

## RETALIATION

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Virginia School Boards Association/Council of School Attorneys

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### I. Basics of Retaliation

- A. In order to establish a prima facie case of retaliation the employee or job applicant must show:
  - 1. Employee or job applicant engaged in protected activity
  - 2. Adverse employment action occurred; and
  - 3. Connection between participation in the protected activity and the adverse causal employment action.
    - a. One accused of retaliation knew about the claimant's protected activity.
- B. Even if the original complaint of discrimination turns out to be unfounded, an employee who can prove that the adverse action was taken because of the complaint can win a retaliation claim.
- C. One-third of all discrimination claims include retaliation.
- D. Negative action taken by an employer shortly after an individual complains raises a red flag.

### II. Summary of *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006)

- A. Clarified standard to use when determining the second element in the prima facie case.
  - 1. Confined to employment or workplace related activity – No
  - 2. How harmful the adverse action must be to be retaliation – “materially adverse” or “reasonable person may be dissuaded from making or supporting a charge of discrimination” as a result of employer’s action.
- B. Sheila White was a forklift operator in the Maintenance Department at the Memphis, Tennessee Railway Yard for Burlington Northern and Santa Fe Railway Co. The Maintenance Department was all male, with the exception of Ms. White. Ms. White complained to her superiors about gender discrimination and sexual harassment and was subsequently removed from her forklift duties to standard track laborer tasks. The transfer did not affect her pay or benefits.
- C. Ms. White filed an EEOC complaint claiming the reassignment was unlawful gender discrimination and retaliation.
- D. Later, Ms. White was suspended without pay for insubordination. After the suspension, Burlington found that she had not been insubordinate, reinstated her, and gave her back pay for the 37 days she was suspended. Nonetheless, she filed another EEOC retaliation charge.

- E. Ms. White sued Burlington Northern claiming that her reassignment and suspension – despite her reinstatement and award of back pay – constituted unlawful retaliation.
- F. A jury awarded her \$43,500 in compensatory damages plus medical expenses and attorneys’ fees. The railroad appealed the decision.
- G. The United States Supreme Court was faced with the task of fashioning a test for what constitutes adverse employment action for retaliation purposes.
- H. Circuit courts had split on this issue with some circuits concluding that a claimant had to show that the adverse conduct was job-related and had resulted in an “ultimate employment decision” such as dismissal.
- I. The Supreme Court concluded that neither job-related adverse conduct nor an ultimate employment decision were necessary for proof of retaliatory conduct under Title VII.
- J. Concerning the job-related adversity issue, the Court held that the anti-retaliation provision does not confine the forbidden conduct to those related to employment or occurring at the workplace.
- K. As to the ultimate employment issue, the Court agreed with a formulation favorable to employees. Under that standard, any action that materially injures or harms an employee who has complained of discrimination and might dissuade a reasonable worker from making or supporting a charge of discrimination can constitute actionable retaliation.
- L. The Court was careful to point out that minor annoyances, petty slights, and simple lack of good manners are not retaliation.
- M. However, the Court also emphasized that the significance of any act of retaliation would depend upon the particular circumstances, i.e., making a schedule change in an employee’s work schedule might be insignificant to many workers, but matter enormously to a young mother with school-aged children.
- N. The Court’s ruling has been widely viewed as broadening the standard for retaliation and making it easier for claimants to file such lawsuits and survive summary judgment.

### **III. Examples of Statutes that Protect Against Retaliation**

- A. More Than 43 Federal Statutes Contain Retaliation Provisions
- B. Examples include:
  1. Title VII of the Civil Right Act of 1964 (race, color, religion, sex and national origin)
  2. Age Discrimination in Employment Act
  3. Americans with Disabilities Act
  4. Fair Labor Standards Act
  5. Occupational Safety and Health Act
  6. Family and Medical Leave Act
  7. Employee Retirement Income Security Act
  8. Uniform Services Employment Re-Employment Act

#### IV. Actions That Could Be Retaliatory

- A. Less than favorable evaluations or performance ratings that affect promotion potential
- B. Changing job duties within the same job classification
- C. Decisions that affect the potential for compensation increases or additional compensation, such as bonuses
- D. Increased scrutiny of employee's work
- E. Decisions impacting benefits such as leave time
- F. Changing security status or access to job premises
- G. Isolating employee by reducing job duties or limiting access to materials
- H. Treating employee differently from other employees, i.e., excluding employee from key meetings, skipping an employee's regular evaluation, etc.
- I. Outside of employment, giving negative evaluations or recommendations
- J. Outside of employment, filing false charges against an employee

