
LABOR AND EMPLOYMENT LAW UPDATE



ARE THE FLOOD GATES OPEN FOR RETALIATION CLAIMS?

Retaliation claims have been on the rise for more than a decade. By 2005, retaliation claims were included in nearly 30% of all charges filed with the Equal Employment Opportunity Commission.

The boom in retaliation claims is explained, in part, by the larger 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.

The explosion is also explained by the breadth of protection afforded by anti-retaliation provisions. A person can lodge a complaint 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 lower courts developed generally applicable rules which limited the types of harms which were actionable under anti-retaliation provisions. These limitations long served as successful grounds for the dismissal of retaliation claims by summary judgment. 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 these limitations finally made its way to the U.S. Supreme Court in *Burlington Northern & Santa Fe Rwy. 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, and affirmed that retaliatory conduct away from work can be actionable.

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 examples of how a schedule change or a work lunch snub could amount to unlawful retaliation.

THE CONTEXT BEFORE THE COURT. Before the Court was a jury verdict which found that two of Burlington's actions were retaliation: A reassignment from forklift duty to dirtier and less prestigious track laborer tasks and a 37-day suspension without pay which the employer later made with pay.

The 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:

AMERICANS WITH DISABILITIES ACT, providing employment protections to persons with disabilities and persons known to have a relationship or association with a disabled person.

AGE DISCRIMINATION IN EMPLOYMENT ACT, outlawing employment discrimination against persons over the age of 40.

EMPLOYEE RETIREMENT INCOME SECURITY ACT, regulating employee benefits.

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.

It is likely, therefore, that the opinion will be relied upon as 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” makes the development of generally applicable rules for disposing of retaliation claims on summary judgment more difficult. If summary judgments become less frequent, potential claimants and their counsel will have little to deter them from filing marginal claims.

Amongst the types of “retaliatory” conduct of which employees may 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 at and 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 allegedly unlawful practices.

DISCLAIMER

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