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## Rise in Claims Likely After Supreme Court Loosens Standard for Retaliation

On June 22, 2006, the U.S. Supreme Court issued a decision expanding the protection to employees who allege they have suffered retaliation after making a complaint of discrimination or harassment under Title VII of the Civil Rights Act of 1964. Employees who make retaliation claims under Title VII no longer must prove they suffered an "ultimate employment decision" or "materially adverse change in the terms and conditions of employment," such as a discharge, demotion, or loss of pay, in order to state a claim. Rather, the Supreme Court adopted a broader standard, holding Title VII prohibits more subtle forms of retaliation, which can even include, depending on the factual circumstances, a change in schedule or even the failure to invite an employee to lunch.

According to the Court, the standard is whether a "reasonable employee would have found the challenged action materially adverse," which, the Court explained, means whether the employer's action "might have dissuaded a reasonable worker from making or supporting a charge or discrimination." The Court also ruled Title VII's anti-retaliation provision is not limited to actions affecting employment or to those occurring at work, and can extend to actions causing harm outside the workplace. *Burlington N. & Santa Fe Ry. Co. v. White*, No. 05-259 (June 22, 2006). The case has been hailed as a vic-

tory by employees' rights groups nationwide.

In the *Burlington Northern* case, the plaintiff was employed as a track laborer and the only female in her department. In this position, she was responsible for removing and replacing track components, transporting track material, cutting brush, and clearing litter

and spillage from the right of way. Shortly after her hire, a forklift operator position

became available, and the plaintiff was reassigned to that position. Subsequently, the plaintiff complained that her supervisor sexually harassed her. The company investigated the complaint, and following the investigation suspended the supervisor and ordered him to attend training sessions regarding sexual harassment. Shortly thereafter, a company official met with the Plaintiff and advised her that during the investigation the company had received several complaints about her working in a forklift position from other employees. The complaints did not relate to her performance, but the fact that the forklift was a less arduous and "cleaner" job than other track laborer positions and employees believed a "more senior man" should have the position, not a junior level employee like the plaintiff. As a

result of the complaints, the company removed her from the forklift and assigned her to a standard track laborer position. Her pay and benefits, however, remained the same. The plaintiff was eventually suspended for alleged insubordination, but was reinstated with full back pay after she filed a grievance.

The plaintiff filed a lawsuit alleging the change in her job duties and work suspension without

pay for insubordination had constituted unlawful retaliation (even though she was reinstated 37 days after her suspension with full backpay). On appeal, the employer argued that to establish a retaliation claim a link must exist between the challenged retaliatory conduct and the terms and conditions of employment. The employer noted that Title VII's substantive anti-discrimination provision protects individuals only from employment-related



continued on page 4

Viva la Revolution? .....2,3

Recruit a Member and Win a Prize—  
Guaranteed! .....8

## Viva la Revolution?

By Susan Hackett, Senior Vice President and General Counsel, ACC

Am I the only one who sees the pink elephant dancing in the room? I'm still waiting for the in-house counsel community to rise up and protest, but the silence is deafening. What's going on out there? Many of the top-tier law firms announced their most recent round of first-year associate pay hikes, and though the legal press reports one major firm after another following suit, there's been surprising little action in response from the in-house bar. Disgust? Sure. But no hint of the revolution that I thought was coming. In-house counsel of the world: Who's managing your legal spending—you or the firms?

Let's do the math. Be conservative and say that an average employer pays about one-third of an employee's pay on top of their salary in order to offer benefits (such as paid vacation/sick time, health, life, disability insurance, retirement or 401K-type contributions, etc.). The newly announced first year salary level of \$160,000 plus \$50,000 in benefits takes us to a total of \$210,000. Then there's overhead, including a portion of the law firm's high-market rent, top-notch administrative support, computer, library, other office technologies, and the art-filled lobby. So let's add another \$100,000 on top of the previous \$210,000, and for the sake of keeping it simple, let's say that our highly recruited first year associate is now costing the firm \$300,000 year. Every associate will get this hike, even the not so competitively recruited ones get it.

That doesn't even take into account the cost of the cocktail-cruising summer associate program, the firm's high-power recruitment, or the cost of attrition. For every 10 of those really expensive first years less than half will make it to partnership and profitability before they're either pushed out or run screaming from the building.

