

# Osama's Message to Management: Don't Get Angry. Get Even.

*Reprisal & Temporal Proximity*

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George W. Bush and I have a lot in common. We both used every scheme, trick, artifice, and device to dodge the draft during the Viet Nam War. We both drank too much in college. He became abstemious in his forties; I in my thirties. His father was vice president before he became president and my father was a union enforcer before he became a furrier. Owing to Attention Deficit Hyperactivity Disorder, we cannot read text which exceeds two pages. We rely on others to convey knowledge to us orally. He receives information between naps while sitting on Dick Cheney's knee. I receive it from audiobooks recorded on compact discs, which I play on my Panasonic portable cd-rom reader.

Kitty Kelley wrote *The Family. The Real Story of the Bush Dynasty*, which the *New York Times* derided as being too sophomoric to be serialized in the *Weekly Reader*. I bought the book, figuring that it would be easy enough even for me to read, but the gossip was too deep. I then bought the audiobook, read by the author herself, to listen to while walking my dog Mocha in the fenced-in dog area of the park near my house. This past Saturday morning, while waiting for Mocha to excrete---the only time it is worthwhile to learn anything about the Bushes is while waiting for your dog to excrete--- Ms. Kelley told me that after her husband was voted out of the presidency, Mrs. Barbara Bush was demanding upwards of \$50,000 per speaking engagement. "Who would pay anything to hear Mrs. Bush speak?", I thought to myself. "Anyway, what is she qualified to speak about?" As far as I knew, the only thing she had done successfully, for she surely had not gotten married to go to work, was somehow to convince her husband that she was not a *complete* parasite. She had not even done that too successfully as Ms. Kelley noted that George Herbert Walker Bush had openly and notoriously maintained a decades' long sexual affair with an assistant which would have made Bill Clinton blush.

"I will tell you whom I would pay money to hear speak," I said to myself as I bent down to scoop the poop. "I would pay to hear Osama bin Laden to teach a seminar to federal or postal service supervisors on how to successfully retaliate against employees who engaged in protected activity."

It would make no sense for Congress to grant an employee a right only to have the employee reluctant to exercise the right for fear of management reprisal. To thaw the "chilling effect" of reprisal, Congress has created a separate cause of action for reprisal in all of its labor-relations statutes.<sup>1</sup> For example, the anti-retaliation provision of Title VII of the Civil Right Act of 1964 provides:

- (a) *Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings*

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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.<sup>2,3</sup>

Where there is no direct evidence of retaliation, courts will analyze a retaliation claim under the *McDonnell Douglas* burden-shifting framework.<sup>4</sup> Following this framework, an employee must first present a prima facie case of retaliation, which then shifts the burden to the employer to produce a legitimate, nondiscriminatory justification for taking the disputed employment action.<sup>5</sup> If the employer provides a legitimate, non-discriminatory justification for the action, the burden shifts back to the employee to provide evidence showing that the employer's proffered reason is a pretext for discrimination.<sup>6</sup> An employee may demonstrate pretext by showing the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief.<sup>7</sup>

To establish a prima facie case of retaliation, the employee must show (1) that she "engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action."<sup>8,9,10</sup>

This article has only to do with the last element; you will have to *bide your time* and *wait patiently* for future articles about the first two elements.

#### *Reprisal and temporal proximity*

I love the couplet *temporal proximity* because I know what it means and most probably you don't. It's a superiority thing with me. The couplet has to do with how close in time two or more things must occur to each other. I love it also because courts and lawyers use it to cover up a completely fallacious concept: reprisal must occur in close *temporal proximity* to the protected activity before an inference arises that the latter caused the former.<sup>11</sup> I love to belong to a club which uses gussied-up words to pull the wool over the eyes of the unsuspecting public.

Just how close on the heels of the protected activity must the reprisal follow? One court

found a four month interval too great.<sup>12</sup> Another found even a three month gap too much.<sup>13</sup> And the Supreme Court said that an “[a]ction taken (as here) 20 months later suggests, by itself, no causality at all.”<sup>14</sup> Another court however found that that a one and one-half month period between protected activity and adverse action may establish causation.<sup>15</sup> Lest you think that there is a bright, shining line between two and three months, think again: another court held that a three-month interval was still close enough in time to draw the inference.<sup>16</sup> Courts are quick to caution that a "specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic."<sup>17</sup> And they are equally quick to emphasize:

that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.<sup>18</sup>

But after incanting this disclaimer, in a later case, the same court relapsed into the simpleminded application of the temporal-proximity test, ruling that a six-month interval was too great.<sup>19</sup>

