

## **Don't Get Mad, Get Even: Practical Strategies for Dealing with Retaliation Claims by the Plaintiff-Employee**

**By Spencer H. Silverglate and Bradley S. Paskievitch**

Spencer H. Silverglate is the managing shareholder of the law firm Clarke Silverglate & Campbell, P.A. in Miami, Florida. His practice focuses on complex commercial and employment litigation and the defense of catastrophic personal injury cases. He is a Past President of the Florida Defense Lawyers Association and is active in the DRI's and IADC's Employment Law Committees. Mr. Silverglate has been named Best of the Bar by the South Florida Business Journal, a Super Lawyer by Florida Trend Magazine and among the Legal Elite by the South Florida Legal Guide. He is a frequent writer and speaker on employment law and other legal topics.

Bradley S. Paskievitch is Sr. Legal Counsel, Compliance & Employment, for DHL Global Business Services, the global leader in logistics and package/freight delivery. He is headquartered in Columbus, OH. Mr. Paskievitch is responsible for compliance, employment and immigration matters for all of DHL's business units throughout the United States, which totals over 40,000 employees. Mr. Paskievitch has presented at numerous employment law seminars and is published in the Association of Corporate Counsel's "Docket" Journal.

SUPPOSE a female employee files a charge with the EEOC alleging sexual harassment by her male supervisor. The supervisor learns of the complaint and begins to avoid the employee. When he invites other employees to lunch, he excludes her. He also gives her fewer work assignments. On her next performance evaluation, the supervisor gives her a lower score than in the past. It seems the entire department is buzzing about the claim. Fed up, the employee reports the situation to human resources, which decides that everyone's best interests would be served by transferring the subordinate to another department. The new position has the same salary and benefits, but somewhat less prestige than the former position.

Does one or more of these acts constitute retaliation? They all may according to the Supreme Court's recent decision *Burlington N. & Santa Fe Ry. Co. v. White*.<sup>1</sup> In *Burlington*, the Court approved the liberal standard espoused by a minority of federal circuits of what constitutes an adverse employment action in a Title VII retaliation claim. The decision removes any doubt that the standard for establishing an adverse employment action is lower for retaliation claims than substantive claims of discrimination.

Even before *Burlington*, retaliation was perhaps the fastest growing and most difficult to defend of all discrimination claims. In 2006, the EEOC received 22,555 retaliation charges.<sup>2</sup> In 2007, the year following *Burlington*, the EEOC received 26,663 retaliation charges, an 18.2% increase from the previous year.<sup>3</sup> 32% of all charges in 2007 related to retaliation, and the EEOC

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<sup>1</sup> 548 U.S. 53 (2006).

<sup>2</sup> EEOC.gov, Charge Statistics FY 1997 Through FY 2007, <http://www.eeoc.gov/stats/charges.html> (last visited Aug. 19, 2008).

<sup>3</sup> *Id.*

recovered more than \$124 million in connection with them (not including monies obtained through litigation).<sup>4</sup> One can only assume that the numbers of retaliation charges will continue to increase in the future.

This article discusses retaliation claims since *Burlington* and recommends practical strategies for dealing with employees who make or support claims of discrimination. Of course, the overarching strategy for dealing with employees who engage in protected activity is not to attempt to get even. The best approach is to resolve the underlying claim in an appropriate manner, whether it is founded or not, without reprisals. If a retaliation lawsuit is filed despite these efforts, winning it will prove more satisfying than getting even.

## **II. *Burlington*: A New Standard for Retaliation Claims**

To present a prima facie case of retaliation under Title VII, a plaintiff must prove that: (1) he engaged in protected activity, (2) the employer was aware of the activity, (3) the employer took an adverse employment action against the employee and (4) a causal connection exists between the protected activity and the adverse employment action.<sup>5</sup> In 2006, the Supreme Court in *Burlington* resolved a split among the circuits on the third element--what constitutes an adverse employment action in a Title VII retaliation claim.

