

## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED   | ACTIVITY  | ADVERSE ACTION   | DEFENSES   | DAMAGES  | SOL • PROCEDURE  |
|---|---|--|--|--|--|
| <p><b>Title VII</b>, 42 U.S.C. §2000e-3(a)</p> <ul style="list-style-type: none"> <li>• Title VII: Race, color, religion, sex, or national origin.</li> <li>• 15 or more employees. 42 U.S.C. §2000e(b).</li> <li>• “Person aggrieved.” 42 U.S.C. §2000e-3(a), §2000e-5(b), (f)(1); <i>Thompson v. North American Stainless</i>, 131 S.Ct. 863 (2011) (fiancé employee).</li> <li>• Former employees. <i>Robinson v. Shell Oil Co.</i>, 117 S.Ct. 843 (1997).</li> <li>• No individual liability. <i>Fantini v. Salem State College</i>, 557 F.3d 22, 30 (1<sup>st</sup> Cir. 2009).</li> </ul> | <ul style="list-style-type: none"> <li>• Making a charge or participating in an investigation, proceeding, or hearing under Title VII. 42 U.S.C. §2000e-3(a).</li> <li>• Opposing a practice made an unlawful employment practice by Title VII. 42 U.S.C. §2000e-3(a).</li> <li>• No words necessary. <i>Collazo v. Bristol-Myers Squibb Mfg.</i>, 617 F.3d 39, 47 (1<sup>st</sup> Cir. 2010).</li> <li>• Perceived OK. <i>Fogleman v Mercy Hospital Inc.</i>, 283 F.3d 561, 571 (3<sup>rd</sup> Cir. 2002).</li> </ul> | <ul style="list-style-type: none"> <li>• “Discriminate against” employee. 42 U.S.C. §2000e-3(a).</li> <li>• Materially adverse action. <i>Burlington Northern &amp; Santa Fe Ry. v. White</i>, 126 S.Ct. 2405 (2006)</li> <li>• “But for” causation. <i>University of Texas Southwestern Medical Center v. Nassar</i>, 133 S.Ct. 2517 (2013).</li> </ul> | <ul style="list-style-type: none"> <li>• No reasonable and good faith belief for opposition. <i>Clark Cnty. Sch. Dist. v. Breeden</i>, 532 U.S. 268 (2001).</li> <li>• Conduct too ambiguous. <i>Albrechtsen v. Board of Regents of University of Wisconsin System</i>, 309 F.3d 433, 437 (7<sup>th</sup> Cir. 2002).</li> <li>• Opposition too unreasonable. <i>Hochstadt v. Worcester Foundation</i>, 545 F.2d 222 (1<sup>st</sup> Cir. 1976).</li> <li>• Job duties exception. <i>Collazo v. Bristol-Myers Squibb Mfg., Inc.</i>, 617 F.3d 39, 48-49 (1<sup>st</sup> Cir. 2010).</li> </ul> | <ul style="list-style-type: none"> <li>• Caps on compensatory and punitive damages. 42 U.S.C. §1981a(b)(3) (\$50K for &lt;101 ees, \$100K for &lt;201 ees, \$200K for &lt;501 ees, \$300K for &gt;500 ees).</li> <li>• Standard for punitive damages is preponderance. <i>Karnes v. SCI Colo. Funeral Servs., Inc.</i>, 162 F.3d 1077, 1081-82 (10<sup>th</sup> Cir. 1998).</li> <li>• Compensatory and punitive damages only available if cannot recover under §1981. 42 U.S.C. §1981a(a)(1)</li> </ul> | <ul style="list-style-type: none"> <li>• 300 days to file with EEOC/MHRC. 42 U.S.C. § 2000e-5(e).</li> <li>• 90 days to file suit after EEOC RTS letter. 42 U.S.C. § 2000e-5(f)(1).</li> <li>• Circuits are split on whether a separate EEOC charge of discrimination is necessary when retaliation grows out of prior EEOC charge. <i>Compare, e.g., Clockedile v. New Hampshire Dept of Corrections</i>, 245 F.3d 1 (1st Cir. 2001) (not necessary) <i>with Richter v. Advance Auto Parts, Inc.</i>, 686 F.3d 847 (8th Cir. 2012) (it is necessary).</li> <li>• Jury trial. 42 U.S.C. § 1981a(c).</li> </ul> |