The *a priori* assumption on which the temporal-proximity test is based is that retaliators lack the self control to allow any time to pass after the protected activity to strike back at the employee. This does not comport with my experience with my supervisors at MSPB who relished the opportunity to *slow cook* the perceived slights and insults and humiliations they suffered at the hands of their subordinates. In the wacky crock pots of their minds, the vendettas they were cooking up grew increasingly more bitter the longer they had to stew about the supposed indignations. Indeed, these sociopaths did not get promoted to their stratospheric grades by acting precipitantly. On the contrary, those who had mentored them up the ranks counseled them against acting impulsively. They were rewarded for “exercising good judgment” which meant not acting at all. In short, they were congenitally incapable of acting too hastily; all they knew was how to lie in wait to strike.

For those like George Walker Bush and I, who suffer from low-frustration tolerance,<sup>20</sup> Osama bin Laden could teach us a thing or two about how to retaliate successfully against an employee who engaged in protected activity. For Osama is the apotheosis of the advice: “Don’t get angry. Get even.”

In Osama’s most recently television appearance---and you have to admit he looked dashing in those robes---he claimed that he masterminded the 9/11 plot as revenge

against us for Israel's invasion of Lebanon in 1981. (Yes, I know this raises the question whether we can claim retaliation for another party's protected activity. But I told you that you would have to be patient for a future newsletter on that issue.) According to Osama,

As I watched the destroyed towers in Lebanon, it occurred to me to punish the unjust the same way [and] to destroy towers in America so it could taste some of what we are tasting and stop killing our children and women.

Temporal proximity? Are you kidding me? Osama held that grudge for 19 years before he acted on it. I cannot think of one of MSPB supervisor, no matter how perversely resolute, who could have held out for nineteen years before retaliating. Perhaps a handful could have held a grudge for a decade or so, but for nineteen years? No way.

Please understand that I am not suggesting that even if Israel's invasion of Lebanon were protected activity, Osama would not be found guilty of reprisal for the 9/11 attack on the World Trade Center. For he admitted retaliatory motive. His own words convict him of reprisal. Since *the temporal-proximity test is used only to prove reprisal by circumstantial evidence*, Osama's Herculean patience provides him with no defense. But what if Osama had not confessed to reprisal? Given the near eternity between the protected activity and his attack, how then could we have convicted Osama of reprisal?

Simple. The attack itself was tantamount to a confession of reprisal. Whatever justification Osama may have had to attack the government of the United States for its support of the Israeli invasion of Lebanon (and I don't recall if the government supported it at all), surely the occupants of the World Trade Center nineteen years later bore no guilt. In the parlance of *McDonnell Douglas*, Osama had no legitimate business reason to attack the twin towers. The attack itself betrayed *some* grudge that Osama held against us. But what if Osama was put off by some activities that were protected and some that were not? In others words, what if Osama's motives for the attack were an *admixture* of the permissible and the prohibited? Could we then prove that he launched the attack "because" of protected activity?

In a future newsletter, I will attempt to answer that question by contrasting the "but for' causation-in fact test" with the "substantial factor test."<sup>21</sup> This discussion, in turn, will provide an apt segue, in the same article, into an extensive discussion of whistleblower reprisal. Be patient. The temporal proximity between this article and that one ought to be close.

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<sup>1</sup> Federal government and its agencies are liable for retaliation against employee, even though statutory language extending Title VII coverage to federal employees does not specifically create cause of action for retaliation. *Afanador v. U.S. Postal Service*, D.Puerto Rico 1991, 787 F.Supp. 261,

<sup>2</sup> 42 U.S.C.A. § 2000e-3

<sup>3</sup> A primary purpose of Title VII's retaliation clause is maintaining unfettered access to Title VII's statutory remedial mechanisms; permitting employers to discriminate against an employee because of an employee's

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past use of Title VII's remedial mechanisms could significantly deter employees from engaging in such proceedings. *Ghirardelli v. McAvey Sales & Service, Inc.*, S.D.N.Y.2003, 287 F.Supp.2d 379

<sup>4</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) *Jeffries v. State of Kansas*, 147 F.3d 1220, 1231 (10th Cir.1998) (applying the *McDonnell Douglas* framework to a claim of retaliation)

<sup>5</sup> *Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir.2003)

<sup>6</sup> *Id.*

<sup>7</sup> *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1120 (10th Cir.2001)

<sup>8</sup> *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir.2003) (internal quotation marks omitted); *Ackel v. National Communications, Inc.* 339 F.3d 376, \*385 (C.A.5 (La.),2003)

<sup>9</sup> To establish a *prima facie* case of retaliation under the FMLA, a plaintiff must show that (1) she took an FMLA leave, (2) she suffered an adverse employment decision, and (3) the adverse decision was causally related to her leave. *Conoshenti v. Public Svce. Electric & Gas Co.*, 364 F.3d 135 (3d Cir.2004).

