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SUPREME COURT CLARIFIES STANDARDS FOR RETALIATION CASES

When an employee claims retaliation because she opposed a practice made lawful by Title VII or filed a claim of discrimination, must the employee show that the retaliation affected her terms and conditions of employment? How harmful must the retaliation be in order to fall within Title VII's anti-retaliation prohibition? Federal courts have disagreed on these issues, which have now been resolved by the Supreme Court in *Burlington Northern & Sante Fe Railway Co. v. White*, DLR, June 22, 126 S.Ct. 2405 (2006).

The plaintiff in this case, White, filed charges with EEOC claiming that Burlington Northern retaliated against her by changing her job responsibilities and suspending her for 37 days because she had complained to her supervisor about on-the-job harassment. Title VII's anti-retaliation provisions prohibit employer actions that "discriminate against" an employee or job applicant because he or she opposed a practice that Title VII prohibits or filed a charge of discrimination or assisted in a Title VII investigation. The *Burlington* case focuses on the meaning of the "discriminates against" requirement. Does that mean that there must be a close relationship between the retaliation and employment? Several courts have said yes to that question and held that unlawful retaliation occurs only if the retaliation affects "terms, conditions, or benefits of employment." This is the criteria that applies when an employee claims discrimination. For example, if an employee claims that he was not invited to have lunch with his supervisor because he was Hispanic, that employee must prove that having lunch with his supervisor was a "term or condition" of employment. The theory is

that the discrimination provisions of Title VII are confined to actions which affect employment or alter the conditions of the workplace.

The Court held that the criteria for proving discrimination differ from those applicable in retaliation cases. It relied heavily on the differences in the language of the statute. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment*" because of that individual's race, color, etc. As the italicized language indicates, unlawful discrimination occurs when the challenged act affects employment or alters conditions of employment. In contrast, the anti-retaliation provision makes it unlawful for an employer to "discriminate against" an employee because he filed a discrimination charge. That language does not require that the retaliatory act affect terms and conditions of employment. Based on these differences in language, the Court concluded that the anti-retaliation provisions are not limited to actions that affect the terms and conditions of employment and extend beyond workplace-related or employment-related retaliatory acts.

Does that mean that any act of retaliation is actionable under Title VII? The Court said no to that question. To be actionable, the employee must show that a reasonable employee would have found the challenged action "materially adverse, which in this [the retaliation] context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" What makes a retaliatory action "materially adverse" will depend on the particular circumstances. As the Court observed, "context matters." Thus, "a schedule change in an employee's work schedule

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may make little difference to many workers, but may matter enormously to a young mother with school age children."

There is no doubt that this decision makes it easier for employees to prove retaliation. Under this decision, the same act—say, for example, a change in work schedule—could be an illegal act of retaliation but not an illegal act of discrimination. As a practical matter, because the employee has a lesser burden of proof in a retaliation case than in a discrimination case, it will be more difficult for employers to obtain pre-trial dismissals in retaliation cases, and, as a result, settling retaliation cases will likely become more difficult and costly. Employers may find themselves willing to settle retaliation claims where the damages are relatively small compared with the time, cost and potential exposure of litigating, but the employee (and her counsel who is entitled to attorneys fees if successful) may be unwilling to settle on terms that are acceptable to the employer because of pain and suffering claims and attorneys fees that would be available at trial. This is a decision which makes sense analytically but could prove nettlesome to employers in practice.

EMPLOYMENT PROVISIONS IN IMMIGRATION REFORM

The immigration bill that passed the Senate in May will, if enacted into law, have a significant effect on hiring procedures. The bill would eliminate the current I-9 hiring procedure and replace it with a new centralized electronic hiring system. Within three days of hire, employers would have to access the system to confirm the new employee's identity and his eligibility to work. The Department of Homeland Security would confirm within 10 days, and, if it lacked sufficient information to confirm, the new hire would be given opportunity to submit additional information.

SEXUAL HARASSMENT: HOW MUCH MUST THE EMPLOYEE PROVE?

When a workplace is permeated with ridicule and insult that is sufficiently pervasive to alter the conditions of the victim's employment, Title VII has been violated. How much does an employee have to show to establish that the work environment is sufficiently hostile? That issue was addressed in a recent decision by the court of appeals in New York. *Schiano v. Quality Payroll Services*, 445 F.3d 597 (2d Cir. 2006).

The plaintiff, Schiano, was a female who claimed that her supervisor had on several occasions told her that if she wanted to progress within the company, she was sleeping with the wrong person (a co-worker); that the supervisor had placed his hand on her thigh at the company Christmas party; asked if they could go to his room after the party; and, on several occasions, placed his hands on her back and shoulders while she was working. The district court held that these claims were not severe enough to create a hostile working environment. The court of appeals disagreed.

