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PROVING KNOWLEDGE, NOTICE AND AWARENESS IN DISCRIMINATION AND RETALIATION CASES

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Employment law often turns upon what an employer knows, and when it knows it. For example, in a disability discrimination case, the plaintiff should demonstrate that the employer was aware of the disability. Or in a retaliation case, the plaintiff will be called on to demonstrate that the employer was aware that the plaintiff made protected complaints. Alvarado v. Donahoe, 687 F.3d 453, 459-460 (1st Cir. 2012). This article focuses on the amount and type of evidence that may be used to demonstrate an employer's knowledge.[1]

On the one hand, direct evidence of an employer's knowledge of an employee's protected status or activity is not needed; inferences may be used to establish knowledge. NLRB v. Hospital San Pablo, Inc., 207 F.3d 67, 74 (1st Cir. 2000); Fowler v. Labor Relations Commission, 56 Mass. App. 96, 100 (2002). Circumstantial evidence alone is sufficient to demonstrate awareness. Mole v. University of Mass., 442 Mass. 582, 593 (2004); Pontarelli v. Stone, 930 F.2d 104, 115 (1st Cir. 1991) (in a section 1983 retaliation case, the Court rejected the argument that there must be direct evidence that the employer had knowledge of the employee's protected conduct, stating "we have recognized, in all sorts of similar settings, that circumstantial evidence alone may be sufficient to support a finding of 'knowledge.'"). In Kiely v. Teradyne, Inc., 85 Mass. App. 431, 442 (2014), an experienced manager's knowledge of the plaintiff's MCAD charge was based on a "toe hold" of evidence, where the manager was instructed by Human

[1] This article does not address the question of when notice given to an agent of the employer imputes notice to the employer. See Quinn v. Hintlian, 4 Mass. App. 805 (1976); Restatement (Second) of Agency, § 258.

Resources to document his decision to terminate, which departed from the normal process. Another good example of circumstantial evidence establishing awareness, Joyce v. Upper Crust, 2015 U.S. Dist. Lexis 95542 (D. Mass), at 13-14 & n.4 (timing of job criticisms months after making complaint, and the employer's review of employee's phone records was sufficient to show employer knowledge of protected activity).

On the other hand, speculation that the employer may have heard rumors about an employee's protected activity may not be enough to establish knowledge. Mole, 442 Mass. at 593-594; but see Brookfield v. Labor Relations Comm'n, 443 Mass. 315, 322 (2005). The mere fact that a supervisor is employed by a Defendant does not demonstrate that the supervisor is aware of a complaint that is otherwise known to the Defendant. Medina-Rivera v. MVM, Inc., 713 F.3d 132, 140 (1st Cir. 2013). The First Circuit has indicated that where a decisionmaker denies knowledge of protected conduct, such denial controls in the absence of some evidence to the contrary. Alvarado, 687 F.3d at 460.

An employer's knowledge of certain information may support a "prima facie" claim of discrimination or retaliation. For example, a short period of time between an employer's notice of protected conduct and an adverse action may support a prima facie case of retaliation. Harrington v. Aggregate Industries-Northeast Region, Inc., 668 F.3d 25, 32 (1st Cir. 2012) (prima facie case satisfied where two months had transpired between protected conduct and adverse actions). The knowledge element of a prima facie case is satisfied with proof that high level executives learned of the employees protected status, and even in the absence of additional specific proof that the on-site managers were aware of such status. Id.

An employer's knowledge that its employee is experiencing harassment from co-workers is sufficient to establish the employer's liability for such harassment. Such knowledge may come from the employee's internal complaints, but liability is also established when the employer learns of the harassment from other sources. Fisher v. Orange, 2012 U.S. Dist. Lexis 23488 (D. Mass.), at 16-17.

TYPE OF KNOWLEDGE REQUIRED

The first step in determining the amount of evidence required to establish knowledge is to establish what type of knowledge the law requires. For example, in EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032-3033 (2015), the Supreme Court noted that the Title VII disparate treatment provision "does not impose a notice requirement," in contrast to a similar provision contained in the Americans with Disabilities Act. So, for example, an employer who rejects an applicant in order to avoid having to reasonably accommodate that applicant, has violated the law, even if the employer only has an unsubstantiated suspicion that

an accommodation would be needed. Id., at 2033 & n.3. The employer's motive is unlawful, even if the assumptions that it is based on are not solid. Id.

