process with the employee on leave.⁹⁹ The court, however, held that the plaintiff did not have a reasonable belief that the employer was violating the law with respect to the employee with the heart condition.¹⁰⁰

In another case involving advocating on behalf of someone else, the court in *Tyson v. Access Services*¹⁰¹ held that the plaintiff, who was advocating on behalf of her disabled clients, had not engaged in protected activity because the plaintiff could not have reasonably believed her disagreements with her employer about the level of care being provided to some disabled clients was a violation of the ADA.¹⁰²

Sometimes the courts did not even consider the reasonable belief rule but simply held that the plaintiff did not engage in protected activity because she did not oppose behavior that was actually unlawful under the ADA. In *Lukic v. Eisai Corporation of North America, Inc.*,¹⁰³ the plaintiff took Family and Medical Leave Act (FMLA) leave to be with her baby, who had Down's syn-

⁹² *Id.* at 964.

⁹³ *Id.* at 964–65.

⁹⁴ *Id.* at 965.

⁹⁵ *Kimbrough v. Cincinnati Ass'n for the Blind & Visually Impaired*, 986 F. Supp. 2d 904 (S.D. Ohio 2013).

⁹⁶ *Id.* at 909.

⁹⁷ *Id.* at 912.

⁹⁸ *Id.* at 914.

⁹⁹ *Id.* at 917.

¹⁰⁰ *Id.*

¹⁰¹ *Tyson v. Access Servs.*, 158 F. Supp. 3d 309, 311 (E.D. Pa. 2016).

¹⁰² *Id.* at 316.

¹⁰³ *Lukic v. Eisai Corp. of N. Am. Inc.*, 919 F. Supp. 2d 936 (W.D. Tenn. 2013).

drome.¹⁰⁴ When she was later terminated and alleged that the employer retaliated against her for taking leave to care for her disabled daughter, the court held that there was no protected activity because she was not complaining about behavior that was actually unlawful under the ADA—employers are not required to accommodate an employee’s need to care for a disabled family member.¹⁰⁵ The court is correct that the ADA’s association provision does not require employers to give employees a reasonable accommodation to care for a disabled loved one,¹⁰⁶ but the court never considered whether the plaintiff had a reasonable belief that the employer had violated the ADA. Thus, her retaliation claim failed.¹⁰⁷

Similarly, the court in *Morissette v. Cote Corp.*¹⁰⁸ held that the plaintiff failed to meet the protected activity prong of the prima facie case, stating that a jury could not reasonably conclude that the employer’s requirement that the plaintiff, who was a heavy equipment mechanic, be able to pass a Department of Transportation medical exam was discriminatory.¹⁰⁹ Therefore, his opposition to that requirement was not protected activity.¹¹⁰ Again, the court neglected to even consider the reasonable belief rule.

The court also failed to consider the reasonable belief rule in *Scruggs v. Pulaski County*.¹¹¹ The plaintiff in this case worked as a juvenile detention officer and suffered from fibromyalgia, degenerative discrimination, and cervical disease.¹¹² Because the employer claimed it could not accommodate her lifting restriction, it put her on leave.¹¹³ Before the leave expired, the plaintiff requested an additional week of unpaid leave to allow her to obtain a certification from her doctor that would have lifted her restrictions.¹¹⁴ Because the employer did not think the additional leave would allow her to work without restrictions, it terminated her.¹¹⁵ The court held (incorrectly, in my mind) that a request for an additional week of leave beyond the twelve weeks required under the FMLA was not a reasonable accommodation.¹¹⁶ Thus, in analyzing her retaliation

¹⁰⁴ *Id.* at 938.

¹⁰⁵ *Id.* at 945.

¹⁰⁶ *See, e.g.,* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1091–92 (10th Cir. 1997).

¹⁰⁷ *Lukic*, 919 F. Supp. 2d at 946.

¹⁰⁸ *Morissette v. Cote Corp.*, 190 F. Supp. 3d 193 (D. Me. 2016).

¹⁰⁹ *Id.* at 211–12.

¹¹⁰ *Id.* at 211.

¹¹¹ *See Scruggs v. Pulaski Cty.*, 817 F.3d 1087, 1094 (8th Cir. 2016).

¹¹² *Id.* at 1091.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1093. The court is wrong about this because additional leave beyond what is required by the FMLA is often considered a reasonable accommodation, as long as the request is not for indefinite leave. *Compare* *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1135–36 (9th Cir. 2001) (allowing leave if it’s for a set period of time), *with* *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) (holding that indefinite leave is not a reasonable accommodation), *and* *Thomas v. Trane*, No. 5:05-CV-440(CAR), 2007 WL 2874776, at *7

claim, the court held that requesting additional leave could not be protected activity because she was not requesting a reasonable accommodation.¹¹⁷ Even if the court was correct that additional leave was not a reasonable accommodation, it should have considered whether she had a reasonable belief that asking for additional leave was a reasonable accommodation.

Other cases failed on the protected activity prong because the court held that the plaintiff never requested an accommodation, and there was no other protected activity, such as an EEOC charge. For instance, in *Preddie v. Bartholomew Consolidated School Corp.*,¹¹⁸ the plaintiff was a fifth-grade teacher, who was diabetic and had a son who suffered from sickle cell anemia.¹¹⁹ His boss complained to him about his son's illnesses causing him to miss work in part because the plaintiff had been absent quite a bit for his own disability.¹²⁰ The plaintiff missed two days because of diabetes, and six days because of acute hypertension and kidney failure.¹²¹ Despite his repeated absences that certainly would have qualified for FMLA leave, the plaintiff never formally applied for leave under the FMLA.¹²² The court held that his retaliation claim must fail because he never requested a reasonable accommodation.¹²³ Even though he requested leave for his own disability several times, the court stated that these requests did not actually constitute requests for accommodations under the ADA and were therefore not protected activity.¹²⁴

2. Misapplication of the "Materially Adverse" Standard

As discussed above, the relevant standard for determining whether there is an adverse employment action sufficient to meet the second element of a retaliation claim was announced in the Supreme Court's decision in *Burlington Northern & Santa Fe Railway v. White*.¹²⁵ The Court held that in order to meet the standard, the plaintiff has to demonstrate that the action "would have been materially adverse to a reasonable employee . . ."¹²⁶ The action must be "harm-

(M.D. Ga. Sept. 27, 2007) (holding same). See generally U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <https://www.eeoc.gov/policy/docs/accommodation.html> [<https://perma.cc/M88E-CDNG>] (stating that, even if an employee has exhausted all leave under the FMLA, the employer has to provide additional leave under the ADA unless doing so would cause an undue hardship).

¹¹⁷ *Scruggs*, 817 F.3d at 1094.

¹¹⁸ *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806 (7th Cir. 2015).

¹¹⁹ *Id.* at 808.

¹²⁰ *Id.* at 810.

¹²¹ *Id.* at 811.

¹²² *Id.*

¹²³ *Id.* at 814.

¹²⁴ *Id.* at 815.

¹²⁵ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

¹²⁶ *Id.* at 54.

ful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.”¹²⁷

This seems straightforward enough, and the Court even clarified that despite this being an objective standard, “[c]ontext matters.”¹²⁸ However, in many ADA retaliation cases, actions that might objectively seem like adverse employment actions were held not to be.¹²⁹

For instance, in *Buie v. Berrien*, the plaintiff had lung disease and asthma and had trouble with the air quality issues at her workplace.¹³⁰ She requested a private office or the ability to telework and both were initially denied, although eventually they transferred her back to a location she had worked at previously that had a private office for her.¹³¹ Throughout this process, her boss yelled at her, walked away from her, and slammed doors in her face.¹³² The court held that this behavior did not amount to an adverse employment action, because it was not “tangible.”¹³³ Similarly, the court held that the delay in granting her an accommodation was also not an adverse employment action.¹³⁴ Other courts have similarly held that being yelled at by a supervisor is not an adverse employment action.¹³⁵

In *Hargrove v. AARP*,¹³⁶ the court held that negative performance reviews and increasingly harsh working conditions that did not abide by the plaintiff’s doctor’s restrictions were not adverse employment actions.¹³⁷ Similar to other cases, the court also held that the “denial of a request for accommodation does not by itself support a claim of retaliation based on the request. If it did, then every failure-to-accommodate claim would be doubled.”¹³⁸

In another questionable case, the plaintiff had Attention Deficit Disorder (ADD) and requested a quiet work space as an accommodation, which was given in part because a coworker agreed to swap offices.¹³⁹ Later on, the employer moved the plaintiff to another building and her supervisor assigned her to a

¹²⁷ *Id.* at 57.

¹²⁸ *Id.* at 69.

¹²⁹ For a list of all cases holding that there was no adverse employment action, see *infra* Appendix A.

¹³⁰ *Buie v. Berrien*, 85 F. Supp. 3d 161, 166 (D.D.C. 2015).