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| <p><b>ADA</b>, 42 U.S.C. §12203</p> <ul style="list-style-type: none"> <li>• ADA: Discrimination because of disability.</li> <li>• 15 or more employees.</li> <li>• Split on whether there is individual liability. <i>Compare Spiegel v. Schulmann</i>, 604 F.3d 72 (2<sup>nd</sup> Cir. 2010) (no) with <i>Shotz v. City of Plantation, Fla.</i>, 344 F.3d 1161, 1168 (11<sup>th</sup> Cir. 2003) (yes).</li> <li>• States have 11<sup>th</sup> Amendment immunity. <i>Board of Trustees of the University of Alabama v. Garrett</i>, 531 U.S. 356 (2001).</li> </ul> | <ul style="list-style-type: none"> <li>• Participation and opposition similar to Title VII. 42 U.S.C. §12203(a).</li> <li>• Also includes exercise of rights. 42 U.S.C. §12203(b).</li> <li>• Request for accommodation. <i>Wright v. CompUSA, Inc.</i>, 352 F.3d 472, 477 (1st Cir. 2003).</li> <li>• Circuit split on “a motivating factor” versus “but for” causation. <i>Compare Serwatka v. Rockwell Automation, Inc.</i>, 591 F.3d 957, 962 (7<sup>th</sup> Cir. 2010) (“but for”) with <i>Head v. Glacier Northwest, Inc.</i>, 413 F.3d 1053, 1065 (9<sup>th</sup> Cir. 2005) (“a motivating factor”).</li> </ul> | <ul style="list-style-type: none"> <li>• “Materially adverse action.” <i>E.E.O.C. v. Picture People, Inc.</i>, 684 F.3d 981, 988 (10<sup>th</sup> Cir. 2012).</li> <li>• Also includes coercion, intimidation, threat, harassment, or interference with rights. 42 U.S.C. §12203(b); <i>Brown v. City of Tucson</i>, 336 F.3d 1181, 1193 (9<sup>th</sup> Cir. 2003).</li> </ul> | <ul style="list-style-type: none"> <li>• Title VII defenses for opposition and participation. <i>See Mitchell v. Yates</i>, 402 F.Supp.2d 222, 229 (D.D.C. 2005) (good faith).</li> </ul> | <ul style="list-style-type: none"> <li>• Probably no compensatory or punitive damages. <i>See, e.g., Alvarado v. Cajun Operating Co.</i>, 588 F.3d 1261, 1269 (9<sup>th</sup> Cir. 2009).</li> </ul> | <ul style="list-style-type: none"> <li>• 300 days to file with EEOC/MHRC.</li> <li>• 90 days to file in court.</li> <li>• Probably no jury trial. <i>See, e.g., Alvarado v. Cajun Operating Co.</i>, 588 F.3d 1261, 1270 (9<sup>th</sup> Cir. 2009).</li> </ul> |

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| <p><b>ADEA</b>, 29 U.S.C. §623(d)</p> <ul style="list-style-type: none"> <li>• ADEA: Age (40 and over) discrimination. 29 U.S.C. §§ 623(a), 631(a).</li> <li>• 20 or more employees. 29 U.S.C. §630(b).</li> <li>• “Person aggrieved.” 29 U.S.C. §626(C)(1).</li> <li>• States have 11<sup>th</sup> Amendment immunity. <i>Kimel v. Florida Bd. Of Regents</i>, 528 U.S. 62 (2000).</li> <li>• No individual liability. <i>Mason v. Stallings</i>, 82 F.3d 1007, 1009 (11<sup>th</sup> Cir.1996).</li> </ul> | <ul style="list-style-type: none"> <li>• Same as Title VII. <i>Kessler v. Westchester Cnty. Dep’t of Soc. Servs.</i>, 461 F.3d 199, 205 (2<sup>nd</sup> Cir. 2006).</li> </ul> | <ul style="list-style-type: none"> <li>• Same as Title VII. <i>Kessler v. Westchester Cnty. Dep’t of Soc. Servs.</i>, 461 F.3d 199, 205 (2<sup>nd</sup> Cir. 2006).</li> </ul> | <ul style="list-style-type: none"> <li>• Same as Title VII. <i>See, e.g., Mesnick v. General Elec. Co.</i>, 950 F.2d 816, 828 (1<sup>st</sup> Cir. 1991) (Participation clause is broader.)</li> </ul> | <ul style="list-style-type: none"> <li>• Emotional distress damages, without caps. 29 U.S.C. §§ 216(b), 626(b); <i>Moore v. Freeman</i>, 355 F.3d 558 (6<sup>th</sup> Cir. 2004).</li> <li>• Circuit split on punitive damages. <i>Compare Travis v. Gary Community Mental Health Center, Inc.</i>, 921 F.2d 108, 112 (7<sup>th</sup> Cir. 1990) <i>with Snapp v. Unlimited Concepts, Inc.</i>, 208 F.3d 928, 939 (11<sup>th</sup> Cir. 2000).</li> <li>• Liquidated damages equal to lost wages. 29 U.S.C. §§ 216(b), 626(b).</li> </ul> | <ul style="list-style-type: none"> <li>• 300 days to file with EEOC. 29 U.S.C. §626(d).</li> <li>• Jury trial. 29 U.S.C. § 626(C)(2).</li> <li>• Right to bring personal action extinguished if EEOC files suit. 29 U.S.C. §626(C)(1).</li> </ul> |
| <p><b>EPA</b>, 29 U.S.C. § 215(a)(3)</p> <ul style="list-style-type: none"> <li>• EPA: Unequal pay between sexes. 29 U.S.C. § 206(d).</li> <li>• Nearly all</li> </ul>   | <ul style="list-style-type: none"> <li>• Filed complaint, instituted proceeding, testified in proceeding under EPA, serve on industry committee.</li> </ul>                    | <ul style="list-style-type: none"> <li>• Same as Title VII. <i>Darveau v. Detecon, Inc.</i>, 515 F.3d 334, 341-344 (4<sup>th</sup> Cir. 2008).</li> </ul>                      | <ul style="list-style-type: none"> <li>• Presumably the same as Title VII. <i>Cf. Darveau v. Detecon, Inc.</i>, 515 F.3d 334, 341-344 (4<sup>th</sup> Cir. 2008)</li> </ul>                            | <ul style="list-style-type: none"> <li>• Emotional distress damages, without caps. <i>Moore v. Freeman</i>, 355 F.3d 558 (6<sup>th</sup> Cir. 2004); 29 U.S.C. §§</li> </ul>  | <ul style="list-style-type: none"> <li>• No administrative exhaustion requirement. 29 U.S.C. §216(b).</li> <li>• Three-year SOL to file in court for</li> </ul>   |

