SECTION VIII: PROVING DISCRIMINATION – RETALIATION
ABOUT THIS DOCUMENT

The Civil Rights Division’s Title VI Legal Manual provides an overview of Title VI legal principles. This document is intended to be an abstract of Title VI principles and issues; it is not intended to provide a complete, comprehensive directory of all cases or issues related to Title VI. For example, this manual does not address all issues associated with private enforcement. In addition, although the manual includes cases interpreting both Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq., and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, where their interpretation overlaps with Title VI, the manual should not be considered to be an overview of any statute other than Title VI.

The Civil Rights Division periodically issues policy guidance, directives, or other memoranda to federal agencies regarding statutes the Division enforces. The manual discusses, as appropriate, current guidance documents and directives relating to Title VI. Persons referring to the manual periodically should check the Division’s websites (www.usdoj.gov/crt and www.lep.gov) for guidance documents and directives issued subsequent to the publication of the manual. Comments on the manual, and suggestions as to future updates, including published and unpublished cases, may be addressed to:

Federal Coordination and Compliance Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Avenue NW – NWB  
Washington, D.C. 20530  
Telephone and TDD (202) 307-2222  
FAX (202) 307-0595  
E-mail FCS.CRT@USDOJ.GOV

The Civil Rights Division issues the Title VI Legal Manual pursuant to its responsibility under Executive Order 12250, 28 C.F.R. pt. 41, app. A, to coordinate federal government compliance with the requirements of Title VI and other federal financial assistance statutes and to foster consistent and coordinated Title VI enforcement. The manual is intended only to provide general assistance to interested persons and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States. Finally, because the law changes frequently, the Civil Rights Division cannot guarantee that all information is current. Updates will be issued from time to time; please refer to the date issued for each section.
Section VIII: Proving Discrimination - Retaliation

A. Introduction

It is well-settled that Title VI supports retaliation claims. See, e.g., Peters v. Jenney, 327 F.3d 307, 318 (4th Cir. 2003); Chandamuri v. Georgetown Univ., 274 F. Supp. 2d 71, 83 (D.D.C. 2003); Gutierrez v. Wash. Dep't of Soc. & Health Servs., CV-04-3004-RHW, 2005 WL 2346956, at *5 (E.D. Wash. Sept. 26, 2005). When a person reasonably believes that he or she has been the victim of discrimination that Title VI or other federal law prohibits, or has witnessed another person being discriminated against, that person should be able to report the alleged discrimination without fear of retaliation or fear that doing so will further jeopardize accessing benefits or services. Similarly, a person should be free to access the services, programs, and activities that federal financial assistance supports without fear that a recipient might discriminate against him or her merely for seeking access.

The Supreme Court has defined retaliation as an intentional act in response to a protected action. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173-74 (2005). Citing Jackson, the court in Gutierrez underscored the intentional nature of a retaliation complaint: “Retaliation is, by definition, an intentional act. It is a form of “discrimination” because the complainant is being subjected to differential treatment.” Gutierrez, 2005 WL 2346956, at *5. The complained of matter need not be a complaint; it can be any lawful conduct that an individual engages in connected with a protected right. “The very concept of retaliation is that the retaliating party takes action against the party retaliated against after, and because of, some action of the latter.” Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 514 (1958). It carries with it the notion of “getting even.” See id. As noted in a 2011 law review article:

Retaliation is a deliberate action used to send a clear message that complaining is unwelcome and risky. It is employed to instill fear in others who might consider making a complaint in the future. Those with cause for complaining are frequently among the most vulnerable in an institution. Once they complain, they are labeled “troublemakers.” Retaliation, and the fear of retaliation, becomes a potent weapon used to maintain the power structure within the institution.


This chapter on retaliation provides an overview of the legal authority for a private party to bring a retaliation claim under Title VI to an agency or in court, addresses who has standing to bring a retaliation complaint, and identifies what an agency should look for when assessing the merits of a retaliation allegation.
B. Legal Authority

Title VI does not include an express provision prohibiting retaliation. Nonetheless, courts, including the Supreme Court, have held that various anti-discrimination statutes contain an implied cause of action for retaliation based on the general prohibition against intentional discrimination. See, e.g., Jackson, 544 U.S. at 173 (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action”). A statute that prohibits intentional discrimination implicitly prohibits acts of retaliation for complaints about or opposition to discrimination. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969) (a prohibition on racial discrimination includes an implicit prohibition on retaliation against those who oppose the discrimination); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 451 (2008) (a race discrimination statute encompasses retaliation actions as Congress and long line of precedent intended); Gomez-Perez v. Potter, 553 U.S. 474, 479 (2008) (ADEA federal-sector provision that prohibits age discrimination implicitly covers claims of retaliation for filing an age discrimination complaint); Peters, 327 F.3d at 318-19 (prohibition against retaliation is implicit in the text of Section 601 of Title VI).

