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Retaliation Revisited

Supreme Court Tips Legal Scales in Favor of Employee Retaliation Claims

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Sponsor Article: Ericson Thorpe & Swainston, Ltd.

Surely, many employers' worst fear is an allegation of "retaliation" based on some minimal employment action taken after a sexual harassment or discrimination claim was lodged by an employee. These claims conjure up fear in the hearts of employers, in part, because of the federal courts' unpredictable interpretations of the type of actions that constitute retaliation. The prevailing law makes such claims easy to allege, hard to defend and sometimes impossible to disprove.

Furthermore, as with many areas of the law, the rules of retaliation are constantly changing. The U.S. Supreme Court recently clarified these rules, tipping the scales even further in favor of employees claiming retaliation. In *Burlington Northern & Santa Fe R.R. Co. v. White*, 126 S.Ct. 2405 (2006), the Supreme Court explained that retaliation occurs whenever an employer's action would discourage a reasonable employee from making a discrimination complaint.

The elements of a retaliation claim.

In order to bring a successful retaliation claim, an employee must prove two things.

First, the employee must prove she engaged in conduct protected by Title VII or other civil rights laws. The courts have held that "protected conduct" includes such acts as making formal or informal sexual harassment complaints to the employer, filing a race discrimination claim with the EEOC or testifying in another employee's civil rights case against the employer. So long as the action was undertaken in good faith, which is almost assumed by the courts, it will likely be protected for purposes of a retaliation claim.

Second, the employee must prove the employer took a tangible employment action against her based upon the protected conduct. As recognized by

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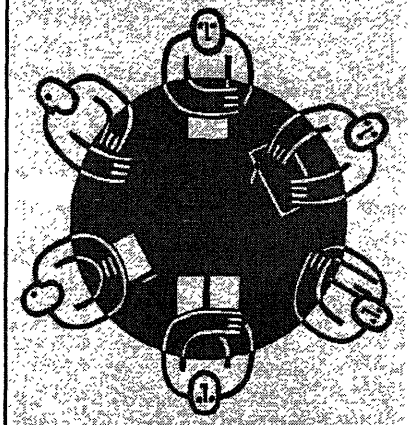

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Retaliation Revisited

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the Ninth Circuit, "[n]ot every employment decision amounts to an adverse employment action." However, prior to the Supreme Court's recent decision, the federal courts were divided about what actions were sufficiently adverse to constitute retaliation. Some held "adverse actions" must involve ultimate employment decisions such as hiring or firing.

Others held lesser actions could constitute retaliation so long as such action adversely affects the terms, conditions or benefits of employment.

The Court's expanded definition of retaliation.

These definitions have now been thrown out by the Supreme Court, which held in *Burlington* that "the scope of [retaliatory conduct] extends beyond workplace-related or employment-related retaliatory acts and harm." As an example, the Court cited a hypothetical in which an employer may file criminal charges against an employee after a sexual harassment complaint. A similar possibility, though not cited by the Court, would be a scenario in which an employer reports an undocumented worker to the Bureau of Immigration after receiving a complaint.

After dismissing the definitions of "adverse action" previously enunciated by the federal courts, the Supreme Court ruled that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge or discrimination." Thus, whether an action amounts to retaliation is a question to be answered under the "reasonable person" standard.

This change in the law is important because it alters the manner in which courts will tackle claims of retaliation. Though the Court defined the reasonable person standard as "objective," it emphasized the need for courts to make a case-by-case determination.

Because such determinations will be based on how courts have ruled in similar cases, it is important for HR professionals faced with tough choices to speak with attorneys knowledgeable in this area of the law.

Anticipated impact of the new ruling.

The sad reality is that retaliation claims are often used as leverage by poorly-performing employees who anticipate their time is about to run out. The Ninth Circuit has recognized the legitimate concern "that employers will be paralyzed into inaction once an employer has lodged a complaint under Title VII, making such a complaint tantamount to a 'get out of jail free' card for employees engaged in job misconduct." Such possibilities may be even likely in light of the Supreme Court's recent ruling, since that ruling may make it even more difficult to predict how a court will rule on the particular facts of any case of alleged retaliation.

The Supreme Court did not overturn its previous decision that employers need not withhold employment action merely because an employee has engaged in allegedly protected activity. The Court has stated that "proceeding along lines previously contemplated, though not yet definitively determined" does not amount to retaliation.

Nonetheless, employers must carefully consider any potential actions in regard to complaining employees - whether those actions are employment-related or otherwise.

Now more than ever, it is crucial for an employer to work together with its employmentlaw attorney before making any adverse decisions about employees which could ultimately be viewed as retaliation by a judge or jury.