

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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Second Circuit Clarifies Federal Law on Employment Retaliation Claims

In a recent decision, the U.S. Second Circuit Court of Appeals, the federal appeals court covering New York and adjacent states, sought to clarify the federal law standard for evaluating retaliation claims under the principal anti-discrimination statutes including, Title VII, the ADEA and the Reconstruction Era Civil Rights Act. Significantly, the court found that such retaliation claims are evaluated under a separate, more expansive standard than substantive discrimination (including hostile work environment) claims.

In *Carr v. New York City Transit Authority*, the plaintiff alleged she was subject to a retaliatory hostile work environment resulting from her discrimination complaints about being passed over for two promotions. She alleged discrimination based on her race, gender and age under Title VII, the Age Discrimination in Employment Act and section 1981 of the Civil Rights Act of 1866. The trial court granted summary judgment to the defendants. One of the issues on appeal was the legal standard for evaluating plaintiff's retaliation claims.

The court identified the Supreme Court's decision in *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006) as the controlling precedent. There, the Court had established that retaliation claims under the federal statutes are governed by common principles which include application of the *McDonnell Douglas* framework for analyzing such claims, but were to be analyzed separately from the underlying substantive discrimination claims (e.g., the failure to promote).

The court in *Carr* explained that this retaliation standard was distinguished from the standard for alleged discriminatory conduct in at least two significant ways. First, retaliation claims cast a broader net. While claims of discrimination focus on how the defendant's action impact certain enumerated aspects of the plaintiff's employment (i.e., refusal to hire, discharge, compensation, terms, conditions or privileges of employment), the conduct challenged in retaliation claims is not so limited. Any discrimination because of the plaintiff's protected conduct could give rise to a retaliation claim. So, for example, discriminatory conduct outside of the workplace or the employment context could arguably support a retaliation claim. This distinction is based on a nuanced reading of the separate statutory prohibitions against discrimination and retaliation.

Second, in the context of a claim of "hostile environment," the Second Circuit held that *Burlington Northern* established a different standard for evaluating whether the defendant's predicate conduct is sufficient to support a retaliation claim. In the context of a claim of retaliatory hostile environment, the court must determine whether the plaintiff suffered "a materially adverse action" by the defendant, which is defined as an adverse action that would dissuade a reasonable worker from making or supporting a charge of discrimination.

In *Carr*, the court expressly confirmed that this standard is separate from the "severe or pervasive" standard that applies to define adverse actions in the context of discriminatory hostile environment (i.e., defendant's conduct toward the plaintiff was sufficiently severe or pervasive as to alter the terms

of plaintiff's employment) and that the "severe or pervasive" standard does not apply to retaliation claims. In summary, the court held that to establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) she engaged in protected activity; (2) the defendant was aware of that activity; (3) she was subjected to a retaliatory action that was materially adverse; and (4) there was a causal connection between the protected activity and the materially adverse action, where a "materially adverse" action is one that would have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Retaliation claims often present complicated challenges for employers in terms of both managing ongoing employment relationships and in defending litigation. Even in cases in which the underlying discrimination claim is dismissed on a pretrial or summary judgment motion, the retaliation claim may survive to trial. The *Carr* decision increases employers' risks by broadening the scope of potential retaliation claims. As a result, a critical aspect of an employer's non-discrimination policy and complaint handling procedure must be proactive steps to anticipate, monitor, and prevent situations that could give rise to retaliation claims.

If you have any questions about the information presented in this blog post, please contact [Thomas Eron](#), any attorney in Bond's [labor and employment practice](#) or the Bond attorney with whom you are regularly in contact.

