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UNITED STATES SUPREME COURT DELIVERS DOUBLE-WHAMMY FOR EMPLOYERS: RETALIATION AND DISCRIMINATION JUST GOT EASIER TO PROVE

By: Becky Gottsegen, Partner, Baton Rouge Office

A. RETALIATION

Most employers are cognizant of and take great pains to remedy discrimination and/or harassment complaints in the workplace. However, many employers are frequently blindsided by retaliation claims brought by employees who claim adverse treatment because of their protected activity. An employer that successfully resolves a discrimination or harassment complaint is only halfway home. The employer then must ensure that supervisors and employees do not retaliate against the employee because she/he engaged in the protected activity of raising a good faith complaint of harassment or discrimination. Furthermore, the umbrella of what constitutes protected activity has grown over the years. Generally, employees are protected from adverse treatment if they, in good faith, make complaints about discrimination or harassment, wage and hour violations, OSHA violations, whistleblower claims, etc. Statistics show retaliation claims have doubled in the last 15 years.

Even when an employer's adverse action against an employee has nothing to do with the protected conduct, there may be an appearance of impropriety and an issue of timing that will have to be dealt with if the employer's action is legally challenged. Thus, employers should always be mindful of their timing when taking adverse action against employees who recently have engaged in protected conduct.

Until recently, to prove a retaliation claim, employees in the U.S. Courts of Appeals for the Fifth Circuit (Louisiana, Mississippi, and Texas) had to show the employer's action involved an ultimate employment action, such as firing, demotion, denial of a promotion, or a reduction in pay. Employees in the U.S. Courts of Appeals for the Eighth Circuit (Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska) faced a similar burden of proof. Generally, position or scheduling changes that did not involve a demotion or reduction in pay and minor disciplinary actions were not enough to support a valid claim for retaliation. It was a heavy burden

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for employees to meet. However, because of a recent U.S. Supreme Court decision, employees now have been given a lot more ammunition for making retaliation claims. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2406 (2006). The number of retaliation claims undoubtedly will increase even more in light of this recent decision.

Retaliation is Broader than an “Ultimate Employment Action”—To establish a claim of retaliation, employees must prove that: (1) they engaged in protected activity, (2) they suffered adverse action, and (3) there is a causal connection between the participation in the protected activity and the adverse employment action. In the *White* case, the U.S. Supreme Court defined “adverse action” rather broadly. To put the Court’s decision in context, let’s review the facts of the case:

Sheila White worked as a track laborer in the Tennessee yard of Burlington Northern & Santa Fe Railway in Memphis, Tennessee. She was later assigned to operate the forklift as her primary responsibility—work that was not nearly as laborious as the work she performed as a track laborer.

White was the only woman working in the rail yard. She subsequently complained about sexist remarks by her supervisor. After an investigation, the company suspended the supervisor and required him to attend harassment training. During the investigation, however, several of White’s co-workers complained about her having the forklift job and argued that a more senior employee should have the “privilege” of the forklift job (which was viewed as a “cleaner” job). Shortly thereafter, White was suspended without pay for 37 days for alleged insubordination. She filed a grievance through her union and won. The suspension for insubordination was reversed and she received back pay, but she was not returned to her forklift position. White then sued, claiming her suspension and reassignment back to the track laborer position were done in retaliation for her complaints about her supervisor.

Even though White received full back pay for the 37 days she was suspended, and even though she was returned to work, the U.S. Supreme Court ruled that the suspension and reassignment were retaliatory acts. Under the old law in the Fifth and Eighth Circuits, White’s suspension and reassignment most likely would not have been enough to support a retaliation claim because neither involved an “ultimate employment action.” A unanimous U.S. Supreme Court rejected the “ultimate employment action” standard as too restrictive, and opted instead for a broader definition of retaliation that includes acts that are “materially adverse” to a reasonable employee. To be materially adverse, said the Court, the employer’s action must be such that it would “dissuade a reasonable worker from making or supporting a charge of discrimination.” The Court added that its holding only covered significant harms to employees, as opposed to “petty slights” or “minor annoyances” that often take place at work.

At first glance, the Court’s definition of retaliation may seem to be an objective standard (reasonable employee); however, the Court added a hint of subjectivity in the standard by ruling that the “significance of any given act of retaliation will often depend on the particular circumstances”—“context matters.” For example, the Court explained that a schedule change may not amount to much unless the employee is a young mother with school age children. The Court provided another example, stating that while not inviting someone to lunch is typically a petty slight, excluding someone from a training lunch may be retaliatory. Therefore, in determining “materiality,” the particular preferences and circumstances of the individual in question will be relevant.

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Retaliation is Not Limited to Conduct in the Workplace—The U.S. Supreme Court's ruling in *White* is also significant in that it recognized that employees may suffer actionable retaliation outside of the workplace. The Court gave as an example a case in which an employer retaliated against an employee who made a complaint against the employer by filing false criminal charges against him.

Retaliatory conduct outside of the workplace will be difficult for employers to prevent. Employers cannot monitor acts outside of the workplace, such as vandalizing an employee's personal property or harassing phone calls to an employee. However, employers will be required to investigate complaints that involve alleged retaliation outside of the workplace, and, where appropriate, take disciplinary action.

New Definition of Retaliation Will Most Likely Apply to Other Federal and State Discrimination Laws—Retaliation claims may arise under a variety of federal and state discrimination laws (that contain a retaliation provision), including Title VII (such as in *White*), the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Family Medical Leave Act. Because Title VII cases often are cited and relied upon by courts interpreting other laws prohibiting retaliation, the U.S. Supreme Court's definition of retaliation in *White* most likely will apply to other federal and state laws that contain retaliation provisions.