¹³¹ *Id.* at 167–68.

¹³² *Id.* at 167.

¹³³ *Id.* at 177–78.

¹³⁴ *Id.* at 178.

¹³⁵ See, e.g., *Alderson v. Ferrellgas, Inc.*, 127 F. Supp. 3d 937, 956 (N.D. Ind. 2015) (stating that being yelled at by supervisor is not materially adverse; the plaintiff was not a reasonable worker; she was an “extremely sensitive” worker); *Lewis v. Erie Cty. Med. Ctr. Corp.*, 907 F. Supp. 2d 336, 350 (W.D.N.Y. 2012) (stating that the plaintiff being chastised, berated, chased down the hall, criticized, given negative performance evaluations, and denied schedule changes are not adverse employment actions).

¹³⁶ *Hargrove v. AARP*, 205 F. Supp. 3d 96 (D.D.C. 2016).

¹³⁷ *Id.* at 115.

¹³⁸ *Id.* at 116. (internal quotations and citations omitted).

¹³⁹ *Aldrich v. Burwell*, 197 F. Supp. 3d 124, 128 (D.D.C. 2016).

loud cubicle right by the supervisor's office, so the supervisor could closely monitor the plaintiff.¹⁴⁰ Shortly after plaintiff filed an Equal Employment Opportunity complaint, for which the supervisor acknowledged receipt, the supervisor gave her a "leave restriction," which required the plaintiff to announce her whereabouts to her supervisor any time she would be away from her desk for fifteen minutes or more.¹⁴¹ A few months later, the plaintiff was suspended for ten days for failing to adhere to the leave policy on a day when a blizzard was underway in Washington D.C.¹⁴²

In analyzing whether this increased scrutiny or monitoring was an adverse employment action, the court first noted that courts have been almost unanimous in holding that monitoring or tracking of an employee's whereabouts does not rise to the level of a materially adverse action.¹⁴³ Instead, the court recognized this as a "basic employment practice" and said it can only be an adverse employment action if the plaintiff previously had immunity from monitoring policies.¹⁴⁴ The court seemed to recognize that there might be an exception if the employer's monitoring is not applied consistently¹⁴⁵ (which it arguably was not in this case) but then stated that selective enforcement does not alone convert enforcement of a policy into an adverse employment action—it's still just a petty slight.¹⁴⁶ Even though the plaintiff found it condescending or even infantilizing, the court stated that "her personal response cannot transform an otherwise 'minor annoyance' into 'an action that would have dissuaded a reasonable worker from making a charge of discrimination.'"¹⁴⁷

3. Causation

Generally speaking, unless there is a smoking gun regarding a decision-maker's retaliatory motive, most plaintiffs prove causation through suspicious timing, a close temporal proximity between the protected activity and the adverse employment action.¹⁴⁸ But many, many courts in the cases I researched held that temporal proximity alone is not enough to establish causation, even at the *prima facie* case stage.¹⁴⁹

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 129.

¹⁴² *Id.*

¹⁴³ *Id.* at 132.

¹⁴⁴ *Id.* at 133.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 134.

¹⁴⁷ *Id.* at 134–35 (citation omitted) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)) (then quoting *Baloch v. Kempthorne*, 550 F.3d 1191, 1198 (D.C. Cir. 2008)).

¹⁴⁸ Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 56 (2018) [hereinafter Porter, *Ending Harassment*].

¹⁴⁹ For a list of these cases, see *infra* Appendix B.

For instance, in *Kieffer v. CPR Restoration & Cleaning Service, LLC*,¹⁵⁰ the plaintiff had several disabilities that required him to request several leaves of absence over his career.¹⁵¹ His bosses made statements about his medical conditions interfering with his work.¹⁵² After a work-related injury and a worker's compensation claim, he was terminated, with his boss stating: "[W]e have enough trouble feeding the ones we have, and things have gotten weird, so I thought long and hard, and this is just the best decision I think."¹⁵³ When discussing his prima facie case of retaliation, the court noted that he satisfied the first two elements—his requests for reasonable accommodations for his disabilities were his protected activity, and he suffered an adverse employment action when he was terminated.¹⁵⁴ But then the court stated that unless the temporal proximity is unusually suggestive of retaliatory animus, timing alone will not satisfy the causation element.¹⁵⁵ The court stated that here, the two-month lapse between his protected activity and termination was too long.¹⁵⁶ The court also noted that the statements about his supervisors being upset about his leaves of absence is not enough to establish causation; instead, they are merely inquiries about his ability to comply with the employer's workplace rules.¹⁵⁷

Similarly, in *Perez v. Transformer Manufacturers, Inc.*,¹⁵⁸ the plaintiff worked a physically arduous job and eventually injured himself at work, leading to restrictions that prohibited him from doing the main function of his job, so he was placed on light duty pursuant to his worker's compensation claim.¹⁵⁹ His supervisor told him that if he was too old or too injured to do the job, "the door is over there."¹⁶⁰ After his worker's compensation claim was denied, his boss said he shouldn't work there because he was "old, useless, and only getting in the way," and that he couldn't return until he was "100% recovered."¹⁶¹ He filed a charge of discrimination on October 13, 2009, claiming he had been terminated, although he did continue to receive short-term disability benefits until January 15, 2010.¹⁶² Once the benefits expired, he was terminated on January 25, 2010.¹⁶³ The only issue for the court was causation.¹⁶⁴ The plaintiff be-

¹⁵⁰ *Kieffer v. CPR Restoration & Cleaning Serv., LLC*, 200 F. Supp. 3d 520 (E.D. Pa. 2016).

¹⁵¹ *Id.* at 526.

¹⁵² *Id.*

¹⁵³ *Id.* at 527.

¹⁵⁴ *Id.* at 536.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Perez v. Transformer Mfrs., Inc.*, 35 F. Supp. 3d 941 (N.D. Ill. 2014).

¹⁵⁹ *Id.* at 945.

¹⁶⁰ *Id.* at 946.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 947.

¹⁶⁴ *Id.* at 954.

lieved his termination in January 2010 was retaliation for filing the EEOC charge in October 2009.¹⁶⁵ The court, however, stated that three months is too long to be evidence of causation.¹⁶⁶ The court did not believe that the comments by his boss that he was “useless” and getting in the way demonstrated retaliatory intent.¹⁶⁷ Instead, the court stated that those comments were isolated and did not demonstrate that the employer was motivated by retaliation.¹⁶⁸

The plaintiff also couldn’t prove causation in *Reyes v. Krasdale Foods, Inc.* Even though there was only one month between the plaintiff’s filing of an EEOC charge and his adverse employment action (constructive discharge), because the employer acted the same way by refusing his accommodation requests both before and after the protected activity, he couldn’t establish causation.¹⁶⁹ Despite the fact that the plaintiff’s boss became hostile and agitated when he requested a schedule change to better manage his diabetes, the court held that there was no causation.¹⁷⁰

In *Robinson v. Rocktenn, CP, LLC*,¹⁷¹ the plaintiff was a utility employee who had knee problems, leading to knee surgery.¹⁷² The surgery took place in December 2009 and she returned to work in June 2010.¹⁷³ In August 2010, the plaintiff requested an accommodation, specifically, that she be allowed to work on an automatic machine because the manual machine hurt her knee and her back.¹⁷⁴ The employer denied her the accommodation, and shortly thereafter (in October 2010), the employer suspended her twice.¹⁷⁵ She did not believe the suspensions were warranted so she filed a grievance.¹⁷⁶ The employer fired her on October 19, 2010.¹⁷⁷ When discussing her retaliation claim, the court stated that her protected activity was a charge filed in October 2009,¹⁷⁸ although that charge is not mentioned in the facts of the case. The court ignored the grievance she filed in October 2010 as a possible protected activity, and then stated that the one-year time gap between her October 2009 charge and her October 2010 termination was too long.¹⁷⁹ I don’t necessarily disagree that in an ordinary case, one year would be long, but in addition to ignoring the grievance as protected activity, the court also rejected the plaintiff’s argument that she was

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Reyes v. Krasdale Foods, Inc.*, 945 F. Supp. 2d 486, 494 (S.D.N.Y. 2013).

¹⁷⁰ *Id.* at 489, 494.

¹⁷¹ *Robinson v. Rocktenn, CP, LLC*, 986 F. Supp. 2d 1287 (N.D. Ala. 2013).

¹⁷² *Id.* at 1296–97.

¹⁷³ *Id.* at 1297.

¹⁷⁴ *Id.* at 1298.

¹⁷⁵ *Id.* at 1299.

¹⁷⁶ *Id.* at 1300.

¹⁷⁷ *Id.* at 1311.

