APPENDIX ON ADVERSE ACTIONS

1. The common interpretation of various anti-retaliation provisions

In interpreting anti-retaliation provisions, courts often draw on similar provisions in other statutes. Magistrate Judge Freeman made this point in the *Kreinik* case, which dealt with retaliation under ERISA and the NYLL:

> The courts have frequently relied on interpretations of the anti-retaliatory provisions in federal labor statutes interchangeably, given that such provisions in Title VII, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), the National Labor Relations Act ("NLRA"), the Fair Labor Standards Act ("FLSA"), and ERISA are modeled on one another or are similarly worded, thus assuming parallel congressional intent with respect to meaning. *See, e.g., Robinson v. Shell*, 519 U.S. 337, 346, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997) (noting that the NLRA, FLSA and Title VII all share a "primary purpose" of "maintaining unfettered access to statutory remedial mechanisms"); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 330 (D.C. Cir. 1991) (comparing parallel retaliation provisions in the ADEA and Title VII and noting that "cases interpreting the latter are frequently relied upon in interpreting the former"); *Patterson v. McCarron*, No. 99 Civ. 11078, 2001 WL 1488122, at *3 (S.D.N.Y. Nov. 21, 2001) (employing Title VII analysis in ERISA retaliation case).
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> *Kreinik v. Showbran Photo, Inc.*, No. 02 Civ. 172, 2003 WL 22339268, at *3, fn 3 (S.D.N.Y. Oct. 14, 2003)

For this reason, this section on adverse actions is organized by topic as opposed to by statute.

2. The general test for an adverse action

Proving retaliation requires demonstrating that some form of adverse action was taken against the plaintiff. Some courts have offered some general guidance on what constitutes an adverse action:

- *Castagna v. Luceno*, Slip Copy, 2011 WL 1584593 (S.D.N.Y. 2011) (*citing Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002)) (calls for "using an objective standard" in which "the total circumstances of [a plaintiff's] working environment [must have] changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace") [New York Labor Law].

- *Wannamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("the ADEA does not define adverse employment action solely in terms of job

termination or reduced wages and benefits, and that less flagrant reprisals by employers may indeed be adverse…On the other hand, 'not every unpleasant matter short of [discharge or demotion] creates a cause of action' for retaliatory discharge…Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse') (citations omitted) [ADEA and NYSHRL].

- *Ginsberg v. Valhalla Anesthesia Assoc.*, 971 F. Supp. 144, 148–49 (S.D.N.Y. 1997) [Title VII]:

> An adverse employment action must "affect[ ] 'the terms, privileges, duration, or conditions of the plaintiff's employment.'" …While this Court has recognized that claims of retaliation are not limited "'only to acts of retaliation that take the form of cognizable "employment actions" such as discharge, transfer or demotion,'" … there must be some impact on plaintiff's employment or prospective employment for the counterclaims to constitute an 'employment action'.

3. Less traditional examples of adverse actions

a. *Filing of counterclaims*

Several courts have held that the filing of a counterclaim or other lawsuit against the plaintiff could constitute an act of retaliation and/or provided positive language on this point.

- *Kreinik v. Showbran Photo, Inc.*, No. 02 Civ. 1172, 2003 WL 22339268, at *9 (S.D.N.Y. Oct. 14, 2003) (defendant's filing of counterclaims constituted sufficient adverse employment action under § 215 because "counterclaims asserted against [plaintiff] could harm his reputation in his industry and negatively affect his prospective employment or business opportunities," especially "where counterclaims, which could have been raised earlier, instead closely followed the assertion of [employee's] claims").

- *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) (finding allegation that plaintiff's employer filed a lawsuit against him alleging fraud with a retaliatory motive and without a reasonable basis in fact or law an actionable adverse employment action under FLSA).

- *Giliatta v. Tectum, Inc.*, 211 F. Supp. 2d 992, 1008-09 (S.D. Ohio 2002) (noting the "adverse chilling effect" of baseless retaliatory counterclaims).

- *Jacques v. DiMarzio*, 200 F. Supp. 2d 151, 162-63 (E.D.N.Y. 2002) (discussing retaliatory effect of bad faith counterclaim to plaintiff's NYLL claim).

- *Arthur Young & Co. v. Sutherland,* 631 A.2d 354, 367 (D.C. Ct. Appeals 1993) (while the employer had the legal right to foreclose, the statute barring retaliation at issue "contains no safe harbor for otherwise lawful acts done for an improper retaliatory purpose").

- *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 744 (1983) ("the prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the [NLRA] that may be enjoined by the [NLRB]").

