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TITLE VII

USSCt: "Context matters" in retaliation cases

On June 22, 2006, the US Supreme Court established a broad standard for determining what types of employer conduct can be considered illegal retaliation. Under the Court's new standard, the challenged action must be one that an objectively reasonable employee would have found "materially adverse." In other words, the employer's actions must be "likely to dissuade employees from complaining or assisting in complaints about discrimination." The decision resolves a split among the circuit courts over the proper standard for interpreting the anti-retaliation provision of Title VII. All nine Justices affirmed a decision in favor of an employee who was reassigned and suspended for 37 days without pay after she complained to company officials about her supervisor's sexual harassment. Justice Alito concurred in the judgment but disagreed with the majority's standard. *Burlington N & Santa Fe Ry Co v White*, USSCt, Dkt No 05-259, 87 EPD ¶42,394.

"The decision clearly expands the definition of retaliation under Title VII," said Philip Berkowitz. It also has broad implications for retaliation claims brought under other statutes with anti-retaliation provisions, he added. "It unquestionably will give comfort to plaintiffs' lawyers. It will encourage the filing of these claims, and it will result in employers implementing even more stringent compliance policies."

"But if this decision forces employers to hold serious discussions with managers and employees about what kinds of things they can and cannot do after a person has filed a discrimination complaint, that is a good thing," Lynne Bernabei observed.

Inside

This month in Insight, the Supreme Court's recent decision in *Burlington N & Santa Fe Ry Co v White* is the subject of comments by:

- **Philip M. Berkowitz**, partner in the New York City office of Nixon Peabody LLP, and chair of the firm's international law practice team. Berkowitz advises employers on labor and employment issues.
- **Lynne Bernabei**, founding partner of The Bernabei Law Firm, PLLC, Washington, DC. Bernabei is a civil rights lawyer, representing employment discrimination plaintiffs and whistleblowers.

Background

Sheila White was a forklift operator and the only female working in her department. She complained to company officials about her supervisor's comments, including repeatedly telling her that women should not be working in that department and making insulting and inappropriate remarks to her in front of her male coworkers. After an investigation, the supervisor was suspended and ordered to attend sexual harassment training. During a meeting to resolve her internal complaint, White was told that she was being reassigned because of her coworkers' complaints. Her pay and benefits remained the same and the duties of the reassigned position were still within her job description, but her new job was "more arduous" and "dirtier" than the forklift position, which was considered a better job.

White filed an EEOC charge and a short time later, after an incident with a different supervisor, she was suspended for 37 days without pay for insubordination. A subsequent internal investigation and hearing determined that she had not been insubordinate and should not have been suspended. White was reinstated with full backpay.

A jury returned a verdict in the employer's favor on the sex bias claim and in White's favor on the retaliation claim. The *en banc* Sixth Circuit affirmed in part and remanded in part in a decision that addressed what constituted an adverse employment action under the retaliation provision of Title VII (85 EPD ¶41,633).

The Supreme Court's decision

The Court rejected the company's argument that Title VII's substantive and anti-retaliation provisions should

be interpreted the same and that actions prohibited by the anti-retaliation provision should similarly be limited to "conduct that 'affects the employee's compensation, terms, conditions, or privileges of employment.'" Instead, the Court found the language of the substantive provision differs from the language of the anti-retaliation provision in "important ways."

Substantive and anti-retaliation provisions differ. The substantive provision is explicitly limited in scope to actions that affect employment or alter workplace conditions. Conversely, there are no words that limit the scope of the anti-retaliation provision, the Court observed. Further, Congress must have intended this distinction because not only is the language of the provisions different, but the purpose of the provisions is different as well. "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."

"To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination," wrote the Court. "But one cannot secure the second objective 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," said the Court.

EEOC interpretation. The Court also rejected the company's use of *Burlington Indus v. Ellerth* for support, noting that the case did not discuss the scope of the general anti-retaliation provision. In fact, the Court pointed out, *Ellerth* did not mention Title VII retaliation at all. Nor was there any support in the EEOC's interpretation of the provision to support the company's argument. Although the EEOC's 1988 and 1991 Compliance Manuals include language that the "anti-retaliation provision is limited to adverse employment action," the Court observed, those same manuals included language that suggested a "broader interpretation," and manuals published before and after the 1988 and 1991 manuals expressed a broad interpretation of the anti-retaliation provision.

The Court also rejected the company's and US Solicitor General's view that it was "anomalous" to read the statute "to provide broader protection for victims of retaliation than for those who Title VII primarily seeks to protect. . . ." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.