GENERAL CORPORATE KNOWLEDGE

One line of cases holds that an employer's general corporate knowledge of protected conduct is binding, even in the absence of evidence that specific decisionmakers were informed of such conduct. Alston v. New York City Transit Auth., 14 F. Supp. 2d 308, 311 (S.D.N.Y. 1998).

CONSTRUCTIVE KNOWLEDGE

Based on the context, an employer will be charged with notice based on constructive knowledge. In some contexts, the burden of proving constructive knowledge is low. A good example is when the employer is charged with failure to pay overtime hours that are not reported on a timesheet.

> An employer's knowledge is measured in accordance with his duty . . . to inquire into the conditions prevailing in his business. An employer does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates . . .. The cases must be rare where prohibited work can be done . . . and knowledge or the consequences of knowledge avoided. In reviewing the extent of an employer's awareness, a court need only inquire whether the circumstances . . . were such that the employer either had knowledge of overtime hours being worked or else had the opportunity through reasonable diligence to acquire knowledge. Further the cases must be rare where prohibited work can be done and knowledge or the consequences of knowledge avoided.

Reich v. Dep't of Conservation & Nat. Res., St. of Ala.,, 28 F.3d 1076, 1082 (11th Cir. 1994).

On the other hand, an employee's constructive knowledge of an EEOC exhaustion requirement is easily demonstrated, by proof that the employee retained counsel, or where the employer has conspicuously posted notice of such requirement in the workplace. Bartlett v. Dept. of the Treasury, 2014 U.S. App. Lexis 6388 (1st Cir.), at 25-26; Maillet v. TD Bank US Holding Co., 981 F. Supp. 2d 97 (D. Mass. 2013), 2013 U.S. Dist. Lexis 160114, at 17 (retention of lawyer places employee on constructive knowledge of statutory filing requirements).

USING NOTICE ISSUE TO FAVOR THE PLAINTIFF

It is possible to use the knowledge issue as a sword, to get in evidence that might otherwise be excluded. The case of Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72 (1st Cir. 2006), involved allegations that the plaintiffs were demoted due to political discrimination. The plaintiffs were permitted to show that they experienced harassment at the hands of non-decisionmakers, based on their political affiliations. The First Circuit held that the harassment constituted evidence that the plaintiff's political affiliations were known among the employees in the department, and constituted indirect evidence that the decisionmakers knew their status as well. Id. at 81. Thus, the knowledge issue may be the basis for introducing a wide swath of evidence concerning the workplace in general.

Or, one could argue that a plaintiff is entitled to discovery of other prior instances of discrimination in the workplace, to establish that the harm suffered by the plaintiff was foreseeable. See Callahan v. First Congregatoinal Church of Haverhill, 441 Mass. 699, 714 (2004).

AN EMPLOYER'S ERRONEOUS UNDERSTANDING

A defendant's erroneous perception of the situation is no defense, where, had the defendant's understanding been accurate, it would be engaging in illegal conduct. Thus, for example, where a defendant believes the plaintiff to be in the protected group, and discriminates against the plaintiff for her membership in that group, liability attaches, despite the fact that the plaintiff is not truly within the protected group. Estate of Amos v. City of Page, Arizona, 257 F.3d 1086, 1094 (9th Cir. 2001) (White plaintiff had standing to sue for a discriminatory search on the basis of Native American animus, where police officers erroneously believed the plaintiff to be Native American). Likewise, an employer is liable for retaliation, even where it erroneously believes that the plaintiff engaged in protected conduct. Brock v. Richardson, 812 F.2d 121, 123 (3rd Cir. 1986) (FLSA); Saffels v. Rice, 40 F.3d 1546, 1549 (8th Cir. 1994); Reich v. Hoy Shoe Co., 32 F.3d 361, 368 (8th Cir. 1994) (OSHA); Rojas-Velazquez v. Feigueroa-Sancha, 2012 U.S. App. Lexis 6395 (1st Cir. 2012) (section 1983 misperception of the employee's political leanings); United States ex rel. Bartz v. Ortho-McNeil Pharm., 856 F. Supp. 2d 253, 270 (D. Mass. 2012 (False Claims Act); Grosso v. City University of New York, 2005 WL 627644 (S.D.N.Y. 2005) (retaliation based on the belief that the plaintiff had engaged in protected activity); Ortiz v. John O. Butler Co., 1994 WL 240567 (N.D. Ill. 1994) (employer's belief that the employee had engaged in protected conduct).