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| <p>employers regardless of size. 29 U.S.C. § 203(d).</p> <ul style="list-style-type: none"> <li>• Individual liability. <i>See, e.g., Donovan v. Agnew</i>, 712 F.2d 1509, 1510 (1<sup>st</sup> Cir. 1983).</li> <li>• Former employees. <i>Dunlop v. Carriage Carpet Co.</i>, 548 F.2d 139, 147 (6<sup>th</sup> Cir. 1977).</li> </ul> | <p>29 U.S.C. §215(a)(3).</p> <ul style="list-style-type: none"> <li>• Oral complaint sufficient. <i>Kasten v. Saint-Gobain Performance Plastics Corp.</i>, 131 S.Ct. 1325, 1335 (2011).</li> <li>• Split in circuits on whether internal complaint to employer is covered (as opposed to an administrative or court complaint). <i>Compare Valerio v. Putnam Associates Inc.</i>, 173 F.3d 35, 44 (1<sup>st</sup> Cir. 1999) (covered) with <i>Lambert v. Genesee Hospital</i>, 10 F.3d 46 (2<sup>nd</sup> Cir.1993) (not covered).</li> </ul> |  | <p>(two statutes interpreted the same).</p>   | <p>216(b), 626(b).</p> <ul style="list-style-type: none"> <li>• Circuit split on punitive damages. <i>Compare Travis v. Gary Community Mental Health Center, Inc.</i>, 921 F.2d 108, 112 (7<sup>th</sup> Cir. 1990) with <i>Snapp v. Unlimited Concepts, Inc.</i>, 208 F.3d 928, 939 (11<sup>th</sup> Cir. 2000).</li> <li>• Liquidated damages equal to lost wages. 29 U.S.C. §§ 216(b), 626(b).</li> </ul> | <p>willful violations; otherwise 2 years. 29 U.S.C. § 255.</p> <ul style="list-style-type: none"> <li>• “Willful” means “employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” <i>McLaughlin v. Richland Shoe Co.</i>, 486 U.S. 128, 133 (1988).</li> <li>• Right to bring personal action extinguished if DOL files complaint. 29 U.S.C. §216(b)(2).</li> <li>• Jury trial. <i>See Pons v. Lorillard</i>, 549 F.2d 950, 953 (4<sup>th</sup> Cir. 1977).</li> </ul> |
| <p><b>FMLA</b>, 29 U.S.C. §2615</p> <ul style="list-style-type: none"> <li>• FMLA: 12 weeks of leave for childbirth,</li> </ul>   | <ul style="list-style-type: none"> <li>• Exercise of or the attempt to exercise, any right provided under FMLA. 29 U.S.C. §2615(a)(1).</li> </ul>  | <ul style="list-style-type: none"> <li>• Interfere with, restrain, or deny exercise or attempted exercise of rights. 29 U.S.C. §2615(a)(1).</li> </ul> | <ul style="list-style-type: none"> <li>• Coverage, activity, adverse action.</li> </ul> | <ul style="list-style-type: none"> <li>• Lost wages or actual money losses up to 12 weeks. 29 U.S.C. § 2617(a)(1)(A)(i).</li> <li>• Liquidated damages</li> </ul>  | <ul style="list-style-type: none"> <li>• No administrative exhaustion.</li> <li>• 3-yr SOL for willful violation; otherwise 2 yrs. 29 U.S.C.</li> </ul>   |

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| <p>adoption, serious health condition. 29 U.S.C. § 2612(a).</p> <ul style="list-style-type: none"> <li>• 50 or more employees. 29 U.S.C. § 2611(4).</li> </ul> | <ul style="list-style-type: none"> <li>• Opposing any practice made unlawful by FMLA. 29 U.S.C. §2615(a)(2).</li> <li>• Filed any charge, or has instituted or caused to be instituted any proceeding, under or related to FMLA. 29 U.S.C. §2615(b)(1).</li> <li>• Given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under FMLA. 29 U.S.C. §2615(b)(2).</li> <li>• Testified, or is about to testify, in any inquiry or proceeding relating to any right provided under FMLA. 29 U.S.C.</li> </ul> | <ul style="list-style-type: none"> <li>• Discharge or in any other manner discriminate against any individual for opposition. 29 U.S.C. §2615(a)(1).</li> <li>• Discharge or in any other manner discriminate against any individual because such individual is involved in proceedings, gave information, or testified in proceedings or inquiries. 29 U.S.C. §2615(b).</li> </ul> |          | <p>equal to lost wages or money losses, unless good faith shown. 29 U.S.C. § 2617(a)(1)(A)(iii).</p> | <p>§2617(c).</p> <ul style="list-style-type: none"> <li>• Jury trial. <i>Frizzell v. Southwest Motor Freight</i>, 154 F.3d 641, 642 (6<sup>th</sup> Cir. 1998).</li> </ul> |