The court noted that whether conduct was severe enough to create a hostile work environment was a question of fact. The Supreme Court has cited four factors that should be weighed in determining this issue: the frequency of the conduct; its severity; whether it is physically threatening or humiliating; and whether it unreasonably interferes with an employee's work performance. No one factor is controlling. Viewing these factors as a whole, the court concluded that a reasonable jury, weighing the four factors, might find the evidence sufficiently pervasive to establish a hostile work environment.

We are not surprised by this decision. What it illustrates is the reluctance of an appellate court to deny a trial to a plaintiff unless the plaintiff's claims are so weak that no reasonable jury could rule in her favor.

MAKING A DIRECT THREAT AND POSING A DIRECT THREAT: IS THERE A DIFFERENCE UNDER ADA?

A decision by the second circuit in New York illustrates the difference under the ADA (Americans with Disabilities Act) between making a direct threat to another employee and posing a direct threat. *Sista v. CDC Ixis North America Inc.*, 17 AD Cases 1453 (2d Cir. 2006).

The ADA prohibits discrimination against a "qualified individual with a disability" If an employee "poses a direct threat," which has been defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," then that employee is not "otherwise qualified to perform his job" under the ADA standards. An employer may defend against a disability claim by showing that the employee poses a direct threat to others.

In this case, the plaintiff made a direct threat against other employees. The court noted that the "poses a direct threat to others" defense is not applicable when an employee actually makes a threat." (Court's emphasis). Rather, "poses a direct threat" is a term of art under the ADA which means that the employee, has a condition—say, an uncontrolled propensity for anger and violence—that makes him a direct threat to others. In this case, however, the plaintiff was fired because he made threats to other employees in violation of company policy. Whether that employee actually posed a direct threat to others was not deemed relevant because, as EEOC noted in its brief to the court, an "employer may discipline or terminate an individual who, because of disability, makes a threat against other employees if the same discipline would be imposed on a non-disabled employee engaged in the same conduct." Put another way, the employer did not fire the plaintiff because he was disabled, but because he threatened other employees in violation of company policy. Because the plaintiff failed to show that this

stated reason for his discharge was pretextual, the court ruled that his discharge did not violate the ADA.

This cases illustrates an important principle of ADA law— while it is illegal to fire a qualified person with a disability, it is not illegal to fire that disabled person if he engages in conduct that would result in termination if committed by an employee who was not disabled.

FAMILY MEDICAL LEAVE ACT (“FMLA”)

Is an employer obligated to restore every employee to employment upon termination of FMLA leave? The fourth circuit joined several other circuits in saying no to that question. *Yashenko v. Harrah's NC Casino*, 11 WH Cases 711 (4th Cir. 2006).

The plaintiff in this case asserted an unqualified right to reinstatement upon termination of his FMLA leave. In rejecting that claim, the court cited the section of the FMLA which provides that “nothing in this section shall be construed to entitle any restored employee to . . . any . . . position . . . other than any . . . position to which the employee would have been entitled had the employee not taken the leave.” Despite the somewhat tortured syntax, this language, according to the court, means that an employee cannot use the FMLA to get reinstated to a job that he, would have lost if he had not taken FMLA leave.

A similar concept was invoked by the seventh circuit court of appeals in Chicago in a similar FMLA case. *Crouch v. Whirlpool Corp.*, 11 WH Cases 716 (7th Cir. 2006). The plaintiff, Crouch, worked for Whirlpool, as did his girlfriend. Both applied for vacation leave for the same two-week period. Because Crouch's girlfriend had more seniority than Crouch, her vacation leave was granted but Crouch's request was not. Crouch then sought disability leave for the same two-week period and – surprise – went to Las Vegas with his girlfriend during that time. When Whirlpool noticed that Crouch had sought disability leave the prior year after being denied vacation leave, it

commenced an investigation and produced pictures of Crouch doing yard work during the time that he had claimed disability because of a knee injury. It then terminated Crouch for misuse of leave.

The court sustained Whirlpool's position. It noted that the return-to-work provisions of the FMLA apply only to employees on leave “for the intended purpose of the leave.” It also noted an earlier decision in which the same court had held that even an employer's honest suspicion that the employee was not using his medical leave for its intended purpose was enough to defeat the employee's FMLA claim for reinstatement.

The theory of the court parallels the logic of the fourth circuit decision discussed above – namely, Crouch was not fired because he took FMLA leave but rather because he was misusing the leave. As the court noted, Whirlpool's “honest suspicion forecloses Crouch's FMLA claim.”

At the other extreme of FMLA jurisprudence is a decision of the eighth circuit court of appeals upholding an award of liquidated damages against an employer for violating FMLA. *Hite v. Vermeer Manufacturing Co.*, 11 WH Cases 792 (8th Cir. 2006). Employers sometimes forget that in certain cases FMLA violations trigger significant financial damages. Specifically, FMLA provides for liquidated damages for FMLA violations equal to twice the financial damages actually suffered plus interest. Therefore, if an employee was wrongfully fired for taking FMLA leave or for not returning as required, the employee may have a back pay claim, which gets doubled if he prevails. Liquidated damages are not required in every case; rather, if the employer proves that it acted in good faith and on reasonable grounds, the court, in its discretion, can reduce the award and eliminate the liquidated damages.