ESTABLISHING WHETHER EMPLOYER PLANNED ADVERSE ACTION BEFORE IT BECAME AWARE OF THE PLAINTIFF'S PROTECTED ACTIVITY

Sometimes, an employer will argue that it had planned to take adverse action against an employee, even prior to the employee protected conduct. This evidence may be rebutted if the employer failed to inform the employee of the plan, and the employer failed to document its plan prior to the protected conduct. Trainor v. HEI Hospitality, LLC, 2012 U.S. App. Lexis 22554 (1st Cir.), at 14-17. On that basis, a reasonable jury could conclude that the adverse action was initiated after notice of the protected conduct.

ESTABLISHING KNOWLEDGE UNDER A RULE 12 INQUIRY

A supervisor's knowledge of the political affiliation of a group of employees' political affiliation is properly established for purposes of Rule 12, where the Complaint asserts that the group replaced by people of a different political affiliation, and where the employees were questioned by clerical workers with respect to the circumstances of their hiring to determine political affiliation, and where employees of the department commonly discussed party affiliation Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 14-15 (1st Cir. 2011). Knowledge is thereby established despite of a lack of specifics concerning the identity of the replacements, or a precise recitation of the employer's inquiries. Id. Grajales v. Puerto Rico Ports Authority, 682 F.3d 40 (1st Cir. 2012) * 15-16 (awareness of Plaintiff's political affiliation is demonstrated by the fact that he had been appointed to a high-ranking policymaking position (Secretary of State) under the PDP administration).

In Joyce v. Upper Crust, LLC, 2012 U.S. Dist. Lexis 103101 (D. Mass.), at 15, the Court held that a Complaint need not contain a specific allegation of employer knowledge of protected conduct, so long as the Complaint alleged a sufficient connection between the protected conduct and the adverse action.

NOTICE ISSUES IN JURY INSTRUCTIONS

Where knowledge or awareness is fairly addressed in the jury instructions, it is not required that the jury be provided a special verdict question focusing on the issue. Ciccarelli v. School Department of Lowell, 70 Mass. App. 787, 794-795 (2007).

ESTABLISHING AN EMPLOYER'S AWARENESS OF THE LAW

Sometimes, it is important to establish an employer's awareness of the law. For example, such awareness supports the award of punitive damages, or a willful violation of law under the FMLA or FSLA. There are a variety of ways to establish knowledge of the law.

First, it is important to understand the depth of knowledge required to satisfy the plaintiff's burden of proof. For example, with respect to awards of punitive damages, there appear to be at least three levels of knowledge required. To recover multiple damages under a c. 151B age discrimination theory, the employee should show that the employer had knowledge of the specific statute, and that the employer acted with knowledge or reason to know that its conduct violated the statute. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 107-108 & n.23 (2009).

Title VII requires that the employer must discriminate in the face of a perceived risk that its actions will violate Federal law, but permits such a finding in the presence of "general, intentional discrimination." Haddad, 455 Mass. at 107. n.23. Such standards are satisfied where the decision-makers knew of the existence of anti-discrimination laws and of the employer's policies which implement those laws. Bruso v. United Airlines, Inc., 239 F.3d 848, 858 & n. 6 (7th Cir. 2001). The First Circuit has held that knowledge of an employer's anti-discrimination policies places managers on notice of the law against discrimination for the purposes of punitive damages. Romano v. U-Haul Int'l, 233 F.3d 655, 669 (1st Cir. 2000) (discriminatory manager . . . "knew about U-Haul's anti-discrimination policies"). Many other courts hold the same.[2]

With respect to c. 151B claims other than age claims, "Massachusetts has not incorporated a requirement that the defendant be aware that its actions violate legally protected rights in order to be liable for punitive damages." Haddad, 455 Mass., at 107, n. 23. Rather, acts that are outrageous, egregious or evil in motive, even in the absence of knowledge of the statute, justify awards of punitive damages.

