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Labor and Employment Law Alert

U.S. Supreme Court Gives Employees An Expanded Right To Claim Retaliation

At the end of its June, 2006, session, the U.S. Supreme Court expanded the right of employees to claim that they were retaliated against for making claims of unlawful discrimination. The opinion is entitled Burlington Northern & Santa Fe Railway Co. v. White, and was a unanimous decision, with a separate concurring opinion by Justice Alito.

The decision was an interpretation of Title VII, the federal law prohibiting employment discrimination. The statute not only prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, but also makes it unlawful “for an employer to discriminate against any of his employees or applicants for employment” because the employee “has opposed any practice made an unlawful employment practice” by federal law, or because the employee “has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing” under the federal discrimination law. The question was whether the retaliation prohibited by the statute relates only to terms and conditions of employment, or whether the statute also forbids retaliation in non-employment areas. The Supreme Court ruled that the statute forbids retaliation in non-employment areas, as well as employment-related matters.

What does this mean? Most retaliation claims arise from adverse changes in the terms of employment shortly after a claim of discrimination. For example, an employee who works the day shift will naturally

claim retaliation if he is transferred to the night shift or demoted shortly after making a claim of discrimination. However, employers have also retaliated against employees outside the workplace. The Supreme Court cited a case where an employer filed false criminal charges against an employee who complained of discrimination, and another case where the FBI retaliated against an employee by refusing, contrary to its own policy, to investigate death threats against him and his wife.

Will this mean more claims of retaliation? Probably, since there are now more fact patterns that will fall within the scope of the prohibition against retaliation. However, the increase may not be great, since most retaliation claims arise from conduct in the workplace, which has always been covered by the statute’s prohibition.

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Are retaliation claims now easier to prove? No. The employee must still prove that the retaliatory action was “materially adverse,” and caused “injury or harm.” The Supreme Court emphasized material adversity because, “it is important to separate significant from trivial harms,” and reiterated its previous opinion that the discrimination laws do not set forth “a general civility code for the American workplace.” “An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.”

The Supreme Court also emphasized that proof of a retaliation claim must establish conduct that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” This is an objective test, that depends upon how a hypothetically reasonable person would respond to the retaliatory conduct, rather than how the complaining employee actually responded. The reasonableness of the conduct will be determined by the jury in the context of the employment relationship. As an example, the Court said, “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”

Can an employee win a retaliation claim if he loses the discrimination claim? Yes. The Supreme Court ruled that, “The standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint.” Thus, an employer can win by showing that it did not discriminate, but still lose if it retaliated against the employee for making the discrimination complaint.

What does Massachusetts law say about this subject? The Massachusetts discrimination statute also prohibits retaliation, making it an unlawful practice, “for any person [or] employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden” by the statute, “or because he has filed a complaint, testified or assisted in any proceeding” under the statute. It is also unlawful for “any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by” the statute, or “to coerce, intimidate, threaten or interfere with such other person for having aided or

encouraged any other person in the exercise or enjoyment of any right granted” by the statute.

The Massachusetts statute is broader than the federal statute because it applies to “any person,” as well as to employers. Thus, fellow employees -- or even non-employees -- can violate the statute by retaliating against people who make claims of discrimination. An example would be a person who refuses to hire someone who made a claim of discrimination at his previous place of employment. Another example would be employees who retaliate against a fellow employee who complains of discrimination or sexual harassment.

No reported case of Massachusetts federal or state courts, or the Massachusetts Commission Against Discrimination, deals with claims of retaliation outside the employment context. Thus, it is impossible to determine whether the Massachusetts courts will follow the Supreme Court’s lead, but it certainly seems likely in view of the broad language of the Massachusetts discrimination statute.

What should employers do? Employees may make claims of unlawful discrimination in many ways -- by informal complaints to a supervisor or human relations officer, by formal grievances, or by complaints to the Massachusetts Commission Against Discrimination or the Equal Employment Opportunity Commission. Knowledge of the complaint should be limited to those employees who have a need to know about it (which may be difficult, in view of the employer’s obligation to investigate the complaint), and all supervisory employees should be warned that any changes in the employee’s terms and conditions of employment must be justified to a higher level of management who is not personally charged with discrimination. Members of the Rubin and Rudman Employment and Labor Law Department are available to give counseling in these situations.