the Employment Law newsletter

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Burlington Northern v. White: Supreme Impact on Title VII Retaliation Claims

By Gregory E. Rogus and Christina Schmucker

Introduction

Under Title VII of the Civil Rights Act of 1964, it is unlawful for any employer[1] to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions or privileges of employment because of the individual's race, color, religion, sex or national origin.[2] Employers are also prohibited from limiting, segregating or classifying employees or applicants for employment in any way that would deprive or tend to deprive the individual of employment opportunities or otherwise affect his or her status as an employee because of the individual's race, color, religion, sex or national origin.[3] These anti-discrimination measures have been, and continue to be, crucial components in the federal government's promotion of public policy favoring employment and employment opportunities free from classification-based discrimination. To further this goal, Congress intended that employees and employment appli-

[1] The Act defines an "employer" to include individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, or receivers who are engaged in an industry affecting commerce, and who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C.§2000e (a) and (b).

[2] 42 U.S.C.§2000e-2(a)(1).

[3] 42 U.S.C.§2000e-2(a)(2).

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Welcome

We are pleased to present this inaugural edition of our Employment Law Newsletter. Our intent is to present and discuss current topics of interest and concern to business owners, executives, human resource professionals, managers, supervisors and others, within the sphere of employment law, including recent court decisions, litigation trends, new legislation, and strategic and tactical considerations to assist business enterprises and operations in their interface with the legal system.

In this edition, Christina Schmucker and I examine the Supreme Court's recent decision in *Burlington Northern and Santa Fe Railway Co. v. White*, and its impact upon the future course of Title VII retaliation claims. In addition, Marvin Muller and Arturo Aviles take a look at recent legislative and administrative rule-making proposals affecting employer responsibilities as part and parcel of the federal government's immigration reform efforts.

Thank you for taking the time to review these articles. Please feel free to distribute this newsletter to others within your organization. We welcome your questions, comments, suggestions and other feedback, and look forward to hearing from you.

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Editor

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cants have an effective means to challenge unlawful acts, and therefore established procedures for such individuals to follow when seeking to vindicate their Title VII rights. Congress was mindful that employers may, in many instances, have a good faith basis for contesting a particular discrimination charge. If so, employers were expected to utilize Title VII's procedural framework to present their side of the story. But Congress remained wary of the potential for some employers to take matters into their own hands in responding to discrimination claims. An employer's annoyance, resentment, or perhaps anger at being accused of wrongdoing, forced to undertake and/or participate in an investigation, and compelled to incur substantial legal expense in defending itself could lead to counter-measures aimed at chilling a particular employee's exercise of his rights or sending a message to others to think twice before bringing their own discrimination claims.

Congress realized that such employer conduct could defeat Title VII's principal purpose. Therefore, it included within the Act another provision declaring it illegal for any employer to "discriminate against" an employee or applicant for employment because that individual has "opposed any practice" that was itself an unlawful employment practice under the Act, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing involving employment discrimination.[4] Thus, for example, an employer cannot take retaliatory action against an employee who has filed a charge alleging sexual harassment or other workplace discrimination, nor can an employer retaliate against an individual who provides the Equal Employment Opportunity Commission ("EEOC") with information supporting a co-employee's charge of discrimination.

Though it unmistakably targeted retaliation as an additional form of unlawful discrimination, Congress did not use the specific word "retaliation" in the Act, nor did it provide any definition.[5] Not surprisingly, the anti-retaliation provision has spawned considerable litigation over its meaning and scope. The courts have readily observed that retaliation can take many forms, from the overt (firing or demoting the complainant) to the more subtle (changing an employee's work schedule or transferring him or her to a less desirable work location), but have struggled in drawing a consistent line between that which is actionable under Title VII and that which is not. Consequently, differing tests emerged from the various federal Courts of Appeals, leaving employers guessing whether certain actions or decisions might constitute unlawful retaliation.

On June 22, 2006, the United States Supreme Court weighed in with its decision in *Burlington Northern & Santa Fe Railway Co. v. White*.[6] *Burlington Northern* eliminates much of the previous conflict over what is, or is not, actionable retaliatory conduct. But the news is not all good for employers, since the Court has favored an interpretation of Title VII's anti-retaliation provision that is more expansive than the law's other anti-discrimination measures. Furthermore, while the Court has, on the one hand, underscored the need for objectivity in judging whether an action challenged by an employee as retaliatory has indeed crossed the line, the Court's opinion acknowledges a need to examine specific case contexts—in Justice Breyer's words, "Context matters." As a consequence, it is likely that the number and variety of retaliation claims to be filed in the wake of *Burlington Northern* will both increase significantly.