In Jackson, the Court explained how retaliation constitutes intentional discrimination:

Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination. Retaliation is, by definition, an intentional act. It is a form of “discrimination” because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination “based on sex” because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional “discrimination” “based on sex,” in violation of Title IX.

Jackson, 544 U.S. at 173-74 (citations omitted). The Court also noted that the language in the statute itself supplies sufficient notice to a recipient that it cannot retaliate against those who complain of discrimination. Id. at 183.

For Title VI, as discussed elsewhere in this manual, Section 601 prohibits discrimination based on race, color, or national origin, while Section 602 authorizes and directs federal departments and agencies that extend financial assistance to issue rules, regulations, or orders to effectuate

---

Section 601. Under this authority, most federal grant-making agencies have included an anti-retaliation provision in their Title VI regulations. The DOJ regulation provides the following:

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 VI, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subpart.

28 C.F.R. § 42.107(e); see also Johnson v. Galen Health Insts., Inc., 267 F. Supp. 2d 679, 695 (W.D. Ky. 2003) (Title IX anti-retaliation provision cuts to the core of its ban on intentional discrimination and is covered by that section’s existing cause of action).

Retaliatory behavior needs to be barred irrespective of whether the underlying claim is based on intent or disparate impact. Although one Court of Appeals has found that a private plaintiff cannot pursue a retaliation claim in court based on his or her opposition to alleged disparate impact discrimination, Title VI does not grant recipients a license to threaten individuals or prevent them from bringing disparate impact complaints to the government, which has the ability to pursue disparate impact claims in court and in the administrative process.

Moreover, and as discussed elsewhere in this manual, some courts have found that in certain circumstances, evidence of a disparate impact can also be evidence of intentional discrimination.

---

2 Other federal funding agencies’ regulations also bar retaliation. See 5 C.F.R. § 900.407(e) (Office of Personnel Mgmt.); 6 C.F.R. § 21.11(e) (Dep’t of Homeland Sec.); 7 C.F.R. § 15.7 (Dep’t of Agric.); 10 C.F.R. § 1040.104(d) (Dep’t of Energy); 10 C.F.R. § 4.45 (Nuclear Regulatory Comm’n); 13 C.F.R. § 112.10(f) (Small Bus. Admin.); 14 C.F.R. § 1250.106(e) (NASA); 15 C.F.R. § 8.9(a) (Dep’t of Commerce); 18 C.F.R. § 1302.7(d) (Tenn. Valley Auth.); 18 C.F.R. § 705.7(e) (Water Resources Council); 22 C.F.R. § 141.6(e) (Dep’t of State); 22 C.F.R. § 209.7(e) (Agency for Int’l Dev.); 24 C.F.R. § 1.7(e) (Dep’t of Hous. & Urban Dev.); 29 C.F.R. § 31.7(e) (Dep’t of Labor); 32 C.F.R. § 195.8(e) (Dep’t of Defense); 34 C.F.R. § 100.7(e) (Dep’t of Educ.); 38 C.F.R. § 18.7(e) (Dep’t of Veterans Affairs); 40 C.F.R. § 7.100 (Envtl. Prot. Agency); 41 C.F.R. § 101-6.210-5 (Gen. Servs. Admin.); 43 C.F.R. § 17.6(e) (Dep’t of the Interior); 45 C.F.R. § 80.7(e) (Dep’t of Health & Human Servs.); 45 C.F.R. § 1110.7(e) (Nat’l Found. on the Arts & Humanities); 45 C.F.R. § 1203.7(e) (Corp. for Nat’l & Cmty. Serv.); 45 C.F.R. § 611.7(e) (Nat’l Science Found.); 45 C.F.R. § 80.7(e) (Dep’t of Health & Human Servs.); 49 C.F.R. § 21.11(e) (Dep’t of Transp.). In addition, assurance documents from some agencies include a non-retaliation provision.

3 In Peters, the court limited the viability of a private suit for retaliation claim when the underlying allegation addresses unlawful disparate impact. According to Peters, a private individual cannot bring a retaliation claim under Title VI based on an underlying complaint of disparate impact. 327 F.3d at 319. DOJ disagrees. A recipient violates Title VI if it retaliates against a private individual who opposes a discriminatory action or participates in a matter alleging discrimination whether the underlying matter concerns intentional discrimination or disparate impact. As noted above, retaliation is a form of intentional discrimination, which Title VI clearly covers. See Jackson, 544 U.S. at 173-74 (“Retaliation is, by definition, an intentional act.”). If a recipient intentionally takes an adverse action against an individual because he or she alleged that it violated Title VI, it should not matter whether the alleged violation raises an intent or disparate impact claim, particularly within the administrative setting. Cf. id. at 544 U.S. at 180 (“Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.”).
See Garcia ex rel. Garcia v. Bd. of Educ. of Albuquerque Pub. Schs., 436 F. Supp. 2d 1181, 1192 (D.N.M. 2006). The line between an intent and impact case is not always clear, particularly before the facts are gathered through discovery or an administrative investigation. In such cases, it may be impossible for an individual complainant to know, at the point of his or her complaint, whether a particular discriminatory effect is the result of a neutral policy or practice or was intentional. It is therefore entirely impractical to limit the retaliation protection to underlying intent claims.