Plaintiffs' attorney should also keep in mind that frivolous counterclaims could be grounds for moving for sanctions pursuant to FRCP Rule 11. *See, e.g., Jacques v. DiMarzio*, 200 F. Supp. 2d 151, 162-63 (E.D.N.Y. 2002).

Courts in other circuits have held that a compulsory counterclaim may not, as a matter of law, be considered retaliatory. *See, e.g.,. Beltran v. Brentwood*, 426 F. Supp. 2d 827. 833 (N.D. Ill. 2006). However, courts in the Second Circuit have not done so. *See Yankelevitz v. Cornell*, No. 95 Civ. 4593, 1996 WL 447749, at * 4 (S.D.N.Y. Aug. 7, 1996).

b. *Threats*

Threats are now explicitly mentioned in some statutes (i.e. the New York Labor Law) and has also come up in other contexts. *See N.L.R.B. v Lloyd Wood Coal Co.*, 585 F.2d 752 (5th Cir. 1978) (superintendent's telling employees that mine where they worked would be closed if they signed union authorization cards constituted an unfair labor practice).

c. *Opposing unemployment benefits*

In the *Matter of Electchester Housing Project, Inc. v. Rosa*, 639 N.Y.S.2d 848, 849, 225 A.D.2d 772, 773 (2d Dep't 1996), the defendant's contesting of former employee's unemployment benefits, in response to the filing of a complaint with the State Division of Human Rights, constituted retaliation under the New York Executive Law.

d. *Retaliation against undocumented workers*

At least one federal court in the Second Circuit has held that it is illegal under the FLSA to report a worker to the INS as retaliation for their wage-hour complaint. *See Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 135 (W.D.N.Y. 2003) (employer who retaliates against an employee by reporting him/her to INS and claiming he/she is a terrorist will be in violation of anti-retaliation provision of FLSA).

There have also been positive decisions in district courts in California. *See Singh v. Jutla & C.C.&R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (denying motion to dismiss after finding that employer reporting undocumented workers to INS with retaliatory intent to violate FLSA § 215); *see also Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (finding "[t]here is no question that the protections provided by the FLSA apply to undocumented aliens" and thus employer's notification to INS of plaintiff's status may constitute illegal retaliation).

In certain instance, plaintiffs may be able to obtain preliminary injunctive relief barring the employer from taking certain retaliatory actions. *See Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 135 (W.D.N.Y. 2003) (obtaining an order enjoining employer from contacting government authorities regarding plaintiffs' immigration status).

4. Examples of adverse actions outside of the traditional employment relationship

Courts have been willing to interpret anti-retaliation provisions broadly and have held that retaliation need not occur within a current employer-employee relationship. The *Kreinik* court offers a good description of some such decisions:

> This reasoning, combined with the case law in this circuit as it has developed with respect to this issue in various statutory contexts, supports Kreinik's position that Section 510 should be read to cover post-employment retaliation. *See, e.g., Silver v. Mohasco Corp.*, 602 F.2d 1083, 1090 (2d Cir. 1979) (post-employment blacklisting falls within the scope of retaliatory provisions of Title VII), *rev'd on other grounds*, 477 U.S. 807, 814 n. 17 (1980); *Patchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (finding that Title VII "prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct"); *Straus*, 253 F.Supp.2d at 447–48 (noting that while the Second Circuit hasn't spoken squarely on this issue, "[i]t seems only logical that former employees and beneficiaries, who in many instances have as strong an interest in the pension rights as their employee counterparts, receive some protection from alienation of those rights under § 510 of ERISA"); P*atel v. Lutheran Med. Ctr.*, 753 F.Supp. 1070, 1073 (S.D.N.Y.1991) (noting that a claim for retaliation under the ADEA is cognizable even where the employment relationship had been terminated before the alleged adverse action occurred).
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> *Kreinik v. Showbran Photo, Inc.*, No. 02 Civ. 172, 2003 WL 22339268, at *5 (S.D.N.Y. Oct. 14, 2003)

This section provides a list of some cases where the courts have considered whether specific types of actions outside of a current employment relationship constitute an adverse action and thus might constitute retaliation. In particular, cases dealing with

the issues of blacklisting, negative employment references and other actions impacting employee's ability to find future work are considered.

At least one statute explicitly prohibits the blacklisting of employees. *See* 29 U.S.C. § 1855 ("Migrant and Seasonal Agricultural Worker Protection Act") ("No person shall intimidate, threaten, restrain, coerce, *blacklist*, discharge, or in any manner discriminate…").

Courts have also considered similar issues under other statutes as well. In general, actions by the employer that are likely to have a tangible impact on their obtainment of subsequent employment have been found to constitute adverse actions.