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|  | §2615(b)(3).   |   |  |   |   |
| <p><b>NLRA</b>, 29 U.S.C. §158(a)</p> <ul style="list-style-type: none"> <li>• NLRA: Right to collective bargaining.</li> <li>• Most private employers (not government). 29 U.S.C. §152(2).</li> <li>• Third-party standing. <i>Tasty Baking Co. v. National Labor Relations Board</i>, 254 F.3d 114, 127 (D.C. Cir. 2001).</li> </ul> | <ul style="list-style-type: none"> <li>• Concerted activity for the purpose of mutual aid or protection. 29 U.S.C. §157.</li> <li>• Group action or seek to initiate or to induce or to prepare for group action; not solely by and on behalf of the employee himself. <i>N.L.R.B. v. Portland Airport Limousine Co., Inc.</i>, 163 F.3d 662, 665 (1<sup>st</sup> Cir. 1998).</li> </ul> | <ul style="list-style-type: none"> <li>• Interfere with, restrain, or coerce employees in exercise of rights. 29 U.S.C. §158(a)(1).</li> </ul>  | <ul style="list-style-type: none"> <li>• Lack of protected activity or adverse action.</li> </ul>  | <ul style="list-style-type: none"> <li>• NLRB ordered remedies including reinstatement and back pay. 29 U.S.C. § 160.</li> </ul>  | <ul style="list-style-type: none"> <li>• Six months to file with NLRB. 29 U.S.C. §160(b).</li> </ul>  |
| <p><b>Title IX</b>, 20 U.S.C. §1681(a)</p> <ul style="list-style-type: none"> <li>• Title IX: Sex discrimination in education program or activity receiving Federal financial assistance. 20 U.S.C. §1681(a).</li> <li>• Program specific. <i>North Haven v.</i></li> </ul>  | <ul style="list-style-type: none"> <li>• Complaint of sex discrimination. <i>Jackson v. Birmingham Bd. of Educ.</i>, 544 U.S. 167, 174 (2005).</li> <li>• See adverse action.</li> </ul>   | <ul style="list-style-type: none"> <li>• “No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title IX], or because he has made a complaint, testified,</li> </ul> | <ul style="list-style-type: none"> <li>• Courts differ on whether there is a Title IX claim for money damages for complaint about sex discrimination against employees (as opposed to students). <i>Compare Lakoski v. James</i>, 66 F.3d</li> </ul> | <ul style="list-style-type: none"> <li>• Private suit for money damages authorized with intentional discrimination. <i>Franklin v. Gwinnett County Public Schools</i>, 503 U.S. 60 (1992).</li> <li>• No caps.</li> </ul> | <ul style="list-style-type: none"> <li>• No administrative exhaustion requirement.</li> <li>• Six-year SOL. <i>Lakshman v. University of Maine System</i>, 328 F.Supp.2d 92, 116 (D.Me. 2004).</li> </ul> |

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| <p><i>Bell</i>, 456 U.S. 515, 537 (1982).</p>  |  | <p>assisted, or participated in any manner in an investigation, proceeding or hearing under this subpart.”<br/> <a href="#">DOJ Title IX Legal Manual</a> §IV(3) (quoting Title VI regulation).</p> | <p>751, 753 (5<sup>th</sup> Cir. 1995) (no) <i>with</i> <i>Preston v. Com. of Va. ex rel. New River Community College</i>, 31 F.3d 203, 206 (4<sup>th</sup> Cir. 1994) (yes).</p> |  |   |
| <p><b>Rehab Act §504</b>, 29 U.S.C. § 794(a)</p> <ul style="list-style-type: none"> <li>• §504: Qualified individual with a disability denied the benefits of, or be subjected to discrimination under covered program.</li> <li>• Recipients of federal financial assistance, Executive Agency, Postal Service.</li> <li>• Program specificity defined in §504. 29 U.S.C. §794(b).</li> </ul> | <ul style="list-style-type: none"> <li>• Same as ADA. 29 U.S.C. § 794(d).</li> </ul> | <ul style="list-style-type: none"> <li>• Same as ADA. 29 U.S.C. § 794(d).</li> </ul>  | <ul style="list-style-type: none"> <li>• Same as ADA. 29 U.S.C. § 794(d).</li> </ul>  | <ul style="list-style-type: none"> <li>• Emotional distress damages available. <i>Sheely v. MRI Radiology Network, P.A.</i>, 505 F.3d 1173, 1204 (11th Cir. 2007).</li> <li>• No caps on compensatory damages.</li> <li>• No punitive damages. <i>Barnes v. Gorman</i>, 536 U.S. 181, 189 (2002).</li> </ul> | <ul style="list-style-type: none"> <li>• No administrative exhaustion.</li> <li>• Six-year SOL. <i>Richards v. City of Bangor, Maine</i>, 878 F.Supp.2d 271, 278 (D.Me. 2012).</li> </ul> |