The Law Prior to *Burlington Northern*

As Justice Breyer noted in the Supreme Court's *Burlington Northern* opinion, the Courts of Appeals had come to different conclusions about the scope of Title VII's anti-retaliation provision, particularly the reach of its phrase "discriminate against." Did it mean that the only actions that could be challenged as retaliatory had to be employment or workplace related? And how harmful must the employer's actions be to constitute retaliation?

The Third and Fourth Circuits applied the same standard for retaliation that they applied to substantive discrimination offenses, requiring that the action challenged as retaliatory must "result in an adverse effect on the 'terms, conditions or benefits' of employment."[7] In the *Burlington Northern* case, the Sixth Circuit allied itself with the Third and Fourth, holding that a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions" of employment.[8] None of these Circuits, however, restricted the meaning of "adverse employment actions" to "ultimate employment decisions" such as hiring and firing.

By contrast, the Fifth and Eighth Circuits employed an ultimate employment decision standard, meaning that retaliatory conduct was actionable only if it involved hiring, granting leave, discharging, promoting or compensation.[9]

The Seventh and the District of Columbia Circuits had held that the plaintiff must show that the "employer's challenged action would have been material to a reasonable employee," which in contexts like the *Burlington* case, means that it would likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[10]

Finally, the Ninth Circuit, following EEOC guidance, had said that

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[4] 42 U.S.C.§2000e-3(a).

[5] Id. See also 42 U.S.C.§2000e.

[6] 2006 WL 1698953, ___ S. Ct. ___, 98 Fair Empl. Prac. Cas. (BNA) 385.

[7] See *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Van Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001).

[8] *Burlington Northern & Santa Fe v. White*, 364 F.3d 789, 795 (6th Cir. 2004).

[9] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686 (8th Cir. 1997).

the plaintiff must simply establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[11]

The Retaliation Claims in *Burlington Northern*

The underlying claims in *Burlington Northern* involved several alleged instances of retaliation. Ms. White, the only female employee at her worksite, complained to Burlington Northern officials that her immediate supervisor had repeatedly told her that women should not be working in her department, and had also made insulting and inappropriate remarks to her in front of her male colleagues. Following an internal investigation, Burlington Northern suspended the supervisor and ordered him to attend a sexual-harassment training session. At the same time, however, White was removed from her forklift duty and assigned to perform only standard track laborer tasks. The reassignment did not affect White's pay and benefits, but the laborer position was considered a less prestigious and dirtier job. A company official told her that the reassignment reflected coworkers' complaints that, in fairness, a "more senior man should have the less arduous and cleaner job of forklift operator."

White then filed a complaint with the EEOC contending that the reassignment amounted to unlawful gender-based discrimination and retaliation for her having earlier complained about her supervisor. She later filed a second retaliation charge, claiming that the same official who had reassigned her had placed her under surveillance and was monitoring her daily activities. A few days later, White was suspended without pay after being accused of insubordination by her immediate supervisor. White invoked internal grievance procedures which ultimately led Burlington Northern to conclude that White had not been insubordinate. The company reinstated White to her position and awarded her back-pay for the thirty-seven days she was suspended. She then filed an additional EEOC charge for retaliation based on the suspension.

After exhausting the necessary administrative remedies, White filed a lawsuit against Burlington Northern claiming that its actions in changing her job responsibilities and suspending her for thirty-seven days without pay constituted unlawful retaliation in violation of Title VII. A jury awarded her compensatory damages. The Sixth Circuit upheld the judgment, but the Court's members differed as to the proper standard to apply. The Supreme Court accepted the case for review to resolve the split among the various Circuits regarding the appropriate standard.

The Supreme Court's Decision

The Court initially compared the language used in Title VII's substantive anti-discrimination and anti-retaliation provisions, and observed that they differ "in important ways." The former included words such as "hire," "discharge," "compensation, terms, conditions or privileges of employment," "employment opportunities," and "status as an employee," all of which, in the Court's view, explicitly limited the scope of that provision to actions that affect employment or alter the conditions of the workplace. The anti-retaliation provision, however, did not use these limiting words.