#### V. Fourth Circuit and Eastern and Western Districts of Virginia Cases – After *Burlington Northern*

- A. Adverse Action
  - 1. *Scurlock-Ferguson v. City of Durham*, 2007 WL 806003 (4<sup>th</sup> Cir. 2007) (unpublished).
    - a. Prior to the *Burlington Northern* decision, employee lost in the lower court, because court held that her transfer to a position involving the same pay and benefits was not an adverse employment action for purposes of a retaliation claim. The Court of Appeals affirmed. The U.S. Supreme Court granted certiorari and reversed for further consideration in light of *Burlington Northern*. The Court of Appeals, in turn, remanded the case to the district court for further consideration of the issue of whether the transfer “could be considered an actionable adverse employment action.”
    - b. Citing *Burlington Northern*, the court stated that an employee could prove adverse action if the employee showed “that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”
  - 2. *Csicsmann v. Sallada*, 2006 WL 3611729 (4th Cir. 2006) (unpublished)
    - a. Employee contended the company retaliated against him and discriminated against him because he took Family Medical Leave. The employee's position as a computer server group manager was eliminated while he was on FMLA leave. Consistent with the FMLA he was reinstated to an “equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” The employee worked the same schedule and was in the same physical office. The employee contended his new position on the disaster recovery project was less prestigious and

less visible. The court noted that the “concrete and measurable aspects of . . . his positions were exactly the same.” Following a merger, this new position was eliminated, and the employee was let go. Court found there was a legitimate business reason for elimination of the position.

- b. The court also held that the plaintiff did not have a valid claim for retaliation. Court stated that the employee failed to show any material harm and only offered evidence of intangible alleged harms stemming from the employees preference for the previous position. Employee’s transfer to the equivalent position did not constitute an adverse action.
  - c. Retaliation claimed under FMLA and Employee Retirement Income Security Act (“ERISA”).
  - d. Granting of employer’s motion for summary judgment affirmed.
3. *Parson v. Wynne*, 2007 WL 731398 (4<sup>th</sup> Cir. 2007) (unpublished)
- a. Performance review and removal from alternative work schedule were not materially adverse. Employee alleged that she did not receive a monetary bonus due to her evaluation. Bonus was discretionary, therefore the court found employee’s failure to receive bonus did not have a “significant detrimental effect” on the terms and conditions of employment. Employer’s refusal to allow her to work an alternative schedule also held not to have a significant detrimental effect.
  - b. Granting of employer’s motion for summary judgment affirmed
4. *Fitzgerald v. Ennis Bus. Forms, Inc.*, 2007 WL 81797 (W.D. Va. 2007)
- a. Employee was transferred involuntarily from the first shift to the third shift. He asserted that this transfer was inconvenient to him and stressful, even though it probably meant a decrease in responsibility in terms of the number of workers he had to supervise. Employee claimed discrimination and retaliation.
  - b. The court examined the alleged damaging conduct and concluded that the transfer from first shift to third shift was not an “adverse employment action” for Title VII purposes, but was a sufficient adverse action for purposes of making a claim of retaliation.
  - c. The transfer occurred nearly four years after the protected activity. Employee failed to prove causation.
  - d. Employer’s motion for summary judgment granted.
- B. Causation – Temporal Proximity
1. *Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007)
- a. Fourth Circuit acknowledged that the prima facie elements were changed in retaliation cases as a result of *Burlington Northern*.
  - b. Employee contended employer fired her in July 2002 as a result of her gender and in retaliation for complaining of discrimination in December 2001. The court found that causation was established in a retaliation claim even though there was a **seven-month gap** between the protected activity and the employee’s termination.

Causation can be proven by temporal proximity or by recurring, retaliatory events which occur between the time of the complaint and the termination. One month after the employee complained of discrimination to human resources, the supervisor who knew of her complaint against him reduced her supervisory responsibilities, took away her authority to set prices and meet directly with certain clients. In other words, he stripped her of significant job responsibilities, which made it easier to claim that her position was not needed and should be eliminated. Three months after she complained of discrimination her supervisors began discussing terminating the employee. Additionally, after the decision to terminate the position due to its redundant nature was made, the supervisor immediately set out to hire a replacement.