B. DISCRIMINATION

Oftentimes, when employees are not hired/promoted for a particular job, they claim their qualifications are superior to those of the employee who was selected and allege they were not selected because of their age, race, gender, national origin, religion, etc. Until the U.S. Supreme Court's recent ruling in *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), employees in the Fifth and Eleventh (Alabama, Georgia, and Florida) Circuits could win such cases only when the disparity in qualifications was so apparent it would "jump off the page and slap you in the face." According to the U.S. Supreme Court in *Ash*, the "visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring [unlawful discrimination] from superior qualifications."

While the U.S. Supreme Court declined to define a standard for pretext claims grounded on superior qualifications, and refused to comment on whether the petitioner's evidence established pretext, it hinted that the standards articulated by the U.S. Courts of Appeals for the Ninth Circuit (California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Hawaii, and Alaska) and the District of Columbia were acceptable. The Ninth Circuit's standard is that "qualifications evidence standing alone may establish [unlawful discrimination] where the plaintiff's qualifications are clearly superior to those of the selected applicant." The D.C. Circuit's standard is similar: a discriminatory motive can be implied "if a reasonable employer would have found the plaintiff to be significantly better qualified for the job." The U.S. Supreme Court also cited with favor a standard articulated by the Eleventh Circuit that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."

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Accordingly, employers no longer will be able to defend claims brought by employees who allege failure to hire/promote by arguing that any disparity in qualifications must “jump off the page” and “slap you in the face.” However, the good news is that the standards endorsed by the U.S. Supreme Court in the *Ash* case are not drastically different —just not as visual and emphatic.

C. PROACTIVE MEASURES EMPLOYERS CAN TAKE

Employers should take the following steps to prevent retaliation claims and reduce their risks of liability for discrimination or retaliation in hiring, promoting, disciplining, demoting or firing employees:

- Update employee handbooks to include a policy prohibiting retaliation. Such a policy should require employees to report any form of retaliation to management or human resources so it can be investigated and remedied. To the extent possible, provide alternative avenues for reporting complaints.
- Conduct supervisor training on the U.S. Supreme Court’s broad definition of retaliation. Teach supervisors how to respond to complaints of retaliation (even acts that occur outside of the workplace) and instruct them to consult with Human Resources and/or legal counsel before taking any adverse action against an employee who has complained about or filed a charge of discrimination or harassment. Supervisors often are accused of giving the “cold shoulder” or ignoring employees who have complained of discrimination or harassment. Supervisors need to be trained that ignoring employees may be actionable retaliation under the definition adopted by the U.S. Supreme Court in *White*. At the same time, supervisors need to understand that just because an employee has reported a complaint of discrimination or harassment does not give them a free pass to violate company policies.
- Question decision-makers to ensure that any contemplated adverse action has nothing to do with an employee’s complaint about discrimination or harassment. Employers also need to make sure employees are being treated the same as other similarly situated employees.
- Periodically check on employees who have complained about discrimination or harassment, or who have filed charges of discrimination, to make sure they have not suffered any retaliation. Document your conversations, and investigate any reports of retaliation.
- To avoid a finding that your hiring or promotion decisions are pretextual, use objective criteria to the extent possible. Include both minimum and preferred qualifications in your job postings/advertisements. That way, if an applicant/employee does not qualify for the position/promotion or has only the minimum qualifications, while the person selected has both the minimum and the preferred qualifications, you will have a good defense to any claim of discrimination or retaliation.
- Document and discuss performance issues with employees so you can show they were “on notice” that adverse action might occur if they didn’t improve or eliminate their problems and were allowed the opportunity to improve or correct their problems.

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SIX JONES WALKER LABOR & EMPLOYMENT ATTORNEYS NAMED IN *BEST LAWYERS IN AMERICA*® 2007

H. Mark Adams, Rebecca G. Gottsegen, Cornelius R. Heusel, Clyde H. Jacob III, Sidney F. Lewis V, and Robert B. Worley, Jr., were recently selected by their peers for inclusion in *The Best Lawyers in America*® 2007 in the category of Labor and Employment Law. This year, a total of fifty-two Jones Walker attorneys were listed in twenty-nine practice areas, some being honored in multiple categories.

LABOR & EMPLOYMENT INTERNET RESOURCES

HRhero.com

[Louisiana Employment Law Letter](#)

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- [Council on Education in Management](#)**
FMLA Update 2006
H. Mark Adams
Rebecca G. Gottsegen
September 14-15, 2006, Baton Rouge, Louisiana
- [Human Resource Management Association—New Orleans](#)**
Dealing with New Diversity Issues in a Post-K Landscape
Mary Ellen Jordan
September 20, 2006, Zea Restaurant, New Orleans, Louisiana
- [National Business Institute—Immigration and Employment: Legal Aspects of Hiring Foreign Nationals](#)**
Situational Changes that Impact Corporate Obligations
Laurie M. Chess
September 15, 2006, Hyatt Regency, Miami, Florida
- [HRhero.com—11th Annual Advanced Employment Issues Symposium](#)**
Disaster Management
H. Mark Adams—Speaker
Workplace Sabotage: Employers Have Rights, Too.
Jennifer L. Anderson
November 8-10, 2006, Caesars Palace, Las Vegas, Nevada
- Loyola University School of Law—Annual Labor & Employment Law Conference
The Application of the National Labor Relations Act in Non-Union Workplaces
Sidney F. Lewis, V
November 9-10, 2006, Pan American Life Center, New Orleans, Louisiana
- [University of Houston Law Center—Advanced Employment Law for Employers and Employment Lawyers](#)**
Disaster Contingency Planning and Crisis Management
H. Mark Adams
November 30-December 1, 2006, Dallas, Texas
December 7-8, 2006, Houston, Texas

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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