Before *Burlington*, the Third, Fourth and Sixth Circuits applied the same standard for retaliation as substantive discrimination claims—that the challenged action must affect the terms, conditions or benefits of employment.<sup>6</sup>

The Fifth and Eighth Circuits were more restrictive. They limited actionable retaliation to “ultimate employment decisions” such as hiring, termination, promotion, demotion and compensation.<sup>7</sup>

The Seventh and District of Columbia Circuits were more liberal. They held that the challenged conduct must have dissuaded the reasonable employee from making or supporting a charge of discrimination.<sup>8</sup>

Finally, the Ninth Circuit, following EEOC guidance, held that 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.”<sup>9</sup>

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<sup>4</sup> EEOC.gov, Retaliation, <http://www.eeoc.gov/types/retaliation.html> (last visited Aug. 18, 2008).

<sup>5</sup> See *Cifra v. G. E. Co.*, 252 F.3d 205, 216 (2d Cir. 2001).

<sup>6</sup> See, e.g., *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 798-800 (6th Cir. 2002); *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997).

<sup>7</sup> See, e.g., *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

<sup>8</sup> See, e.g., *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006); *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

<sup>9</sup> *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

Factually, plaintiff in *Burlington* was the only woman working for the “maintenance-of-way” department for a railroad’s Tennessee yard. She was hired as a track laborer. Her primary duty was operating a forklift, but the job also involved removing and replacing track components, transporting track material, cutting brush, and removing litter and cargo spillage from the right-of-way. Plaintiff complained to company officials that her supervisor repeatedly told her that women should not be working in the maintenance-of-way department. She also complained that he made insulting and inappropriate remarks to her in front of male colleagues. After an internal investigation, the supervisor was suspended for 10 days and ordered to attend sexual harassment training.

Soon after her complaint, Plaintiff was removed from forklift duty and reassigned to standard track laborer tasks. She was told that a “more senior man” should have the “less arduous and cleaner job” of forklift operator. Plaintiff filed a complaint with the EEOC claiming that the reassignment was gender-based and retaliatory. A few days later, Plaintiff got into a disagreement with another supervisor. She was suspended without pay for insubordination and invoked the internal grievance procedure. However the employer ultimately reversed its decision, and she was awarded back pay for the 37 days she was suspended. She sued, claiming that both the reassignment and suspension amounted to unlawful retaliation under Title VII.

The Supreme Court began its analysis of the standard to be applied in retaliation cases with the text of Title VII. The statute’s core anti-discrimination provision states:

It shall be an unlawful employment practice for an employer—

- (1) *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or*
- (2) *to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.*<sup>10</sup>

In contrast, the anti-retaliation provision states:

It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>11</sup>

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<sup>10</sup> 42 U.S.C. § 2000e-2(a) (emphasis added).

<sup>11</sup> 42 U.S.C. § 2000e-3(a) (emphasis added).

The Court observed that the words in the substantive anti-discrimination provision—“hire,” “discharge,” “compensation, terms, conditions, or privileges of employment,” “employment opportunities,” and “status as an employee”—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision, which simply makes it unlawful to “discriminate” against an employee who engages in protected activity.<sup>12</sup>

The Court went on to explain why the language differences make sense given the distinct purposes behind the two provisions. The substantive, anti-discrimination provision seeks to prevent injury to individuals based on who they are, i.e., their racial, ethnic, religious or gender-based status. The anti-retaliation provision, on the other hand, seeks to prevent harm to individuals based on what they do, i.e., their conduct. To secure the first objective, the Court reasoned, Congress did not need to prohibit anything other than employment-related discrimination. “The substantive provision’s basic objective of ‘equality of employment opportunities’ and the elimination of practices that tend to bring about ‘stratified job environments,’ would be achieved were all employment-related discrimination miraculously eliminated.”<sup>13</sup>

In contrast, the anti-retaliation provision’s objectives would not be eliminated by focusing solely on the workplace. The Court observed that “[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.”<sup>14</sup>

On the other hand, the Court also noted that the anti-retaliation provision protects individuals not from all retaliation, but from retaliation that produces injury or harm. Against this backdrop, the Court adopted the standard applied by the Seventh and District of Columbia Circuits. That is, “a plaintiff must show 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 . . .”<sup>15</sup>

The Court went on to clarify what it meant by “material adversity”:

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth “a general civility code of the American workplace.” . . . An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees

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<sup>12</sup> *Id.* at 62.