The Court reasoned that Congress intended the wording difference to make a legal difference. Whereas the anti-discrimination provision, with its specific references to terms, conditions or privileges of employment, seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious or gender-based status, 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. To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. However, because an employer could effectively retaliate against an employee by taking actions not directly related to his employment, or by causing him harm outside the workplace, limiting the anti-retaliation provision only to employment-related actions would not deter the many forms that effective retaliation can take, and thus would fail to fully achieve the provision's primary purpose of maintaining unfettered access to statutory remedial mechanisms. Accordingly, the Court held that the anti-retaliation provision is not limited to discriminatory actions that affect the terms and conditions of employment. In so doing, the Court not only rejected the standard formulated by the Third, Fourth and Sixth Circuits, but also the Fifth and Eighth Circuits' requirement limiting actionable retaliation only to ultimate employment decisions.

The Court next turned its attention to determining the requisite level of seriousness to which an employee's harm from retaliation must rise to make it actionable under Title VII. On this point, the Court agreed with the formulation set forth by the Seventh and District of Columbia Circuits. A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. In using the expression "materially adverse," the Court intended to separate significant from trivial harms. Only the former are actionable, since the anti-retaliation provision prohibits employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts and their employers. Petty slights, minor annoyances and simple lack of good manners will not create such deterrence.

The Court further explained that the provision's standard for judging harm must be objective—would a reasonable person in the employee's position consider the challenged action materially adverse? A plaintiff's unusual subjective feelings do not

[10] *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211, 1217-1218 (D.C. Cir. 2006).

[11] *Ray v. Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000).

count. However, in gauging the reaction that a reasonable person may experience, the Court instructed that the particular circumstances surrounding the act of retaliation must be taken into account. The Court proffered two examples: (1) a schedule change in an employee's work schedule may make very little difference to many workers, but may matter enormously to a young mother with school children; and (2) a supervisor's refusal to invite an employee to lunch would normally be a trivial, non-actionable petty slight, but to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Applying this standard to the case at hand, the Supreme Court determined there was sufficient evidence to support the jury's verdict on White's retaliation claims. While noting that a reassignment of job duties is not automatically actionable, it could be materially adverse to a reasonable person depending on the circumstances. Here, there was considerable evidence that the job to which White was transferred was more arduous and dirty, and that the job from which she was transferred required more qualifications, carried more prestige, was objectively considered a better job, and that White was resented by male employees for occupying it. With regard to her suspension, the evidence demonstrated that White and her family had to live without income for thirty-seven days, during which she had no knowledge whether or when she would return to work. In addition, White sought medical treatment for her emotional distress. The Court reasoned that an indefinite suspension without pay could well act as a deterrent to filing a charge of discrimination, even if the suspended employee eventually received back-pay.

Burlington Northern's Impact on Employers

The Supreme Court's ruling presents a "mixed bag" for employers. On the one hand, it replaces conflicting standards with a uniform rule. Employers carrying on business operations in jurisdictions that previously utilized inconsistent standards will no doubt welcome the elimination of those differences and the uncertainty and confusion they may have generated. Employers will also embrace the Court's clarification that retaliation claims must be measured by an objective standard. This should result in enhanced opportunities to obtain successful summary judgment rulings, since the vagaries of an employee's subjective mindset will not be a material issue.

On the other hand, the Court's decision fully opens the door for employees to pursue retaliation claims for employer actions that do not directly impact the terms, conditions, and privileges of employment. Nor will employees be limited to suing only for actions taken or decisions made at the workplace itself. Business owners, executives, human resource personnel, supervisors and managers must keep in mind that their words and deeds outside the immediate employment environment could have actionable consequences if they include an arguably retaliatory component. Employers should update their anti-retaliation policies, and provide additional training where necessary to ensure awareness of and compliance with the Court's directives. Particular focus should be placed on the Court's admonition that "context matters." This will likely be the basis for considerable future litigation, as employees strive to emphasize contextual factors in an effort to demonstrate actionable retaliation.

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Social Security Administration No-Match Letters and the Proposed "Safe-Harbor" Procedures for Employers

By Marvin J. Muller

The Form I-9 Process

Everyone knows that employing an unauthorized worker is illegal. What most do not understand is how to determine exactly who is and is not authorized to work. Section 274A of the Immigration & Nationality Act (INA) places the responsibility for making these determinations directly on employers. Employers are required to complete an I-9 Employment Eligibility Verification Form for all employees within three days of hiring. There are few exceptions. These forms must then be retained and updated as needed. I-9 form completion requires an in-depth review of certain documents regarding each employee's identity and proof of employment authorization. While employers seldom have trouble obtaining the required documentation from U.S. citizens, it is often quite difficult for an employer to determine the validity of a document presented by a foreign-born worker. This is due in part to the numerous types of valid employment authorization documents issued by the government in past years.

