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MANAGING COMPLAINTS IN THE WORKPLACE

The U.S. Supreme Court in its June, 2006 opinion *Burlington Northern & Santa Fe Railway Co.* extended the scope of legal protection for employees claiming that they have been retaliated against due to complaints about discrimination. The Court held that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 is not confined to those actions that affect the terms and conditions of employment, such as compensation or promotions, but rather prohibits all employer actions which would be "*materially adverse*" to a "*reasonable*" employee or job applicant. The Court also established that actions which would dissuade such a "reasonable" worker from making or supporting a discrimination charge will be considered retaliatory even if they occur *outside* the workplace. Although the case concerned employment discrimination, it has broader implications due to the many federal and state statutes which prohibit retaliation. Employers need to be very aware of anti-retaliation provisions, because even if there was no underlying discrimination or violation of law, liability can be created due to retaliation.

Potential Liability for Employers Expands

The *Burlington Northern* case rejected the test urged by the U.S. Solicitor General that required a link between the challenged retaliatory action and the terms, conditions or status of employment. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (June 22, 2006). In doing so, it failed to adopt a bright-line rule as to what constitutes actionable retaliation under Title VII. Title VII is a federal law that prohibits employment discrimination against any individual on the basis of race, color, national origin, religion or sex. It contains an anti-retaliation provision, which prohibits adverse employer actions that "discriminate against" an employee (or job applicant) because he has opposed a practice that Title VII forbids, or has participated in a Title VII investigation, hearing or proceeding. Relying on the statutory language, the Court took a broad view of the type of conduct which supports a retaliation claim.

Prior to the *Burlington Northern* decision, federal courts were divided over the interpretation of the anti-retaliation provision. Some courts required the employee to show that the adverse employment action materially affected the "terms and conditions" of employment. Other courts took an even narrower approach, making retaliatory conduct actionable only when it constituted ultimate adverse employment decisions like "hiring, granting leave, discharging, promoting, and compensating." *Mattern v. Eastman Kodak Co.*, 104 F. 3d 702, 707 (5th Cir. 1997). Lastly, some courts took a more expansive view of the anti-retaliation provision. In such jurisdictions, a plaintiff would only have to show that the employer's challenged action would have dissuaded a reasonable employee from making a complaint.

The U.S. Supreme Court adopted the expansive view of the anti-retaliation provision. It held that the plaintiff must only show that the action was "materially adverse," which means that a "reasonable employee" would be dissuaded from making or supporting a charge of discrimination. In the Court's view, this is an "objective" standard. The Court emphasized that the requirement of materiality was included to separate significant from trivial harms, because Title VII "does not set forth a general civility code for the American workplace." The practical effect of this decision is to increase the responsibility employers face in responding to employees' complaints. This is because employers must now predict whether certain actions (either within the context of the workplace or even outside of it) might dissuade an employee from making a discrimination complaint.

Example 1:
Employee X files a charge that he was racially harassed by his supervisor and coworkers. After learning about the charge, X's manager asked two employees to keep an eye on X and report back about his activities. The surveillance constitutes "an adverse action" that is likely to deter protected activity, and it is unlawful if it was conducted because of X's protected activity.*

Retaliation at a Massachusetts Holiday Party

Federal law is not the only source of recovery for employees who feel they have been retaliated against due to discrimination complaints. State anti-discrimination statutes also protect employees from retaliatory actions.

Under Massachusetts law, Chapter 151B, the following elements are required for a retaliation claim: 1) the employee reasonably and in good faith must have believed that the employer was engaged in wrongful discrimination; 2) the employee acted reasonably in response to that belief; and 3) there is a causal connection between the protected conduct and an adverse employment action. *Pardo v. General Hosp. Corp.*, 446 Mass. 1, 19 (2006). Thus, Massachusetts law also applies a "reasonable employee" standard, but considers it in addition to the way now applicable under Title VII. The focus is on whether the employee acted "reasonably" when he made the complaint, not only on whether a "reasonable" employee would be dissuaded from making a complaint.

Like Title VII, however, the anti-retaliation provision in Chapter 151B is relatively broad in that it prohibits an employee from "otherwise" discriminating against a person because of a complaint of discriminatory practices. The scope of "otherwise" discriminatory actions can include a hostile work environment, rather than only ultimate adverse employment actions. *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005). Massachusetts law is also stricter than federal law relative to liability for a supervisor's actions. Under Chapter 151B, employers are strictly liable for supervisory harassment. In addition, employers in Massachusetts are held liable under a negligence standard for coworker harassment if the employer should have known about the harassment and failed to take prompt action to stop the harassment.

