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Retaliation Claims Beyond Title VII: Practice Tips

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I. INTRODUCTION

A variety of federal and state statutes prohibit employers from retaliating against employees who engage in certain statutorily protected activities. In *Burlington Northern & Santa Fe Railway Co. v. White* the Supreme Court clarified the standard that should be used to determine whether an actionable harm has occurred for purposes of Title VII retaliation. This paper summarizes the Supreme Court's landmark decision in *White*, and surveys how courts have applied the *White* standard to other state and federal statutes. This paper also sets out the framework for determining whether a public employee's speech is protected under the First Amendment, a framework that was recently modified by the Supreme Court in *Garcetti v. Ceballos*.

II. THE *WHITE* DECISION

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

In this landmark case, the Supreme Court ruled that a worker complaining of retaliation can prevail even if the worker does not suffer a tangible adverse employment action (*i.e.*, one that causes an economic loss) or been subjected to a hostile working environment. Instead, an employee may successfully recover if he or she can point to a "materially adverse employment action" that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 126 S.Ct. at 2415.

Shelia White was a track laborer assigned to operate a forklift in a rail yard. After she complained about sexual harassment, BNSF removed her from forklift duty and assigned her to perform regular track-laborer tasks. BNSF later suspended White without pay for insubordination. After White complained, BNSF rescinded the suspension, reinstated her, and paid back pay for the thirty-seven days she was suspended

Held: The Supreme Court rejected the approach taken by the Fifth Circuit (and other Circuits) that only "ultimate employment actions" are actionable under Title VII. *See, e.g.*, *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997). Instead, the Court chose a less demanding standard for the harm that a plaintiff must show to support a Title VII retaliation claim: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, 126 S.Ct. at 2415. Under that standard, the Court found that White's reassignment to regular track-laborer duties and her temporary suspension were both cognizable under Title VII's retaliation provisions.

Comments: The Supreme Court limited its decision to retaliation cases. Thus, for purposes of straightforward discrimination claims based on race, sex, national origin, or other protected classifications, the Fifth Circuit (and other Circuits) continue to apply the "ultimate employment action standard."

The International Municipal Lawyers Association filed an amicus brief in support of BNSF while the *White* case was pending in the Supreme Court. IMLA argued that a "tangible employment action" or "hostile environment" needed to be shown to establish an actionable claim under the retaliation provision of Title VII – just as these elements are necessary in discrimination claims under Title VII. The Court rejected that argument and decided the case in a manner that gives broader protection from retaliation than from discrimination based on classifications protected under Title VII (*e.g.*, race and sex). In other words, a double standard now applies within Title VII. This is a point that lawyers advising supervisors needed to emphasize. The simple fact is that retaliation claims are now easier for an employee to state than are ordinary discrimination claims.

Another interesting point, noted by Justice Alito in the concurring opinion he filed in *White*, is that the decision creates the perverse result of protecting persons subjected to milder forms of discrimination than those exposed to more severe actions. That is true because a person who suffers severe race or sex discrimination is not likely to be easily deterred from filing a charge. But an employee subject to mild forms of discrimination might be deterred from pursuing a charge by relatively mild forms of retaliation. In other words, the more serious the underlying discriminatory act (and thus the greater the impetus to report the act), the more severe the retaliatory action an employer could engage in without giving rise to a claim of retaliation.

III. *WHITE*'S APPLICATION UNDER OTHER FEDERAL EMPLOYMENT STATUTES

After the *White* decision, courts almost uniformly applied its standard to other federal employment statutes. For example, just three months after *White*, the Tenth Circuit had already applied the new standard to the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act. *See Metzler v. Fed. Home Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006). Indeed, it is only when the statute in question contains a significant textual deviation from Title VII that courts have been willing to deviate from the *White* standard. *See Eberhardt v. First Centrum, LLC*, 2007 U.S. Dist. LEXIS 10405, at *42-43 (E.D. Mich. Feb. 15, 2007) (declining to apply the *White* standard in the context of the Michigan Elliott-Larsen Civil Rights Act, in part because the statute itself contained language which explicitly limited retaliation claims to actions that affected a "term, condition, or privilege of employment").