Take discovery on this issue. Ask managers whether they knew about the law prohibiting discrimination. Internal policies, such as those prohibiting harassment may reflect an employer's understanding that gender discrimination in general is illegal. Haddad, 455 Mass. at 108 & n.24.

Argue that pretextual reasons given by employers reflect their consciousness that they knew the true reason for its conduct is unlawful. "Resort

[2] Ogden v. Wax Works, Inc., 214 F.3d 999, 1010 (8th Cir. 2000); Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 443 (4th Cir. 2000), cert. denied, 531 U.S. 822 (2000); Alexander v. Fulton County, 207 F.3d 1303 (11th Cir. 2000) (finding that sheriff acted in the face of perceived risk of violation of federal law was supported by evidence that she knew differential treatment was illegal); Parrish v. Sollecito, 280 F. Supp. 2d 145 (S.D.N.Y. 2003) (evidence of general training in EEO protocol and hiring practices is sufficient to infer awareness of Title VII rights).

to a pretextual explanation is like flight from the scene of a crime, evidence indicating consciousness of guilt . . .." Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1069 (1996).

The falsification of some documents, and failure to retain necessary time records in a pattern that disfavored the employee, shows an awareness of the law, and willfulness of its violation. Armitage v. Dolphin Plumbing & Mechanical LLC, 510 F. Supp. 2d 763, 774 (M.D. Fl. 2007).

Many statutes require employers to post their legal obligations prominently in the workplace. See G.L. c. 151B, §§ 3A, 7. The argument should be made that postings in conformity with the law place the employer on notice of their obligations, and that managerial employees should be presumed to understand the information contained in these postings. Do discovery to confirm the existence and content of the postings in the workplace.

The fact that the employer has been investigated for statutory violations in the past will help establish their awareness of the law. Herman v. Palo Group Foster Home, Inc., 183 F.3d 468, 474 (6th Cir. 1999). An employer's prior act, such as its history of violating the law, may be offered to prove knowledge of the law, and the prior act need not be similar to the charged act, so long as the prior act was one which would tend to make the existence of the defendant's knowledge more probable that it would be without the evidence. R & B Transportation v. U.S. Dept. of Labor, 618 F.3d 37, 46 (1st Cir. 2010) (history of violations of regulations admissible to show the employer was aware of its obligations, and that the employer repeatedly violated its duty).

Consider the forms used by the employer. Their use of a standard FMLA form demonstrates their knowledge of the FMLA, and consequently their breach of the FMLA could be seen as a willful violation. Lukacinsky v. Panasonic Service Co., 2004 U.S. Dist. Lexis 25846 (D. Mass.), at 22.

ESTABLISHING AN EMPLOYER'S AWARENESS OF A FACT

The general circumstances may give rise to an inference of knowledge. For example, where a plaintiff complains about a supervisor, and the plaintiff is later transferred away from that supervisor because of the complaint, then it is reasonable to infer that the supervisor's supervisor knew about the complaint. Khan v. OneBeacon Insurance Co., 2015 U.S. Dist. Lexis 42408 (D. Mass.), at 13.

* Ambiguous Admission: Polk v. Yellow Freight System, Inc., 876 F.2d 527, 531 (6th Cir. 1989) (jury could infer that supervisor knew that the employee had complained to the civil rights agency, because the supervisor stated, "I know

where you've been."); Pettiford v. New Bedford Police Department, 26 MDLR 204, 313 (2004) (supervisor acknowledged knowing about lawsuit in a tirade, and another looked right at Plaintiff, saying "someone has complained about me").

* Active, prominent roles in protected activities generates an inference that the decisionmaker has knowledge of such protected activity. Acevedo-Diaz v. Aponte, 1 F.3d 62, 69 (1st Cir. 1993) (politically active employees); NLRB v. Hospital San Pablo, Inc., 207 F.3d 67, 74 (1st Cir. 2000) ("At a minimum, Arroyo was a committed union activist and actually solicited co-workers at the Hospital, and it is reasonable to believe that someone dropped a hint, if not more, to management. Human nature is not to the contrary"); Holsum De P.R., Inc. v. N.L.R.B., 456 F.3d 265, 270 (1st Cir. 2006) (unionizing openly, and in plain view, warrants inference of management's knowledge of protected activity); Martinez-Velez v. Rey-Hernandez, 506 F.3d 32, 44 (1st Cir. 2007) (supervisor of six months could be found to have knowledge of employee's party affiliation, where the employee spoke openly about her political views and sat in the NPP portion of the de facto segregated cafeteria).

