Employment Law Briefing

Insights on Legal Issues in the Workplace

NOVEMBER/DECEMBER 2006

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Supreme Court rules on what constitutes employer retaliation

Federal law for more than 40 years has barred employers from retaliating against employees who complain about discrimination on the job. Congress didn't define "retaliation" when it passed Title VII of the Civil Rights Act of 1964. But now the Supreme Court has — in *Burlington Northern v. White*.

Sexual harassment alleged

The case began in a rail yard when the plaintiff — the only woman working in the maintenance department — complained that her supervisor had sexually harassed her. After investigating the charge, the railroad suspended the supervisor for 10 days and made him attend a sexual-harassment training session.

When the supervisor told the plaintiff about the discipline, he also told her he was removing her from forklift duty and assigning her — within the same job classification — to outdoor work on the tracks. He said he had based his decision on co-workers' complaints that "a more senior man" should have the "less arduous and cleaner job" of forklift operator.

Retaliation alleged

The plaintiff filed a formal complaint with the EEOC, alleging that her job reassignment constituted retaliation for having complained about the supervisor's harassment. A few days later, the railroad suspended her for 37 days without pay for insubordination during a dispute with another supervisor. After an internal review showed she hadn't been insubordinate, the railroad reinstated her with back pay. She then filed an additional retaliation charge with the EEOC based on the suspension.

After exhausting her EEOC remedies, the plaintiff sued in federal court, alleging retaliation in violation of Title VII based on the job-duties change and suspension. Finding in her favor on both claims, a jury awarded $43,250 in compensatory damages (for pain and suffering). The Sixth Circuit affirmed.

A split in the circuits

The Supreme Court accepted the case because the issue of what constitutes retaliation has arisen in every federal appellate circuit, resulting in conflicting opinions. For example, the Sixth, Third and Fourth Circuits held that, to establish retaliation, a plaintiff had to show an "adverse employment action" — defined as a "materially adverse change" in employment terms.

The Fifth and Eighth Circuits set an even more restrictive standard: They limited retaliatory conduct to "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, and compensating."

The Seventh and District of Columbia Circuits held that the clause's scope was broader. They held that a plaintiff must show that the employer's conduct would have likely dissuaded a reasonable worker from making or supporting a discrimination charge.

The Ninth Circuit standard was broader yet. It held that a plaintiff must simply establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."

A unanimous judgment

The Supreme Court sided with the Seventh and D.C. Circuits in an opinion written by Justice Breyer and joined by all the other justices except Justice Alito, who concurred in the judgment but disagreed with the scope of the antiretaliation clause.

A concurring opinion

Justice Breyer's opinion in *Burlington* was joined by all the other justices except the most recently appointed, Justice Alito. He wrote a separate concurring opinion in which he agreed with the judgment but disagreed with the majority's interpretation of Title VII's antiretaliation clause.

Justice Alito argued that the Court should determine the antiretaliation clause's scope by reading it in conjunction with the clause that bars discrimination against persons with respect to employment terms. By reading these provisions together, he concluded that the antiretaliation clause was limited to actions that affected employment terms.

Furthermore, he argued that an employer who wishes to retaliate against an employee for engaging in protected conduct was more likely to do so on the job. He stated that many more retaliation opportunities existed on the job and that many off-the-job retaliation forms constituted crimes and were thus especially risky.

In addition, Justice Alito argued that many off-site retaliation types could also be considered to affect employment terms and thus would be covered by the antiretaliation clause. For example, he cited a case in which the FBI had retaliated against an agent by failing to provide off-duty security. Alito argued that providing security to an agent whose life may be threatened while off duty easily qualifies as an employment term even though it occurred while he was off duty.

Nevertheless, Justice Alito found that the employer's actions in *Burlington* did affect employment terms and, thus, there was retaliation.

The Court found that Title VII's antiretaliation provisions didn't limit its scope to employment-related conduct only, because employers can effectively retaliate against employees by taking actions not directly employment related or by causing harm outside the workplace. It cited as an example the case of an employer filing false criminal charges against a former employee who had complained of discrimination.

So the Supreme Court held that a plaintiff must show the challenged action to be "materially adverse." This means that the action might have "dissuaded a reasonable worker from making or supporting" a discrimination charge. The Court noted that it spoke of *material* adversity, separating significant from trivial harms and reiterating its previously stated view that Title VII didn't set forth "a general civility code for the American workplace."

Verdict affirmed

Based on this standard, the Supreme Court affirmed the Sixth Circuit's upholding the jury's verdict on the plaintiff's retaliation claim. The railroad argued that reassigning her to other duties wasn't material because all the duties fell within the same job description. But the Court rejected this argument, holding that her reassignment was materially adverse, because the new assignment was more arduous and dirtier than her previous forklift work and could dissuade a reasonable worker from complaining about discrimination.