Below is a survey of cases in which courts have applied the *White* standard to other federal employment statutes:

42 USC § 1981: *Weaks v. Roadway Express, Inc.*, 259 Fed. Appx. 75, 77 (10th Cir. 2007) (holding that a plaintiff must meet the *White* standard to prevail on a § 1981 retaliation claim); *Miller v. Wachovia Bank, N.A.*, 2008 U.S. Dist. LEXIS 18132, *22 (N.D. Tex. Mar. 7, 2008) (applying *White* to a § 1981 claim and noting "[a]lthough *Burlington Northern* involved a claim under Title VII of the Civil Rights Act of 1964, section 1981 claims are analyzed under the same framework as Title VII claims.").

42 USC § 1983 (First Amendment Retaliation): *McLaurin v. City of Jackson Fire Dep't*, 217 Fed. Appx. 287, 288 (5th Cir. 2006) (indicating that *White* affected the determination of adverse employment actions in the context of § 1983 claims).

Americans with Disabilities Act: *Harding v. Newburgh Enlarged City Sch. Dist.*, 2008 U.S. Dist. LEXIS 17744 & n3 (S.D.N.Y. Mar. 6, 2008) ("Although White involved claims under Title VII, the standard applies here because the retaliation provisions of the ADA and Title VII contain similar language and have been interpreted uniformly"); *Grubic v. City of Waco*, 2008 U.S. App. LEXIS 1980, *3 & n.6 (5th Cir. Jan. 30, 2008) ("Although *Burlington Northern* was a Title VII case, this court applies the same analysis to ADA and Title VII retaliation claims."); *Evans v. MAAX-KSD Corp.*, 2008 U.S. Dist. LEXIS 6333, 16-17 (E.D. Pa. Jan. 25, 2008) (applying the *White* standard to retaliation claims under the ADA and the Pennsylvania Human Relations Act); *Hatch v. Pitney Bowes*, Inc., 485 F. Supp. 2d 22, 36 (D.R.I. 2007) (adopting the *White* standard for ADA retaliation).

Age Discrimination in Employment Act: *Shaffer v. Peake*, 2008 U.S. Dist. LEXIS 22967, *29 (W.D. Pa. Mar. 24, 2008) ("Given the similarities between the anti-retaliation provision contained in Title VII and that contained in the ADEA, the Court is convinced that they should be construed in a similar manner. Thus, the Court proceeds on the assumption that the principles discussed in *Burlington Northern* apply with equal force to the private sector provisions of the ADEA."); *Farrar v. Town of Stratford*, 537 F. Supp. 2d 332, 355 (D. Conn. March 19, 2008) ("With regard to what constitutes an adverse employment action for Title VII or ADEA retaliation purposes, the Supreme Court has held 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 of discrimination.); *U.S. EEOC v. Univ. of La*., 2007 U.S. Dist. LEXIS 96531, *16 (W.D. La. Nov. 2, 2007) (citing *White* in an ADEA case and noting that the "refusal to pay [plaintiff] while he substituted for Dr. Williamson arguably could have 'dissuaded a reasonable worker' from seeking to vindicate his rights under the ADEA."); *Nagle v. Vill. of Calumet Park*, 2006 U.S. Dist. LEXIS 92251 (N.D. Ill. Dec. 18, 2006) ("To qualify as actionable retaliation under Title VII or the ADEA, an employer's action must be such that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.").

