RETALIATION CLAIMS AFTER *BURLINGTON NORTHERN V. WHITE*

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2007 EMPLOYMENT LAW SYMPOSIUM

July 20, 2007
Dallas, Texas

I. RETALIATION CLAIMS AFTER *BURLINGTON NORTHERN V. WHITE*

A. Title VII

Generally, in discussing work place retaliation claims there are two key provisions of Title VII of the of the Civil Rights Act of 1964 that are at issue. Section 703(a) forbids employment discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Section 704(a) forbids "discriminat[ion] against" an employee or job applicant who has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. § 2000e-3(a). Although the two provisions are intertwined with respect to retaliation claims, the language of the anti-discrimination provision differs from that of the anti-retaliation provision in several important ways.

1. Section 703(a) – "Anti-Discrimination Provision"

Section 703(a) prohibits a wide range of discriminatory employment practices based upon a person's "race, color, religion, sex, or national origin." Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a)(1). Section 703(a) states in pertinent part:

> It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Id. The purpose of this anti-discrimination provision is simple and straightforward: it "seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Burlington Northern & Santa Fe Railway v. White*, --- U.S. ----, 126 S.Ct. 2405, 2412, 165 L.Ed.2d 345 (2006).

In *Burlington Northern*, the Supreme Court reiterated that because of the very nature of the conduct that this provision is designed to prevent, the only conduct that is prohibited relates solely to work place discrimination. *Id*. Accordingly, in order to determine if an employer violated Section 703 (a), Courts are confined to consider only discriminatory conduct that occurred in the employment context. *Id*. As the Supreme Court noted, "(t)he substantive provision's basic objective of 'equality of employment opportunities' and the elimination of practices that tend to bring about 'stratified job environments' would be achieved were all employment-related discrimination miraculously eliminated." *Id*. (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

2. Section 704(a) – "Anti-Retaliation Provision"

Section 704(a) prohibits discrimination against a person who has participated in a Title VII participation or proceeding. Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a). Section 704 (a) provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... 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."

Id. The anti-retaliation provision's objective is to prevent employers from "interfering (through retaliation) with an employee's efforts to secure or advance the basic guarantees" and protections provided by the anti-discrimination provision. *Burlington Northern*, 126 S.Ct. at 2412. In *Burlington Northern*, the Supreme Court clearly defined the fundamental differences between the two provisions' objectives. The Supreme Court succinctly stated that

the anti-discrimination "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." *Id*.

In noting differences between the provisions' objectives and the language of each provision, the Supreme Court held that the anti-retaliation provision does not confine the conduct that it forbids to those that are occur solely in the workplace or are only employment related. *Id*. at 2406.

B. ***Burlington Northern & Santa Fe Railway v. White*, --- U.S. ----, 126 S.Ct. 2405 (2006).**

1. Underlying Facts of Burlington Northern

In September 1997, the Plaintiff, Sheila White, a forklift operator, complained to Burlington Northern & Santa Fe Railway Company officials that her immediate supervisor made insulting, inappropriate gender based discriminatory remarks to her in front of her male colleagues. After an internal investigation, Burlington suspended the supervisor and ordered him to attend a sexual-harassment training session. *Id*. at 2409. Upon informing White about the supervisor's discipline, a Burlington official also informed her that she was being transferred to work as a regular track worker, a more physically demanding job than operating a forklift. The Burlington official explained that the reassignment reflected co-worker's complaints that, in fairness, a "'more senior man'" should have the "'less arduous and cleaner job'" of forklift operator. *Id*.

Shortly thereafter, White filed a complaint with the Equal Employment Opportunity Commission ("EEOC") asserting that the reassignment of her duties constituted an unlawful gender-based discrimination and retaliation for her having earlier complained about her supervisor. She subsequently filed a second retaliation charge with the EEOC, asserting that Burlington had placed her under surveillance. *Id*.

A few days later, White and another supervisor had a disagreement about which truck should transport White from one location to another. The facts of the disagreement were in dispute, but as a result of the disagreement White was suspended for 37 days without pay for insubordination. Burlington eventually concluded that the Plaintiff had *not* been insubordinate. Burlington reinstated White to her position and awarded her backpay for the 37 days she was suspended. White filed an additional retaliation charge with the EEOC based on the suspension. *Id*.

