

Employment Law Retaliation Under Title VII: Two Viewpoints

By: Nancy Richards-Stower and Debra Weiss Ford

Burlington Northern and Santa Fe Railroad Company v. White

Editor's Note: Employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both New Hampshire fellows of the College of Labor and Employment Lawyers, discuss the recent US Supreme Court decision, Burlington Northern and Santa Fe Railroad Company v. White, which set new national standards for what constitutes actionable retaliation under Title VII of the Civil Rights Act of 1964, as amended. On June 22, in a 9-0 ruling—with all, except concurring Justice Samuel Alito, joining Justice Stephen Breyer's reasoning—the United States Supreme Court upheld Sheila White's retaliation claims by adopting a surprisingly expansive standard defining retaliation.

Debra: Well, Nance, stop gloating.

Nancy: Why should I? This was nearly a slam dunk for employee rights.

Debra: There's still a lot of room to maneuver.

Nancy: Not if the courts follow both the letter and spirit of this case.

Debra: Remember, the spirit is in the eye of the beholder.

Nancy: You mean in the pen of the....

Debra: Watch it, Nance!

Nancy: I meant no disrespect; it was only a "stray remark" (although one wise federal judge opined that "Stray remarks were windows to the soul.").

Debra: But this is not a "stray remark" case; it's all about retaliation. Let's debate the probable impact of this case.

Nancy: Oh, all right. The "Fellows" Debate

Nancy: I'm so glad that the court made clear that the old "tangible employment action" test was created only to define when a company would be vicariously liable for a supervisor's sexual harassment; it was not the definition of what constitutes discrimination or retaliation. Ever since the decisions of Faragher v. Boca Raton and Burlington Industries v. Ellerth, em-

ployees have had to swat away at the "tangible employment action" arguments in retaliation cases.

Debra: In 2004, approximately 20,000 retaliation cases were filed with the EEOC. Now, with this new standard, aptly called "unclean" and leading to "topsy-turvy results" by Justice Alito, we can expect even more retaliation cases.

Nancy: I love how the court allowed for the personalization of what constitutes retaliation. A shift change for Joe, a childless, married man, might not shake his world; for Jeanne, a single mom with day-care considerations, the shift change would be actionable retaliation.

Debra: But, the problem is there is still no clear definition of what constitutes retaliation. The retaliation definition should be limited to only those discriminatory practices that affect an employee's compensation, terms, conditions or privileges of employment. If an employer gives all employees flowers for Secretaries Day but omits to give them to one employee, do we now have a possible retaliatory action?

Nancy: I think it depends on the details. But the court did set an elastic limit when it said that not all retaliation would be actionable, just retaliation which caused harm and was materially adverse, just before enlarging the category of actionable retaliation by adopting the test that it is activity which "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Opinion, 13.) In a small office setting, if the flower-distribution ceremony was "public," the pointed leaving-out of the one secretary who complained of sexual harassment last week would certainly deter others from complaining: not because any of the secretaries gave a hoot about the flowers (message to bosses: give money instead), but because the message sent by the discriminatory distribution of the flowers speaks volumes about the mindset and intent of the boss.

Moving on, I was saddened, but not shocked, that the solicitor general, on behalf of the United States,

argued against the government’s own expert discrimination agency, the EEOC. It was almost too much to bear, especially after *Garcetti*. (*Garcetti v. Ceballos*, decided earlier this summer, limited the First Amendment rights of government employees to speech pertaining to things outside their job duties. The solicitor general argued against the employee. (See page 1, July 7, 2006 edition of Bar News at www.nhbar.org. for Nancy Richards-Stower’s article on this decision.)

Debra: I think the Bush Administration was rightly concerned about creating a flood of retaliation lawsuits.

Central to the court’s decision is, arguably, a strict statutory construction:

“...There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 800–801 (1973). The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do.” (Opinion, p. 8)

Nancy: Lots of retaliatory stuff takes place outside of work. I’m glad the court recognized that, citing *Rochon v. Gonzales*, where the FBI’s retaliation took the form of refusing to investigate death threats against the employee, but I fear that this extreme example will be used by some to set the bar too high. Death is kind of the “Daddy of Retaliation.”

Debra: From an employer’s perspective, some of the most troubling language in this case is the Court’s conclusion that it was Congress’s purpose in enacting the anti-retaliation provision to have it apply to even alleged harm occurring to an employee outside the workplace.

The anti-retaliation provision in Title VII only prohibits “discrimination” against those who are involved in a Title VII proceeding or those who oppose a practice forbidden by Title VII. But the Court in *White* interpreted congressional intent as prohibiting employers from “interfering with an employee’s

efforts to secure or advance enforcement of the Act’s basic guarantees,” and the Court then said it was necessary to interpret the anti-retaliation provision broadly since “an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.” But what does that mean? It creates a nebulous standard, ensuring the filing of many lawsuits.

Nancy: I also thought it was cool for the court to cite to the EEOC’s Web page and its compliance manual www.eeoc.gov/policy/docs/retal.html (available in the clerk of court’s case file). You never know when the court will defer to the government experts and when it will remind us it doesn’t have to if it doesn’t want to.

Debra: I think the Court just wanted to show us that it is computer literate.

Nancy: Of course, the “yang” to the “Hooray, Ying” for employees might be that part of the decision refusing to recognize all retaliation as actionable (Opinion, 13). Some employee advocates predict that this gap will be leveraged by the employers’ bar. I understand their skepticism based on how the courts have interpreted other employee victories from the Supreme Court. I was concerned that the court seemed to dismiss the effects of co-employee snubbing. For example, there’s a reason that the Amish selected shunning as the punishment of choice for those who stray.

Debra: But, Nance, how can you argue against “reasonable”? As the Court said:

In our view, 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.’”

We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth “a general civility code for the American workplace.” (Opinion, 13)

Nancy: Well, Deb, the decision reads great, but its implementation in the federal courts is what counts. What is “objectionably reasonable” depends on the eyes, heart and, often, the gender of the beholder (at least in my family), and has in other contexts



offered fertile ground for federal court summary judgment decisions in favor of employers. I'm fearful that the very real retaliation suffered by my clients will be categorized as "petty slights." What's "petty" to an outsider can be suffocating to the employee who has just complained about sexual harassment, or race discrimination, or has just testified for another employee and is petrified about what comes next. Sometimes a single glare directed at an employee after she makes an internal complaint can send her into a state of dread and foreboding, and she quits. It's not as if anti-retaliation provisions are published anywhere in the workplace, and even that rare employer who does stick a clause in a handbook doesn't type it in bold, 14-point type, now do they? Yes, Burlington Northern reads great, but so did Reeves (Reeves v. Sanderson

Plumbing Products, Inc., 530 U.S. 133 (2000)) and Desert Palace (Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)), yet the phrase "neutered by the lower courts" comes to mind.

Debra: Well, this is a big win for the plaintiff's bar. We can disagree on the wisdom of the decision, but I am sure we agree that this is quite a significant case. It expands the protection to employees who claim they have suffered retaliation after making a claim of discrimination or harassment under Title VII of the Civil Rights Act of 1964. The Court unanimously held that even acts of retaliation can, given the circumstances, include a change in schedule or even a failure to invite an employee to lunch. This should keep the employment bar quite busy.

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