Fair Labor Standards Act: *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) ("[A] plaintiff asserting a retaliation claim under the FLSA need only allege that his employer retaliated against him by engaging in an action 'that would have been materially adverse to a reasonable employee' because the 'employer's actions . . . could well dissuade a reasonable worker from making or supporting a charge of discrimination.'); *Jeter v. Montgomery County*, 480 F. Supp. 2d 1293, 1300 (M.D. Ala. 2007) ("Based on the comparable language in [Title VII and the FLSA], the similar purposes of anti-retaliation provisions, and the case law from other circuits, the court concludes that *White* is applicable to a claim for retaliation under the FLSA."); *Moran v. Ceiling Fans Direct, Inc*., 2007 U.S. Dist. LEXIS 81754, *4-5 & n.1 (S.D. Tex. Nov. 7, 2007) (citing *White* standard and noting "[a]lthough Burlington involved a retaliation claim under Title VII rather than under the FLSA, the retaliation provision of the FLSA uses language nearly identical to that of Title VII. Consequently, decisions interpreting Title VII are instructive in cases involving the FLSA.").

Family and Medical Leave Act: *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 979 (7th Cir. 2008) (citing *White* for the proposition that "[m]aterially adverse actions are not limited to employment-related activities but include any actions that would dissuade a reasonable employee from exercising his rights under the FMLA."); *DiCampli v. Korman Cmtys.*, 257 Fed. Appx. 497, 500-501 (3d Cir. 2007) ("A plaintiff claiming retaliation must show that a reasonable employee would have found the alleged retaliatory action materially adverse in that it well might have dissuaded a reasonable worker from exercising a right under the FMLA."); *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 & n.2 (10th Cir. 2006) ("Because the FMLA's retaliation clause is derived from Title VII and is thus intended to be construed in the same manner, the Supreme Court's rejection of our adverse employment action requirement applies with equal force in the context of an FMLA retaliation case"); *Smith v. Murphy & Sons, Inc.*, 2007 U.S. Dist. LEXIS 64063, 25-26 (N.D. Miss. Aug. 28, 2007) (indicating that it would apply *White* to plaintiff's FMLA retaliation claim because *White* "broadened the definition of 'adverse employment action' in the Title VII retaliation context (and presumably other retaliation contexts as well) to permit recovery for actions which a reasonable employee would have found to be 'materially adverse.'"); *Foraker v. Apollo Group, Inc.*, 2006 U.S. Dist. LEXIS 85737, at *5 (D.Ariz. November 22, 2006) ("Although *Burlington* and *Ray* are Title VII cases, Defendant does not dispute that this definition of an adverse employment action applies under the FMLA"); *Campbell v. Wash. County Pub. Library*, 2006 U.S. Dist. LEXIS 64397, at *17-19,2006 WL 2612985, at *6 (S.D. Ohio September 8, 2006) (applying the *White* standard to plaintiff's FMLA retaliation claim); *Steele v. Kroenke Sports Enterprises*, 2006 U.S. Dist. LEXIS 48576, at *25 (D.Colo. July 18, 2006) (same).

Other Federal Statutes: *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, 2007 DOL Ad. Rev. Bd. LEXIS 7 (ARB Jan. 31, 2007) (adopting the *White* adverse employment action standard for Aviation Investment and Reform Act for the 21st Century (AIR 21)); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) ("[W]e find that the *Burlington* definition of 'unfavorable personnel action' applies to SOX whistleblower claims"); *Brooks v. Wynne*, 2008 U.S. Dist. LEXIS 51206, 9-10 (W.D. Okla. July 3, 2008) (applying the *White* standard to plaintiff's Rehabilitation Act claim because "[t]he court of appeals has applied [the *White*] standard to retaliation claims under the Americans with Disabilities Act (ADA), and ADA standards apply to Rehabilitation Act claims.").