Proper standard for analysis. To determine whether conduct is retaliatory "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse." In this context, the action "might well have dissuaded a reasonable employee from making or supporting a discrimination claim."

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>
> **Philip Berkowitz**

Objective standard. The provision's standard for judging harm must be objective, wrote the Court. "An objective standard is judicially administrable." Any given act of retaliation will often depend upon the particular circumstances. "Context matters," said the Court. What may be a minor slight in one instance may be grounds for a retaliation claim in another depending on the specific harm that results from the action.

Finally, the standard is tied to the retaliatory act, not the underlying conduct that formed the basis of the Title VII complaint. "By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination."

White's claim. While job reassignment is not automatically actionable, the jury had considerable evidence before it regarding the jobs in question and the duties for each one to support its conclusion that the reassignment would have been materially adverse to a reasonable employee, the Court ruled.

The Court rejected the company's argument that the 37-day suspension without pay "lacked statutory significance" because the employee ultimately was reinstated with backpay. White testified that 37 days without a paycheck caused a physical and emotional hardship. An indefinite suspension without pay "could well act as a deterrent, even if the suspended employee eventually received backpay." In 1991, Congress amended Title VII to permit victims of intentional discrimination to recover compensation and punitive damages to "make victims whole." Allowing employers to avoid liability in such circumstances "would undermine the significance of that congressional judgment," the Court concluded.

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LYNNE BERNABEI

Retaliation on and off the job

Bernabei does not think the decision is a major change in the law. "On the contrary, it makes clear what the law has been all along," she said. "Over the years, we have seen a narrowing of employment rights in some of the circuits in ways that are contrary to the whole statutory scheme." As an example, she cited the view of some circuits that an employee can only challenge "ultimate" employment decisions under Title VII, such as a hiring or a firing or a demotion, even though "lesser" actions, taken together, could make one's working life miserable. "Hopefully, this is the beginning of a push back to something more in accordance with Title VII and other statutory schemes."

The retaliatory acts against White—reassigned duties and a suspension without pay—occurred on the job. Nevertheless, the Court explicitly held that the scope of the anti-retaliation provision extends beyond workplace-and employment-related acts. While it may be reasonable to expect the employer to monitor what goes on in the workplace, it troubles Berkowitz that the Court opens the door to retaliation claims based on conduct occurring outside of the workplace.

But the fact that the Court did not avoid the question of whether Title VII's anti-retaliation provision encompasses such conduct, although perhaps it could have given the facts of the case—coupled with the fact that it was an 8-1 decision—indicates to Berkowitz that this was not a controversial issue for the Court. "It reflects the Court's strong opinion that while there may be disagreement over what constitutes harassment, Congress' intent in prohibiting retaliation for asserting one's rights is clear and must be upheld."

"I think the Court recognizes that retaliation cases are very contentious," said Bernabei. "Employees and employers take them very personally. That may also help to explain why the Court established a more global standard that would address situations involving retaliatory acts that occur outside of the workplace, even though the specific retaliatory acts against White occurred on the job." It is not uncommon for the effects of retaliation to be felt off the job. The effect of denying a request for flex-time following the filing of a discrimination complaint, for example, is largely felt outside of work, she observed.

Impact of the decision

According to Bernabei, this was the most important retaliation case to reach the Supreme Court in 10 to 20 years, and the bar looked to it to stabilize the law for a time. "Many lawyers and courts look at Title VII law as a single body of law. This case offered the Court a good opportunity to address the difference between the discrimination and retaliation provisions in terms of how each protects employees. As in previous Title VII cases, the Court tried to establish an objective standard to settle this issue, at least for a period of time," she said.

The Court established something of a middle ground that is less restrictive than the "ultimate decision" standard used in some circuits to decide retaliation cases and a bit more restrictive than the "adverse treatment" standard used in other circuits. But the new standard is far from an objective standard, said Berkowitz. He expects to hear the Court's statement "context matters" repeated over and over again by plaintiffs' counsel.

"Although the Court took pains to say that the retaliation must be material, it also made it very clear that retaliatory conduct may be material for one person but not for another. These cases now appear to require a fact-intensive analysis as to whether a reasonable person in the employee's position would have found the conduct material," he said.

More cases. In the short term, Bernabei expects to see more retaliation cases. "Any time the Supreme Court clarifies the law, it makes it easier for lawyers and clients to determine which cases will go to trial and which will not. That should lead to more clearly meritorious cases being filed and more of those cases going to trial. Presumably what the Court was trying to do was set a clear line to help employers and lawyers who practice in this area determine which side a particular case falls on."