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

on leave from November 2009 to June 2010, during which the employer did not have an opportunity to retaliate against her.¹⁸⁰

In another case where the plaintiff lost because she was not able to prove causation, the plaintiff was a contracts specialist who was diagnosed with multiple sclerosis (MS) after she was hired.¹⁸¹ She started having difficulty with attendance and punctuality because of the MS diagnosis and excessive fatigue caused by the MS, and she requested several accommodations, including FMLA leave.¹⁸² She also requested a work-from-home accommodation, which the employer denied, and shortly thereafter, she was terminated, allegedly for her tardiness.¹⁸³ The court recognized that she was able to meet the first two elements of the prima facie case—her protected activity was requesting accommodations and the adverse employment action was, of course, the termination.¹⁸⁴ She argued that causation was demonstrated by the short time between her accommodation requests and her termination, as well as the fact that they started disciplining her for tardiness after she requested an accommodation, when she had been allowed to arrive late in the past (before she had begun requesting accommodations) without any consequence.¹⁸⁵ The court disagreed, stating that timing alone is not enough.¹⁸⁶ The court also held that emails indicating that the employer was frustrated about her FMLA leaves were also not evidence of retaliatory motive, so she could not prove causation.¹⁸⁷

Finally, in *Adams v. Persona, Inc.*,¹⁸⁸ after the plaintiff admitted his dependency on alcohol, the employer told him that if he entered treatment, they would allow him ten weeks of leave.¹⁸⁹ After he completed the treatment, the employer terminated him.¹⁹⁰ Although the court cited the correct rule that a request for an accommodation is protected activity for an ADA retaliation claim, it debated whether the plaintiff had actually requested an accommodation.¹⁹¹ Ultimately, though, the court held that because a request for leave to attend rehabilitation for alcohol dependency qualifies for ADA protection as a request for an accommodation, the plaintiff's admission to alcohol dependency could be construed as his request for accommodation.¹⁹²

¹⁸⁰ *Id.* at 1312 n.24.

¹⁸¹ *Taylor-Novotny v. Health All. Med. Plans, Inc.*, 772 F.3d 478, 482 (7th Cir. 2014).

¹⁸² *Id.* at 484.

¹⁸³ *Id.* at 487.

¹⁸⁴ *Id.* at 494–95.

¹⁸⁵ *Id.* at 495.

¹⁸⁶ *Id.* at 496.

¹⁸⁷ *Id.*

¹⁸⁸ *Adams v. Persona, Inc.*, 124 F. Supp. 3d 973 (D.S.D. 2015).

¹⁸⁹ *Id.* at 977.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 979.

¹⁹² *Id.* at 981. Because the plaintiff was terminated, the court easily found the second element of the claim—that the plaintiff suffered an adverse employment action—was met. *Id.* at 982.

With regard to causation, the court cited the now-familiar rule that temporal proximity alone cannot establish causation at the prima facie stage unless the timing is “very close,” which the court interpreted to mean less than one month.¹⁹³ Because Adams was terminated two months after he admitted to alcoholism and the employer offered him leave to enter treatment, the court stated that the two months, “alone, cannot establish causation.”¹⁹⁴ It also cited an Eighth Circuit case as stating that “even two weeks is ‘barely’ sufficient for establishing causation.”¹⁹⁵

4. Pretext

Even when a plaintiff can prove the prima facie case of retaliation, the employer then has the opportunity to assert a legitimate non-discriminatory reason for the adverse employment action.¹⁹⁶ This is a very easy burden; therefore, most cases will proceed to the final step in this burden-shifting framework—whether the employee can prove that the employer’s reason was pretextual. Quite frequently, the courts in ADA retaliation cases hold that the plaintiff cannot prove pretext.¹⁹⁷ Many of these cases are fact sensitive, and undoubtedly, many of them are correctly decided. But because a motion for summary judgment requires the court to construe the facts in the light most favorable to the non-moving party (almost always the plaintiff), some of the cases courts dismissed, claiming lack of pretext, were troubling.

For instance, in *Johnson v. District of Columbia*,¹⁹⁸ the plaintiff was a public-school teacher who had severe back problems, which led to medical leave and a request for an aide to help her with lifting, etc.¹⁹⁹ She eventually injured herself at work, although the worker’s compensation claim was denied.²⁰⁰ She requested additional leave, which was at first granted.²⁰¹ However, at some point she was ordered to return to work, but she believed that she was not physically able to return.²⁰² More specifically, she told her employer that she was suffering from severe depression, so she asked for an extension of leave.²⁰³ In a November 16 letter, the employer told the plaintiff that it would evaluate her latest request for a leave extension as long as she submitted a bunch of paper-

¹⁹³ *Id.* at 982.

¹⁹⁴ *Id.* at 983.

¹⁹⁵ *Id.* (citing *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002)).

¹⁹⁶ *Booth v. Houston*, 58 F. Supp. 3d 1277, 1290 (M.D. Ala. 2014).

¹⁹⁷ *See infra* Appendix C (listing 60 cases that failed because the court held that the plaintiff could not prove pretext).

¹⁹⁸ *Johnson v. District of Columbia*, 207 F. Supp. 3d 3 (D.D.C. 2016).

¹⁹⁹ *Id.* at 7–8.

²⁰⁰ *Id.* at 9.

²⁰¹ *See id.* at 8.

²⁰² *Id.* at 9.

²⁰³ *Id.* at 10.

work, including a questionnaire filled out by her doctor, by November 23.²⁰⁴ Plaintiff objected to the one-week turnaround, claiming that it would take longer than that for her medical provider to get to the paperwork, especially given that the deadline was the day after Thanksgiving that year.²⁰⁵ Despite the plaintiff's attempts, her doctor did not submit the paperwork until November 30, and the employer fired the plaintiff in the interim for failing to meet its strict deadline.²⁰⁶

The court did not discuss her prima facie case, and instead jumped right into the plaintiff's pretext argument.²⁰⁷ The court stated that the employer's decision to terminate her for failing to meet a deadline for submitting medical paperwork (something which was out of her control) was a legitimate non-discriminatory reason for her termination and she had not proven pretext.²⁰⁸ The court also stated that the temporal proximity between her request for the accommodation (additional medical leave) and her termination was not enough to prove pretext.²⁰⁹ And even though the deadline and subsequent decision by the employer to terminate her was unfair, it was not retaliatory.²¹⁰

In another case, after the plaintiff started taking medication for anxiety, which caused him to behave bizarrely, he took a leave of absence and was eventually medically cleared for work.²¹¹ Shortly thereafter, in May 2014, the plaintiff was asked to investigate a complaint.²¹² Management became unhappy about how the plaintiff handled the complaint, so the CEO met with the plaintiff to tell him that his job was going to be reworked to remove any management duties.²¹³ The employer changed the plaintiff's job duties, and his salary was reduced by \$50,000.²¹⁴ Eventually, this led the plaintiff to file a charge of discrimination with the EEOC in March 2015.²¹⁵ In August 2015, there was a business downturn and plaintiff was informed that the employer would need to lay off employees.²¹⁶ Plaintiff was one of those employees who would be laid off unless he could put together a successful business plan that would bring in some new business.²¹⁷ During this time, the CEO commented to him that "life would be easier [without] this distraction," referring to the plaintiff's EEOC

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.* at 11.

²⁰⁸ *Id.* at 12.

²⁰⁹ *Id.* at 13.

²¹⁰ *Id.*

²¹¹ *Ullrich v. Cexec, Inc.*, 233 F. Supp. 3d 515, 520, 531 (E.D. Va. 2017).

²¹² *Id.* at 520.

²¹³ *Id.* at 521.

²¹⁴ *Id.*

²¹⁵ *Id.* at 522.

²¹⁶ *Id.* at 522–23.

²¹⁷ *Id.* at 523.

charge.²¹⁸ Despite this statement, the court held that it was not enough to establish causation or pretext.²¹⁹

5. *Not Fully Argued*

Finally, some cases are lost simply because the plaintiff's lawyer does not argue the case properly. For instance, in one case, even though the plaintiff had requested an accommodation, which is protected activity, and was shortly thereafter terminated, which should have met both the elements of the adverse employment action, and causation, the court stated that the plaintiff did not argue the elements of her prima facie case.²²⁰ Instead, the plaintiff had simply argued that the employer did not have valid reasons for terminating her, and the court held that this is simply a legal assertion and dismissed her claim.²²¹

C. *Some Plaintiffs Survive*

Certainly, there were plenty of meritorious claims in my dataset, sixty-six to be exact. Some had very strong facts. But others were cases that I imagined other courts would have dismissed. In other words, some of the cases survived because the court took seriously its obligation to construe all factual disputes in favor of the plaintiff, the non-moving party.