Comments: While the *White* standard may allow claims based on fairly trivial matters to go forward in litigation, practitioners should keep in mind that *White* does not affect the damages that are available under a particular retaliation statute. Since Title VII was amended in 1991, compensatory damages have been recoverable for pain and suffering. Punitive damages are also available against private sector employers. Thus, an employee without economic damage may recover these forms of damages plus attorney's fees. But that is not the case with all federal statutes. For example, under the ADEA, FMLA, and FLSA, compensatory damages are not recoverable – only lost pay, benefits, and liquidated damages based on economic damages. Therefore, even if a claim without economic harm is sufficient to state a retaliation claim under such statutes, all that a plaintiff is likely to receive is injunctive relief and attorney's fees. Thus, the impact of *White* is far less when a retaliation statute does not provide for compensatory damages.

IV. STATE WHISTLEBLOWER STATUTES

In *Montgomery County v. Park*, 246 S.W.3d 610 (Tex. 2007), the Texas Supreme court ostensibly adopted the *White* standard in the context of a state whistleblower case. In that case, a patrol lieutenant with the Montgomery County Sheriff's Department reported sexual remarks made by an elected official about a department employee. That report resulted in an internal investigation. After making that report, the Sheriff changed certain of the lieutenant's job duties.

The Texas Whistleblower Act prohibits public employers from taking an "adverse personnel action" against whistleblower employees. Although the statute defines a "personnel action" as an "action that affects a public employee's compensation, promotion, transfer, work assignment, or performance evaluation," it does not define "adverse." The *Montgomery County* court reasoned that because the anti-retaliation provision of Title VII and the Texas Whistleblower Act serve similar purposes, it was appropriate to require plaintiffs to show objective, material harm under both. The court therefore stated that it was adopting the *White* standard for purposes of the Texas Whistleblower Act. Interestingly, in analyzing the lieutenant's claims, the Texas Supreme Court focused on the fact that his changed job duties did not result in a loss of pay, an element that the *White* court found to be non-dispositive.

Although it remains to be seen whether other states will adopt the *White* standard for state whistleblower claims, it seems likely, especially in states that use statutory language similar to Texas'. *See, e.g.* FLORIDA STATUTE § 448.101 *et seq.* (prohibiting "retaliatory personnel actions," which it defines as "the discharge, suspension, or demotion by an employer of an employee or any other adverse employment action taken by an employer against an employee in the terms and conditions of employment") (emphasis added); NEW YORK LABOR LAW § 740 (defining "retaliatory personnel actions" as the "discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.") (emphasis added).

V. FIRST AMENDMENT RETALIATION

The standard for determining whether a public employee's speech is protected under the First Amendment was established in the seminal Supreme Court decisions *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). Under those cases, a public employee's speech is protected by the First Amendment when the interests of the worker "as a citizen in commenting upon matters of public concern" outweigh the interests of the state, as an employer, in promoting the efficiency of the services it performs through its employees. *See Pickering*, 391 U.S. at 568. The Supreme Court recently modified the framework for considering First Amendment retaliation cases with its decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).

In *Garcetti*, the Supreme Court focused on the "citizen " element of the test and in doing so modified the standard approach to deciding whether speech is protected. Before addressing the "public concern" aspect of the test, the threshold inquiry is now whether an employee was speaking as a citizen, rather than an employee. *Garcetti* at 1959-60. Using that framework, the *Garcetti* Court held that a memorandum written by a calendar deputy district attorney relating to

a pending prosecution was not speech protected by the First Amendment. *Id.* at 1955-56. A defense attorney asked plaintiff Ceballos to review an arrest warrant in a pending case for inaccuracies. When he did, Ceballos discovered that the affidavit contained serious factual misrepresentations by a deputy sheriff. Ceballos relayed his findings to his supervisors and followed up by preparing a disposition memorandum explaining his concerns and recommending dismissal of the case. The criminal case was ultimately dismissed, and Ceballos alleged that he was thereafter subjected to a series of retaliatory employment actions in violation of the First Amendment. *Id.* at 1955-56.