<sup>13</sup> *Id.* at 63 (citations omitted).

<sup>14</sup> *Id.* (citing *Rochon v. Gonzales*, 438 F.3d at 1213 (FBI’s refusal, contrary to policy, to investigate death threats a federal prisoner made against agent and his wife constituted retaliation)); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination).

<sup>15</sup> *Id.* at 68 (citations omitted).

experience.<sup>16</sup> The anti-retaliation provision seeks to prevent employer interference with “unfettered access” to Title VII remedial mechanisms. It does so by prohibiting employer actions that are likely “to deter victims of discrimination from complaining to the EEOC,” the courts, and their employers. And normally petty slights, minor annoyances and simple lack of good manners will not create such deterrence.<sup>17</sup>

The Court concluded that the standard for judging harm must be objective—that of the reasonable employee. However, the standard is also case specific. For example, a schedule change may be insignificant in one case, “but may matter enormously to a young mother with school age children.”<sup>18</sup> Similarly, a supervisor’s refusal to invite an employee to lunch is normally a “nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch” might well be actionable.<sup>19</sup>

Applying this standard to the facts of the case, the Court found sufficient evidence to sustain the jury finding of material adverse employment actions. While the Court noted that reassignment of job duties is not automatically actionable, here, the evidence was that the track laborer duties were “more arduous and dirtier” and less prestigious than those of forklift operator.<sup>20</sup> Additionally, even though plaintiff ultimately received back pay, she had to live for 37 days without pay while the company investigation was pending. During this period, plaintiff obtained medical treatment for emotional distress. Under the circumstances, the jury’s conclusion that the employer retaliated against Plaintiff was a reasonable conclusion.<sup>21</sup>

### **III. The Impact of *Burlington* on Anti-Retaliation Laws Beyond Title VII**

Several other federal laws model their retaliation provisions after Title VII. For example, the Americans with Disabilities Act,<sup>22</sup> Age Discrimination in Employment Act,<sup>23</sup> Family and Medical Leave Act,<sup>24</sup> Fair Labor Standards Act,<sup>25</sup> and Occupational Safety and Health Act,<sup>26</sup> have borrowed Title VII’s interpretation of what constitutes adverse action in a retaliation

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<sup>16</sup> See 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting that “courts have held that personality conflicts at work that generate antipathy” and “‘snubbing’ by supervisors and co-workers” are not actionable).

<sup>17</sup> *Id.* (citations omitted).

<sup>18</sup> *Id.* at 69.

<sup>19</sup> *Id.* (citations omitted).

<sup>20</sup> *Id.* at 71.

<sup>21</sup> *Id.* at 72.

<sup>22</sup> 42 U.S.C. § 1217(a).

<sup>23</sup> 29 U.S.C. §§ 621-634.

<sup>24</sup> 29 U.S.C. §§ 2601-2654.

<sup>25</sup> 29 U.S.C. §§ 201-219.

<sup>26</sup> 29 U.S.C. §§ 651-678.

claim.<sup>27</sup> Similarly, many state civil rights acts apply Title VII case law when interpreting their own statutes.<sup>28</sup> Consequently, the impact of *Burlington* likely will be sweeping. It may well mark a liberalization of state and federal anti-retaliation law across the nation.

#### **IV. The Impact of Burlington on Lower Federal Courts**

Numerous courts have applied the *Burlington* standard of adverse employment action to retaliation claims. A non-exhaustive sampling follows.

##### **A. Cases Finding Adverse Employment Action**

*Hawkins v. Anheuser-Busch, Inc.*,<sup>29</sup> involved alleged retaliatory harassment by a co-worker. The female brewery plaintiffs claimed a male co-worker repeatedly sexually harassed them. After the matter was reported to the company, the co-worker allegedly retaliated by, among other things, setting fire to one plaintiff's car and another's house. Company investigations took place over a long period of time, and the co-worker was ultimately terminated, not for the retaliation but for the underlying sexual harassment of a plaintiff and another woman. Following his termination, the co-worker shot his girlfriend and then killed himself.

