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Harassment and Discrimination Retaliation: The U.S. Supreme Court Hits Back

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Employers have been advised for many years to ensure that employees who report harassment or discrimination claims, or who participate in investigations of such claims, do not suffer retaliation as a result of those actions. The stakes for employers have been raised considerably as the result of a decision issued in June 2006 by the Supreme Court of the United States.

After providing a preliminary review of discrimination and harassment law as applicable to public employers in New Hampshire, this article analyzes the decision and its effect on employment. For the present, it is sufficient to note that the decision (formally titled *Burlington Northern & Santa Fe Railway Co. v. White*)[1] makes several key rulings:

- Retaliation under Title VII of the Federal Civil Rights Law is separate and distinct from an underlying act of employment discrimination or harassment;

- To make out a claim for retaliation, an employee need show only that the form of retaliation would have deterred a reasonable employee from reporting or participating in the investigation or resolution of the underlying harassment/discrimination claim; and
- Consideration of the effects of retaliation is not necessarily limited to effects manifested in the workplace.

A Bit of Background. Discrimination and harassment in employment are governed under federal law primarily by Title VII of the Civil Rights Act of 1964 as amended, now codified at 42 U.S.C. §2000-e, *et seq*.[2] On the state level, the primary law governing harassment and discrimination is the New Hampshire Human Rights Law (RSA 354-A).[3] While there are many similarities and a degree of overlap between state and federal laws, New Hampshire statutes provide a wider range of protections for employees.[4]

It remains to be seen if the new emphasis on retaliation established by the *Burlington Northern* decision finds its way into New Hampshire Human Rights Commission proceedings, as the U.S. Supreme Court decision analyzed in this article is based, in part, on express wording in the federal law. It can be noted at this point, however, that RSA 354-A:2, XV defines as an unlawful discriminatory practice all "practices prohibited by the Federal Civil Rights Act of 1964, as amended." This incorporation by reference technique very likely means that New Hampshire law can be interpreted to include the express anti-retaliation language of the federal law as now interpreted and applied by U.S. Supreme Court. New Hampshire Law also says an unlawful discriminatory practice includes obstructing or preventing compliance with RSA 354-A, which likely includes retaliation.

Harassment and Retaliation. The prohibition on employer retaliation against employees for reporting harassment or participating in a harassment investigation is not new or novel. Over a period of time, though, the various federal courts of appeal that resolve appeals from

the trial courts in the eleven circuits[5] around the country applied different standards for resolving those appeals. [Note: Oftentimes, cases reach the U.S. Supreme Court when the various circuits have conflicting standards by which they reach their conclusions.]

The standards for determining when sexual harassment occurs in the workplace were clarified sometime ago by the so-called *Ellerth-Faragher* standard enunciated by the Supreme Court in two cases decided in 1998.[6] These two cases reiterated the general Title VII rule that an employer is liable for sexual harassment in the workplace if the employer knew or should have known that harassment was occurring and failed to prevent or remedy the harassment. The cases refined the standards for employment liability when the harasser was the victim's supervisor by holding the employer strictly liable when the harassment involved tangible employment action (called economic or *quid pro quo* harassment). When supervisor harassment did not result in such a tangible result, employers still could be held liable but could assert the defenses that it took reasonable care to prevent and promptly cure harassment and that the victim failed to utilize reasonable preventive or curative procedures adopted by the employer.

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The clarity that arose from those cases, though, was lacking when it came to the standards and legal obligations for applying the law with regard to retaliation. For example, the sixth circuit, in the Midwest, felt that it should use the *Ellerth/Faragher* tests for deciding if an employer should be held accountable for retaliation. The fifth and eighth circuits applied a more limited standard, holding an employer accountable if the retaliation involved something that could be called an ultimate employment decision, such as hiring or firing. The ninth circuit had

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a more liberal standard under which an employer could be held accountable for adverse treatment based on a retaliatory motive. The seventh circuit held employers accountable if the retaliation was in a form that would be material so as to deter a reasonable employee from reporting harassment or participating in a harassment investigation. Thus, it was unclear as to whether retaliation had to directly affect terms and conditions of employment, and the courts differed on how harmful those adverse effects had to be to reach the level of retaliation.

Analysis of the Ruling: Background. In 1997, Ms. White was hired as a track laborer in one of the railroad's yards. She was the only female worker in that yard. Her job classification involved a wide variety of tasks, including operating a forklift. When a forklift operator position in the yard became open, White, who had experience as a forklift operator in a previous job, was assigned by the roadmaster to fill the position as her primary duty. A short time later in September, she complained that her immediate supervisor repeatedly said women should not be working in the maintenance department and made insulting and inappropriate remarks to her in front of male employees. That supervisor was suspended and directed to attend sexual harassment training.