1. *Cases with Really Strong Facts*

I found several cases where the plaintiff had very strong facts to support her ADA retaliation claim. For instance, in *Norris v. GKN Westland Aerospace, Inc.*,²²² the plaintiff worked in a manufacturing facility, when he was diagnosed with Type II diabetes and high blood pressure, which caused other ailments, making it difficult for him to stand for long periods of time, and requiring him to monitor his blood sugar level several times a day and follow a nutrition plan.²²³ Several supervisors were relentless about teasing him and criticizing him for his necessary accommodations.²²⁴ For example, one supervisor criticized him for taking too many breaks to manage his diabetes.²²⁵ Another supervisor would follow him to the restroom and break room and would confront him about the breaks for his diabetes.²²⁶ Plaintiff complained about this harassment and less than two weeks later, he was transferred to the third shift, which disrupted his schedule and made it more difficult for him to manage his

²¹⁸ *Id.* at 524.

²¹⁹ *Id.* at 533–34.

²²⁰ *Torres v. House of Rep. of P.R.*, 858 F. Supp. 2d 172, 181–82, 190 (D.P.R. 2012).

²²¹ *Id.* at 190.

²²² *Norris v. GKN Westland Aerospace, Inc.*, 921 F. Supp. 2d 1308 (M.D. Ala. 2013).

²²³ *Id.* at 1311.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

diabetes.²²⁷ The supervisor on that shift taunted him as well and another supervisor would yell at him for being in the break room too much.²²⁸ Eventually, they suspended him and then terminated him, allegedly for poor quality workmanship.²²⁹ The court sensibly held that there was enough evidence of a retaliatory motive—that his complaints about the harassment caused the adverse employment actions.²³⁰

Similarly, in *Cloe v. City of Indianapolis*,²³¹ the plaintiff was diagnosed with multiple sclerosis (MS) shortly after she began working.²³² After her diagnosis, her supervisor expressed anger about her having to take off work for a doctor's appointment, and one week later, terminated her for alleged conduct that occurred three or four weeks earlier.²³³ The court noted that the misconduct they allegedly terminated her for was fishy and also noted that the supervisor's expression of anger about her leaving early for a doctor's appointment and many other negative comments about her MS were evidence of a retaliatory motive.²³⁴ Thus, the plaintiff's ADA retaliation claim survived.²³⁵

2. *Courts Construing Facts and Law in Plaintiffs' Favor*

As stated above, not all of the cases where plaintiff survived had very strong facts. Some of them survived because the court took seriously its obligation to construe the facts in the light most favorable to the non-moving party—almost always the plaintiff in these cases. For instance, in one case, the plaintiff was a gaming engineering specialist with severe dermatological issues that caused severe pain and disruptions.²³⁶ For many years, he had been allowed to work a flexible schedule where he made up hours later in the day, but at some point, the employer withdrew this accommodation.²³⁷ He requested to have the accommodation reinstated, but the employer refused, so if he came in late, he had to make up the time later in the day but he wouldn't be paid for it.²³⁸ The plaintiff filed an EEOC charge on April 1, 2015, and almost immediately started suffering from retaliatory actions such as an unwarranted criminal investigation, being taken off projects, having his workload increased, and being subject

²²⁷ *Id.*

²²⁸ *Id.* at 1312.

²²⁹ *Id.*

²³⁰ *See id.* at 1319.

²³¹ *Cloe v. City of Indianapolis*, 712 F.3d 1171 (7th Cir. 2013).

²³² *Id.* at 1173.

²³³ *Id.* at 1175.

²³⁴ *Id.* at 1180–81.

²³⁵ *Id.* at 1181.

²³⁶ *Bridgewater v. Mich. Gaming Control Bd.*, 282 F. Supp. 3d 985, 988 (E.D. Mich. 2017).

²³⁷ *Id.* at 988–90; *see generally* Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 DRAKE L. REV. 885, 890 (2015) (discussing this phenomenon of employers withdrawing accommodations that had previously been provided to employees with disabilities).

²³⁸ *Bridgewater*, 282 F. Supp. 3d at 990–91.

to excessive monitoring.²³⁹ The court stated that it was difficult to characterize the unwarranted investigation and excessive monitoring as “petty slights or minor annoyances.”²⁴⁰ And because there were only seventeen days between his EEOC charges and the beginning of the investigation and excessive monitoring, he had proven causation for purposes of surviving the employer’s motion for summary judgment.²⁴¹ This case is interesting because I discussed above a case where the court had held that excessive monitoring was not an adverse employment action.²⁴²

In another case, the plaintiff was an admissions director at a long-term care facility.²⁴³ After she broke her leg and took a leave of absence, the employer told her that she had to be 100% healed to be able to return.²⁴⁴ Her leave expired and again, the employer told her that she could not return without being able to perform all of the job functions with no restrictions.²⁴⁵ Because of this, she filed a charge of discrimination on August 30, 2012.²⁴⁶ On September 10, 2012, she was released to return by her doctor but still had some restrictions on her walking.²⁴⁷ She asked for accommodations to be able to still perform tours of the facility, but the employer refused, and terminated her on September 18, 2012.²⁴⁸ The court held that the close temporal proximity between her requests for accommodation and her termination, along with the employer’s language about not being able to return until she was 100% healed demonstrates retaliatory animus against her for requesting accommodations.²⁴⁹ This case was interesting because there were many cases where plaintiffs did not survive their employers’ motions for summary judgment under similar factual scenarios as this case—i.e., where the employer refused additional leave and refused additional accommodations.²⁵⁰

²³⁹ *Id.* at 991.

²⁴⁰ *Id.* at 1001.

²⁴¹ *Id.*

²⁴² *See supra* Section II.B.2 (discussing *Aldrich v. Burwell*, 197 F. Supp. 3d 124 (D.D.C. 2016)).

²⁴³ *Consedine v. Willimansett E. SNF*, 213 F. Supp. 3d 253, 256 (D. Mass. 2016).

²⁴⁴ *Id.* at 256–57.

²⁴⁵ *Id.* at 257.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 258.

²⁴⁸ *Id.* at 258–59.

²⁴⁹ *Id.* at 262.

²⁵⁰ *See, e.g.*, *Abbott v. Elwood Staffing Servs., Inc.*, 44 F. Supp. 3d 1125, 1150, 1167 (N.D. Ala. 2014) (stating that refusal to accommodate her disability by forcing her on leave rather than giving her a light duty assignment, is not evidence of retaliation); *Anderson v. Procopy Techs., Inc.*, 23 F. Supp. 3d 880, 883–85, 893–94 (S.D. Ohio 2014) (explaining that after plaintiff was diagnosed with epilepsy and couldn’t drive a forklift, he was forced on leave and terminated when the leave expired, and the court held that the five weeks between the plaintiff filing an EEOC charge because they forced him on leave, and the termination was not close enough to demonstrate causation).

III. IMPLICATIONS

A. *A New Narrative*

The common narrative surrounding retaliation claims is that they are often much more successful than discrimination claims.²⁵¹ This is explained in part due to what is seen as a more relaxed standard of proof. Specifically, as explained earlier, a plaintiff in a retaliation suit only needs to have a reasonable belief that the employer engaged in a discriminatory action even if that belief is mistaken.²⁵² This means that sometimes the retaliation claim survives even if the underlying claim (the harassment or discrimination claim) fails. The higher success rates of some retaliation cases might also be explained by the fact that the retaliation cause of action covers more harm than the discrimination doctrine.²⁵³ As noted above, the standard in *Burlington Northern* only requires that the adverse action is “materially adverse,” meaning that it would dissuade a reasonable employee from filing or supporting a claim of discrimination.²⁵⁴ This covers a broader set of adverse actions than a discrimination claim. Because this is supposed to be a fact-sensitive inquiry, one would expect that most of these issues would have to be decided by a jury, and this would then lead to more plaintiffs surviving summary judgment in retaliation cases.²⁵⁵ And if cases do get to a jury, there is some support for the idea that the jury is more likely to believe that a retaliatory motive was at play rather than a discriminatory motive.²⁵⁶

Because of this common narrative, I will admit I was surprised to see the results of my study. Considering that surviving a motion for summary judgment should not be an onerous burden, it was surprising that only one-quarter of plaintiffs in my study were able to survive summary judgment in their ADA retaliation cases. What is unclear is whether this is something unique to disability cases, or whether a study of Title VII retaliation claims during the same time period would reveal a similar result. Obviously, my study does not allow me to answer that question.

But another question is whether there is something about ADA retaliation cases that might make them less successful than other retaliation cases? There might be. Because ADA retaliation claims can (and often do) involve a retaliatory action taken because a plaintiff has requested an accommodation for her disability, it’s possible that employers and courts are reacting negatively to the request for an accommodation. Prior to the ADAAA, when courts were narrow-

²⁵¹ See, e.g., B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 442 (2008); see also sources cited *supra* note 6.

²⁵² George, *supra* note 251, at 467.

²⁵³ See *id.* at 468.

²⁵⁴ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

²⁵⁵ George, *supra* note 251, at 469–70.

