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Labor and Employment Law: Retaliation Claims: The Hidden Danger (9/06)

By James J. Rooney, Buffalo Niagara Human Resource Association's *Network* Newsletter, September, 2006

Amid all the discussion of discrimination and harassment, the issue of retaliation is often treated as little more than an afterthought. And yet, it is clearly one of the most significant potential liabilities for employers. In fact, employers often seem less able to defend themselves against retaliation claims than against employees' initial, underlying complaints.

Recently, the United States Supreme Court focused attention on the issue of retaliation when it issued its decision in *Burlington Northern & Santa Fe Railway Co. v. White*. The Court in *Burlington Northern* expanded the type of conduct that will be deemed unlawful retaliation. As a result, employers must be more careful than ever to take appropriate measures to protect themselves against such claims.

Retaliation Basics

A variety of federal and state statutes make it unlawful to retaliate against an employee who has lodged a complaint or participated in the investigatory or legal process associated with such a complaint. These statutes include not only the classic federal and state anti-discrimination laws, but also the Family and Medical Leave Act, the National Labor Relations Act, and the New York Workers' Compensation Law, to name just a few.

The elements of a retaliation claim are relatively straightforward. An employee must first show that he engaged in so-called "protected activity." This encompasses an array of activities, ranging from lodging a complaint about unlawful conduct to participating in some way in the investigation into, or litigation concerning, such a complaint (e.g., testifying in support of a co-worker's discrimination claim). Once that has been established, the employee must prove that the employer took an adverse employment action against him because of his protected activity. It is this last element -- the causal link between an employer's actions and an employee's protected activity -- that lies at the heart of unlawful retaliation.

Let the Problems Begin

As simple as the law of retaliation may seem, it remains an area where employers repeatedly encounter problems. One of the most common traps arises where the underlying discrimination claim is particularly weak. When employers believe an employee's complaint lacks merit, they frequently assume that their obligations to the complaining employee cease. Many even assume that they are free to punish the employee for having wasted their time and resources with a frivolous complaint. Such assumptions can have costly ramifications. There is widespread agreement among the courts that, even if an employee's underlying complaint proves untrue, the anti-retaliation laws will still afford him protection -- at least so long as he had a reasonable, good faith belief that he was treated unlawfully.

Further complicating matters is the fact that precisely what constitutes an adverse employment action -- the sort of action that an employee can challenge in court -- has always been something of a moving target. On the one hand, it is clear that an employee suffers an adverse action if he is discharged, demoted, or denied a promotion. Far less clear is whether more mundane personnel decisions such as job transfers and reprimands can also be attacked as retaliatory. This is where the Supreme Court's recent decision in *Burlington Northern* becomes relevant. The Court rejected some of the lower courts' more narrow interpretations of

retaliation. In so doing, the Court held that an employee can state an actionable claim of retaliation under Title VII even if no specific term or condition of employment has been affected. Thus, it may be unlawful to retaliate against an employee simply by sending him or her to a less desirable job, even if his or her title, salary, and benefits remain the same. According to the Supreme Court, an employee need only show that the employer's retaliation was serious enough that it would have dissuaded a reasonable employee from ever making a complaint.

The Court in *Burlington Northern* also concluded that the concept of unlawful retaliation was not limited to the workplace. An employer can therefore violate Title VII by retaliating against an employee outside the employment context. By way of example, an employer might engage in unlawful retaliation by filing false criminal charges against an employee, even if the charges have nothing to do with work.

Avoiding Retaliation Claims

Clearly, the *Burlington Northern* decision should motivate employers to take appropriate steps to limit their potential exposure to retaliation claims. In this regard, there are some basic steps that employers can take to minimize their exposure. The first and perhaps most fundamental of these is to educate supervisors about retaliation and to encourage them to seek guidance from upper management or human resources where appropriate. Often supervisors are given extensive training about sexual harassment and discrimination, but hardly a word is said about retaliation. That is a mistake. Ideally, supervisors are required to undergo training, including retaliation training, offered by an attorney or human resources specialist. Among the many positive effects of such training is that it better enables the employer to avoid punitive damages or, in some instances, avoid liability altogether.

On a similar note, employers are well advised to disseminate a policy that not only encourages employees to bring complaints to the attention of management, but assures them that they will not be subjected to retaliation. Employees should be required to sign an acknowledgement that they received the policy. In the event an employee asserts a retaliation claim, the policy will be among the first exhibits introduced by the employer. It will go a long way toward showing that the employer does not discourage complaints. It also may serve as the foundation for certain legal defenses.

In addition, employers must be vigilant about developing a paper trail that can rebut any charge of retaliation. This is particularly important because employees can raise suspicions about retaliation simply by pointing to the fact that they suffered an adverse action shortly after making a complaint. In some cases, the timing of the adverse action is all that is needed to create an inference of retaliation. It is vital, therefore, that the employer have concrete evidence demonstrating that its motivation for taking action against an employee had nothing to do with retaliation. The ideal evidence would show that the personnel decision was made before the employee even engaged in protected activity. Yet even if the sequence of events does not allow for such evidence, a written document that reflects the employer's non-retaliatory motivation is indispensable. Otherwise, the timing of the contested employment decision may seal the employer's fate.

In the end, no matter how many steps employers may take to counteract retaliation, they are often still gun-shy. When faced with the task of managing an employee who has engaged in protected activity, employers can feel paralyzed by the prospect of a retaliation claim. There is, to be sure, no foolproof solution. Yet employers should understand that, despite its challenges, the law of retaliation does not afford employees a free pass. If an employer has acted reasonably, been sensitive to issues of timing, and followed the various steps outlined above, it should have confidence that its personnel decisions can be defended.

Note: Mr. Rooney's article appeared originally in Buffalo Niagara Human Resource Association's *Network* newsletter.

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