At the same time, the roadmaster told White that she was being removed from forklift duty and reassigned to general laborer work. The reassignment, it was said, reflected co-workers' complaints that the "less arduous and cleaner job" of forklift operator should have been given to a "more senior man."[7]

The next month, White filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that her reassignment was unlawful gender discrimination and constituted retaliation for her complaint against her supervisor. In December, White filed an additional charge that the roadmaster had placed her under surveillance and was monitoring her daily activities. A few days later, White and her supervisor disagreed about the means used to transport White between work sites and she was reported as being insubordinate. She was then immediately suspended without pay. After filing a grievance, she was found not to have been insubordinate, was reinstated, and was awarded back pay for the 37 days she was suspended. After meeting the necessary procedural requirements, White then filed litigation against her employer under Title VII, asserting that (1) her reassignment and (2) suspension without pay constituted prohibited retaliation. She won a jury verdict and those awards were upheld by the sixth circuit court of appeals. Burlington Northern then appealed to the Supreme Court.

Analysis: The Law. The Supreme Court's decision, first of all, notes that the language enacted by Congress to prohibit discrimination and to prevent retaliation differed. Title VII first forbids employment discrimination against "any individual" based on the individual's "race, color, religion, sex, or national origin." A separate provision of the law – its "anti-retaliation" provision – forbids an employer from discriminating against an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.

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The Court then concluded that discrimination (and remember that sexual harassment under federal law is treated as being a form of discrimination on the basis of gender or sex) is aimed

at providing protection based on "**who**" an **employee** is. The anti-retaliation language, in contrast, focuses on "**what**" an **employer** does.

Applying those general findings to the facts in the case, the Supreme Court held:

1. The anti-retaliation provision does not limit the harms that it prohibits solely to those occurring directly in the workplace. The anti-discrimination /harassment language of Title VII refers to hiring, discharge, compensation, and terms and conditions of employment. The anti-retaliation provision, though, is not limited in its scope to actions that affect only employment or that alter conditions in the workplace. The broader reach of this provision, the Court reasoned, seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. Since retaliation can take many forms, broader protections are needed.

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2. But, the anti-retaliation provision seeks to bar only employer actions that are material, and this standard must be judged from the viewpoint of a "reasonable employee." In looking at the various standards used by the circuit courts, the Supreme Court adopted a standard most closely resembling that used by the seventh circuit, i.e., retaliation can be shown to exist when the challenged action "might well have dissuaded a reasonable worker from making or supporting charge of discrimination."

In applying these two principles to White's situation, the Supreme Court concluded:

1. Her reassignment to a position that was encompassed within the scope of her position description can equate to retaliatory discrimination. Almost any job description will contain both desirable and undesirable aspects and a jury was entitled to decide if the track laborer duties were more arduous and dirtier than those of a forklift operator.[8] In addition, the forklift position was considered to be a better job by the male employees, who resented White for having obtained it.

2. Burlington had to admit that the 37-day suspension following White's filing a complaint was retaliation. But, said Burlington, that was rendered a "harmless" act because it internally reinstated her and awarded her back pay. The Court rejoined that such reasoning would make the retaliation provision meaningless, as employers could retaliate and then avoid the Congressionally mandated payment of damages for retaliation by responding if the employee then pursues an internal remedy.

3. White's problems were not limited to the workplace, as she faced an indefinite period when she would not be paid. Once again, a jury as the factfinder, could find that type of consequence could dissuade a reasonable employee from filing a discrimination/harassment complaint.

Lessons to Be Learned. One might begin a discussion about the impact of this case by wondering whatever possessed an employer in these days to think that a retaliatory reassignment could be defended.[9] The EEOC, however, notes that retaliation claims are the fastest rising category within the scope of its enforcement activities.[10]

Recognizing Retaliation. A first step in preventing retaliation is its recognition. The EEOC suggests that three main terms are useful by stating that "(r)etaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**.[11]

What is Adverse Action? *According to the EEOC:*

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

- employment actions such as termination, refusal to hire, and denial of promotion;
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance; and
- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

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Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.[12]

Who is Covered? ***Again, the EEOC says:***

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.[13]

What actions are protected? ***Here, the EEOC says that protected activity includes:***

Opposition to a practice believed to be unlawful discrimination. Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the practice violates anti-discrimination law and the manner of the opposition is reasonable.

Examples of protected opposition include:

- Complaining to anyone about alleged discrimination against oneself or others;
- Threatening to file a charge of discrimination;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include:

- Actions that interfere with job performance so as to render the employee ineffective; or
- Unlawful activities such as acts or threats of violence.