Better training. But in the long run, Bernabei hopes that the change will be more preventative. "When an employee brings a retaliation claim, hopefully the employer now understands that it has a good likelihood of losing in court. The prospect of losing the case and incurring substantial damages should have a deterrent effect on future retaliatory conduct. Employers will have to do a better job of ensuring that there is no retaliation, even of the more sophisticated type. Among other things, that requires better training. It will not rid the workplace of retaliation completely, but it will have some curative effect."

Avoiding retaliation claims

The decision sends a loud and clear message that employers must be extremely careful in responding to discrimination complaints, said Berkowitz. Any action taken against an employee who has complained of discrimination must be scrutinized very carefully, he advised. "To some de-

gree this is good news because it makes it all the more important for Human Resources and other professionals to be consulted when there is any kind of allegation of this nature."

Berkowitz also expects that the decision will institutionalize training even beyond what currently exists. By now, most companies have instituted some type of training program addressing equal employment, sexual harassment, etc. "This decision will spur employers to bolster their training, specifically to ensure that managers and supervisors know how to properly respond to these kinds of complaints," he said.

"Context matters." The Court provided two examples to explain the need for a standard expressed in general terms. While a schedule change may not matter much to many workers, it may significantly impact a working mother. Similarly, a supervisor's refusal to invite an employee to lunch may be more than just a petty slight when it is a weekly training lunch that contributes significantly to the employee's advancement. In both cases, such action "might well deter a reasonable employee from complaining about discrimination," wrote the Court.

Anti-retaliation policies are usually incorporated into a broader discrimination or harassment policy, Berkowitz explained. They often contain examples, he observed, and chances are employers will try to give examples during the training process. Examples are helpful to the extent they help employees understand a different perspective, but they usually should not be used to limit the scope of wrongful conduct or to suggest that retaliatory action is limited to the examples, he advised.

Careful investigation. Frequently the policy will also provide that employees who bring claims "in good faith" will not be subject to retaliation. "Sometimes, even that kind of qualifier raises concerns," Berkowitz said. "Obviously, there are occasions when someone makes a complaint that is not well-founded. As employer counsel, we discourage the employer from jumping to the conclusion that a claim is not made in good faith—or, for that matter, that the claim has merit. It's important, in fairness both to the alleged victim and the accused wrongdoer, to exercise caution and to carry out a thorough investigation when responding to these complaints," he stressed.

"There will always be people who file complaints that are not justified, but the vast majority of those who file complaints have some legitimate grievance, whether it is discrimination or not," said Bernabei. With the proper kind of training, she suggested, managers will understand that in order to prove a retaliation claim, an employee need not prove a discrimination claim. "When employers and managers retaliate against someone after making a discrimination complaint, they lose the ability to keep that employee in the workplace by explaining how the act that the employee believed was discriminatory really was not discrimination. Smart employers want to be able to do that," she said.

Retaliation claims are very troublesome, Berkowitz agreed. Even if the underlying discrimination claim is without merit—and often despite the fact that the underlying claim has no merit—the retaliation claim can be successful, he observed. "Retaliation claims are extraordinarily personal. No one likes to be accused of wrongdoing, and it's all too easy to imagine that a person would retaliate against such accusations. Remember, too, that the statute of limitations doesn't start to run until the retaliatory action—not the alleged discriminatory action—takes place," he cautioned.

Bernabei believes that the decision will benefit employers who take the time to instruct managers and supervisors on what they can and cannot do when a person has filed a discrimination complaint. "If the complaint is treated in the proper way, and the employee feels that it has been investigated properly, the employee will return to the workplace and be productive. Whether that happens is entirely dependent on how management handles the complaint," she said.

In her experience, if there is no retaliation, there is a much better chance of dealing successfully with the underlying discrimination complaint. "In almost 90 percent of our cases, retaliation has escalated the hostility between the parties, making an amicable resolution impossible."

Implications for other statutes

Many other statutes contain anti-retaliation provisions, including the Americans with Disabilities Act, the Family and Medical Leave Act, the Age Discrimination in Employment Act, and the Sarbanes-Oxley Act. Will the standard adopted in this decision be applied to retaliation claims brought under those laws?

"There is no question but that it has broad application across the broad range of statutes that prohibit retaliation. I don't think the Justices considered limiting the decision," said Berkowitz.

Bernabei is not as sure that the decision necessarily has a big effect legally. "Every statute will stand or fall on its language. However, this decision will probably embolden courts to interpret other statutes with anti-retaliation provisions more broadly," she suggested. ■

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