Then, there's the added bonus that the majority of big firms operate on a lockstep salary system for associates, so a raise for the first-rung associates necessitates a corre-

sponding \$15,000/year increase (at least) for every other successive class. This way, the natives won't feel bad that the least experienced workers who've labored a shorter time are making more than them. Let's say, conservatively, that the \$300,000 cost of a first year associate, when combined with the very real costs of attrition and recruiting, brings us to a nice "blended" rate of about \$400,000/year in costs.

Who's paying for this? Do you think that when the decision is made to up first-year salaries that the partnership votes to take less money to pay for it? Or do you think that the associates will be expected to "earn their keep?" The latter is a nicer way of saying that clients will be billed for the overworked first-year associates' time and efforts, and the associates will be expected to perform the feat of billing more than anyone thinks they're worth. Both clients and associates lose.

I'm having so much fun with the math, I think I'll keep going.

If you assume that every one of those associates will bill 2,000 hours that can actually be invoiced to a client (as opposed to a certain amount of time that will be billed, but written off as non-collectable for pro bono, incompetence, client objections, learning curve, you name it), that means that their 2,000 hours will have to be billed at an average of \$200 per hour in order to reach the break even point. We all know that firms don't charge associate rates to break even. Large firms bill up to \$400 per hour for these newcomers.

Perhaps a few of those new-to-the-profession associates are so smart or have amazing previous experience, making them worth every dime of \$200+ per hour, and perhaps every one of their 2,000 hours billed is actually providing efficient and meaningful value to the clients they serve. But perhaps the vast number of those hired—smart, hardworking, and deserving as they are—are worth nowhere near \$200 per hour.

Do you remember how much you knew or what your functional worth was the first day you entered the workforce to take your first "real" job? I remember feeling incredibly incompetent and very confused that I'd not learned any of the stuff that I needed in private practice during my summer work, or in law school. Indeed, law school may teach students how to think like a lawyer, but it does very little to produce graduates who are capable of providing valuable and efficient legal services right out of the box. And that's okay, the value of a lawyer is something that's learned and earned over time with hard experience. But clients are expected to pay for it from day one, since firms don't seem to think it's their cross to bear, and I don't see associates volunteering to do internships until their services are worth what they're charging for them either. Most attorneys in the corporate bar are willing to pay for entry level associates working under supervision; it's how it's done...but at a rate that within the last five years was reserved for only the most experienced partners? Come on.

*Sanity check:* You can hire an incredibly smart and experienced partner-level lawyer in the next town over from New York or DC or Chicago or LA who bills at \$250 hour, and who can do the same work with a better result in half the time. That lawyer is very likely a refugee from the big firm and every bit as smart. Let's not forget about those nice folks in India or Iowa or ConsultantLand, or about your favorite vendors who will do the work for even less.

*Sanity check:* The members of the federal judiciary, who we hope will be composed of the best in our profession, and who must be attracted to engage in public service on the bench at the pinnacle of their careers, are paid less than these new first-years. Most of these newbies will make more in their first year than an associate justice of the US Supreme Court. Our underpaid judiciary is not the fault of large law firm associates, but it's a sign of how out of whack the law firm world's artificial pricing structure is.

*Sanity check:* Most new associates spend their time—as they should—learning the ropes by doing legal drudgery: endless, painstaking research; document review and shuffling through terabytes of discovery material; making necessary appearances and filings in courts; writing form contracts and pleadings; and hopefully learning their craft at the elbows of their seniors who have the experience necessary to bill \$500 per hour and more for their time and counsel. Associate apprenticeship is necessary and supervision of those on the learning curve is professionally mandated by every state's legal regulations, but billing for the time of the supervising lawyer and the learning associate is part of a time-honored legal tradition that often amounts to double-billing. Those in the non-law-firm vending community who can expertly perform a variety of the services performed by first-years at a third of the price are gaining ground and expanding their business lines daily. Why not hire a legal research company or a team of ediscovery consultants to do document work, or another in-house paralegal to do the routine and repetitive contracts and pleadings work? I hear of more and more in-house counsel who: 1) won't pay for entry level associates any more—they are "out-lawed" in the retention letter, 2) mandate that their firms work with vendors on some of the less exciting aspects of the case or matter that can be severed and done for a fraction of the firm's costs, and 3) give increasing amounts of work to a couple of savvy law firms who've started creating and offering those alliances with preferred out-sourcers so that they can be more efficient.

*Sanity check:* Many of the best and brightest students graduating from school today say that they don't want to work the hours or make the sacrifices that their senior partners did when they entered the profession. But they'll take the money, thank you. They'll still apply for the jobs in firms where they know that they're expected to put their lives on hold in perpetuity in order to earn the salary and have an eventual shot at a seven-figure income. And their partners, unable to get over their own frustrations, will continue to demand the same rituals of crazy hours that caused their pain.