The railroad also argued that the suspension didn't constitute material harm because it had reimbursed the plaintiff for pay lost during the suspension. Unpersuaded, the Court noted that she was entitled to compensatory damages even if she wasn't entitled to back pay. During the 37 days of her suspension, she and her family had to live without income and without knowing when or whether she would return to work. The Court concluded that this was a serious hardship, and that the jury had rightfully concluded that the suspension was materially adverse.

Lessons for employers

To avoid retaliation claims, employers must deal carefully with employees who complain of discrimination. Even if a court dismisses an original discrimination complaint for lack of merit, employees can still prevail on a retaliation claim. Caution is the watchword.

The incapacity requirement for FMLA eligibility

Does diarrhea caused by medication taken for diabetes constitute a "serious health condition" under the Family and Medical Leave Act (FMLA) that would entitle an employee to extra time for bathroom breaks? That was the issue before the Fifth Circuit in *Mauder v. Metropolitan Transit Authority*.

Employee asks for flexible breaks

A computer technician worked on a help desk, answering phone calls from other employees who called in with computer problems. After he had been on the job for three years, a new supervisor noticed that the technician was frequently away from his desk and unavailable to answer calls. She e-mailed him that he needed to be more visible.

The next month, the technician was diagnosed with Type II diabetes. His doctor prescribed an insulin drug with a side effect of temporary uncontrollable bowel movements and diarrhea. These side effects caused him to spend about 15 minutes per episode in the restroom.

Employer warns employee

Two months later, the supervisor instituted 15-minute breaks at 9:00 a.m. and 2:00 p.m. to improve productivity. Because of his health problems, the technician found he couldn't always delay his trips to the bathroom until his scheduled break times. When his supervisor chastised him about this, he gave her a handwritten doctor's note stating that a temporary side effect of his diabetes medication was diarrhea, but that he expected his condition to improve. Management then denied his request for a flexible break schedule and instructed him to take only scheduled breaks.

When the technician asked management to remove tardy citations in his record based on the doctor's note, the supervisor asked him to provide more information on his medical condition. He refused, stating that he and his doctor had provided enough information.

Employee sues

After this incident, the technician was warned repeatedly — both orally and in writing — regarding his tardiness in returning from breaks. On Sep. 12, 2002, he was given one month to correct his performance deficiencies. He then requested leave under the FMLA and was given an FMLA packet to fill out by Oct. 19, but the company fired him on Oct. 11, citing his failure to improve.

He sued, alleging he was entitled to leave under the FMLA and that he was fired in retaliation for requesting FMLA leave. The trial court ruled for the employer on grounds that the facts were not disputed and the employer was entitled to judgment as a matter of law.

Fifth Circuit looks at FMLA

The technician appealed to the Fifth Circuit. It found that the FMLA provides that an eligible employee shall be entitled to up to 12 weeks of leave during any 12-month period because of a serious health condition that makes the employee unable

to perform the functions of the job. A "serious health condition" is defined as an illness, injury, impairment or physical condition that involves:

1. Inpatient care, or
2. Continuing treatment by a health care provider.

The technician claimed that he was entitled to leave because he suffered from a serious health condition involving continuing treatment from a health care provider. To establish this, he had to show that he had been incapacitated for three or more consecutive days or that he had a period of incapacity due to a chronic serious health condition.

No incapacity, no leave

The Fifth Circuit noted that the technician's claim was "novel" because he wasn't asking for an excused absence from work but rather the right — while at work — to take necessary bathroom breaks. The court also noted that the parties disagreed as to whether the underlying cause of his need for unrestricted bathroom breaks was diabetes or diarrhea.

The court held that the record established that, even if he had a serious health condition due to either diabetes or diarrhea, he had failed to show that the condition left him incapacitated as the FMLA requires. While either diabetes or severe diarrhea could constitute serious health conditions under the FMLA, he didn't experience episodic or continuing incapacity. He was never absent from work because of his condition and didn't seek treatment for either his diarrhea or his diabetes beyond the initial diagnosis or routine check-ups.

Furthermore, he wasn't entitled to leave because he had refused to supply the requested medical information that the FMLA entitles an employer to demand.

The technician claimed that he was entitled to leave because he suffered from a serious health condition involving continuing treatment from a health care provider.

The court also rejected his retaliation claim, holding that the employer had legitimate, nondiscriminatory reasons for firing him, based on his performance. The court noted that he had been put on probation three weeks before he asked for FMLA leave and that, during his probation, his performance failed to improve.

Employers be wary

This case demonstrates the unexpected ways employees can file claims under the FMLA. Under these circumstances, employers must deal carefully when a potential FMLA claim looms.

Never on Sundays

Employer accommodation of employee religious convictions

In *Baker v. Home Depot,* the Second Circuit held that the store had failed to accommodate an employee's religious beliefs when it required him to work on Sundays even though it allowed him to work a shift that didn't interfere with attending church services.

Scheduling conflicts

At his job interview for a full-time sales associate job, an applicant told the store manager that he wouldn't be able to work on Sundays because of his religious convictions but that he could work any other day at any time. He made it clear that, if he couldn't have Sundays off, he couldn't work there. The scheduler assured him this wasn't a problem, and she never scheduled him to work on Sundays.