* Article: Pettiford v. New Bedford Police Department, 26 MDLR 204, 313 (2004) (being quoted newspaper article about matters relating to protected conduct demonstrates the public nature of the complainant's protests).

* Prominent role in particular political administration. Grajales v. Puerto Rico Ports Authority, 682 F.3d 40 (1st Cir. 2012) * 15-16 (awareness of Plaintiff's political affiliation is demonstrated by the fact that he had been appointed to a high-ranking policymaking position (Secretary of State) under the PDP administration).

* Hired by a prior administration which was political opposition. Ocasio-Hernandez v. Fortuno-Vela, 2015 U.S. App. Lexis 791 (1st Cir.), at 15 (this fact helps to show the employer knew of political affiliation, but this factor in isolation does not suffice to provide notice of affiliation).

* Circumstances Surrounding employers actions. A jury may infer that a decisionmaker who hired two test engineers, but rejected the plaintiff for the same job, knew of plaintiff's MCAD complaint, where the decisionmaker was instructed by HR to document the decisionmaking process with respect to Plaintiff, but not with respect to the other candidates. Kiely v. Teradyne, Inc., Memorandum of Decision and Order on Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion to Vacate Punitive Damages Award, Suffolk Superior Court Docket No. 08-5744-D, Hines, J., October 26, 2012, at 7. The fact that an employee was known to be hired by a prior administration may be one fact that the successor administration was on notice of the employee's political

affiliation, but this factor alone does not demonstrate knowledge of political affiliation. Ocasio-Hernandez v. Fortuno-Vela, 2015 U.S. App. Lexis 791 (1st Cir.), at 15; Rego v. Maynard, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, C.A. No. 14-05623, Middlesex, ss., Fishman, J., April 6, 2016 (department rule change addressing raised issue occurred within a week of the communication, and the Supervisor and Chief spoke at least a couple times per week, "suggesting that a high probability that Sullivan mentioned the matter to Chief Corcoran").

* Co-Manager Knowledge – Downward Imputation. Travers v. Flight Services & Systems, Inc., 2013 U.S. App. Lexis 24706, at 7-8 (1st Cir.) (it may be assumed that Managers learned of a CEO's retaliatory animus and desire to terminate protected employee); Kracowec v. Prince George's County, MD, 503 F. Supp. 985, 1009-1010 (D. Mass. 1980) (where the decision-maker interacts with Acting Assistant Director for the Dept. of Human Resources, the court imputed the knowledge of the latter to the former).

* Co-Manager Knowledge – Upward Imputation: See St. Elizabeth's Hospital v. Labor Relations Commission, 2 Mass. App. 782, 783-4 (1975) (knowledge of employee's protected union activity imputed from supervisor to higher superior who made the decision to fire the plaintiff, where the union activity was widespread); Wennik v. PolyGram Group Distrib., 304 F.3d 123, 129 & n.6 (1st Cir. 2002) (there is a reasonable inference that a manager had knowledge of employee's handicap, where the decisionmaker had discussed the employee with another manager, who had known of the handicap. Moreover, others had voiced concerns over the employee's behaviour); Finney v. Madico, Inc., 42 Mass. App. 46, 51 (1997) (it may be presumed that biased managers influenced the decision to terminate an employee, even where that presumably non-biased final decision maker denies that such bias was communicated to him); MCAD and Barnes v. Sleek, Inc., ____ MDLR ____ (March 15, 2011), at 17 (knowledge of employee's protected report to a supervisor is imputed to the owner, where there is evidence that the owner was consulted in the decision to hire the employee); Rego v. Maynard, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, C.A. No. 14-05623, Middlesex, ss., Fishman, J., April 6, 2016 (department rule change addressing raised issue occurred within a week of the communication, and the Supervisor and Chief spoke at least a couple times per week, "suggesting that a high probability that Sullivan mentioned the matter to Chief Corcoran").

* Co-Worker Knowledge: Where clerical personnel were brought in by new administration to question employees, and determine their political affiliation, and a group of employees were fired and replaced by members of other political party, that is sufficient to raise a plausible inference of knowledge of political affiliation.

Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 14-15 (2011). When co-workers know of the employee's protected status, that fact can raise an inference that management knew. NLRB v. Hospital San Pablo, Inc., 207 F.3d 67, 74 (1st Cir. 2000) ("At a minimum, Arroyo was a committed union activist and actually solicited co-workers at the Hospital, and it is reasonable to believe that someone dropped a hint, if not more, to management. Human nature is not to the contrary"); Kralowec v. Prince George's County, Md., 503 F. Supp. 985, 1009-1010 (D. Md. 1980), aff'd 679 F.2d 883 (4th Cir.), cert. denied, 459 U.S. 872 (1982) (where an administrative assistant to the Director knew of the plaintiff's protected conduct, and helped prepare paperwork relating to the plaintiff's termination, the Court assumed that the Administrative Assistant would discuss this type of information with the decisionmaker). Where employees' political affiliations were well known within the department, and the culture of the small workplace was that everyone knew everyone else's political affiliations, this is sufficient to conclude that the decisionmakers knew as well. Peguero-Moronta v. Santiago, 464 F.3d 29, 48 (1st Cir. 2006). Harassment by non-decisionmakers on the basis of protected status, can help establish widespread awareness of that status. Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 81 (1st Cir. 2006).

* Departure from Usual Process. In Kiely v. Teradyne, Inc., 85 Mass. App. 431, 442 (2014), an experienced manager's knowledge of the plaintiff's MCAD was based on a "toe hold" of evidence, where the manager was instructed to document the decision, which departed from the normal process.

* EEOC rule requiring administrative notice to the employer of a filed charge within ten days of filing provides support for establishing notice of the charge. 42 U.S.C. § 2000e-5(b); Vil v. Pricewaterhousecoopers LLP, 2012 U.S. Dist. Lexis 108174 (D. Mass.), at 47.

* Handicap Notice Imputed from Request for Accommodations: Employer's knowledge of handicap may be inferred from a sufficiently direct and specific request for reasonable accommodations. Wynne v. Tufts University School of Medicine, 976 F.2d 791, 795 (1st Cir. 1992).

* Lawyer letter may provide knowledge to management. Putnam v. Saugus, 365 F. Supp. 2d 151, 172-173 (D. Mass. 2005); Rodgriguez-Garcia v. Miranda-Marin, 610 F.3d 756, 768-769 (1st Cir. 2010) (lawyers letters to defendant placed defendant on notice of protected conduct, despite the defendant's denial that he received the letters)

* Letters: Rodgriguez-Garcia v. Miranda-Marin, 610 F.3d 756, 768-769 (1st Cir. 2010) (letters to defendant placed defendant on notice of protected conduct, despite the defendant's denial that he received the letters)

* Meeting Knowledge: Bonds v. School Committee of Boston, Memorandum and Order Pursuant to Rule 1:28, 10-P-2180 (2011) (employer's knowledge of plaintiff's meeting with equity office, and the recommendations of the superintendent to reinstate plaintiff, and so there was evidence to infer knowledge of plaintiff's protected activity before the equity office); Collison v. Sun Microsystems, Inc., 18 Mass. L. Rep. 479, 481 (November 4, 2004) (where decisionmaker knew about a meeting at which the plaintiff engaged in protected conduct, it may be inferred that the decisionmaker knew of the protected conduct); Putnam v. Saugus, 365 F. Supp. 2d 151, 172-173 (D. Mass. 2005) (where an employer is placed on notice of the employee being scheduled to testify before an ethics committee, that knowledge is sufficient to place the employer on notice of the later occurring protected conduct, given that the subject of the testimony was widely discussed); Rodgriguez-Garcia v. Miranda-Marin, 610 F.3d 756, 768-769 (1st Cir. 2010) (employer is aware of an Ethics Office investigation, as well as the employee's vociferous complaints about how he was treated, the employer was on notice of the employee's participation in the Ethics investigation).

* Named in EEOC charge: Decision-maker's position as manager, combined with the reference to the decisionmaker in an EEOC charge, raises the inference that the decisionmaker was aware of the charge. Longs v. Ford Motor Co., 647 F. Supp. 2d 919, 934-935 (W.D. Tenn. 2009). An EEOC rule requiring administrative notice to the employer of a filed charge within ten days of filing provides support for establishing notice of the charge. 42 U.S.C. § 2000e-5(b); Vil v. Pricewaterhousecoopers LLP, 2012 U.S. Dist. Lexis 108174 (D. Mass.), at 47.

