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ARE THE FLOODGATES OPEN FOR RETALIATION CLAIMS?

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Retaliation claims have been on the rise for more than a decade. According to the U.S. Equal Employment Opportunity Commission, only 15.3% of the charges of discrimination filed with the agency in 1992 alleged retaliation. By 2005, retaliation claims were included in nearly 30% of all charges of discrimination.

The boom in retaliation claims is partially explained by the class of potential claimants. The retaliation provisions of many labor and employment statutes extend to all persons and not merely to those for whose protection the statutes were enacted. Indeed, supervisors and human resource officials are common claimants of retaliation.

The explosion is also explained by the breadth of protection afforded by anti-retaliation provisions. A person can engage in legally protected conduct based upon a good faith belief that an employer has violated the law, even if the belief is erroneous. Retaliation can often be inferred from nothing more than a short proximity in time between the protected activity and the challenged action.

HOLDING BACK THE WATERS

Against this tide, several Circuit Courts of Appeal developed jurisprudence in recent years limiting the types of harms which were actionable under anti-retaliation provisions. Five of the 12 Circuit Courts limited actionable harms to "adverse employment actions." The Fifth and Eighth Circuits adopted the most restrictive approach by limiting retaliation claims

to serious actions "such as hiring, granting leave, discharging, promoting, and compensating."

These limitations long served as successful grounds for the dismissal of retaliation claims. In the Fifth and Eighth Circuits, summary judgments were routinely granted to employers for retaliation claims based upon lesser employment actions, such as reprimands, critical performance evaluations, menial or arduous job assignments, threats of discharge, and workplace harassment which did not result in constructive terminations. The prospect of dismissal before trial likely deterred many potential plaintiffs and their counsel from filing marginal retaliation claims.

THE GATEKEEPER'S DECISION

A challenge to the limitations placed upon retaliation claims by these Circuit Courts of Appeals finally made its way to the U.S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*. On June 22, 2006, the Court answered two questions regarding the scope of retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII").

Retaliation Away From Work: The first question asked whether the anti-retaliation provisions of Title VII bar only discrimination in employment. The Supreme Court said no. The Court reasoned that extending the anti-retaliation provisions beyond the workplace was justified because "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."¹

Non-Economic Retaliation: The second question concerned the level of seriousness to which non-economic harm must rise in order to be actionable retaliation. The Court answered: "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse." The Court observed that "context matters" and cited

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two examples:

Example: “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-aged children.”

Example: “A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s advancement might well deter a reasonable employee from complaining about discrimination.”

The Context Before the Court: Before the Court was a jury verdict which found that two of Burlington’s actions amounted to retaliation: A reassignment from forklift duty to standard track laborer tasks and a 37-day suspension without pay.

As to the first action, the Court noted that the jury had before it considerable evidence that the track labor duties were “by all accounts more arduous and dirtier”; that the “forklift operator position required more qualifications, which is an indication of prestige”; and that “the forklift operator position was objectively considered a better job.” Based upon this evidence, the Court found that a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.

As to the second action, the Court rejected the argument that the 37-day suspension was not actionable because the employee was subsequently reinstated with backpay. According to the Court, “many reasonable employees would find a month without a paycheck to be a serious hardship.” Thus, the jury’s conclusion that the 37-day suspension without pay was materially adverse was found to be a reasonable one.

The Supreme Court let the lower court judgment stand. The price paid by Burlington for a one-month suspension with pay and a dirty job was nearly \$100,000.

IMPACT ON OTHER STATUTES

The importance of the *Burlington Northern* ruling is not limited to Title VII. Other statutes with similar anti-retaliation provisions include the following:

Age Discrimination in Employment Act, outlawing employment discrimination against persons over the age of 40.

Americans with Disabilities Act, providing employment protections to persons with disabilities and persons known to have a relationship or association with a disabled person.

Family and Medical Leave Act, governing leave from employment for medical reasons, the birth or adoption of a child, and the care of a child, spouse, or parent who has a serious medical condition.

Employee Retirement Income Security Act, regulating employee benefits.

It is likely, therefore, that the opinion will be relied upon as persuasive precedent in suits alleging retaliation under these statutes.

OPEN FLOODGATES?

The Supreme Court did more than remove barriers which had previously existed to the prosecution of retaliation claims; the Court articulated a standard which will, at least in the short term, invite rather than deter litigation. The declaration that “context matters” hinders the ability of courts to fashion universal rules for analyzing retaliation claims on summary judgment. The Supreme Court’s opinion suggests that an alleged harm may be actionable in some cases, but not others. In the absence of universal rules, some courts may allow questionable retaliation claims to be decided by a jury, rather than by summary judgment. If the prospect of summary judgment is viewed as being less likely by plaintiffs or their counsel, more retaliation claims will be filed.


To be sure, conservative courts such as the Fifth and Eighth Circuits will likely develop universal rules in the future for disposing of marginal retaliation claims on summary judgment. The development of such rules, however, will take time. In the meantime, there will be little to deter the filing of retaliation suits.

Amongst the types of retaliatory conduct which employees will now more frequently complain are the following:

- Arduous or menial job assignments.
- Critical performance evaluations.
- Inadequate training or supervision.
- Verbal or written reprimands.
- Threats of demotion or termination.
- Unwelcome harassment at or away from work.
- Threats or actions involving physical harm or criminal prosecution.

PREPAREDNESS PLANNING

All employers should already have in place a written policy which prohibits retaliation against employees who report unlawful practices or who participate in government proceedings. In the wake of the *Burlington Northern* opinion, employers are also encouraged to take the following measures:

- Initiate retaliation training for supervisors.
- Implement codes of conduct for employee interaction away from the workplace.
- Require closer scrutiny by management and legal counsel of employment decisions affecting persons who have assisted or taken part in enforcement proceedings or who have expressed opposition to alleged unlawful practices. 

FOOTNOTE

- 1) The Court cited with approval two cases in which harm outside the workplace was found to be actionable. See, e.g., *Rochon v. Gonzalez*, 438 F.3d 1211, 1213 (D.C. Cir. 2006) (FBI retaliation against employee “took the form of the FBI’s refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife”); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination)