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Retaliation: Supreme Court Adopts a "Reasonable Employee" Standard

On June 22, 2006, the Supreme Court significantly broadened the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, paving the way for many more retaliation claims in the Second and Third Circuits (which include the Tri-State area). In a unanimous ruling, the Court expanded the definition of retaliation to include any "materially adverse" action that might "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405. The employee-friendly ruling in *Burlington* resolves a split among the various federal Courts of Appeals, but creates new uncertainty for Tri-State employers.

The Supreme Court granted certiorari in this case to resolve disagreement among the Courts of Appeals over the "scope of the Act's anti-retaliation provision, particularly the reach of its phrase 'discriminate against.'" The anti-retaliation section of Title VII prohibits an employer from "discriminat[ing] against any of his employees or applicants for employment…because he has opposed any practice" made illegal under Title VII "or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. Pub. L. 88-352, §704, 78 Stat. 257, as amended, 42 U.S.C. §2000e-3(a). Over time, different Circuits had applied very different standards in determining whether a plaintiff had met the threshold requirements to pursue a claim of retaliation.

For instance, prior to *Burlington*, the Second, Fourth and Sixth Circuits had required an employee to show an "adverse employment action" in order to establish a *prima facie* case of retaliation. Both the Second and Sixth Circuits defined an adverse employment action as "a materially adverse change in the terms and conditions of employment." *Schiano v. Quality Payroll*, 445 F.3d 597, 609 (2d Cir. 2006). Examples of such materially adverse changes included "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Fairbother v. Morrison*, 412 F.3d 39, 56 (2d Cir. 2005).

Meanwhile, other Circuits had applied a more expansive standard. For example, the Seventh and D.C. Circuits had required plaintiffs only to "show that the 'employer's challenged action would have been material to a reasonable employee,' which in contexts like the present one means that it would likely have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (citing *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)). The Supreme Court also noted the different standard used in the Ninth Circuit, which, "following EEOC guidance, had said that a plaintiff must simply establish 'adverse treatment that is based on a retaliatory motive and is

reasonably likely to deter the charging party or others from engaging in protected activity.'" (citing *Ray v. Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000)).

The Facts

Burlington came before the Court on appeal from an *en banc* ruling by the Court of Appeals for the Sixth Circuit. That ruling upheld an award of $43,500 in damages to Sheila White against Burlington Northern and Santa Fe Railway Company. White, the only woman working in Burlington's Maintenance of Way department, had been hired in June 1997 as a "track laborer" with the primary responsibilities of "removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way." Despite her position, Burlington's roadmaster, Marvin Brown, had assigned White the primary responsibility of operating a forklift soon after she was hired.

In September 1997, White complained of sexual harassment by her immediate supervisor, Bill Joiner. According to White, Joiner made improper and offensive comments to her in the presence of male colleagues and repeatedly told her that their department was no place for a woman. A subsequent investigation by Burlington resulted in a 10 day suspension as well as mandatory sexual harassment training for Joiner. Brown thereafter met with White to inform her of the discipline imposed on Joiner and advised her that during the investigation, several of White's co-workers had complained that the "cleaner" and "less arduous" job of forklift operator should go to a "more senior man." Consequently, Brown reassigned White to perform "standard track laborer tasks" and removed her from forklift duties. Notably, White retained the same benefits and pay following the reassignment.

Claiming that her reassignment reflected both gender-based discrimination and retaliation, White filed a charge with the Equal Employment Opportunity Commission (EEOC) in October. In December, White filed a second retaliation complaint with the EEOC, alleging that Brown was "monitoring her daily activities" and "had placed her under surveillance." This second charge was mailed to Brown on December 8. Subsequently, White's immediate supervisor, Percy Sharkey, disagreed with her over a minor work-related issue, and Sharkey informed Brown of the incident, claiming that White had been insubordinate. Brown responded by immediately suspending White without pay. White filed a grievance through her union and was reinstated after 37 days with full backpay for the suspension.

White thereafter filed a Title VII action against Burlington in the District Court for the Western District of Tennessee. White claimed that changing her job responsibilities and the unpaid 37 day suspension amounted to unlawful retaliation. A jury ruled in her favor and awarded her $43,500. On appeal, the Sixth Circuit panel ruled 2-1 to reverse the judgment, holding that White had not suffered retaliation because she had not shown any adverse employment action, given that she ultimately received all of the pay that was due to her and that the reassigned responsibilities were part of her job description. Sitting *en banc*, the full Court of Appeals for the Sixth Circuit then vacated the panel's ruling and voted to reinstate the jury verdict, but did not agree on a single standard to apply in determining whether retaliation had occurred.

The Decision

The Supreme Court ruled for White, concluding that Title VII's "anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." The provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from claiming or supporting a charge for discrimination."

The ruling included a substantive discussion of the statutory language, Congressional intent and the EEOC's historical interpretations of the anti-retaliation provision. Specifically, the Court addressed and rebuffed Burlington's argument that the anti-retaliation section should be interpreted along the same lines as the anti-discrimination provision, finding that "Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm;" the scope of the anti-discrimination provision does not.

The Court also rejected Burlington's argument that both portions of Title VII focus on the workplace and require "a link between the challenged retaliatory action and the terms, conditions, or status of employment." The Court noted that "the two provisions differ not only in language but in purpose as well. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct."

The Court further stated that retaliation cannot be prevented by "focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace."

The Court adopted the standard used by the Seventh and D.C. Circuits, holding that for an alleged harm to constitute actionable retaliation, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse," *i.e.*, the conduct "must dissuade a reasonable worker from making or supporting a charge of discrimination." The Court did caution that "[w]e speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American workplace.'" (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)). The Court added that, "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."

However, the Court provided little guidance in distinguishing between actionable retaliation and "trivial harms," and indeed noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." The Court provided a few examples involving a schedule change and a failure to invite an employee to lunch. The Court stated that a schedule change might not affect most employees, but it would "matter enormously to a young mother with school age children." The Court then described a supervisor's refusal to invite an employee to lunch as a "normally trivial" "nonactionable petty slight." Yet to exclude an employee from a "weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." Thus, the Supreme Court has essentially ruled that whether a challenged action amounts to retaliation will depend very much upon the individual characteristics of the individual plaintiff.

Applying its newly adopted standard to the facts of White's case, the Court found that the 37 day suspension and reassignment to the "standard track laborer tasks" amounted to actionable retaliation. Specifically, even though White was

issued full backpay and her reassignment was technically within the same job description, each action was materially adverse under the particular circumstances of the case.

In reference to White's reassignment to the "more arduous and dirtier" duties of the track laborer position, the Court stated that "[c]ommon sense suggests that one good way to discourage an employee such as White from bringing discrimination would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable." The Court also stated that forklift operator position was more prestigious and "objectively considered a better job." Therefore, "a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee."

Discussing White's suspension without pay for 37 days, the Court noted that White described the time as "the worst Christmas I had out of my life. No income, no money, and that made us all feel bad." Dismissing the fact that White was reimbursed for her backpay, the Court stated that "White did receive backpay" but "had to live for 37 days without income" and "did not know during that time whether or when [she] could return to work." The Court concluded that the jury correctly found the suspension to be materially adverse because a "reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former" and added that "[m]any reasonable employees would find a month without a paycheck to be a serious hardship."

The Impact

Although the full impact of *Burlington* has yet to be determined, there is no doubt that in the short term, the decision will further increase the already-rising number of retaliation claims being pursued against employers. Additionally, because the new standard requires a case-by-case assessment of each individual plaintiff's circumstances, courts may be more likely to deny summary judgment and instead permit these cases to proceed to trial. Thus, retaliation cases are likely to become more costly for employers to litigate. Moreover, until lower courts begin applying the *Burlington* decision to specific claims in significant numbers, employers face considerable uncertainty regarding which claims may be sufficient to withstand a dispositive motion.

Employers should note that even though White likely would have been able to show an adverse employment action under the former Second and Third Circuit standard, the *Burlington* ruling is so broadly based that it has taken retaliation outside of the workplace. In other words, actions that are not job-related, or that would not previously have qualified as "adverse" or "materially adverse," may nonetheless now be considered retaliatory. At a minimum, employers should undertake additional training of their managers and supervisors with regard to this now more expansive definition of retaliation.

Employment Discrimination: New NYC Provisions Impose Greater Burdens on Employers

The New York City Human Rights Law is a civil rights statute that, among other things, prohibits discrimination in the workplace. Already more extensive than its federal and state counterparts, the City law's scope was expanded further with the passage of The Local Civil Rights Restoration Act of 2005 (Act). The Act amended the Human Rights Law in a number of ways that may have significant consequences for New York City employers.

Prior to the Act, claims filed pursuant to the city's Human Rights Law were analyzed by the courts in the same manner as those brought under New York State and federal anti-discrimination statutes. Concluding that this approach resulted in the City narrowly construed, the Act opened with a

directive that the City law be "construed independently" from other similar or even identical New York State or federal statutes. It provided further that the state and federal standards are intended to be only "a floor below which the City's Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise." As a result, employers will no longer be able to rely entirely on the analyses applied by federal courts in similar cases, despite the fact that federal courts issue many more written employment discrimination decisions. Under the new amendment, a state court hearing a claim under the City Human Rights Law is free to ignore a federal decision that is seemingly on point and rule in a manner that affords employees greater rights.

In addition, while the City law already prohibited discrimination based upon marital status or sexual orientation, the Act amended the law to add "partnership status" to the list of protected classes. This addition was intended to describe same-sex domestic partnerships, and may impact an employer's obligations in the area of employee benefits to the extent that federal law does not have pre-emptive effect.

The Act also substantially modified the analysis to be applied to retaliation claims. It was previously a near universal requirement, especially in New York, that an aggrieved party alleging unlawful retaliation demonstrate that he or she suffered a materially adverse employment action. This usually required evidence of a demotion, reduction in compensation or some other tangible consequence. The amendment to the City law explicitly eliminated this requirement. An individual alleging unlawful retaliation now need only show that the challenged act was "reasonably likely to deter a person from engaging in protected activity." Notably, the Supreme Court followed this broader approach when, in July 2006 in the case of *Burlington N. & Santa Fe Ry. Co. v. White*, the Court expanded the scope of federal anti-discrimination law in a similar fashion, as noted above.

Under this more lenient standard, employees will likely argue - and courts analyzing claims under the City Human Rights Law may hold - that seemingly minor, or non-tangible employment actions that would not amount to "materially adverse employment actions" may now be held to be acts of retaliation under the broader standards of the City Human Rights Law. For example, while a mere lateral transfer without any attendant reduction in salary may not amount to a "materially adverse employment action" under federal and state law, a court analyzing that same issue under the amended City Human Rights Law may find that even without a diminution in salary, a question of fact exists as to whether the transfer was reasonably likely to deter a person from engaging in protected activity. This broader, more lenient standard will make it increasingly more difficult for employers to prevail on summary judgment in retaliation cases, which in turn may lead to the filing of more retaliation cases.

Finally, the City law provides that a plaintiff is no longer required to win his or her court case outright in order to be awarded attorneys' fees. The recent amendments provide that a plaintiff whose action was a catalyst for a change in an employer's policy may be considered a prevailing party for the purposes of awarding attorneys' fees. As a result of this change, for example, an employer who settles a discrimination case prior to trial may nonetheless face responsibility for the plaintiff's attorneys' fees if the terms of the settlement bring about a change in the challenged employment policy.

The precise impact of these amendments - and how the courts will analyze and interpret the amendments - remains to be seen. We will continue to monitor the courts' interpretation of these amendments and to advise our clients on best practices in view of these developments.

In Brief

NASD Arbitration: NY Court of Appeals Asked to Rule on Whether Statements in U-5 Termination Forms are Privileged

When an NASD member firm terminates a registered employee, the firm must complete a Form U-5 that states the reason for the termination and is retained on file by the NASD. In late June, the Second Circuit Court of Appeals issued a ruling in *Rosenberg v. MetLife, Inc. et al.*, 453 F.3d 122 (2d Cir. 2006), in which it formally asked the New York State Court of Appeals to decide whether, under New York law, "statements made by an employer on a Form U-5 [are] subject to an absolute or a qualified privilege" that would protect the member firm from defamation claims.

Rosenberg, a former MetLife employee, challenged his termination on various grounds. The U-5 form filed in connection with Rosenberg's termination stated that "an internal review disclosed [that] Rosenberg appeared to have violated company policies and procedures involving speculative insurance sales and possible accessory to money laundering violations." Rosenberg and others whose U-5 forms contained identical language claimed that such statements constituted libel. The District Court for the Southern District of New York dismissed the libel claims on summary judgment, finding that statements made in a Form U-5 are subject to an absolute privilege, and therefore cannot form the basis of any defamation claim.

The Second Circuit disagreed, noting that the application of privilege is a matter of state law and finding that New York has yet to definitively rule in this area. The Court observed that while there is a compelling public interest in encouraging NASD member firms to be candid in completing U-5 forms, the application of an absolute privilege also creates the possibility for "substantial abuses" by unscrupulous employers by eliminating any liability for misstatements. The Court wondered whether the better course would be to apply only a "qualified" privilege that would offer some protection to innocent employees, as some lower courts in New York have ruled.

To date, the New York Court of Appeals has not decided whether it will accept the federal court's invitation to take up this issue. We will continue to monitor developments in this area.

Employers of Minors Must Record Proof of Age

Section 135 of the New York State Labor Law now requires employers to maintain proof of age for all employees between the ages of 18 and 25. N.Y. Lab. Law § 135(2). Acceptable forms of proof include a driver's license, a certificate of age issued by an employment certificating official, or other government-issued documentation. Id. In addition, the legislature amended the law to authorize the imposition of criminal fines and penalties for failure to verify an employee's age in compliance with the statute. Id. § 145. Prior to these amendments, proof of age was not mandatory, and violations of § 135 only resulted in civil penalties. See New York Sponsor's Memorandum, S.B. S3250, 228th Leg. (N.Y. 2005). The purpose of these amendments is to deter employer violations of child labor laws.

Going forward, proof of age should be collected from younger employees after an offer has been extended and accepted, but prior to the actual commencement of work. This may not constitute a substantial change in current practices, as the same documentation used for I-9 forms (such as passports and driver's licenses) may be sufficient for age verification as well. Notably, employers should not request such proof until after an employment offer has extended, as doing so could constitute a violation of the New York State Human Rights Law, which permits age discrimination claims from anyone 18 years of age or older. Of course, any offer can and should be made contingent on the employee's providing proof that he/she is eligible to work, including proof of age. Finally, employers should maintain file copies of the documentation used to prove age, as the Department of Labor may request such records in the future.

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