Although the I-9 form and accompanying instruction booklet appear rather simple to understand, there are a variety of serious issues that an employer may encounter. INA §274A(a)(1) makes it illegal for an employer to hire, recruit or refer for a fee someone not authorized to work. Liability is not limited to "knowing" violations but also includes situations where the employer has "constructive knowledge" of an employee's lack of authorization. 8 C.F.R. § 274a.1(l)(1) The law does not specifically establish a time limit for firing an unauthorized worker, but employers have been sanctioned in the past for failing to discharge a worker within two weeks of learning of an unauthorized status. This means that employers must be prepared to make quick determinations regarding the validity of a worker's documentation. Failing to do so could result in the imposition of financial penalties up to $5000.00 for each incident.

At the same time, an overly cautious employer that requires specific or duplicative documentation and rejects a valid employment authorization document of a prospective or current employee may be subjected to a discrimination lawsuit under INA §274B. In addition, any false attestations on an I-9 form can lead to separate criminal charges in federal court, even if unintentional.

Social Security Administration (SSA) "No-Match" Letters

The SSA receives millions of W-2 Forms every year from employers that have paid wages to employees. The SSA is charged with the responsibility of crediting the wages to the proper social security number for each worker. As one might imagine mistakes are often made in this process. The SSA sends the employer a "no-match" letter when there is a discrepancy between the name and social security number used, or when the number simply does not exist in its system. The employer is then responsible for reviewing the discrepancy and resubmitting proper documentation. Traditionally, the SSA only sends these letters to employers that have ten or more mismatched numbers in their accounts. This means that many employers might be unknowingly employing an illegal worker in spite of their good faith efforts at maintaining an I-9 compliance program.

The Proposed Safe-Harbor Rule

8 C.F.R. 274a.1(1)(1) in its present form outlines two examples when an employer may be deemed to have constructive knowledge of an employee's lack of employment authorization: (1) when there is a failure to complete, or to properly complete, the I-9 form, or (2) when the employer has information that would indicate the alien is not eligible for work, such as knowledge that a labor certification application was initiated on behalf of the employee. The Citizenship and Immigration Service (CIS) of the Department of Homeland Security (DHS) has proposed a new rule that, in addition to codifying existing case law, would include two additional examples of an employer's constructive knowledge of unauthorized employment. See 71 F.R. 34281-34285 (June 14, 2006). The proposed rule adds that written notice from either the SSA in the form of a "no-match" letter, or a written notice from DHS that the document used to evidence a worker's immigration status is not authentic, will constitute constructive knowledge of an employee's inability to accept employment.

The proposed rule change does provide employers with "safe-harbor" protection from prosecution after receiving notice and specifically describes the steps a reasonable employer must take to invoke such protection. First, employers will be expected to review their existing records to determine whether the discrepancy is due to a typographical error on any of the I-9 documentation. If no error exists, the employer must then promptly request the employee to confirm the validity of the documentation previously submitted. These checks must be completed within fourteen days in order to receive "safe-harbor" protection and not be subjected to further scrutiny. If

the discrepancy remains unresolved, the employer will need to take action to terminate the employee or else face the risk of potential sanctions by the DHS for violating INA § 274(a)(2). The Director of CIS' Regulatory Management Division is presently reviewing comments to the proposed rule change submitted by the public. A final rule will be published upon completion of that review process.

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Employment Eligibility Verification Systems Under the Recent Congressional Immigration Reform Bills

By Arturo M. Aviles

Introduction

The subject of immigration reform has received considerable congressional attention in recent months. In December, 2005, the House passed H.R. 4437, *The Border Protection, Antiterrorism, and Illegal Immigration Control Act*. In May, 2006, the Senate passed S.2611, *The Comprehensive Immigration Reform Act of 2006*. Each bill provides numerous changes to current immigration law. Of particular significance to employers, the bills share a common emphasis on employer workplace enforcement in stemming the tide of illegal immigration. Though the House and Senate versions differ in certain respects, each sets up a national Employment Eligibility Verification System (EEVS) that is mandatory for all employers. The system is designed to strengthen and enhance the existing I-9 process.

EEVS is based on the Basic Pilot system created by the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*. The Basic Pilot is a web-based tool used by participating employers on a voluntary basis to verify the employment eligibility of all newly hired employees. Under that system, the employer enters the employee's information from a completed I-9 form into a computer and transmits the information to the federal government to be checked against the Social Security Administration's (SSA) and Department of Homeland Security's (DHS) databases. As of December 1, 2004, the Basic Pilot program has been extended to all fifty states. However, it remains voluntary.