It is well-settled that neither an agency nor a court need find that the underlying conduct about which the individual complained is discriminatory in order for the retaliation protection to attach. Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994) (“[T]here is nothing [in the wording of the participation clause] requiring that the charges be valid, nor even an implied requirement that they be reasonable.”); accord Ray v. Ropes & Gray LLP, 961 F. Supp. 2d 344, 358 (D. Mass. 2013) (quoting Wyatt), aff’d, 799 F.3d 99 (1st Cir. 2015); Slagle v. Cty. of Clarion, 435 F.3d 262, 268 (3d Cir. 2006); Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir. 1999) (“The underlying charge need not be meritorious for related activity to be protected under the participation clause.”) (citing Filipovic v. K & R Express Sys., Inc., 176 F.3d 390, 398 (7th Cir. 1999)).

Even if a private plaintiff could not file suit for retaliation for challenging disparate impact discrimination, a federal agency receiving a retaliation complaint would, nonetheless, have jurisdiction to pursue the retaliation claim.

a. Who May File a Retaliation Claim

A retaliation complaint can be filed by the individual who was the target of the recipient’s original allegedly discriminatory acts; a person whom the recipient has adversely treated for speaking out against the recipient’s allegedly discriminatory acts directed toward a member or members of a protected class; a person who participated in an investigation of alleged discrimination or in the complaint process itself. Title VI does not require that the retaliation victim also be the victim of the discrimination included in the original complaint or a member of the protected class. For example, the Supreme Court has held that an employer violated Title VII when it fired the fiancé of an employee who filed a sex discrimination complaint. Thompson v. N. Am. Stainless, 562 U.S. 170, 177 (2011). In finding that the plaintiff was an “aggrieved” party, the Court ruled that he fell within the “zone of interests” that the anti-retaliation provision intended to protect. See also Jackson, 544 U.S. at 179 (male coach who was retaliated against for complaining about sex discrimination against girl’s team had standing to sue for retaliation under Title IX although he was not the victim of the discrimination that was the subject of his original complaints); Sullivan, 396 U.S. at 237 (white person who was retaliated against for advocating for the rights of a black person had standing to sue for retaliation); Peters, 327 F.3d at 316 (citing and quoting Sullivan); Reinhardt v. Albuquerque Pub. Sch. Bd., 595 F.3d 1126, 1132 (10th Cir. 2010).
2010) (teacher advocated for student in Section 504 matter); Kimmel v. Gallaudet Univ. 639 F. Supp. 2d 34, 43 (D.D.C. 2009) (“advocacy on behalf of minority students is a protected activity sufficient to support a retaliation claim”). Retaliation protections thus are extended to those who oppose discrimination against others because otherwise individuals who witness discrimination might be reluctant to speak out against it. ⁴

b. What Are the Elements of a Retaliation Claim?

If an investigative agency receives a claim of retaliation, the agency should consider whether the evidence establishes the court-developed elements of the claim. Under Title VI, the evidence must show that (1) an individual engaged in protected activity of which the recipient was aware; (2) the recipient took a significantly adverse action against the individual; and (3) a causal connection exists between the individual’s protected activity and the recipient’s adverse action. See Peters, 327 F.3d at 320; Emeldi v. Univ. of Oregon, 673 F.3d 1218, 1223 (9th Cir. 2012); Palmer v. Penfield Cent. Sch. Dist., 918 F. Supp. 2d 192, 199 (W.D.N.Y. 2013); Kimmel, 639 F. Supp. 2d at 43; Hickey v. Myers, 852 F. Supp. 2d 257, 268 (N.D.N.Y. 2012); Chandamuri, 274 F. Supp. 2d at 84.

For there to be “protected activity,” the evidence must show that a person opposed a recipient’s actions that the person reasonably and in good faith believed violated Title VI or participated in a matter that reasonably or in good faith alleged a violation. Peters, 327 F.3d at 320-21; Bigge v. Albertsons, Inc., 894 F.2d 1497, 1503 (11th Cir. 1990); Kimmel, 639 F. Supp. 2d at 43. Opposition or complaints can be oral or written. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1336 (2011) (Congress intended anti-retaliation provisions to protect both oral and written complaints). The evidence does not have to establish that the underlying act violated Title VI, only that the complainant reasonably and in good faith believed that the acts were discriminatory. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69-70 (2006); Peters, 327 F.3d at 321; Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988) (“plaintiff must demonstrate a ‘good faith, reasonable belief that the underlying challenged actions of the employer violated the law.’”).