Held: The Supreme Court found that the speech was not protected by the First Amendment because Ceballos' "expressions were made pursuant to his duties as a calendar deputy." *Id.* at 1959-60. "[W]hen public employees make statements pursuant to their official duties," the Court held, "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

Comments: Following *Garcetti*, Circuit Courts have found a wide variety of employee speech to be "pursuant to official duties," and thus not protected by the First Amendment. *See, e.g., Williams v. Dallas Independent School District*, 480 F.3d 689, 693 (5th Cir. 2007). ("Activities undertaken in the course of performing one's job are activities pursuant to official duties"); *Spiegla v. Hull*, 481 F.3d 961, 966 (7th Cir. 2007) (holding that a focus on an employee's "core" job functions is too narrow after *Garcetti*, which asked only whether employee expression [was] made "pursuant to official responsibilities"); *Casey v. West Las Vegas Indep. Sch. Dist*, 473 F.3d 1323, 1330-31 (10th Cir. 2007) (holding that administrator in charge of a federally-funded program was not acting as a citizen, but rather as part of her official duties by reporting financial irregularities); *Green v. Board of County Commissioners*, 472 F.3d 794, 800-01 (10th Cir. 2007) (noting that although a drug lab employee was "not explicitly required as part of her day-to-day job responsibilities" to complain, her complaints were generally "the type of activit[y] she was paid to do"); *Battle v. Board of Regents*, 468 F.3d 755, 759-62 (11th Cir. 2006) (holding that a low-level employee who reported improprieties in her supervisor's handling of funds was acting within the scope of her employment); *Freitas v. Ayers*, 463 F.3d 838, 855 (9th Cir. 2006) (holding that a correctional officer did not speak as a citizen when she made internal reports to her supervisors about inmate sexual misconduct); *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 (3d Cir. 2006) (holding that a manager who relayed employee complaints to council had acted pursuant to his job duties, not as a citizen); *Mills v. City of Evansville*, 452 F.3d 646, 647-48 (7th Cir. 2006) (concluding that a police sergeant who was critical of a department reorganization was communicating in the capacity of a public employee contributing to the formation and execution of policy, not as a citizen).

VI. PRACTICE TIPS

Employment retaliation claims are relatively easy for employees to state and are commonly litigated. In light of *White*, the door is wide open to litigate over actions that involve no economic loss. This environment requires lawyers advising managers to engage in practices that will either avoid retaliation claims, or put an employer in the position to better defend

against such claims. Here are some tips, in no particular order of importance, that may be useful in meeting those objectives:

1. Anticipate and recognize potential retaliation claims before they are filed. Many forms of employment activities are protected from retaliation. Note that when an employee exercises his or her right to make complaints or file grievances, his or her protection from retaliation likely has been triggered.

2. Do not be over-confident about technical defenses. Retaliation claims should be defensible on the merits: there was no retaliatory motive for a particular adverse action. Technical defense like "no adverse employment action" or "no protected citizen speech" are best left to be made by defense lawyers after a case is in litigation. Human Resource staff and managers should be focused on establishing that adverse employment decisions are free of retaliatory motive and reflect a legitimate business purpose.

3. Before taking an adverse action, document a record of unbiased deliberation.

    - Beware of proximity to protected activity;
    - Beware of perception that fact-finding was rushed;
    - Eliminate biased decisionmakers from process;
    - Document facts;
    - Test your legitimate basis through multiple reviews;
    - Follow your own policies;
    - Be consistent with treatment given to others under similar circumstances.

4. Control the remarks of decisionmakers.

5. Explain to decisionmakers that valid retaliation claims not only expose the organization to liability, but they destroy the credibility of managers and the organization itself.

6. Always remember that third parties (jury or judge) will be given the authority to second-guess decisions of the organization's most powerful decisionmakers. It is an employer's ability to demonstrate a legitimacy of their actions to others that wins retaliation cases. The speculative insights of decisionmakers about employees will not help to support the legitimacy of an employment action.