After exhausting her administrative remedies, White filed a Title VII action against Burlington alleging that Burlington's actions, (1) changing her job responsibilities, and (2) suspending her for 37 days without pay amounted to unlawful retaliation in violation of Title VII. A jury found in White's favor on both of these claims and awarded her $43,500 in compensatory damages, including $3,250 in medical expenses. *Id*.

On appeal, a divided Sixth Circuit panel found in Burlington's favor on both retaliation claims and reversed the judgment of the district court. However, the full Court of Appeals vacated the panel's decision, and heard the matter en banc. The full court affirmed the district court's judgment in Plaintiff's favor on both retaliation claims. Although all members of the en banc court affirmed the district court's judgment, the members differed on the standard to apply in a Title VII retaliation case. *Id*.

The Supreme Court granted certiorari to resolve the various conflicting opinions between the Circuit Courts regarding the application of the anti-retaliation provision of Title VII. *Id*. at 2407-10. In doing so, the Supreme Court unanimously held that the "anti-retaliation provision does *not* confine the conduct it forbids to those that are related to employment or occur at the workplace." *Id*. at 2406 (emphasis added). Despite Burlington's argument that White's retaliation claim lacked statutory significance and was not actionable because Burlington ultimately reinstated White with back pay, the Supreme Court still ruled in favor of White. The Court reasoned that an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually receives back pay because a reasonable employee who had to choose between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. *Id*. at 2417. Accordingly, the Court concluded that there was sufficient evidence to support the jury's conclusion that the 37 day suspension without pay was materially adverse. *Id.* Justice Breyer wrote for the majority.

The Supreme Court's ruling tilts the balance of power in employment settings toward employees by establishing a broader legal standard for retaliation claims. Thus, the Court's ruling makes it much easier for employees to show they have suffered retaliation after complaining of workplace discrimination.

2. Circuit Courts' Previous Conflicting Standards

The Supreme Court noted that it needed to resolve the different conclusions the Circuit Courts have come to "about whether the challenged action has to be employment or workplace related *and* about how harmful that action must be to constitute retaliation." *Id*. at 2410 (emphasis added).

a. Prior Application of the Anti-Retaliation Provision by the Third, Fourth and Sixth Circuit Courts

Prior to the Supreme Court's decision in *Burlington Northern*, the Third, Fourth, and Sixth Circuit Courts had held that the standard that should be applied in retaliation cases requires that the challenged employer's actions must "resul[t] in an adverse effect on the 'terms, conditions, or benefits' *of employment*." *See* id., citing *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789, 795 (6th Cir. 2004); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997) (emphasis added).

b. Prior application of the Anti-Retaliation Provision by the Ninth Circuit Court

The Ninth Circuit required a plaintiff to 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.'" *See id*. at 2411 citing *Ray v. Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000)).

c. Prior application of the Anti-Retaliation Provision by the Seventh and D.C. Circuit Courts

The District of Columbia and Seventh Circuits' application was slightly different than the Ninth Circuit's and required a plaintiff to show that the "'employer's challenged action would have been material to a reasonable employee,'" which meant "it would likely have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *See id*. at 2410-11 citing *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *see Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006).

d. Prior application of the Anti-Retaliation Provision by the Fifth and Eighth Circuit Courts

The Fifth and the Eighth Circuits had adopted the harshest approach of the Circuit Courts. They employed an "ultimate employment decisio[n]" standard, which limits actionable retaliatory conduct to acts "'such as hiring, granting leave, discharging, promoting, and compensating.'" *See id*. at 2410 citing *Mattern v. Eastman Kodak Co*., 104 F.3d 702, 707 (5th Cir. 1997); *see Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997)).

3. Northern Burlington Holding - Supreme Court's Application of the Anti-Retaliation Provision

a. Anti-Retaliation Provision is not limited to an employer's employment-related or workplace action

As noted above, the Supreme Court held that "the application of Title VII retaliation provision is not limited to an employer's employment-related or workplace action." *Northern Burlington*, 126 S.Ct. at 2405. In reaching its decision, the Court compared the key language of Title VII's anti-discrimination provision with the anti-retaliation provision. It noted that the anti-discrimination provision "explicitly limits the scope of that provision to actions that affect employment or alter the conditions of the workplace." However, the Supreme Court also noted that "no such limiting words appear in the anti-retaliation provision." *Id*. at 2411-12.