For a Title VI retaliation claim, an adverse action is an action that would deter a reasonable person from bringing or supporting a charge of discrimination. See, e.g., Jackson, 544 U.S. at 179 (giving coach negative evaluations and firing him as a coach was sufficient evidence of adverse action); Burlington, 548 U.S. at 68, 70 (reassigning employee to a less desirable job and suspending her for 37 days without pay after she complained about work conditions constitutes

⁴ In Crawford v. Metropolitan Government of Nashville & Davidson County, 555 U.S. 271, 277-78 (2009), the Court ruled that anti-retaliation protection also extends to an employee cooperating with an internal employer investigation of a discrimination complaint: “[N]othing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”
adverse action); *Palmer*, 918 F. Supp. 2d at 199 (denial of tenure constitutes adverse action). The evidence must show that the actions the recipient took against the complainant were more than trivial harms, minor annoyances, or petty slights. *Burlington*, 548 U.S. at 68; *Morales v. N.Y. Dep’t of Labor*, 865 F. Supp. 2d 220, 256 (N.D.N.Y. 2012) (plaintiff alleged only “petty slights”), aff’d, 530 Fed. App’x 13 (2d Cir. 2013). An agency should decide what constitutes an adverse action case-by-case, taking into consideration contextual factors or specific circumstances. See *Burlington*, 548 U.S. at 69; *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000).

Lastly, the evidence must show that the protected activity was the likely reason for the recipient’s adverse action. The focus here is on determining whether there is a causal connection between the complainant’s protected activity and the recipient’s alleged adverse action.

A complainant or agency could establish retaliation under one of two methods. Under the first, the direct method of proof, complainants must “offer evidence that [they] engaged in a statutorily protected activity, that the defendants subjected [them] to an adverse employment action, and that a causal connection exists between the two events.” *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 686 (7th Cir. 2008) (citing *Treadwell v. Office of Ill. Sec’y of State*, 455 F.3d 778, 781 (7th Cir. 2006)). Under this evidence method, a plaintiff must present evidence of discriminatory intent that does not require support from inferences.

The second method, indirect proof, involves use of circumstantial evidence that the individual’s protected activity led to an alleged adverse action, either wholly or in part, in response to the individual’s protected conduct. Temporal proximity between the complainant’s protected activity and the recipient’s adverse actions often is relevant to a determination of causation. See, e.g., *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011) (“an adverse action [that] comes so close on the heels of a protected act that an inference of causation is sensible”); *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997) (“the timing of the alleged retaliatory action must be ‘unusually suggestive’ of retaliatory motive before a causal link will be inferred.”); *Palmer*, 918 F. Supp. 2d at 199 (allegation that denial of tenure “swiftly followed” complaint about discrimination supported claim of retaliation). There is no bright line rule, however; “the answer depends on context,” *Loudermilk*, 636 F.3d at 315; and temporal proximity is not dispositive. See, e.g., *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 894 (3d Cir. 1993) (“mere passage of time is not legally conclusive proof against retaliation.”). “When temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to the intervening period for other evidence of retaliatory animus.” *Krouse*, 126 F.3d at 503-04.
c. Third-party retaliation

Finally, under certain circumstances, Title VI’s prohibition on retaliation extends to third parties, which may include lower-level recipient employees, program beneficiaries or participants, organizations with a relationship to the recipient such as contractors, and others. Agency Title VI regulations provide that “[n]o recipient or other person” may retaliate. See, e.g., 28 C.F.R. § 42.107(e) (Department of Justice); 34 C.F.R. § 100.7(e) (Department of Education) (emphasis added). Recipients have two key obligations related to third party retaliation: first, to protect individuals from potential retaliation, recipients are obligated to keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the Title VI regulations, including conducting investigations, hearings, or judicial proceedings; and second, recipients must investigate and respond when a third party engages in retaliatory conduct that Title VI prohibits. As with other types of third party conduct, such as harassment, the extent of the recipient’s obligation is tied to the level of control it has over the bad actor and the environment in which the bad acts occurred. See Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644 (1999). Agencies should make this determination case-by-case. For example, universities are required to investigate and respond adequately to retaliatory conduct by their students. See, e.g., Departments of Education and Justice letter resolving DOJ Case No. DJ 169-44-9, OCR Case No. 10126001 (May 9, 2013).5

---

5 The letter is available here: https://perma.cc/2GAC-Y3YK.