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| <p><b>Title VI</b>, 42 U.S.C. § 2000d</p> <ul style="list-style-type: none"> <li>• Title VI: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.</li> <li>• Only applies to employment when primary objective of funding is to promote employment or practices negatively affect the delivery of services to ultimate beneficiaries. <i>See</i> <a href="#">DOJ Title VI Legal Manual</a>.</li> </ul> | <ul style="list-style-type: none"> <li>• See “Adverse action.”</li> </ul> | <ul style="list-style-type: none"> <li>• “No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this subpart, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart.” 28 CFR 42.107(e).</li> </ul> | <ul style="list-style-type: none"> <li>• See <a href="#">DOJ Title VI Legal Manual</a>.</li> </ul> | <ul style="list-style-type: none"> <li>• Compensatory damages for intentional discrimination. <i>Nieves-Marquez v. Puerto Rico</i>, 353 F.3d 108, 126 n.20 (1<sup>st</sup> Cir. 2003).</li> <li>• No caps.</li> <li>• No punitive damages. <i>See Barnes v. Gorman</i>, 536 U.S. 181, 189 (2002).</li> </ul> | <ul style="list-style-type: none"> <li>• No administrative exhaustion.</li> <li>• Six-year SOL for court actions. <i>Nelson v. University of Maine System</i>, 914 F.Supp. 643, 649 (D.Me. 1996).</li> </ul> |

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| <p><b>42 U.S.C. §1983</b></p> <ul style="list-style-type: none"> <li>• State and local governmental officials individually.</li> <li>• Municipalities and cities when decision is made pursuant to official policy or custom. <i>Monell v. New York City Department of Social Services</i>, 436 U.S. 658, 694 (1978).</li> <li>• Private employers acting under color of state or local law. <i>Lugar v. Edmondson Oil Company</i>, 457 U.S. 922, 940 (1982).</li> </ul> | <ul style="list-style-type: none"> <li>• 1<sup>st</sup> Amend: Speech on matter of public concern weighed against employer’s interest in controlling personnel and internal affairs. <i>Connick v. Myers</i>, 461 U.S. 138, 151 (1983).</li> <li>• Discrimination committed by public officials may be a matter of public concern, but it depends on the circumstances. <i>Montone v. City of Jersey City</i>, 709 F.3d 181, 193-195 (3<sup>rd</sup> Cir. 2013).</li> <li>• No words necessary. <i>Leonard v. City of Columbus</i>, 705 F.2d 1299 (11<sup>th</sup> Cir. 1983).</li> </ul> | <ul style="list-style-type: none"> <li>• No “adverse job action” necessary—retaliation is severe enough if it “would deter a reasonably hardy individual from exercising his constitutional rights.” <i>Barton v. Clancy</i>, 632 F.3d 9, 28 (1<sup>st</sup> Cir. 2011).</li> <li>• Plaintiff burden to show “substantial” or “motivating” factor; then employer must show “but for.” <i>Mount Healthy v. Doyle</i>, 429 U.S. 274 (1977).</li> <li>• Supervisors are liable for subordinates’ retaliation if they know about it and fail to respond to it, both of which may be inferred. <i>Manzer v. Town of Anson</i>, 771 F.Supp.2d 121, 131 (D.Me. 2011).</li> </ul> | <ul style="list-style-type: none"> <li>• Qualified immunity for government officials when conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. <i>Harlow v. Fitzgerald</i>, 457 U.S. 800 (1982).</li> <li>• Speech pursuant to official duties, not as citizen. <i>Garcetti v. Ceballos</i>, 547 U.S. 410 (2006).</li> <li>• Balancing under <i>Connick v. Myers</i>, 461 U.S. 138, 151 (1983). (See “Activity”)</li> <li>• Job duties exception. <i>Garcetti v. Ceballos</i>, 547 U.S. 410 (2006).</li> </ul> | <ul style="list-style-type: none"> <li>• Compensatory and punitive damages. <i>Memphis Community School District v. Stachura</i>, 477 U.S. 299, 307 (1986); <i>Smith v. Wade</i>, 461 U.S. 30, 56 (1983).</li> <li>• No caps.</li> </ul> | <ul style="list-style-type: none"> <li>• No administrative exhaustion.</li> <li>• Six-year SOL. <i>Small v. Inhabitants of Belfast</i>, 796 F.2d 544, 545-49 (1<sup>st</sup> Cir. 1986).</li> <li>• Jury trial. See <i>Monterey v. Del Monte Dunes at Monterey</i>, 526 U.S. 687 (1999).</li> </ul> |