- c. The Fourth Circuit reversed the trial court and held that these events were sufficient to allow the case to proceed beyond summary judgment.
2. *Bragg v. Orthopedic Assoc. of Va.*, 2007 WL 702786 (E.D. Va. 2007)
    - a. A **one-year gap** between the protected activity and the adverse action is too long to show causation.
    - b. Court granted summary judgment for the employer.
  3. *Arapoff v. Johnson & Johnson Serv., Inc.*, 2006 WL 2796839 (E.D. Va. 2006)
    - a. In a Title VII retaliation claim, plaintiff must prove causation by showing that her termination was the result of an unlawful retaliation. This court found a **ten-month gap** between the protected activity and the termination too long to establish causation.
    - b. Employer's motion for summary judgment granted.
  4. *Shelton v. Lockheed Martin Operations Support, Inc.*, 2006 WL 3359613 (E.D. Va. 2006)
    - a. A **three-and-a-half month gap** between the protected activity and the adverse action is too long to show causation in a retaliation claim. Interestingly, the employee conceded that he had no viable discrimination claim. Employee contended being terminated three-and-a-half months after his employer learned of this EEOC claim showed a causal connection. Employee presented no evidence of a causal connection other than the temporal proximity. Court held a three-and-a-half month gap was too long when no other evidence of causation presented.
    - b. Court went on to state even if a three-and-a-half month gap was adequate to prove causation, employer would still prevail, because employee failed to provide any evidence that employer stated reason for firing - defiance and insubordination - was pretextual.
    - c. Employer's motion for summary judgment on the retaliation claims granted.

5. *Varma v. Dudas*, 2007 WL 201082 (E.D. Va. 2007)
  - a. Employee contended that her employer retaliated against her by terminating her employment. The time between the filing of the EEOC complaint and the termination was **five months**. However, the decision and recommendation to terminate was made three months after the EEOC complaint. Temporal proximity is only one factor in determining causality. On numerous occasions before and after the employee filed the EEOC complaint, grievances were filed, warnings were distributed, and superiors were contacted. This environment strengthens the causal connection between the employee's EEOC filing and her termination.
  - b. Although the employer won on summary judgment for other reasons, the court found that this gap between protected activity and the adverse action is close enough to show causation in a retaliation claim, especially when there was intervening retaliatory conduct.

## VI. Tips to Avoid Retaliation Claims

- A. Does fear of a retaliation claim mean an employer cannot take necessary action to ensure an employee is meeting expectations and performing his or her job duties? No. However, caution, planning, careful evaluation and good documentation are necessary before taking any adverse action against an employee who has engaged in a protected activity.
- B. Nine tips to avoid retaliation claims:
  1. Establish a Policy Against Retaliation
    - a. Have a policy against retaliation
    - b. Policy should spell out exactly what retaliation is and state that employer will not tolerate retaliation from any of its supervisors, managers or other employees
    - c. Policy should also tell employees what steps to take if an employee is subjected to retaliation
  2. Train and Educate Employees That Retaliation Will Not Be Tolerated
    - a. Having a policy is only the first step
    - b. Take action to ensure employees know about the anti-retaliation policy
  3. Discuss the Complaint Only With Those Who Need-to-Know
    - a. The fewer people who know about a complaint, the smaller the chances are that an employee, supervisor, or manager will retaliate against the complainer. When employer investigates the employee's complaint, employer will have to discuss the complaint with other employees. Tell only those with a need to know. When such employees are told remind them that retaliation will not be tolerated and refer them to anti-retaliation policy.

4. Communicate With the Complaining Employee
  - a. Explain that the complaint is being taken seriously. Tell the employee to report anything that the employee considers hostile or negative. Refer the employee to the anti-retaliation policy and emphasize that retaliation will not be tolerated.
5. Document Concerns and Issues Regarding Employee as They Arise
  - a. Do not wait until an employee has filed a complaint to address work place issues and violation of policies
6. Uniform Enforcement
  - a. Enforce policies and procedures for similarly situated employees uniformly without singling out the complainant
7. Performance Evaluation
  - a. Provide timely and objective feedback about performance at regular intervals
8. Use Extreme Caution in Email Communication
  - a. Tendency to be casual in our email communication
  - b. Be aware that comments sent by email in the heat of the moment may be examined by a jury at a later date
9. Stop and Carefully Evaluate
  - a. If you must take action against an employee who has complained, be prepared to show that you had valid reasons for discipline, unrelated to the complaint. Those reasons should be supported, if possible, by prior documented warnings to the employee.

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