*Sanity check:* Who says that firms that are paying these rates will recruit the best talent? Skyrocketing salaries and the need to bleed revenues from the resulting associate classes will do more to prevent these firms from hiring anything other than driven and "pedigreed" applicants, even though that may not be the only kind of talent that clients want. Perhaps what clients actually want is not the editor of the law review from one of the 25 "top 10" law schools in the country. Perhaps they want talent more broadly defined: experienced, diverse, and with life experiences beyond those normally held by the majority of "highly-pedigreed" graduates. Maybe clients want lawyers with a more developed ethical compass to work on their complex corporate-quagmire problems. Maybe clients are more interested in graduates with a pronounced passion for public service, or who communicate really well with juries, or who—dare I say it?—are actually satisfied with their jobs because they work in a more balanced work environment. There are plenty of bright lawyers who are actually a pleasure to work with because they are happy, and their lives are a bit more balanced with a mix of work and non-work activities and interests. Some of them might be in that rarified air of graduates who get the \$160,000 per year (read: \$400,000) offer; a great many of those people work elsewhere, though, and don't carry the baggage or the price tag of large law firm life.

Every study out there says it over and over: You don't get more—indeed, you get less—from folks who are working at surge capacity 24/7/365. Those workers are less and less productive and more and more inefficient. The business model of hourly billing in firms exacerbates the problem by encouraging work to be done in greater quantity, rather than with greater efficiency.

So who will stop the madness? Are we going to wait until firms announce in 2009 that the class of 2010 will be offered \$180,000? Will that finally be enough? Or have you reached the end of your rope now?

The corporate legal community needs to stand up and exercise its not inconsiderable

influence. You and your clients are being overcharged for legal work in the largest firms. Do something about it. Tell your firms that charge too much that you won't pay increased rates, and that you don't want any of those nice new associates (or their increasingly expensive senior associate colleagues) billing to your account unless the firm can quantify why it is that they'll provide more value to you as the client than a partner in a less expensive firm, or an expert legal service vendor/consultant. Ask why, if the top 20 recruits in the nation need this much, it is that firms can't just give a raise to them, rather than to every associate in the firm's pool? Explain to them that they're killing the practice of law by driving associates into the ground, and that you're not going to help them do it.

Then go out and hire from the abundant pool of talent in less expensive places, whether it be smaller firm lawyers, or lawyers working outside the confines of the really big cities. Let your expensive firms' management know that while you'll miss their high quality work, they've just got it wrong and you won't be forced to pay for their continued lack of business principal and judgment. Remind them that in spite of what they tell themselves and you everyday, there's quality legal service to be had at a fraction of the cost. After all, most of those large firm's mid-level and experienced associates will be secretly interviewing for jobs in your legal department or these alleged "second" and "third" tier firms as soon as they realize that the cycle of pain at the most prestigious firms just won't stop. We all know they'll be willing to take half the pay in order to earn the privilege of working somewhere they're valued for more than the number of hours they bill, but rather lauded for the high quality legal services they're bright enough to provide.

What can ACC do to support you on this matter? We're considering the alternatives and would like to hear your views. Let me know by emailing me at [hackett@acc.com](mailto:hackett@acc.com). After all, my bill to you is only \$225 per year if you're eligible for membership!

## continued from page 1

discrimination and urged the Court to read the anti-discrimination and retaliation provisions to mean the same thing. Rejecting the employer's argument, the Supreme Court noted that Title VII's anti-discrimination provision and retaliation provision differ significantly. In reaching its decision, the Court closely analyzed the express statutory language prohibiting discriminatory and retaliatory conduct. The Court noted that while the anti-discrimination provision specifically prohibits actions "with respect to compensation, terms, conditions or privileges of employment," the anti-retaliation provision does not contain such an express limitation. Rather, the anti-retaliation provision merely prohibits "discrimination" against those who oppose a practice forbidden by Title VII or participate in a Title VII proceeding. The Court held that this language distinction evinced Congress' purpose of prohibiting employers from "interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." The Court concluded that a broad reading of the anti-retaliation provision is necessary since an "employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace."