Supreme Court

- *Robinson, Sr. v. Shell Oil Company*, 519 U.S. 337 (1997) (negative reference about former employee who made Title VII complaint sufficient to state a claim for relief under Title VII against former employer).

Second Circuit

- *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 178-79 (2d Cir. 2005) (retaliation claim survives summary judgment where employer submitted false, negative reference regarding former employee if jury could conclude that the reference negatively affected plaintiff's chance of receiving employment).

- *Wannamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (a retaliation claim could be maintained where a former employer sullies a plaintiff's reputation, thereby affecting "tangible future employment objectives").

- *Silver v. Mohasco Corp.*, 602 F.2d 1083, 1090 (2d Cir. 1979) (finding that post-employment blacklisting falls within the scope of retaliatory provisions of Title VII).

- *Patchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (finding that a refusal to provide an employee with an employment reference, allegedly in retaliation for filing a claim against the employer, constituted an adverse employment action).

District Courts

- *Abreu v. Suffolk County Police Dep't,* No. 03 Civ. 5927, 2007 WL 608331 (E.D.N.Y. Feb. 23, 2007) (in denying defendant's motion for summary judgment of plaintiff's NYHRL claim for retaliation the court held that the

plaintiff need only show employer's use of discrimination in connection with a prospective, present or past employment relationship).

- *Deluca v. Allied Domecq Quick Serv. Rest.*, No. 03 Civ. 5142, 2006 WL 2713944 (E.D.N.Y. Sept. 22, 2006) (in denying the defendant's motion for summary judgment the court held that if an employer retaliates against a former employee for engaging in protected activity by attempting to deny the former employee an ability to enter into a subsequent business relationship, such conduct is actionable regardless of whether that future business relationship is employer/employee, independent contractor or consultant).

- *Gonzalez v. Police Comm'r Bratton*, 147 F. Supp. 2d 180, 196 (S.D.N.Y. 2001) ("[R]etaliatory conduct that would naturally create major obstacles for a former employee in obtaining employment in her field ... is actionable under [Title VII]."), *aff'd*, No. 01 Civ. 7826, 2002 WL 31317871 (2d Cir. Oct.16, 2002).

- *E.E.O.C. v. Die Fliedermaus, L.L.C.*, 77 F. Supp. 2d 460, 472 (S.D.N.Y. 1999) (finding that public distribution of derogatory flyers in response to the filing of a charge with the E.E.O.C. constituted retaliation under Title VII where the flyers could affect plaintiffs' ability to find jobs).

- *Nielsen v. New York City Comm. on Human Rights*, 94 Civ. 6360, 1998 U.S. Dist. LEXIS 413, *21-22 (S.D.N.Y. 1998) (denying summary judgment motion where NYCCHR allegedly failed to hire plaintiff because of his prior discrimination complaints against other employers; "Title VII prohibits employers from discriminating against applicants for previous exercise of Title VII rights").

- *Martin v. Purolator Courier, d/b/a Emery Worldwide d/b/a P. Chimento*, 94 Civ. 1004, 1996 U.S. Dist. LEXIS 22300, *23 (E.D.N.Y. 1996) ("The Court is of the opinion that retaliatory animus is not negated merely because a plaintiff engages in protected activity against a different employer").

- *Beckett v. The Prudential Insurance Co. of Amer.*, 893 F. Supp 234 (S.D.N.Y. 1995) (denying defendant's motion to dismiss NYHRL claim arising out of former employer's negative reference that resulted in loss of future employment).

State Courts

- *Ballen-Stier v. Hahn & Hessen*, 284 A.D.2d 263 (2001) (court dismissed case but noted that the term "employee" as used in the NYHRL encompasses former employees).

The Appellate Division, interpreting the New York Labor Law, recently issued a decision dismissing a retaliation claim against a prospective employer. *Adler v. 20/20 Companies*, 82 A.D.3d 914, 915, 918 N.Y.S.2d 583, 584 (App. Div. 2d Dep't 2011) ("the text of Labor Law § 215 does not reveal a clear intent to authorize a claim against a prospective employer for a retaliatory failure to hire. Indeed, neither the plain language of the statute nor its legislative history…contemplates an action by a job applicant against a prospective employer for retaliation based on the applicant's complaints regarding a former employer").

However, this case interprets the language of the NYLL prior to being amended by the WTPA. Presumably, the WTPA's addition of the phrase "or any other person" to the list of those prohibited from retaliating against an employee expresses a legislative intent to include those other than current employers, such as a prospective employer.