The Supreme Court further noted that the objective of the anti-retaliation provision cannot be met by only concentrating upon an employer's actions that confined to employment and the workplace. The Court specifically stated that "(a)n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." *Id*.

The Court provided examples in support of its decision. The Court cited cases such as *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination), and *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006) (Retaliation against FBI agent took the form of the FBI's refusal, contrary to policy, to investigate a death threat against the agent).

b. Anti-Retaliation Provision require showing of actions "materially adverse" to a reasonable employee

The Supreme Court also determined that for a Plaintiff to prevail on a retaliation claim, he or she must show that a reasonable employee would have found the challenged employer's action was materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 215 citing *Rochon*, 438 F. 3d at 1219).

The Court spoke of material adversity because it believed it was important to separate significant from trivial harms. The Court reiterated that Title VII does not set forth "a general civility code for the American workplace." *Id*. citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998)). Furthermore, it noted that anti-retaliation provision is not intended to protect employees "those petty slights or minor annoyances that often take place at work and that all employees experience." *Id*. (citing B. Lindemann & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). *Id*.

The Court adopted an objective standard, so an individual employee's "unusual subjective feelings" will not be relevant. The focus is on the materiality of the employer's actions and the perspective of a reasonable employee in the plaintiff's position. The Court referred to the reactions of a *reasonable employee* because it believed that the provision's standard for judging harm must be objective so that it could be judicially administrable. The Court believed that by announcing a *reasonable employee* standard Courts will be to avoid the "uncertainties and unfair discrepancies" that can plague the judiciary in attempting to determine each individual plaintiff's subjective emotions. *Id.*

The Court reasoned that the standard should be in general terms because the importance of any given act of retaliation often depends upon each particular set of circumstances. The Court stated "*(c)ontext matters*. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 2415 (emphasis added).

To illustrate, the Court offered two examples of conduct now potentially deemed as retaliatory: a schedule change in an employee's work schedule may not matter to some employees, but may be enormously significant to a young mother with minor children; and, a supervisor's refusal to invite an employee to lunch is normally trivial, but excluding that employee from a weekly training lunch might well deter a reasonable employee from complaining about discrimination. *Id*. at 2415-16. Therefore, the Court established the general reasonable employee standard rather than providing prohibited acts, because an "act that would be immaterial in some situations is material in others." *Id*. at 2416 citing *Washington, 420 F.3d* at 661.

Given these examples, it appears that the Court has established a test for retaliation that may well require a case-by-case determination on claims of retaliatory conduct. As Justice Alito noted in his concurring opinion, this reasonable employee standard will not necessarily aide in the judicial administration of retaliation cases and may actually causes such cases to become more problematic. Justice Alito opined that "the majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim. The majority's illustration introduces three individual characteristics: age, gender, and family responsibilities. How many more individual characteristics a court or jury may or must consider is unclear." *Id*. at 2421.

C. Recent Fifth Circuit Cases Interpreting *Burlington Northern*

The Fifth Circuit considered several Title VII retaliation cases in the last year since the Supreme Court's opinion in *Burlington Northern v. White* modified the Fifth Circuit's standards. In ***Lee v. Department of Veterans Affairs*, 2007 WL 1747998 (5th Cir. 2007) (unpublished)**, the court reversed and remanded a retaliation claim because it had been evaluated under the old "ultimate employment decision" standard. The issue on remand will be whether the plaintiff's claim that he received disparate training and undesirable office space as a result of his race-discrimination claim constituted impermissible retaliation.

In ***DeHart v. Baker Hughes Oilfield Opers., Inc.*, 214 Fed. Appx. 437 (5th Cir. 2007) (unpublished)**, the court held the plaintiff's retaliation claims were not actionable under Title VII, even under the new *Burlington* standard. The written warning of which the plaintiff complained (which was for insubordination, being argumentative, and excessive absenteeism) would not have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.* at 441. The record showed colorable grounds for the warning and, in fact, it did not dissuade the plaintiff from making a charge of discrimination because she made one several weeks after she received the warning. *Id.* at 442. Because the warning did not constitute an "adverse employment action," the retaliation claim failed.