Example 2:
X filed a charge alleging that she was denied promotion because of her gender. X's supervisor excludes X from regular weekly lunches with other employees. The supervisor started excluding X after she made the complaint. If X was excluded because of her charge, this would constitute unlawful retaliation since it could reasonably deter X or others from making the complaint.*

In *Noviello*, a female employee made a complaint of sexual harassment against another popular employee and was then treated to a "steady stream of abuse" from other employees and supervisors. Most of the abuse came from the woman's coworkers who consistently made negative comments to her, made false allegations against her, and refused to talk to her at company events. The Court held there was ample evidence to show that supervisors were aware of the harassment and did nothing to stop it. Amongst other things, a supervisor of the employee noticed that she was being ignored by her department at a company holiday party and that the employee was forced to sit alone for two hours. Rather than taking steps to deal with the issue or otherwise socializing with her at the event, the supervisor acknowledged the ostracism, and suggested she change her shift. This act, along with notice to other supervisors, was enough to show negligence on the part of the supervisors in dealing with the adverse treatment of the employee. Ultimately, even though the employee's original sexual harassment claim failed, she had sufficient evidence to survive a motion for summary judgment, and potentially hold the employer liable for the retaliatory acts of her coworkers.

"Continuing Violation" Doctrine Includes Retaliation Claims

Under Massachusetts state law, a plaintiff has 300 days in which to file a complaint at the Massachusetts Commission Against Discrimination ("MCAD") after experiencing a discriminatory act under Chapter 151B. The MCAD, however, recognizes a "continuing violation" doctrine for underlying discriminatory acts. When acts of discrimination are of a continuing nature, the statute of limitations is extended.

Not surprisingly, acts of retaliation are also subject to the continuing violation doctrine. In *Clifton v. MBTA*, the Supreme Court of Massachusetts held that a plaintiff employee of the MBTA could rely on the continuing violation doctrine to recover for retaliatory acts committed beyond the statute of limitations. *Clifton v. MBTA*, 445 Mass. 611 (2005). "Although unlawful retaliation, typically, may involve a discrete and identifiable adverse employment decision (e.g., a discharge or demotion), it may also consist of a continuing pattern of behavior that is, by its insidious nature, linked to the very acts that make up a claim of hostile work environment." Id. at 616. This application of the continuing violation doctrine to acts of retaliation is one more example of how employers are potentially open to claims of retaliation, and should not take solace in a statute of limitations imposed by state law. Employers should also be wary of their internal processes of dealing with complaints, both because courts are expanding liability when interpreting anti-retaliation provisions of these statutes, and because such processes may unwittingly lead to retaliation claims.

Other Traps for the Unwary

Burlington Northern has received significant attention because of the implications for employers in managing the workplace when an employee has complained about discrimination. Although the case dealt with retaliation claims brought following a discrimination complaint, there are many state and federal statutes which also prohibit retaliation. It is expected that the broad interpretation of adverse action in *Burlington Northern* will be applied to some of these additional statutes.

Many federal and state statutes include anti-retaliation provisions which prohibit employers from taking adverse action against an employee because he or she has made a complaint, participated in the investigation of a complaint, or otherwise contested some unlawful conduct by the employer. Because retaliation claims can survive even when an underlying claim fails on its merits, employees often file these claims together. As prevailing plaintiffs can recover significant monetary relief for retaliation claims, and may even receive punitive damages, it is important that employers understand behavior which can give rise to multiple claims and take proactive steps to avoid liability.

Among the various additional federal statutes which prohibit retaliation are: (1) the Family Medical Leave Act, 29 U.S.C. § 2654, 29 C.F.R. § 825.220(c); (2) the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); (3) the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a); (4) the Age Discrimination in Employment Act, 29 U.S.C. § 623(d); (5) the Employee Retirement Income Security Act, 29 U.S.C. § 1140; (6) the Americans with Disabilities Act, 42 U.S.C. § 12203(a); (7) the False Claims Act, 31 U.S.C. § 3730(h); and (8) the National Labor Relations Act, 29 U.S.C. § 158. For example, the Americans with Disabilities Act prohibits any person from "discriminat[ing] against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). This type of language mirrors the prohibitive language typically found in the above mentioned statutes.