Participation in an employment discrimination proceeding. Participation means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid.

Examples of participation include:

- Filing a charge of employment discrimination;
- Cooperating with an internal investigation of alleged discriminatory practices; or
- Serving as a witness in an EEO investigation or litigation.
- A protected activity also may include requesting a reasonable accommodation based on religion or disability.[14]

Preventing Retaliation. Employers have many tools and actions that can help to prevent retaliation which, in turn, can help lessen the possibility of facing legal action and potential damages.

1. Adopt a Sexual Harassment/Discrimination Policy that includes prompt effective remedial procedures.
2. Make sure that complaints are handled properly (and don't take them personally).
3. Keep the process as confidential as possible.
4. Don't go alone into the depths. Get legal guidance.
5. Don't focus solely on validity of an underlying complaint.
6. Document, but don't unnecessarily kill trees or fill up hard drives.
7. Adopt and implement an anti-retaliation policy or make sure that the sexual harassment/discrimination policy described in step #1 includes strong and meaningful anti-retaliation provisions.
8. Act promptly but take your time. (Sometimes an overly rapid response can be rash and lead to incorrect conclusions and actions.)

Conclusion and Guidance for Public Employers. The Supreme Court's decision can be viewed as laying out some new ground rules for public employee relations or as merely allocating some additional emphasis upon employee rights of redress for retaliation. Adoption of preventive and remedial policies and procedures continues to be an essential element of risk management in this arena. Co-employee retaliation

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against those who report harassment or participate in resolution of claims must be addressed both in policy and in action. Supervisory personnel continue to be key in determining how an employer will fare in a retaliation proceeding. Policy adoption alone is insufficient protection. Employers must monitor the workplace to maintain awareness of working conditions and must then be prepared to act to resolve complaints and ensure that retaliation, whether overt or subtle, does not occur. Aware and active management will continue to be the best risk management tool in this volatile sphere of employment relations.

Endnotes

[1] 548 U.S. ___ ; 126 S. Ct 2405; 2006 WL1698953 (2006)

[2] The Civil Rights Act covers discrimination based on race, color, religion, sex, or national origin. Other federal laws regulate discrimination on other criteria such as disabilities, age and other factors.

[3] Criteria upon which discrimination is based under New Hampshire law are broader than those under the federal Civil Rights Act and include marital status, familial status, physical or mental disability, and sexual orientation. See RSA 354-A:1. New Hampshire law also expressly defines and prohibits sexual harassment in the workplace, RSA 354-A:7, V.

[4] These differences include additional grounds of prohibited discrimination (e.g., marital status, familial status, sexual

orientation) and broader applicability to employers exempting those fewer than six employees and including "all political subdivisions, boards, departments and commissions thereof."

[5] New Hampshire is located in the First Federal Judicial Circuit.

[6] *Burlington Industries v. Ellerth*, 524 U.S. 742 and *Faragher v. City of Boca Raton*, 524 U.S. 775.

[7] Although the work to which she was reassigned was included within her job description and did not result in a loss of pay, the reassignment was clearly viewed by the employee and others as a loss of prestige.

[8] Allowing a jury to decide this issue is an important consideration. Discrimination and harassment cases are best defended when an employer can get the case resolved before reaching a jury through (a) a motion to dismiss or (b) a motion for summary judgment. To obtain that result, an employer must show that (a) the employee could not recover even if the alleged facts were true or (b) that facts that are not in dispute could not support a judgment for the plaintiff. Once a case reaches a jury, numerous factors, including emotion and a "deep-pocket" reasoning, could lead to adverse results. Even if an employer prevails, a case that involves a trial will be much more expensive. Employer actions such as those recommended in this article may enhance the likelihood of prevailing before a case goes to trial.

[9] According to the Court's opinion, Burlington acknowledged that the basis for the actions against White were founded in retaliation for her complaints.

[10] In 2004, for example, EEOC received 22,740 charges of retaliation based on all statutes it enforces (not just sexual harassment or gender discrimination). It resolved more than 24,000 complaints

(including those filed in prior years) resulting in payments of more than $90 million to claimants. These totals do not include awards that resulted from litigation aside from EEOC proceedings.

[11] See *www.eeoc.gov/types/retaliation.html*.

[12] *Ibid*. For more information about adverse actions, see *EEOC's Compliance Manual Section 8, Chapter II, Part D*, available on the EEOC website.

[13] *Ibid*.

[14] *Ibid.* For more information about Protected Activities, see EEOC's Compliance Manual, Section 8, *Chapter II, Part B - Opposition* and *Part C - Participation*.