The Supreme Court also found that the two provisions serve different purposes and thus should be interpreted differently. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their race, ethnicity, gender, or religion. The anti-retaliation provision seeks to prevent employers from interfering with an employee's efforts to secure Title VII's guarantees. The Court noted that this objective could not be secured by focusing only on workplace-related conduct because an employer could retaliate against employees by taking actions not related to employment or by causing harm outside of the workplace. Thus, the Court concluded that the anti-retaliation provision "extends beyond workplace-related or employment-related harm."

The Court then addressed the standard for determining whether an alleged harm constituted unlawful retaliation. The Court held that a plaintiff must show that a "reasonable

employee would have found the challenged action materially adverse." The conduct must dissuade "a reasonable worker from making or supporting a charge of discrimination." The Court emphasized that this standard is objective so an individual employee's "unusual subjective feelings" are irrelevant. Reiterating that Title VII is not a general workplace civility code, the Court stated that a plaintiff must demonstrate that the alleged harm is significant. Whether an action is materially adverse will depend on the circumstances of a particular case and should be judged from the perspective of a reasonable person in plaintiff's position. Simply put, "context matters." To illustrate the application of these principles, the Court gave two examples, one involving a schedule change, and the other a refusal to invite an employee to lunch, an issue discussed heavily during the oral argument. A schedule change might not matter to most employees, the Court explained, but it "may matter enormously to a young mother with school age children." Likewise, a supervisor's refusal to invite an employee to lunch is "normally trivial, a nonactionable petty slight." However, 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. Thus, depending on the circumstances, a reasonable employee might consider these actions materially adverse.

Applying this standard to the specific facts before the Court "whether a reassignment of duties within the same job description and/or a 37 day unpaid suspension which was followed by reinstatement and full back pay, constitute actionable retaliatory conduct" the Court held that each action could be the basis for a retaliation claim. As to the reassignment of job duties, the Court stated that while reassignment is not automatically actionable, in the circumstances of this case, there was evidence that the track labor duties were more arduous and dirtier and that the forklift operator position was more prestigious job, and thus, reassignment would have been materially adverse to a reasonable employee. As to the suspension, the Court held that it was actionable since a "suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay." The Court noted, "[m]any reasonable employees would

find a month without a paycheck to be a serious hardship." In fact, the Court acknowledged White's testimony that without income during the suspension it was the "worst Christmas [she] had out of [her] life" and that she became depressed, which resulted in her obtaining medical treatment for emotional distress.

In reaching this conclusion, the Court reiterated two limitations on its holding. First, the Court advised that the alleged retaliatory conduct must be material and not trivial. The Court, citing to EEOC guidance, stated that "petty slights, minor annoyances, and simple lack of good manners" are insufficient. Second, the Court explained that an objective "reasonable person" standard is applicable. As stated by the Court, "context matters" and the "significance of any act of retaliation will often depend on particular circumstances."

According to the EEOC, approximately 26% of all charges filed in 2005 involved retaliation claims. This decision likely

will open the door to an even greater number of retaliation lawsuits. To defend against potential retaliation claims, employers should train their supervisors regarding retaliation and the Court's broad standards. Employers also should review their policies to ensure that they prohibit not only discrimination and harassment, but also retaliation. Before taking any potentially adverse action against employees who may have complained about discrimination, supervisors should engage their human resources experts and counsel regarding that decision.

*This article was written by Patrick G. DeBlasio, III, Esq., a partner in the Miami office of Jackson Lewis LLP, and is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis LLP and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. For more information, please contact Patrick DeBlasio at 305.577.7602 or [deblasip@jacksonlewis.com](mailto:deblasip@jacksonlewis.com).*

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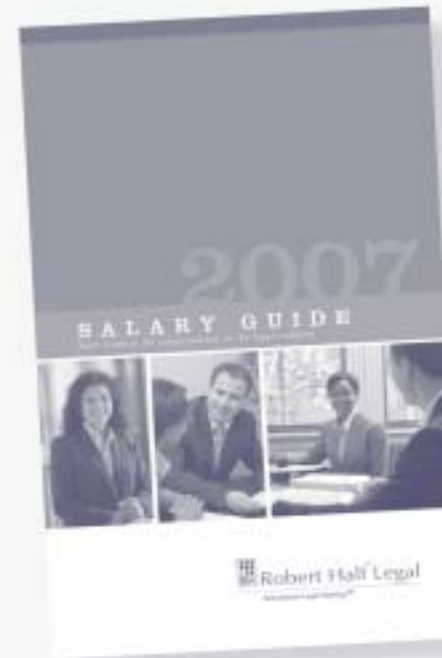
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