Similarly, there are Massachusetts statutes prohibiting retaliation including: (1) the Massachusetts Payment of Wages Statute, M.G.L. ch. 149, § 148A; (2) the Massachusetts False Claims Act, M.G.L. ch. 12 §5J; (4) the Massachusetts Fair Wage Act, M.G.L. ch. 151 § 19(1); (5) the Massachusetts Worker's Compensation

Practical Pointers

1. Emphasize to supervisors and human resources staff that retaliation does not consist solely of actions that affect working conditions, but can take place in the greater social context of the workplace. Courts are READY and WILLING to look beyond the workday in finding acts of retaliation.
2. Train supervisors and human resource staff members on how to react when a claim is raised. Stress to them the importance of maintaining an open atmosphere and the importance that the complainant not be treated differently than his or her peers.
3. When investigating an employee's complaint, communicate the complaint only to those supervisors and employees that are on a "need to know basis." The less people with knowledge of the complaint, the less people the employee can claim participated in retaliatory acts.
4. When conducting investigative interviews, emphasize the seriousness of all employee complaints, the sensitivity of the investigation, and the importance of treating the complainant the same as any other employee. Suggest the need for confidentiality.
5. If an employee has made a complaint, use objective standards to evaluate that employee's annual review, compensation and bonus opportunities. Don't let the person who was complained about do the review of the complainant unless the review is substantiated by someone else. The goal is to show that the complainant was objectively and fairly reviewed.

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Law, M.G.L. ch. 152, § 75B(2); (6) the Massachusetts Whistleblower Statute, M.G.L. ch. 149, § 185(5)(b); and (7) the Massachusetts Anti-Discrimination Statute, M.G.L. ch. 151B, § 4(4). Employers may be able to distinguish *Burlington Northern* if the language in the relevant statute specifically includes adversity relative to an employee's terms and conditions of employment. As a practical matter, however, it seems likely that the more expansive view of retaliation will soon begin to be applied to these other statutes.

Most states have an interest in providing employees with a comfortable forum where the employee can make allegations, submit complaints and aid investigations. This statutory protection encourages employees to be open and honest about problems without fear of reprisal. As the scope of protective statutes has broadened, legislatures view anti-retaliation provisions as a significant means to achieving their legislative intent. A recent Massachusetts Supreme Judicial Court case involving tip pooling at the landmark Boston restaurant Locke-Ober illustrates this interest. *Smith v. Winter Place LLC*, 447 Mass. 363 (August 1, 2006).

Tip pooling is prohibited under Massachusetts law except in certain circumstances, and is actionable under the Payment of Wages statute which is enforced by the Attorney General. In the *Locke-Ober* case, even though the plaintiffs had not yet filed a wage complaint with the Attorney General, the fact that the servers had complained internally was sufficient to support a claim of retaliation. The Supreme Judicial Court noted that retaliation is a separate and independent cause of action. Recognizing that the purpose of the retaliation provision is to encourage enforcement of the wage laws by protecting complaining employees, it permitted the internal complaints of wrongdoing to serve as the basis of their retaliation claims

Practical Pointers (cont.)

6. Create clear written policies that delineate the standards and considerations used in deciding employee promotions and bonuses, and make employees aware of these policies. Apply these standards consistently when making decisions about compensation, promotion and bonuses.

7. Create a written policy that instructs employees on how to file a claim of discrimination. Establish that retaliation is prohibited and will be investigated and resolved. Ensure that every employee is aware of this policy. It will be more difficult for an employee to later claim that he was afraid of complaining out of retaliation concerns if there is a clear company policy against retaliation that has been made available to all employees.

8. When practical, consider the "healing power of time" when dealing with a complainant you need to fire for unrelated reasons. Even if your motive is not to retaliate, courts are likely to consider the proximity in time of the complaint and the adverse action. You have a better chance of surviving a retaliation claim the longer the time period between the complaint and the change in work conditions.

*From the EEOC guidelines on retaliation, cited with approval by the Supreme Court in *Burlington Northern*.

*If you wish to inquire further about our Employment Law Group, please contact **James F. Kavanaugh, Jr., Thomas J. Gallitano, or Constance M. McGrane**.*