²⁵⁶ *Id.* at 469.

ly interpreting the definition of disability, most scholars argued that the narrow construction indicated a “backlash” against the ADA.²⁵⁷ Scholars hypothesized that the most likely explanation for the hostility against ADA claims is that employers and courts consider reasonable accommodations to constitute “preferential treatment” in the workplace.²⁵⁸ Thus, it’s possible that ADA retaliation claims might fare worse than other retaliation claims because of the hostility towards reasonable accommodations in the workplace. If so, then the broadened definition of disability in the ADAAA does not have much hope of bringing new life to the ADA.

B. Room for Reform

Because of the negative result in this study, the next step should be discussions about future reform to allow more plaintiffs to bring successful ADA retaliation claims (or at least to survive summary judgment). This is especially important in ADA cases (perhaps even more important than Title VII retaliation cases) because, as noted, the alleged protected activity of many of the plaintiffs in these cases is requesting an accommodation. If an employee feels deterred from requesting an accommodation because she is worried about her employer retaliating against her, the anti-discrimination goals of ADA will not be realized.

Although fully exploring these reforms is beyond the scope of this article, my preliminary proposal is to reform the anti-retaliation law under the ADA to address some of the problems associated with all three elements of the prima facie case. Unfortunately, there is not an easy fix for the frequency with which courts conclude that the plaintiff has not proven that the employer’s alleged reason for the adverse employment action was pretextual. But if we were to improve the law surrounding the ADA retaliation prima facie case, there would be fewer cases where plaintiffs lose.

First, we should abandon the requirement that the employee have a reasonable belief that she was complaining about behavior that violated the ADA or that she had a reasonable belief that she was entitled to an accommodation she requested. In similar contexts, I argued that courts should dispense with the reasonable requirement and only require that an employee have a good faith belief that she is complaining about conduct that violates the law and that she act rea-

²⁵⁷ See, e.g., Linda Hamilton Krieger, *Introduction to BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 1, 5–6 (Linda Hamilton Krieger ed., 2006); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 21–22 (2000).

²⁵⁸ See Long, *supra* note 3, at 225; Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1113 (2014); Porter, *Backlash*, *supra* note 2, at 14 (arguing that the backlash is based on the fact that the “ADA’s reasonable accommodation provision confers special treatment on individuals with disabilities, and therefore, courts want to limit that special treatment to those who are considered truly deserving.”).

sonably in bringing the complaint.²⁵⁹ Other scholars have made similar arguments in the Title VII context.²⁶⁰ The criticisms of the “reasonable” standard are several: it stifles the broad remedial goals of Title VII or other anti-discrimination statutes (like the ADEA or the ADA);²⁶¹ it places employees in an unfair catch-22 with respect to reporting harassment;²⁶² it judges the reasonableness of the belief based on a judge’s law-trained perspective, rather than the perspective of a layperson;²⁶³ and informal complaints should be encouraged rather than discouraged.²⁶⁴ I agree with these reasons.²⁶⁵

Second, we need to lower the threshold of harm to meet the “material adverse” standard. The Supreme Court’s standard in *Burlington Northern* is not the problem. The problem, as noted by other scholars, is that the reasonable person standard has been interpreted by lower courts in a way that “fails to reflect the views of most reasonable people.”²⁶⁶ This is a similar problem to the one above—where courts allow their own perceptions of what is “reasonable” to cloud their judgment about how a reasonable person who is not a law-trained judge would feel or behave. In this context, it is likely that federal judges, who enjoy lifetime job security, would not be deterred from complaining about discrimination because it would be very difficult for anyone to retaliate against them.²⁶⁷ Although arriving at a specific standard is not the subject of this article, we do need to lower the threshold regarding what constitutes an “adverse employment action.” I am not suggesting that one dirty look is enough, but I am troubled by how frequently courts hold that snubbing or ostracizing an employee who engaged in protected activity is not an adverse employment action.²⁶⁸ And yet the consequences of being ignored or ostracized in the work-

²⁵⁹ Ann C. McGinley & Nicole Buonocore Porter, *Public Policy and Workers’ Rights: Wrongful Discharge Discipline Actions and Reasonable Good-Faith Beliefs*, 21 *EMP. RTS. & EMP. POL’Y J.* 511, 533–43 (2017) (arguing that, in Chapter 5 of the Restatement of Employment Law—The Tort of Wrongful Discharge in Violation of Public Policy—, the drafters should have eliminated the requirement that an employee has a “reasonable belief” that the conduct complained of violated the law); Porter, *Ending Harassment*, *supra* note 148, at 56–57 (arguing that the Title VII retaliation doctrine should be amended to eliminate the requirement that an employee’s belief that the conduct she complained of violated the law be objectively reasonable).

²⁶⁰ Deborah L. Brake, *Retaliation*, 90 *MINN. L. REV.* 18, 102–03 (2005) [hereinafter Brake, *Retaliation*]; Deborah L. Brake, *Retaliation in an EEO World*, 89 *IND. L.J.* 115, 165–66 (2014) [hereinafter Brake, *Retaliation in an EEO World*]; Senn, *supra* note 17, at 2061.

²⁶¹ See, e.g., Brake, *Retaliation*, *supra* note 260, at 55; Senn, *supra* note 17, at 2048.

²⁶² See, e.g., Brake, *Retaliation*, *supra* note 260, at 77; Brake, *Retaliation in an EEO World*, *supra* note 260, at 138–44; Senn, *supra* note 17, at 2074–77.

²⁶³ See, e.g., Brake, *Retaliation*, *supra* note 260, at 76–77, 82.

²⁶⁴ See, e.g., *id.* at 78; Senn, *supra* note 17, at 2079–80.

²⁶⁵ See Porter, *Ending Harassment*, *supra* note 148, at 56–57.

²⁶⁶ See, e.g., Sperino, *supra* note 57, at 2055; Porter, *Ending Harassment*, *supra* note 148, at 57.

²⁶⁷ Porter, *Ending Harassment*, *supra* note 148, at 55.

²⁶⁸ See, e.g., *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1105–06 (7th Cir. 2012) (holding that being called a “cry baby” and “trouble maker” by supervisor was not

place can be “emotionally devastating” and very effective at punishing the complaining employee and discouraging others from exercising their rights in the workplace.²⁶⁹

Third, I also find fault with the courts’ jurisprudence on the causation inquiry.²⁷⁰ As noted above, the determination of causation inevitably involves looking at the temporal proximity between the protected activity and the adverse employment action.²⁷¹ Very short gaps between the two events will help plaintiff prove her prima facie case.²⁷² But most courts hold that the temporal proximity alone is insufficient to establish a prima facie case of retaliation.²⁷³ Moreover, courts take an overly restrictive view on what is “too long” to support an inference of causation. I have seen firsthand some employers waiting for six months or more before taking a retaliatory action. A savvy, well-counseled employer knows that it cannot take an adverse employment action immediately after a harassment or discrimination complaint. But some employers simply bide their time, waiting until they can terminate or take other adverse employment actions without the suspicion of retaliation.²⁷⁴ Overly stringent temporal proximity rules ignore this reality.

Thus, I propose that, when establishing the prima facie case of retaliation, which is not supposed to be an onerous burden, there should be a one-year cut-off.²⁷⁵ Anything shorter than that would be presumed to meet the prima facie element of causation, and then the burden of production would shift to the employer to demonstrate a non-retaliatory reason for the adverse employment action.²⁷⁶ I recognize that this does not move the ball very far, because many of these cases turn on the third step of the burden-shifting framework—whether or not the plaintiff can prove that the defendant’s non-retaliatory reason for the action was pretextual—but it would at least force the court to analyze the pretext element.²⁷⁷

adverse action); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657–58 (5th Cir. 2012) (holding co-worker harassment, including name-calling, physical intimidation, false accusations, vandalizing belongings, and verbal threats, not retaliatory); *Stephens v. Erickson*, 569 F.3d 779, 790 (7th Cir. 2009) (holding supervisors yelling at plaintiff and physically isolating him from other employees did not rise to level of adverse employment action); *see also* George, *supra* note 251, at 443.

²⁶⁹ George, *supra* note 251, at 443.

²⁷⁰ Ivan E. Bodensteiner, *The Risk of Complaining—Retaliation*, 38 J. C. & U. L. 1, 7 (2011) (“The most difficult hurdle of retaliation plaintiffs . . . is showing a causal connection or link between the protected activity and the materially adverse employment action. Absent any remarks made by those responsible for the challenged decision, the most telling evidence may be the temporal proximity between the protected activity and the adverse action.”).

²⁷¹ *See* Porter, *Ending Harassment*, *supra* note 148, at 56.

²⁷² George, *supra* note 251, at 458.

²⁷³ *Id.* at 458–59.

²⁷⁴ Porter, *Ending Harassment*, *supra* note 148, at 55–56.

²⁷⁵ *Id.* at 58.

²⁷⁶ George, *supra* note 251, at 457.

²⁷⁷ *Id.*; *see also* Porter, *Ending Harassment*, *supra* note 148, at 58.