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## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED  | ACTIVITY  | ADVERSE ACTION  | DEFENSES  | DAMAGES  | SOL • PROCEDURE   |
|--|---|---|---|--|---|
| <p><b>42 U.S.C. §1981</b></p> <ul style="list-style-type: none"> <li>• §1981: Race or color discrimination (includes ancestry or ethnicity, e.g., Arab, Jewish). <i>St. Francis College v. Al-Khazrai</i>, 481 U.S. 604 (1987).</li> <li>• Private entities. <i>Johnson v. Railway Express Agency, Inc.</i>, 421 U.S. 454 (1975).</li> <li>• State and local government officials.</li> <li>• Municipalities and cities when decision is made pursuant to official policy or custom. <i>See Monell v. New York City Department of Social Services</i>, 436 U.S. 658, 694 (1978) (§1983).</li> <li>• Individual liability.</li> </ul> | <ul style="list-style-type: none"> <li>• Same types as Title VII. <i>Sayger v. Riceland Foods, Inc.</i>, 735 F.3d 1025, 1031 (8<sup>th</sup> Cir. 2013).</li> </ul> | <ul style="list-style-type: none"> <li>• Retaliation. <i>CBOCS West, Inc. v. Humphries</i>, 553 U.S. 442 (2008).</li> <li>• Materially adverse action. <i>Chapter 7 Trustee v. Gate Gourmet, Inc.</i>, 683 F.3d 1249, 1258 (11<sup>th</sup> Cir. 2012).</li> <li>• “But for” causation. <i>Sayger v. Riceland Foods, Inc.</i>, 735 F.3d 1025, 1032 (8<sup>th</sup> Cir. 2013).</li> </ul> | <ul style="list-style-type: none"> <li>• Same governmental immunity as §1983. <i>See Jett v. Dallas Indep. School Dist.</i>, 491 U.S. 701, 735-736 (1989). <i>See also Sessions v. Rusk State Hospital</i>, 648 F.2d 1066, 1069 (5<sup>th</sup> Cir. 1981)(11<sup>th</sup> Amend bar to action against state).</li> <li>• Title VII defenses. <i>See, e.g., Metoyer v. Chassman</i>, 504 F.3d 919, 930 (9<sup>th</sup> Cir. 2007).</li> </ul> | <ul style="list-style-type: none"> <li>• Compensatory or punitive damages without caps. <i>Johnson v. Railway Exp. Agency, Inc.</i>, 421 U.S. 454, 460 (1975); 42 U.S.C. § 1981a(b)(4); <i>Hawkins v. 1115 Legal Service Care</i>, 163 F.3d 684, 691-692 (2<sup>nd</sup> Cir. 1998).</li> <li>• Punitive damages proof same as Title VII. <i>Lowery v. Circuit City Stores</i>, 206 F.3d 431, 441 (4<sup>th</sup> Cir. 2000).</li> </ul> | <ul style="list-style-type: none"> <li>• No administrative exhaustion. <i>Johnson v. Railway Express Agency, Inc.</i>, 421 U.S. 454, 460 (1975).</li> <li>• Four-year SOL for court actions. <i>Jones v. R. R. Donnelley &amp; Sons Co.</i>, 541 U.S. 369 (2004); <i>CBOCS West, Inc. v. Humphries</i>, 553 U.S. 442, 451 (2008).</li> <li>• Jury trial. <i>Setser v. Novack Investment Co.</i>, 638 F.2d 1137 (8<sup>th</sup> Cir. 1981).</li> </ul> |

\*Federal employees are not addressed in this Aid.

## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED   | ACTIVITY   | ADVERSE ACTION  | DEFENSES   | DAMAGES   | SOL • PROCEDURE   |
|---|--|---|--|---|---|
| <p><i>Whidbee v. Garzarelli Food Specialties, Inc.</i>, 223 F.3d 62, 75 (2<sup>nd</sup> Cir. 2000).</p> <ul style="list-style-type: none"> <li>• Independent contractors. <i>Danco, Inc. v. Wal-Mart Stores</i>, 178 F.3d 8, 13-14 (1<sup>st</sup> Cir. 1999).</li> </ul>   |  |   |  |   |   |
| <p><b>MHRA I (employment)</b>, 5 M.R.S. §4572(1)(E)</p> <ul style="list-style-type: none"> <li>• MHRA: Discrimination because of race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, WPA, prior Workers' Comp.</li> <li>• Nearly all "employers." 5 M.R.S. §4553(4).</li> <li>• Persons "subject to" unlawful</li> </ul> | <ul style="list-style-type: none"> <li>• Make a charge, testify, or assist in any investigation, proceeding or hearing under the MHRA. 5 M.R.S. §4572(1)(E).</li> <li>• Oppose a practice that would be violation of MHRA. 5 M.R.S. §4572(1)(E).</li> <li>• No "exercise" of rights protection.</li> </ul> | <ul style="list-style-type: none"> <li>• Employer may not "discriminate in any manner against" individuals. 5 M.R.S. §4572(1)(E).</li> <li>• Probably only need "materially adverse action" because similar language to Title VII.</li> <li>• Probably "but for" causation. <i>Maine Human Rights Comm'n v. City of Auburn</i>, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim). <i>But see</i> .</li> </ul> | <ul style="list-style-type: none"> <li>• Probably same defenses as Title VII because same language.</li> </ul> | <ul style="list-style-type: none"> <li>• Compensatory and punitive damages (with caps) if 15 or more employees. 5 M.R.S. §4613(2)(B)(8)(e)(\$50K for &lt;101 ees, \$100K for &lt;201 ees, \$300K for &lt;501 ees, \$500K for &gt;500 ees).</li> <li>• Standard for punitive damages is clear and convincing evidence. <i>Batchelder v. Realty Res. Hospitality, LLC</i>, 2007 ME 17, ¶ 22.</li> </ul> | <ul style="list-style-type: none"> <li>• 300 days to file with MHRC/EEOC. 5 M.R.S. §4611.</li> <li>• SOL in court is the later of 2 yrs from date of discrimination or 90 days after (1) MHRC dismissal or (2) 90 days after RG finding. 5 M.R.S. §4613(2)(C).</li> <li>• Jury trial if 15 or more employees and claim for compensatory or punitive damages. 5 M.R.S. §4613(2)(B)(8)(g); <i>DiCentes v. Michaud</i>,</li> </ul> |

\*Federal employees are not addressed in this Aid.

## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED  | ACTIVITY  | ADVERSE ACTION   | DEFENSES  | DAMAGES  | SOL • PROCEDURE   |
|--|---|--|---|--|---|
| <p>employment discrimination may bring claim. 5 M.R.S. §§4553(1)(D), 4611, 4621.</p> <ul style="list-style-type: none"> <li>• No individual liability. <i>Fuhrman v. Staples</i>, 2012 ME 135, ¶35.</li> </ul> |   | <p><i>Fuhrman v. Staples</i>, 2012 ME 135, ¶21 (holding that plaintiff only must show that WPA-protected activity “was a substantial, even though perhaps not the only, factor motivating her dismissal”).</p>   |   | <ul style="list-style-type: none"> <li>• Compensatory and punitive damages only available if cannot recover under §1981. 5 M.R.S. §4613(2)(B)(8)(a).</li> <li>• Civil penal damages if under 15 employees. 5 M.R.S. §4613(2)(B)(7).</li> </ul> | <p>1998 ME 227, ¶10.</p>  |
| <p><b>MHRA II (WPA)</b>, 5 M.R.S. §4572(1)(A)</p> <ul style="list-style-type: none"> <li>• WPA-protected activity. 26 M.R.S. §833.</li> <li>• Same coverage as MHRA I.</li> </ul>                              | <ul style="list-style-type: none"> <li>• Report to employer or “public body” what reasonably believe is violation of state or federal law. 26 M.R.S. §833(1)(A).</li> <li>• Report must be by employee and employer must be able to correct violation. <i>Hickson v. Vescom</i>, 2014 ME 27, ¶20.</li> <li>• Be requested to participate in an investigation, hearing or inquiry</li> </ul> | <ul style="list-style-type: none"> <li>• “Adverse job action.” <i>LePage v. Bath Iron Works Corp.</i>, 2006 ME 130, ¶ 20.</li> <li>• Probably “but for” causation. <i>Maine Human Rights Comm’n v. City of Auburn</i>, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim). <i>But see</i> . <i>Fuhrman v. Staples</i>, 2012 ME 135, ¶21 (holding that plaintiff only must show that WPA-protected</li> </ul> | <ul style="list-style-type: none"> <li>• No objectively reasonable belief employer was acting unlawfully. <i>Bard v. Bath Iron Works Corp.</i>, 590 A.2d 152, 155 (Me. 1991).</li> <li>• No report to employer before report to public body. 26 M.R.S. §833(2).</li> <li>• No good faith. <i>Currie v. Indus. Sec., Inc.</i>, 2007 ME 12, ¶27.</li> <li>• Job duties</li> </ul> | <ul style="list-style-type: none"> <li>• Same as MHRA I.</li> </ul>  | <ul style="list-style-type: none"> <li>• Same as MHRA I.</li> </ul> |

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## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED   | ACTIVITY   | ADVERSE ACTION  | DEFENSES  | DAMAGES  | SOL • PROCEDURE  |
|---|--|---|---|--|--|
|   | <p>held by that public body, or in a court action. 26 M.R.S. §833(1)(C).</p> <ul style="list-style-type: none"> <li>• Other WPA-protected activity. 26 M.R.S. §833.</li> </ul>   | <p>activity “was a substantial, even though perhaps not the only, factor motivating her dismissal”).</p>  | <p>exception. <i>Winslow v. Aroostook</i>, 736 F.3d. 23, 32 (1<sup>st</sup> Cir. 2013).</p>   |  |  |
| <p><b>MHRA III (general retaliation and interference)</b>, 5 M.R.S. §4633</p> <ul style="list-style-type: none"> <li>• Any “person.”</li> <li>• May include individual liability because “person” is defined to include individuals. 5 M.R.S. §4553(7).</li> <li>• Persons “subject to” unlawful employment discrimination may bring claim. 5 M.R.S. §§4553(1)(D), 4611, 4621.</li> </ul> | <ul style="list-style-type: none"> <li>• Opposed any act or practice that is unlawful under the MHRA. 5 M.R.S. §4633(1).</li> <li>• Made a charge, testified, assisted or participated in MHRA investigation, proceeding, or hearing. 5 M.R.S. §4633(1).</li> <li>• Exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of MHRA rights. 5 M.R.S. §4633(2).</li> </ul> | <ul style="list-style-type: none"> <li>• “Discriminate against any individual” for opposition or participation. 5 M.R.S. §4633(1).</li> <li>• Opposition and participation probably interpreted same as Title VII because language similar.</li> <li>• Also coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted by MHRA. 5 M.R.S. §4633(2). (This language is similar to ADA, 42 U.S.C. §12203(b).)</li> </ul> | <ul style="list-style-type: none"> <li>• Probably same defenses as Title VII for opposition and participation because same language.</li> </ul> | <ul style="list-style-type: none"> <li>• Civil penalties, but maybe no compensatory or punitive damages because not “employment discrimination.” 5 M.R.S. §4613(2)(B)(8); 5 M.R.S. § 4572(1).</li> </ul> | <ul style="list-style-type: none"> <li>• Same as MHRA I, except no jury trial if no claim for compensatory or punitive damages. 5 M.R.S. §4613(2)(B)(8)(g); <i>DiCentas v. Michaud</i>, 1998 ME 227, ¶10.</li> </ul> |