* Personnel Records: Cuello-Suarez v. Puerto Rico Elec. Power Auth., 988 F.2d 275, 278 n.5 (1st Cir. 1993) (personnel records contained place of birth information).

* Reporter: Where someone discovers the employee's protected status, and that person has a practice of reporting such information to the decisionmaker, a fact-finder may infer that the information was communicated in the employee's case. Where an employee was enlisted as a covert operative, reporting colleagues' attitudes toward unionization, it may be inferred that the employer knew of the plaintiff's intention to vote in favor of unionization, where the plaintiff communicated that intention to the operative. E.C. Waste, Inc. v. N.L.R.B., 359 F.3d 36, 42 (1st Cir. 2004). Where the decision-maker's second in command knew of an employee's protected complaint of discriminatory treatment, knowledge of that complaint may be imputed to the decision maker, where the second in command testified [1] that the complaint was very serious; [2] that he had a practice of informing the decision-maker of important matters; [3] that he

informed others in positions of authority, and [4] that he was "pretty sure" that he spoke to the decision-maker about an incident upon which the complaint was based. Pontarelli v. Stone, 930 F.2d 104, 115 (1st Cir. 1991). A jury may assume that information sent to the employer's lawyer would be communicated to the decisionmaker, who was interacting with the lawyer at the time. Ciccarelli v. School Department of Lowell, 70 Mass. App. 787, 794 (2007).

* Rumors: Pettiford v. New Bedford Police Department, 26 MDLR 204, 313 (2004).

* Small Plant Doctrine, where the size of the plant, as well as other considerations, make it likely that the employer observed the employee's protected activity. Fowler v. Labor Relations Commission, 56 Mass. App. 96, 100 n.7 (2002).

* Suspicion: Where there is evidence that the decisionmaker suspected the employee of engaging in protected activity, that it sufficient knowledge of awareness. Hernandez v. Spacelabs Med., Inc., 343 F.3d 1107, 1113-1115 (9th Cir. 2003).

* Threat to Complain: Where an employee threatens to complain to the government, and later a governmental investigation is initiated, a jury could infer that the employer understood that the employee complained to the government. Simas v. First Citizens' Fed. Credit Union, 170 F.3d 37, 45 (1st Cir. 1999); Vieques Air Link, Inc. v. U.S. Dept. of Labor, 437 F.3d 102, 107 (1st Cir. 2006); See Gifford v. Atchison, Topeka & Santa Fe Railway Co., 685 F.2d 1149, 1155-56 n. 3 (9th Cir. 1982). Furthermore, where an employer is placed on notice of the employee being scheduled to testify before an ethics committee, that knowledge is sufficient to place the employer on notice of the later occurring protected conduct, given that the subject of the testimony was widely discussed. Putnam v. Saugus, 365 F. Supp. 2d 151, 172-173 (D. Mass. 2005).

* Timing of Adverse Action, can help demonstrate knowledge. Fowler v. Labor Relations Commission, 56 Mass. App. 96, 100 (2002); St. Elizabeth's Hospital v. Labor Relations Commission, 2 Mass. App. 782, 783-4 (1975); Joyce v. Upper Crust, 2015 U.S. Dist. Lexis 95542 (D. Mass), at 13; Hennagir v. Utah Dep't of Corr., 587 F.3d 1255, 1267 (10th Cir. 2009); Ferguson v. Middle Tennessee State University, 451 S.W.3d 375 (2014).

ESTABLISHING AN EMPLOYEE'S AWARENESS THAT HIS OR HER MISCONDUCT IS CONTRARY TO THE EMPLOYER'S INTERESTS

* Specific acts and omissions of the worker which adversely affect the employer's interest can demonstrate through inference that the employee was aware that those acts or omissions intentionally were contrary to the interests of the employing unit. Barrett v. Dept. of Unemployment Assistance, 2013 Mass. App. Unpub. Lexis 764, at 6-7.

PUNITIVE DAMAGES

* Falsely denying knowledge of protected conduct, to cover up wrongdoing, justifies punitive damages. Ciccarelli v. Sch. Dept., 70 Mass. App. 787, 798 (2007)