<sup>10</sup> Title VII test for retaliatory discharge is virtually identical to that utilized in federal cases interpreting retaliatory claims under Age Discrimination in Employment Act. *Singer v. State of Me.*, D.Me.1994, 865

<sup>11</sup> The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be "very close," *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (C.A.10 2001).

<sup>12</sup> *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (C.A.7 1992) \*274 4-month period insufficient).

<sup>13</sup> *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (C.A.10 1997) (3-month period insufficient);

<sup>14</sup> *Clark County School Dist. v. Breedon* 532 U.S. 268, \*273-274, 121 S.Ct. 1508, \*\*1511 (U.S.,2001)

<sup>15</sup> *Ramirez v. Oklahoma Dep't. of Mental Health*, 41 F.3d 584, 596 (10th Cir.1994)

<sup>16</sup> See, *Stover v. Martinez* 382 F.3d 1064, \*1074 (C.A.10 (Colo.),2004), reviewing case law from other jurisdictions.

<sup>17</sup> *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir.2003)

<sup>18</sup> *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3rd Cir.1997).

<sup>19</sup> *Morrissey v. Luzerne County Community College* L 2360988, \*6 -7 (3rd Cir. (C.A.3 (Pa.),2004)

<sup>20</sup> *High frustration tolerance (HFT) vs low frustration tolerance (LFT)*: High frustration tolerance beliefs are rational in the sense that they are again primarily flexible and not grossly exaggerated. These beliefs are expressed in their full form, thus: 'Failing my driving test would be difficult to tolerate, but I could stand it'. The stronger a person's unmet preference, the more difficult it would be for her to tolerate this situation, but if she holds an HFT belief it would still be tolerable. In this sense, an HFT belief is consistent with reality. It is also logical since it again makes sense in the context of the person's preference. Finally, like a preference and an antiawfulizing belief, it is constructive since it will help the person take effective action if the negative event that is being faced can be changed and it will encourage the person to make a healthy adjustment if the situation cannot be changed.

Low frustration tolerance beliefs, on the other hand, are irrational in the sense that they are first and foremost grossly exaggerated. They are couched in such statements as 'I can't stand it. 'I can't bear it., 'It's intolerable. When a person has a low frustration tolerance belief, she means one of two things: (i) she will disintegrate or (ii) she will never experience any happiness again. Since these two statements are obviously untrue, an LFT belief is inconsistent with reality. It is also illogical since it is a nonsensical conclusion from the person's implicit rational belief (e.g. 'Because it would be very bad if I failed my driving test, I couldn't stand it if I did fail'). Finally, like musts and awfulizing beliefs, it is unconstructive since it will interfere with the person taking effective action if the negative event that the person is facing can be changed and it

will stop the person from making a healthy adjustment if the situation cannot be changed. From *Brief Rational Emotive Behaviour Therapy* by Windy Dryden

<sup>21</sup> "Plaintiff asserts that retaliatory discharge is tortious in nature, see *Scott v. Otis Elevator Co.*, 524 So.2d 642 (Fla.1988), and appears to advocate use of either of two other tests. The "'but for' causation-in fact test provides that 'to constitute proximate cause there must be such a natural, direct, and continuous sequence between the negligent act ... and the [plaintiff's] injury that it can reasonably be said that *but for* the [negligent] act ... the injury would not have occurred.'" *Stahl v. Metropolitan Dade County*, 438 So.2d 14, 17 (Fla. 3rd DCA 1983) (citation omitted). The "substantial factor test" employed in negligence cases provides that "[d]efendant's conduct in an action for personal injuries is considered a cause of the event if it was a material and substantial factor in bringing it about. Whether it is such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men could not differ." *Stahl*, 438 So.2d at 19 (citation omitted)." *Sierminski v. Transouth Financial Corp.* 216 F.3d 945, \*950 (C.A.11 (Fla.),2000)

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Act appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations.

He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*