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## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED  | ACTIVITY   | ADVERSE ACTION   | DEFENSES   | DAMAGES  | SOL • PROCEDURE  |
|--|--|--|--|--|--|
| <p><b>MHRA IV (“interference” as “unlawful discrimination”),</b> 5 M.R.S. §4553(10)(D)</p> <ul style="list-style-type: none"> <li>• Defendant undefined.</li> <li>• May include individuals.</li> <li>• Persons “subject to” unlawful employment discrimination may bring claim. 5 M.R.S. §§4553(1)(D), 4611, 4621.</li> </ul> | <ul style="list-style-type: none"> <li>• Seeking to exercise any of the rights under the MHRA. 5 M.R.S. §4553(10)(D).</li> <li>• Complaining of a violation of the MHRA. 5 M.R.S. §4553(10)(D).</li> <li>• Testifying in any “unlawful discrimination” proceeding. 5 M.R.S. §4553(10)(D).</li> </ul> | <ul style="list-style-type: none"> <li>• Punish or penalize. 5 M.R.S. §4553(10)(D).</li> <li>• Attempting to punish or penalize. 5 M.R.S. §4553(10)(D).</li> </ul> | <ul style="list-style-type: none"> <li>• Unclear.</li> </ul> | <ul style="list-style-type: none"> <li>• Civil penalties, but maybe no compensatory or punitive damages because not “employment discrimination.” 5 M.R.S. §4613(2)(B)(8); 5 M.R.S. § 4572(1).</li> </ul> | <ul style="list-style-type: none"> <li>• Same as MHRA I, except no jury trial if no claim for compensatory or punitive damages. 5 M.R.S. §4613(2)(B)(8)(g); <i>DiCentes v. Michaud</i>, 1998 ME 227, ¶10.</li> </ul> |
| <p><b>MHRA V (“aid and abet” as “unlawful discrimination”),</b> 5 M.R.S. §4553(10)(D)</p> <ul style="list-style-type: none"> <li>• Same as MHRA IV.</li> </ul>   | <ul style="list-style-type: none"> <li>• Anything protected by MHRA I through IV.</li> </ul>   | <ul style="list-style-type: none"> <li>• Aid, abet, incite, compel, coerse person who is retaliating. 5 M.R.S. §4553(10)(D).</li> </ul>                            | <ul style="list-style-type: none"> <li>• Unclear.</li> </ul> | <ul style="list-style-type: none"> <li>• Same as MHRA IV.</li> </ul>   | <ul style="list-style-type: none"> <li>• Same as MHRA IV.</li> </ul>   |

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## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED  | ACTIVITY  | ADVERSE ACTION  | DEFENSES  | DAMAGES   | SOL • PROCEDURE  |
|--|---|---|---|---|--|
| <p><b>Maine Medical Leave</b>, 26 M.R.S. §847</p> <ul style="list-style-type: none"> <li>• MML: 10 weeks of leave per 2 years if employed for 12 consecutive months, unless fewer than 15 employees at job site. 26 M.R.S. §844(1).</li> </ul> | <ul style="list-style-type: none"> <li>• See adverse action.</li> </ul> | <ul style="list-style-type: none"> <li>• Employer may not interfere with, restrain or deny the exercise of or the attempt to exercise any right provided by MML. 26 M.R.S. § 847(1).</li> <li>• Employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against any employee for exercising any right provided by MML. 26 M.R.S. § 847(2).</li> <li>• Employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against any employee for opposing any practice made unlawful by MML. 26 M.R.S. § 847(3).</li> </ul> | <ul style="list-style-type: none"> <li>• Probably follow analogous provisions in other laws.</li> </ul> | <ul style="list-style-type: none"> <li>• Lost wages or \$100 per day as liquidated damages. 26 M.R.S. § 848(1).</li> <li>• Equal amount for willful violation. 26 M.R.S. § 848(2).</li> </ul> | <ul style="list-style-type: none"> <li>• No express SOL, so probably six years. 14 M.R.S. §752.</li> </ul> |

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## Employment Retaliation Desk Aid (with cites)\*

| LAW • COVERED   | ACTIVITY  | ADVERSE ACTION  | DEFENSES   | DAMAGES  | SOL • PROCEDURE  |
|---|---|---|--|--|--|
| <p><b>Maine Workers' Compensation Act</b>, 39-A M.R.S. §353</p> <ul style="list-style-type: none"> <li>• Covered "employee" and "employer." 39-A M.R.S. §§ 102(11, 12), 353.</li> </ul> | <ul style="list-style-type: none"> <li>• See "Adverse Action."</li> </ul> | <ul style="list-style-type: none"> <li>• An employee may not be discriminated against by any employer in any way for testifying or asserting any claim under Comp Act. 39-A M.R.S. §353.</li> </ul> | <ul style="list-style-type: none"> <li>• Unclear.</li> </ul> | <ul style="list-style-type: none"> <li>• Reinstatement to previous job, back wages, reestablishment of employee benefits. 39-A M.R.S. §353.</li> </ul> | <ul style="list-style-type: none"> <li>• 2 yrs to file petition with Workers' Comp Board. 39-A M.R.S. §§ 306(1), 353.</li> </ul> |

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