In this case, the court declined to do that. It noted that where the jury finds intentional retaliation, it would be very difficult and maybe impossible for the plaintiff to convince the court to waive

the double damages. In this case, the court had no difficulty in finding that there was evidence of intentional retaliation, and, therefore, no basis for reducing the double damage award imposed by the lower court.

NLRB: REVISITING THE UNION'S RIGHT TO CONFIDENTIAL INFORMATION

We have observed in earlier newsletters that the Bush-appointed NLRB, while claiming that it was acting within the framework of established precedent, was in fact making significant—some would say radical—changes in labor law. A good example is the Board's decision in *Northern Indiana Public Service Co.*, 347 N.L.R.B. No. 17 (2006).

In that case, Randy Chaplin, an employee, claimed that his supervisor, Long, threatened him and other employees with violence. The Union filed a grievance, claiming that Long's threats violated the contract provision which required a safe workplace. The employer's HR Manager interviewed Chaplin, Long, and Mickey Bellard, the employer's Superintendent of Operations and made notes of the three interviews. To assist in processing the grievance, the union asked the employer for information about its investigation. The employer told the union who was interviewed but declined to provide the notes of the interviews, claiming that such information was confidential. Note that the three people interviewed included the charged supervisor, Long, and his boss, Bellard.

The Board analyzed this case in three steps. The first issue was whether the employer had a legitimate confidentiality interest to protect. The Board found that the company had such an interest because it had promised confidentiality to the three people who were interviewed and that such promises “encourage witnesses to participate in investigations of workplace misconduct” and protect them from retaliation and intimidation. This conclusion is really difficult to comprehend because two of the persons interviewed—Long and Bellard—were supervisors and Long was not a “witness” but the accused.

Supervisors do not need or expect protection from retaliation, and, in our experience, companies have never thought it necessary to promise confidentiality to supervisors, particularly one accused of misconduct in company investigations. Moreover, we wonder how any company can promise confidentiality in an investigation which may result in a trial or hearing. This is why companies can't and don't promise confidentiality in sexual harassment investigations and, again in our experience, the promise of confidentiality "to the extent possible" has not, in practice, had the effect of impeding employer investigations. The Board's conclusion that the employer had a legitimate confidentiality interest because it had promised confidentiality to supervisors is a sharp departure from existing law.

The Board then sought to balance the company's need for confidentiality against the union's need for the information and found that the balance favored the company. Finally, the Board noted that even where the balance favors the company, a company which declines to provide relevant information must still seek an accommodation with the requesting party as to how the information could be provided without compromising the company's legitimate concerns. The Board found that the employer had made such an accommodation.

Again, we have difficulty understanding the Board's rationale. In past cases, the Board has required that employers provide summaries of the substance of the investigation. The employer did not provide a summary here. It did provide the names of the people interviewed and, therefore, according to the Board, the Union "could interview them, just as the [Employer] did." But how can the Board assume that two company supervisors—including the charged party— would agree to be interviewed by the union in connection with a pending grievance which the union filed? It is truly hard to understand how, under NLRB standards, the disclosure of the names of the people interviewed can be seen as an "accommodation" which allows the union to obtain relevant

information.

This case is certainly helpful to management in limiting disclosure of information that has been requested by the union. But if, as we suspect, this decision will be denied enforcement in court, the precedential value of the decision will be extremely limited.

NEW LAWS GOVERNING IDENTITY THEFT

New York and New Jersey have joined other states in passing laws addressing identity theft. Under NY law anyone conducting business in New York who maintains computerized data of personal or private information must notify the owner or licensee of the information, as well as the attorney general and others, if any third party acquires it without authorization. New York and New Jersey also now allow a victim of identity theft to place a freeze on his/her credit report that will prohibit a consumer reporting agency from releasing any information from that credit report without the individual's express authorization.

These laws also regulate the manner in which documents containing personal information should be destroyed. Under these laws, when businesses dispose of records containing any personal identifying information, such as maiden names, social security numbers, account numbers, or other numbers that might identify an individual, they cannot simply toss the documents into the trash but must dispose of those documents in a manner consistent with industry practice which insures that the personal information is destroyed and unreadable. In practice, this means that when records are destroyed under corporate retention policies, they must be either shredded or destroyed in another way which insures that the information cannot be read or retrieved. Violators may be subject to a fine of up to \$5,000.

PERSONAL NOTES

Andy Zelman has been elected to fellowship in the prestigious College of Labor and Employment Lawyers. The goals of the College are to promote

achievement, advancement and excellence in the practice of labor and employment law. Fellowship in the College is highly selective and limited to attorneys, government officials, academics and arbitrators who have distinguished themselves in the practice of labor and/or employment law over the course of years.

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