EEVS Under The House Bill

The House's version of EEVS makes nationwide employer participation in the Basic Pilot System mandatory for new hires within two years of enactment and for all employees within six years. In addition to mandating compliance with the current I-9 procedures discussed above, Title VII of H. R. 4437 requires employers to re-verify the worker's information, including name, Social Security Number and/or alien identification number, utilizing the new EEVS, within three days of hire. The EEVS is to provide verification or tentative non-verification of an employee's eligibility to work within three working days. Tentative non-verification information must be provided to the employee by the employer, and becomes final within ten days if not contested by the employee. The bill prohibits the employer from terminating the employee based on tentative non-verification,

but requires termination upon receipt of final non-verification.

The bill imposes initial civil penalties ranging from $5,000 to $7,500 for hiring or continuing to employ an unauthorized worker. Repeat violators may be fined between $10,000 and $15,000 if the violation occurs within the first two years and between $25,000 and $40,000 thereafter. Civil penalties may also be levied for failure to comply with required record keeping. Finally, any employer found to be engaging in a pattern or practice of knowing violations is subject to a criminal penalty of up to $50,000 for each unauthorized worker and/or imprisonment for no less than one year.

The Senate Version

The Senate has opted to repeal the Basic Pilot altogether and, instead, require all employers to use its new system within eighteen months of enactment. Under Title III of S.2611, the employer must use the EEVS to check whether the employee is authorized to work in the United States within three days of hire. Within ten days of an employer's submission, the EEVS issues a confirmation or a tentative non-confirmation of the employee's eligibility to work. If a tentative non-confirmation is received, the employer must notify the employee in writing within three days of the non-confirmation, thereby triggering the employee's obligation to contest the initial response. The tentative non-confirmation becomes final if not contested by the employee within ten days, or within thirty days if unsuccessfully contested. Once a non-confirmation becomes final, the employer must terminate the employee.

Like the House bill, the Senate version imposes civil penalties for employers hiring or continuing to employ unauthorized workers, but the amounts differ. An initial violation carries a penalty ranging from $500 to $4,000 per employee. For a second violation occurring within twelve months, the fines range from $4,000 to $10,000, and for a third violation within a two year period, from $6,000 to $20,000 per worker. Civil penalties are also provided for failure to comply with required record keeping. For a pattern and practice of knowing violations or failure to use EEVS, the Senate bill subjects employers to a criminal penalty of no more than $20,000 for each unauthorized worker and/or imprisonment for no more than three years for the entire pattern or practice.

Business Concerns With EEVS

On June 27, 2006, the House of Representatives Small Business Committee conducted hearings on the subject of immigrant employment verification. While much of the testimony took on a pro-reform and pro-immigrant tone, there were, nonetheless, concerns raised over the proposed EEVS program.

Not surprisingly, the primary concern focused upon the costs that EEVS will create for businesses. The ambitious national rollout of a mandatory EEVS may entail hundreds of millions of dollars to implement. Witnesses raised questions not only as to dollar amounts, but also as to funding mechanisms. Some witnesses suggested that employers pay a fee to use the EEVS. Other witnesses strongly opposed this approach. Additional questions were raised whether mandatory participation will increase the paperwork burden for businesses that are already saddled with I-9 record keeping issues.

Another significant concern highlighted by the testimony was the accuracy, and consequent economic impact upon business, of the underlying SSA and DHS databases. Under the existing Basic Pilot, a tentative non-confirmation which is subsequently found erroneous and reversed is characterized as a "false negative." One witness cited an independent research study that found 20% of Basic Pilot queries resulted in "false negatives," thereby creating the potential for both employers and employees to incur the additional costs associated with reversing incorrect findings in one out of five cases. In light of these costs, Congress was asked to ensure that the proposed EEVS confine errors to *de minimis* levels, and that SSA and DHS improve their respective databases.

Finally, witnesses expressed concern over the issue of identity theft, since the Basic Pilot program cannot detect multiple uses of names and social security numbers by workers in different locations. Witnesses urged Congress to formulate criteria for flagging and investigating potential identity theft to protect unknowing employers from hiring or retaining unauthorized employees.

In July, the House of Representatives began conducting field hearings throughout the country to invite public comment on both H.R. 4437 and immigration issues in general. Similarly, the Senate Judiciary Committee has launched field hearings on S. 2611. Congressional negotiations on the immigration reform bill have been put on hold until the hearings are completed. It is expected that conferences will begin in September to reconcile the differences in the competing bills before a comprehensive bill is presented to the President for signature. The series of field hearings and postponed negotiations make passage of a comprehensive bill before November's midterm elections unlikely.

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