Spring 2019]

DISABLING ADA RETALIATION CLAIMS

855

CONCLUSION

Post-ADAAA, many scholars believed that the expanded definition of disability would lead to many more meritorious claims. This article has demonstrated that this hope has been unrealized when it comes to ADA retaliation claims. Courts continue to disable ADA retaliation claims after the ADAAA became effective. Although the goal of this article was to expose the problem rather than to fashion a solution, my hope is that we will continue to discuss ways we can reform retaliation law so more of these meritorious claims can survive the summary judgment stage.

APPENDIX A: CASES WHERE EMPLOYER'S DISPOSITIVE MOTION IS GRANTED—
NO ADVERSE EMPLOYMENT ACTION

1. Aldrich v. Burwell, 197 F. Supp. 3d 124, 132, 139 (D.D.C. 2016)
2. Boyle v. Lynch, 5 F. Supp. 3d 425, 438–39 (W.D.N.Y. 2014)
3. Buie v. Berrien, 85 F. Supp. 3d 161, 177–78, 183 (D.D.C. 2015)
4. Casanova v. Wyndham Grand Rio Mar Beach Resort & Spa, 205 F. Supp. 3d 220, 236–38 (D.P.R. 2016)
5. Credeur v. Louisiana Through Office of Att’y Gen., 860 F.3d 785, 797–98 (5th Cir. 2017)
6. Davis v. Kimbel Mech. Sys., 322 F.R.D. 470, 486, 494 (W.D. Ark. 2017)
7. Fox v. Costco Wholesale Corp., 239 F. Supp. 3d 564, 584–86 (E.D.N.Y. 2017)
8. Gard v. U.S. Dep’t of Educ., 752 F. Supp. 2d 30, 37, 39 (D.D.C. 2010)
9. Garner v. Sch. Dist. of Phila., 63 F. Supp. 3d 483, 500–01 (E.D. Pa. 2014)
10. Hair v. Fayette Cty., 265 F. Supp. 3d 544, 566–68, 570 (W.D. Pa. 2017)
11. Hargrove v. AARP, 205 F. Supp. 3d 96, 115, 120 (D.D.C. 2016)
12. Hawkins v. Smith, 46 F. Supp. 3d 1175, 1190–91 (N.D. Okla. 2014)
13. Jenkins v. Med. Labs. of E. Iowa, Inc., 880 F. Supp. 2d 946, 964, 966 (N.D. Iowa 2012)
14. Kelly v. N.Y. State Office of Mental Health, 200 F. Supp. 3d 378, 406–08 (E.D.N.Y. 2016)
15. Lacasse v. Didlake, Inc., 194 F. Supp. 3d 494, 503–04 (E.D. Va. 2016)
16. Lawson v. Avis Budget Car Rental, LLC, 194 F. Supp. 3d 301, 308, 314 (S.D.N.Y. 2016)
17. Marotta v. Ford Motor Co., 119 F. Supp. 3d 676, 697–98 (E.D. Mich. 2015)
18. Mattingly v. Univ. of S. Fla. Bd. of Trs., 931 F. Supp. 2d 1176, 1187–88, 1191 (M.D. Fla. 2013)
19. Monaco v. Limestone Veterinary Hosp., 152 F. Supp. 3d 253, 264 (D. Del. 2016)
20. Ramos v. Toperbee Corp., 241 F. Supp. 3d 305, 333–34, 339 (D.P.R. 2017)
21. Randle v. Tri-Cty. Metro. Transp. Dist. of Or., 171 F. Supp. 3d 1084, 1090, 1092 (D. Or. 2016)
22. Shipman v. Nat’l R.R. Passenger Corp., 241 F. Supp. 3d 114, 121–22, 124 (D.D.C. 2017)

Spring 2019] *DISABLING ADA RETALIATION CLAIMS* 857

23. Smith v. Miami-Dade Cty., 21 F. Supp. 3d 1286, 1290–91 (S.D. Fla. 2014)
24. Solomon v. Sch. Dist. of Phila., 882 F. Supp. 2d 766, 784–85 (E.D. Pa. 2012)
25. Thompson v. District of Columbia, 272 F. Supp. 3d 17, 24–25 (D.D.C. 2017)
26. Walker v. District of Columbia, 279 F. Supp. 3d 246, 273–74, 278 (D.D.C. 2017)
27. Wilson v. Gaston Cty., 145 F. Supp. 3d 549, 564–65 (W.D.N.C. 2015)

APPENDIX B: CASES WHERE EMPLOYER'S DISPOSITIVE MOTION IS GRANTED—
NO CAUSATION

1. *Abbott v. Elwood Staffing Servs.*, 44 F. Supp. 3d 1125, 1168–69 (N.D. Ala. 2014)
2. *Alderson v. Ferrellgas, Inc.*, 127 F. Supp. 3d 937, 953, 960 (N.D. Ind. 2015)
3. *Anderson v. Nat'l Grid, PLC*, 93 F. Supp. 3d 120, 147–48 (E.D.N.Y. 2015)
4. *Arroyo-Ruiz v. Triple-S Mgmt. Grp.*, 206 F. Supp. 3d 701, 716–17, 720 (D.P.R. 2016)
5. *Backhaus v. Gen. Motors LLC*, 54 F. Supp. 3d 741, 754–56 (E.D. Mich. 2014)
6. *Barley v. Fox Chase Cancer Ctr.*, 46 F. Supp. 3d 565, 583–84 (E.D. Pa. 2014)
7. *Bates v. Roche Diagnostics Corp.*, 971 F. Supp. 2d 833, 846–47 (S.D. Ind. 2013)
8. *Belton v. Snyder*, 249 F. Supp. 3d 14, 26 (D.D.C. 2017)
9. *Bennett v. Dall. Indep. Sch. Dist.*, 936 F. Supp. 2d 767, 783, 789 (N.D. Tex. 2013)
10. *Bonnette v. Shinseki*, 907 F. Supp. 2d 54, 73, 82 (D.D.C. 2012)
11. *Bradley v. D.C. Pub. Schs.*, 222 F. Supp. 3d 24, 30–31 (D.D.C. 2016)
12. *Brady v. Bd. of Educ.*, 222 F. Supp. 3d 459, 475–76 (D. Md. 2016)
13. *Brooks v. Capistrano Unified Sch. Dist.*, 1 F. Supp. 3d 1029, 1037, 1039 (C.D. Cal. 2014)
14. *Brown v. Vanguard Grp., Inc.*, No. 16-946, 2017 WL 412802, at *18–20 (E.D. Pa. Jan. 30, 2017)
15. *Bullard v. FedEx Freight, Inc.*, 218 F. Supp. 3d 608, 619 (M.D. Tenn. 2016)
16. *Campbell v. N.Y.C. Transit Auth.*, 93 F. Supp. 3d 148, 177–79 (E.D.N.Y. 2015)
17. *Campos v. Pahrump*, 274 F. Supp. 3d 1106, 116–17, 1119 (D. Nev. 2017)
18. *Cherkaoui v. City of Quincy*, 213 F. Supp. 3d 264, 280–81 (D. Mass. 2016)
19. *Congress v. District of Columbia*, 277 F. Supp. 3d 82, 90–91 (D.D.C. 2017)
20. *Cortes v. MTA N.Y.C. Transit*, 802 F.3d 226, 233 (2d Cir. 2015)
21. *Croons v. N.Y. State Office of Mental Health*, 18 F. Supp. 3d 193, 208, 213 (N.D.N.Y. 2014)