But 11 months later, the scheduler's successor scheduled him to work on a Sunday. He objected and was told it was a mistake, and he failed to show up without any repercussions.

A few months later, a new store manager asked the associate why he wasn't scheduled to work on Sundays. He explained that his religious beliefs precluded any labor on Sundays. The manager told the associate that he needed to be "fully flexible" and that he couldn't work there if he couldn't work on Sundays. The next month, the store scheduled the associate to work on a Sunday. He called the store that day and reported that he wouldn't be in for religious reasons.

Accommodations offered

Two days later, the store manager again asked him why he had been absent. He again explained that he couldn't work on Sundays for religious reasons. She asked him if he attended church on Sundays. When he replied that he did, she offered him a later Sunday shift so he could attend church. He refused the offer, stating that he couldn't work at all on Sundays.

Because the accommodation didn't address the conflict between the employment requirement and his religious practice, the offered accommodation couldn't be considered reasonable.

She also offered him the option of part-time employment where he could have Sundays off but wasn't guaranteed a 40-hour week or benefits. He refused because he needed full-time employment and benefits. When he was again scheduled for Sunday work on a Sunday, he called in to explain his absence for religious beliefs. The store then fired the associate for unexcused absences.

Conflict not addressed

The associate sued, alleging discrimination based on his religion in violation of Title VII. The trial court ruled for the store on the basis that it had offered him a reasonable accommodation by allowing him to work a later shift so that he could attend church services.

But the Second Circuit reinstated the suit. It noted that the associate's principal objection was to working on Sundays. The offered accommodation addressed only the issue of missing church services. Because the accommodation didn't address the conflict between the employment requirement and his religious practice, the offered accommodation couldn't be considered reasonable.

Inexplicable diminution vs. undue hardship

The Second Circuit expressed no opinion on whether the offer of part-time employment or allowing shift exchanges with other employees would constitute reasonable accommodation. It sent those issues back to the trial court for consideration.

The Second Circuit did note that an offer of accommodation may be unreasonable if it causes an employee to suffer an inexplicable diminution in his employee status or benefits. The court also let the trial court consider the store's defense that granting the associate's request for Sundays off would cause it an undue hardship, noting that an accommodation is said to cause an undue hardship whenever it results in "more than a de minimis cost" to the employer.

Employers cautioned

One interesting note about this case is that the associate successfully represented himself. This shows that even a plaintiff without an attorney should be taken seriously. In fact, these cases may prove to be particularly troublesome, because judges frequently take extra care to make sure that unrepresented litigants are treated fairly.

Spying through a peephole didn't establish a hostile work environment

In *Cottrill v. MFA Inc.*, the Eighth Circuit dealt with the claims of two women who alleged that they had been subjected to a hostile work environment created by a male supervisor's spying on them in the ladies' room.

The spying begins

A company hired a woman to work as a bookkeeper in its retail facility and later hired another woman to work part time. The part-timer became suspicious when she noticed that, when the bookkeeper went to the ladies' room, their supervisor went into his personal break room that had a common wall with the ladies' room. The part-timer first thought the supervisor was having an affair with the bookkeeper but then realized that the bookkeeper was unaware of the supervisor's actions.

The part-timer searched the break room and discovered a peephole through which the ladies' room could be observed. She reported her discovery to the vice-chairman of the board of directors and told him she believed the supervisor was responsible. Then she told the bookkeeper about the peephole.

The employer acts

The vice-chairman notified upper management, who found that the supervisor had installed the peephole when the ladies' room was remodeled a few years back. With the bookkeeper's cooperation, management installed a video surveillance camera in the break room to catch the supervisor's spying. With this "concrete proof," the company fired him, notified law enforcement, removed the peephole and offered counseling to the women. They continued working there under a new supervisor.

Both women testified later in depositions that the company had done nothing wrong between the time the peephole was discovered and the supervisor was fired. Nevertheless, the women sued for sex discrimination under Title VII, claiming that they had been subjected to a hostile work environment.

The courts decide

The trial court ruled for the employer on grounds that the facts were undisputed and the employer was entitled to judgment as a matter of law. The Eighth Circuit affirmed, holding that a Title VII plaintiff can rely only on evidence that relates only to harassment that she was aware of while she was allegedly subject to a hostile work environment. Because the bookkeeper wasn't aware of the peephole and the spying, she couldn't rely on it to establish a hostile work environment.

As for the part-timer, the Eighth Circuit looked at the totality of the circumstances that she perceived and held that she hadn't established that the alleged harassment was objectively "so intimidating, offensive, or hostile that it poisoned the work environment."

Prompt action pays off

This case demonstrates the importance of acting promptly and effectively when anyone complains of harassment. Here the company's prompt response enabled it to avoid liability for its supervisor's reprehensible conduct.

A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

"Above all, we are at your service …"

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