In ***Equal Employment Opportunity Commission v. Stocks, Inc.*, 2007 WL 1119186 (5th Cir. 2007) (unpublished)**, the Court reversed an entire case based on the district court's erroneous refusal to submit a punitive damage claim requested by the plaintiff in a sexual harassment and retaliation case. The court found the employer/owner's comments sufficient to raise a fact issue as to malice or reckless indifference sufficient to support an award of punitive damages. *Id*.

The owner testified he had reduced her shifts because it was reported to him that she had said she would sue for sexual harassment; "that's extortion. . . . She was threatening my livelihood. . . . "I said put her on a one-week suspension, give her one shift that week and, you know, hopefully she will have learned her lesson." The court remanded for a new trial on all issues because the evidence relating to the punitive damages claim was not easily segregable from evidence of liability.

In ***Bryan v. Chertoff*** , **217 Fed. Appx. 289 (5th Cir. 2007) (unpublished)**, a pilot employed by the federal government brought an employment discrimination action, alleging claims for age and race discrimination, along with a retaliation claim based upon an hostile work environment. The United States District Court for the Western District of Texas, 2005 WL 2206129, granted summary judgment in favor of employer as to all claims. The district court declined to reach the substantive issues related to the Plaintiff's retaliation claim based upon an alleged hostile work environment concluding that no such cause of action exists in the Fifth Circuit. *Id*.

On Appeal, the Plaintiff urged the panel to recognize a retaliatory hostile work environment claim asserting that the Supreme Court's *Burlington Northern* decision counsels in favor of recognizing such a claim. The Fifth Circuit, applying the *Burlington Northern* new standard, affirmed the decision of the trial court as to both the underlying discrimination claims and the retaliation claim holding that the Plaintiff did not establish a prima facie case of hostile work environment, even under the *Burlington Northern* standard. *Id*.

"A prima facie case of hostile work environment requires the plaintiff to prove, *inter alia*, that the employee was subject to unwelcome harassment and that the employer should have known of the harassment and failed to take prompt remedial action." *Id.*, citing *Felton v. Polles*, 315 F.3d 470, 484 (5th Cir.2002). However, the 5th Circuit, in support of its decision, noted that the Plaintiff offered only trivial complaints to support his claim for a hostile work environment. For example, the Plaintiff complained that a supervisor yelled loudly in the workplace; however, according to the Plaintiff's own deposition testimony, the supervisor's yelling was directed at all employees. The Plaintiff also complained that another supervisor removed his flight jacket from his work space, which the court noted was clearly trivial "trivial and cannot support a hostile work environment claim." *Id*.

In ***Pryor v. Wolfe*, 196 Fed. Appx. 260 (5th Cir. 2006) (unpublished)**, the court held the plaintiff's

retaliation claim was actionable under either the old standard or the new *Burlington* standard and reversed the district court. It found the plaintiff's complaint – that M.D. Anderson withheld his paycheck in retaliation for his race discrimination complaint – would "almost certainly 'dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 263. Thus, a rule 12(b)(6) dismissal of this claim was improper.

In ***Easterling v. School Bd. of Concordia Parish*, 196 Fed. Appx. 251 (5th Cir. 2006) (unpublished), a** female former employee, a teacher, brought action against the School Board, alleging sex-based discrimination claims and retaliation claims. The United States District Court for the Western District of Louisiana awarded the School Board summary judgment on both the retaliation and constructive discharge claims.

On appeal, the 5th Circuit Court reversed and remanded the summary judgment as to the retaliation claim because it had been evaluated under the old "ultimate employment decision" rather than the new standard which does not confine the actions and harms it forbids to those that are related to employment." The issues to be considered on remand are whether the School Board's following actions constitute retaliatory conduct: (1) assigning the Plaintiff to two working offices ten miles apart without increasing her compensation, (2) placing her in an office that was inferior to those of other employees in her position and had a foul odor, (3) forcing her to work outdoors for the first time in her twelve-year employment history with the School Board, (4) hindering her success in her coaching efforts by removing certain students from her teams, (5) removing her privilege of writing directive memos, (6) preventing her from having weekly Friday practices, (7) preventing her from routinely doing community outings with students, (8) did not allow her access to files and records during her preparation period, (9) preventing her from reporting to other locations when needed, and (10) excluding her from school-oriented social activities; and (11) denying her a transfer to a higher paying behavioral interventionist position, and instead, hiring two applicants who lacked teacher certification but held master's degrees.