22. *Cross v. Valley Servs., Inc.*, 963 F. Supp. 2d 1232, 1241–42 (D. Utah 2013)
23. *Curley v. City of N. Las Vegas*, 772 F.3d 629, 634 (9th Cir. 2014)
24. *Dawson v. Wal-Mart Stores E., LP*, 160 F. Supp. 3d 1303, 1306–07 (N.D. Ala. 2016)
25. *Debacker v. City of Moline*, 78 F. Supp. 3d 916, 928, 934 (C.D. Ill. 2015)
26. *De la Cruz v. Children’s Tr. of Miami-Dade Cty.*, 843 F. Supp. 2d 1273, 1281–1283 (S.D. Fla. 2012)
27. *Dechberry v. N.Y.C. Fire Dep’t*, 124 F. Supp. 3d 131, 154–56, 161 (E.D.N.Y. 2015)
28. *Drasek v. Burwell*, 121 F. Supp. 3d 143, 162–63 (D.D.C. 2015)
29. *Echevarria v. AstraZeneca, LP*, 133 F. Supp. 3d 372, 401–02, 409 (D.P.R. 2015), *aff’d*, 856 F.3d 119 (1st Cir. 2017)
30. *Edwards v. Gwinnett Cty. Sch. Dist.*, 977 F. Supp. 2d 1322, 1333–34, 1336 (N.D. Ga. 2013)
31. *EEOC v. Prod. Fabricators, Inc.*, 763 F.3d 963, 973–74 (8th Cir. 2014)
32. *Fernandez-Ocasio v. Walmart P.R., Inc.*, 94 F. Supp. 3d 160, 173–75, 180 (D.P.R. 2015)
33. *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016)
34. *Gavurnik v. Home Props., L.P.*, 227 F. Supp. 3d 410, 421 (E.D. Pa. 2017)
35. *Graves v. Bank of Am.*, 54 F. Supp. 3d 434, 443–44 (M.D.N.C. 2014)
36. *Hardwick v. Amsted Ry. Co., Inc.*, 929 F. Supp. 2d 1129, 1138, 1140 (D. Kan. 2013)
37. *Hardwick v. John & Mary E. Kirby Hosp.*, 860 F. Supp. 2d 641, 651 (C.D. Ill. 2012)
38. *Hill v. Walker*, 737 F.3d 1209, 1219 (8th Cir. 2013)
39. *Hoppe v. Lewis Univ.*, 692 F.3d 833, 842–43 (7th Cir. 2012)
40. *Housel v. Rochester Inst. of Tech.*, 6 F. Supp. 3d 294, 308, 317 (W.D.N.Y. 2014)
41. *Howard v. Okla. Dep’t of Corr.*, 247 F. Supp. 3d 1210, 1223, 1228 (W.D. Okla. 2017)
42. *Ihegword v. Harris Cty. Hosp. Dist.*, 929 F. Supp. 2d 635, 662, 670 (S.D. Tex. 2013)
43. *Isley v. Aker Phila. Shipyard, Inc.*, 191 F. Supp. 3d 466, 471, 473 (E.D. Pa. 2016)
44. *Kieffer v. CPR Restoration & Cleaning Serv., LLC*, 200 F. Supp. 3d 520, 536, 540 (E.D. Pa. 2016)
45. *Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214, 1226–27 (10th Cir. 2016)

46. *Kimbrough v. Cincinnati Ass'n for the Blind & Visually Impaired*, 986 F. Supp. 2d 904, 919, 921 (S.D. Ohio 2013)
47. *Klemme v. W. Irondequoit Cent. Sch. Dist.*, 69 F. Supp. 3d 335, 341 (W.D.N.Y. 2014)
48. *LaCasse v. Didlake, Inc.*, 194 F. Supp. 3d 494, 504 (E.D. Va. 2016)
49. *Lawler v. Peoria Sch. Dist. No. 150*, 119 F. Supp. 3d 928, 938 (C.D. Ill. 2015)
50. *Lewis v. Erie Cty. Med. Ctr. Corp.*, 907 F. Supp. 2d 336, 351, 353 (W.D.N.Y. 2012)
51. *Lillian v. Nat'l R.R. Passenger Corp.*, 259 F. Supp. 3d 837, 846 (N.D. Ill. 2017)
52. *Luster-Malone v. Cook Cty.*, 4 F. Supp. 3d 1005, 1017 (N.D. Ill. 2013)
53. *Marini v. Costco Wholesale Corp.*, 64 F. Supp. 3d 317, 333, 336 (D. Conn. 2014)
54. *Marks v. Wash. Wholesale Liquor Co.*, 253 F. Supp. 3d 312, 329–30 (D.D.C. 2017)
55. *Marotta v. Ford Motor Co.*, 119 F. Supp. 3d 676, 697–98 (E.D. Mich. 2015)
56. *Marquis v. Omniguide, Inc.*, 714 F. Supp. 2d 640, 647–48 (N.D. Tex. 2010)
57. *Mazur v. N.Y.C. Dep't of Educ.*, 53 F. Supp. 3d 618, 639, 641 (S.D.N.Y. 2014)
58. *McKay v. Vitas Healthcare Corp. of Ill.*, 232 F. Supp. 3d 1038, 1047–48 (N.D. Ill. 2017)
59. *Mendillo v. Prudential Ins. Co. of Am.*, 156 F. Supp. 3d 317, 344, 347–48 (D. Conn. 2016)
60. *Mercer v. Se. Pa. Transit Auth.*, 26 F. Supp. 3d 432, 447, 449 (E.D. Pa. 2014)
61. *Monaco v. Limestone Veterinary Hosp.*, 152 F. Supp. 3d 253, 264 (D. Del. 2016)
62. *Moore-Fotso v. Bd. of Educ. of the City of Chi.*, 211 F. Supp. 3d 1012, 1038, 1040 (N.D. Ill. 2016)
63. *Moran v. Wegmans Food Markets, Inc.*, 65 F. Supp. 3d 327, 332 (W.D.N.Y. 2014)
64. *Mullenix v. Eastman Chem. Co.*, 237 F. Supp. 3d 695, 711 (E.D. Tenn. 2017)
65. *Murray v. Warren Pumps, LLC*, 821 F.3d 77, 88, 92 (1st Cir. 2016)
66. *Nadel v. Shinseki*, 57 F. Supp. 3d 288, 298, 300 (S.D.N.Y. 2014)
67. *Nehan v. Tootsie Roll Indus.*, 54 F. Supp. 3d 957, 977 (N.D. Ill. 2014)
68. *Nieblas-Love v. N.Y.C. Housing Auth.*, 165 F. Supp. 3d 51, 75, 80 (S.D.N.Y. 2016)

69. Norton v. PHC-Elko, Inc., 46 F. Supp. 3d 1079, 1091, 1095 (D. Nev. 2014)
70. Oden v. SEPTA, 137 F. Supp. 3d 778, 791, 794 (E.D. Pa. 2015)
71. Palmer v. Fed. Express Corp., 235 F. Supp. 3d 702, 723–24 (W.D. Pa. 2016)
72. Perez v. Transformer Mfrs., Inc., 35 F. Supp. 3d 941, 954, 956 (N.D. Ill. 2014)
73. Randle v. Tri-Cty. Metro. Transp. Dist. of Or., 171 F. Supp. 3d 1084, 1090, 1092 (D. Or. 2016)
74. Reyes v. Krasdale Foods, Inc., 945 F. Supp. 2d 486, 494 (S.D.N.Y. 2013)
75. Robinson v. Rocktekn CP, LLC, 986 F. Supp. 2d 1287, 1311–12 (N.D. Ala. 2013)
76. Rodriguez v. Atria Senior Living Grp., Inc., 887 F. Supp. 2d 503, 512, 518 (S.D.N.Y. 2012)
77. Rubano v. Farrell Area Sch. Dist., 991 F. Supp. 2d 678, 708–09 (W.D. Pa. 2014)
78. Russell v. Phillips 66 Co., 184 F. Supp. 3d 1258, 1273, 1276 (N.D. Okla. 2016)
79. Sampson v. Methacton Sch. Dist., 88 F. Supp. 3d 422, 444, 446 (E.D. Pa. 2015)
80. Scott v. Kaneland Cmty. Unit Sch. Dist. No. 302, 898 F. Supp. 2d 1001, 1009 (N.D. Ill. 2012)
81. Silk v. Bd. of Trs. of Moraine Valley Cmty. Coll., 46 F. Supp. 3d 821, 835–36 (N.D. Ill. 2014), *aff'd*, 795 F.3d 698 (7th Cir. 2015)
82. Smith v. Strayer Univ. Corp., 79 F. Supp. 3d 591, 606 (E.D. Va. 2015)
83. Stermer v. Caterpillar, Inc., 102 F. Supp. 3d 959, 968 (N.D. Ill. 2015)
84. Stinnett v. Delta Air Lines, Inc., 278 F. Supp. 3d 599, 616, 617–18 (E.D.N.Y. 2017)
85. Taylor-Novotny v. Health All. Med. Plans, Inc., 772 F.3d 478, 497, 499 (7th Cir. 2014)
86. Tillman v. Verizon N.Y., Inc., 118 F. Supp. 3d 515, 541, 543 (E.D.N.Y. 2015)
87. Tsuji v. Kamehameha Schs., 154 F. Supp. 3d 964, 980 (D. Haw. 2015)
88. Ullrich v. CEXEC, Inc., 233 F. Supp. 3d 515, 532, 534 (E.D. Va. 2017)
89. Valtierra v. Medtronic Inc., 232 F. Supp. 3d 1117, 1127–28 (D. Ariz. 2017)
90. Vazquez-Robles v. CommoLoCo, Inc., 186 F. Supp. 3d 138, 155, 157 (D.P.R. 2016)
91. Walker v. District of Columbia, 279 F. Supp. 3d 246, 268, 278 (D.D.C. 2017)

92. Walker v. J.P. Morgan Chase Bank, 262 F. Supp. 3d 574, 584, 587 (N.D. Ill. 2017)
93. Wells v. Cincinnati Child. Hosp. Med. Ctr., 860 F. Supp. 2d 469, 484 (S.D. Ohio 2012)
94. Welsh v. Automatic Data Processing, Inc., 954 F. Supp. 2d 670, 684–85 (S.D. Ohio 2013)
95. Wesley-Dickson v. Warwick Valley Cent. Sch. Dist., 973 F. Supp. 2d 386, 408–09, 411 (S.D.N.Y. 2013)
96. Wilson v. City of Gaithersburg, 121 F. Supp. 3d 478, 485–86 (D. Md. 2015)
97. Withers v. Johnson, 763 F.3d 998, 1005 (8th Cir. 2014)

APPENDIX C: CASES WHERE EMPLOYER'S DISPOSITIVE MOTION IS GRANTED—
NO PRETEXT

1. *Alderson v. Ferrellgas, Inc.*, 127 F. Supp. 3d 937, 953, 960 (N.D. Ind. 2015)
2. *Backhaus v. Gen. Motors LLC*, 54 F. Supp. 3d 741, 755 (E.D. Mich. 2014)
3. *Banks v. Bosch Rexroth Corp.*, 15 F. Supp. 3d 681, 695, 699 (E.D. Ky. 2014)
4. *Bielich v. Johnson & Johnson, Inc.*, 6 F. Supp. 3d 589, 616, 620 (W.D. Pa. 2014)
5. *Campbell v. N.Y.C. Transit Auth.*, 93 F. Supp. 3d 148, 178–79 (E.D.N.Y. 2015)
6. *Castagnozzi v. Phx. Beverages, Inc.*, 208 F. Supp. 3d 461, 479–80 (E.D.N.Y. 2016)
7. *Clark v. Jewish Childcare Ass'n*, 96 F. Supp. 3d 237, 263 (S.D.N.Y. 2015)
8. *Collazo-Rosado v. Univ. of P.R.*, 765 F.3d 86, 93, 95 (1st Cir. 2014)
9. *Croons v. N.Y. State Office of Mental Health*, 18 F. Supp. 3d 193, 209, 213 (N.D.N.Y. 2014)
10. *Curley v. City of N. Las Vegas*, 772 F. 3d 629, 633–34 (9th Cir. 2014)
11. *Daley v. Cablevision Sys. Corp.*, 675 Fed. App'x 97, 98 (2d Cir. 2017)
12. *Debacker v. City of Moline*, 78 F. Supp. 3d 916, 928–29, 934 (C.D. Ill. 2015)
13. *Dickey v. McDonald*, 238 F. Supp. 3d 1068, 1076 (N.D. Ill. 2017)
14. *Doak v. Johnson*, 19 F. Supp. 3d 259, 281 (D.D.C. 2014)
15. *Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119, 135, 141 (1st Cir. 2017)
16. *Edwards v. Gwinnett Cty. Sch. Dist.*, 977 F. Supp. 2d 1322, 1334, 1336 (N.D. Ga. 2013)
17. *Eisner v. City of New York*, 166 F. Supp. 3d 450, 460, 463 (S.D.N.Y. 2016)
18. *Eubank v. Lockhart Indep. Sch. Dist.*, 229 F. Supp. 3d 552, 562, 571 (W.D. Tex. 2017)
19. *Feist v. La. Office of the Att'y Gen.*, 730 F.3d 450, 455 (5th Cir. 2013)
20. *Fernandez-Ocasio v. Walmart P.R. Inc.*, 94 F. Supp. 3d 160, 177, 180 (D.P.R. 2015)
21. *Hair v. Fayette Cty.*, 265 F. Supp. 3d 544, 569–70 (W.D. Pa. 2017)
22. *Hargrove v. AARP*, 205 F. Supp. 3d 96, 116, 120 (D.D.C. 2016)
23. *Hernandez v. Int'l Shoppes, LLC*, 100 F. Supp. 3d 232, 267–68 (E.D.N.Y. 2015)

24. *Holly v. Kindred Healthcare Operating, Inc.*, 51 F. Supp. 3d 1113, 1124, 1129 (D. Utah 2014)
25. *Hopkins v. Sam's West, Inc.*, 216 F. Supp. 3d 1322, 1334, 1339 (N.D. Ala. 2016)
26. *Hoppe v. Lewis Univ.*, 692 F.3d 833, 843 (7th Cir. 2012)
27. *Jenkins v. Med. Labs. of E. Iowa, Inc.*, 880 F. Supp. 2d 946, 965–66 (N.D. Iowa 2012)
28. *Johnson v. City of Blaine*, 970 F. Supp. 2d 893, 916–17 (D. Minn. 2013)
29. *Johnson v. District of Columbia*, 207 F. Supp. 3d 3, 12, 19 (D.D.C. 2016)
30. *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1100 (D.C. Cir. 2017)
31. *Juback v. Michaels Stores, Inc.*, 143 F. Supp. 3d 1195, 1214–15 (M.D. Fla. 2015)
32. *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 633, 635 (8th Cir. 2016)
33. *Lewis v. Erie Cty. Med. Ctr. Corp.*, 907 F. Supp. 2d 336, 352–53 (W.D.N.Y. 2012)
34. *Lucas v. T-Mobile USA, Inc.*, 217 F. Supp. 3d 951, 959–60 (S.D. Tex. 2016)
35. *Ludovico v. Kaiser Permanente*, 57 F. Supp. 3d 1176, 1202–03 (N.D. Cal. 2014)
36. *Mercer v. Se. Pa. Transit Auth.*, 26 F. Supp. 3d 432, 448–49 (E.D. Pa. 2014)
37. *Merrill v. McCarthy*, 184 F. Supp. 3d 221, 244, 249–50 (E.D.N.C. 2016)
38. *Norton v. PHC-Elko, Inc.*, 46 F. Supp. 3d 1079, 1091, 1095 (D. Nev. 2014)
39. *Oden v. SEPTA*, 137 F. Supp. 3d 778, 793–94 (E.D. Pa. 2015)
40. *Orr v. City of Rogers*, 232 F. Supp. 3d 1052, 1069, 1075 (W.D. Ark. 2017)
41. *Proudfoot v. Arnold Logistics, LLC*, 59 F. Supp. 3d 697, 711–12 (M.D. Pa. 2014)
42. *Rodriguez-Fonseca v. Baxter Healthcare Corp. of P.R.*, 899 F. Supp. 2d 141, 153, 155 (D.P.R. 2012)
43. *Salser v. Clarke Cty. Sch. Dist.*, 802 F. Supp. 2d 1339, 1359, 1361 (M.D. Ga. 2011)
44. *Senatore v. Lynch*, 225 F. Supp. 3d 24, 41 (D.D.C. 2016)
45. *Sharbono v. N. States Power Co.*, 218 F. Supp. 3d 1004, 1022 (D. Minn. 2016)
46. *Sharp v. Waste Mgmt. Inc.*, 47 F. Supp. 3d 584, 601, 607 (S.D. Ohio 2014)

Spring 2019] *DISABLING ADA RETALIATION CLAIMS* 865

47. *Shipman v. Nat'l R.R. Passenger Corp.*, 241 F. Supp. 3d 114, 122, 124 (D.D.C. 2017)
48. *Silk v. Bd. of Trs. of Moraine Valley Cmty Coll.*, 46 F. Supp. 3d 821, 836 (N.D. Ill. 2014), *aff'd*, 795 F.3d 698 (7th Cir. 2015)
49. *Sneed v. City of Harvey*, 6 F. Supp. 3d 817, 834, 843 (N.D. Ill. 2013)
50. *Trane v. Northrop Grumman Corp.*, 94 F. Supp. 3d 367, 381 (E.D.N.Y. 2015)
51. *Ullrich v. CEXEC, Inc.*, 233 F. Supp. 3d 515, 533–34 (E.D. Va. 2017)
52. *EEOC v. Placer ARC*, 114 F. Supp. 3d 1048, 1062–63 (E.D. Cal. 2015)
53. *Vargas-Medina v. Ortho Biologics, LLC*, 247 F. Supp. 3d 169, 184 (D.P.R. 2017)
54. *Velez-Ramirez v. Puerto Rico*, 98 F. Supp. 3d 388, 395, 396 (D.P.R. 2015), *aff'd*, 827 F.3d 154 (1st Cir. 2016)
55. *Walker v. Children's Nat'l Med. Ctr.*, 236 F. Supp. 3d 136, 147 (D.D.C. 2017)
56. *Wesley-Dickson v. Warwick Valley Cent. Sch. Dist.*, 973 F. Supp. 2d 386, 409, 411 (S.D.N.Y. 2013)
57. *Wheeler v. Jackson Nat'l Life Ins. Co.*, 159 F. Supp. 3d 828, 858, 865 (M.D. Tenn. 2016)
58. *White v. Standard Ins. Co.*, 895 F. Supp. 2d 817, 840, 854 (E.D. Mich. 2012)
59. *Williams v. Kennedy*, 38 F. Supp. 3d 186, 197, 199 (D. Mass. 2014)
60. *Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 396, 398 (6th Cir. 2017)

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