Two of the women sued for retaliation. Likening co-worker retaliation to co-worker harassment, the Sixth Circuit recognized a claim for the former for the first time, joining what it considered to be the majority of federal circuits.<sup>30</sup> The court adopted the following test for co-worker retaliation: (1) the conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination (applying the *Burlington* standard), (2) supervisors or members of management have actual or constructive knowledge of the co-worker's retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.<sup>31</sup>

Applying the test to the facts of the case, the court found as to one plaintiff that the company knew or should have known of the arson allegations but failed to investigate them. The court found this to be actionable retaliation.<sup>32</sup> Given the sequence of events, however, the court found that the company's termination of the co-worker was an adequate response to the other retaliation plaintiff's claim.<sup>33</sup>

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<sup>27</sup> See J. Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 Am. J. Trial Advoc. 539, 547-49 (2007).

<sup>28</sup> *Id.*

<sup>29</sup> 517 F.3d 321 (6th Cir. 2008).

<sup>30</sup> *Id.* at 345-46.

<sup>31</sup> *Id.* at 347.

<sup>32</sup> *Id.* at 349.

<sup>33</sup> *Id.* at 39-50.

*Halfacre v. Home Depot, U.S.A., Inc.*,<sup>34</sup> held that, in light of *Burlington*, a lower performance evaluation after an employee filed a charge of discrimination with the EEOC could amount to an adverse employment action. The court reversed summary judgment for the employer and remanded for the parties to take discovery on whether the evaluation impacted the employee's wages or professional development.

*Kessler v. Westchester County Dept. Social. Serv.*,<sup>35</sup> reversed summary judgment for the employer on the issue of adverse employment action. The employer transferred the employee to another position after he filed a charge of discrimination with the EEOC. The transfer did not affect his job title, job grade, salary, benefits or hours of work. However, in his new position his managerial responsibilities were removed and replaced with clerical tasks. The court found that, under *Burlington*, this could dissuade a reasonable employee from making or supporting a charge of discrimination.

*Billings v. Town of Grafton*,<sup>36</sup> is an interesting case, both for its treatment of the retaliation claim and the underlying discrimination claim. As to the discrimination claim, the First Circuit held that a boss's repeated staring at his secretary's breasts could constitute sexual harassment.<sup>37</sup> As to the retaliation claim, the court held that a transfer to a job with less prestige, requiring less experience and fewer qualifications and with fewer high-profile assignments could amount to an adverse employment action.<sup>38</sup> Summary judgment for the employer was reversed.

In *Hare v. Potter*,<sup>39</sup> a postal employee was not selected for a management training program following an internal complaint of sexual harassment. She also complained of negative comments by her supervisors, poor treatment, longer work hours and lower performance ratings. The Third Circuit had little difficulty concluding that not being selected for the training program could constitute an adverse employment action under *Burlington*. Significantly, the court also held that the retaliation claim was valid as it related to a hostile work environment. While the court observed that the conduct might not be considered severe or pervasive for a substantive claim of harassment, it was enough to survive summary judgment under the lower standard for retaliation claims.<sup>40</sup>

In *Edwards v. Town of Huntington*,<sup>41</sup> plaintiff, a carpenter, claimed that he was retaliated against for filing a charge of discrimination with the EEOC. Specifically, he claimed that his employer unduly scrutinized his work and job performance, required him to provide doctors' notes to explain absences, denied him overtime, told him to "get back to work," prohibited him for using his cell phone at work and failed to provide him with certain tools and equipment. The district court in New York held that this conduct, taken collectively, rose to the level of materiality under *Burlington*.

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<sup>34</sup> 221 Fed. Appx. 424, 431-434 (6th Cir. 2007).

<sup>35</sup> 461 F.3d 199, 209-11 (2d Cir. 2006).

<sup>36</sup> 515 F.3d 39 (1st Cir. 2008).

<sup>37</sup> 515 F.3d at 47-51.

<sup>38</sup> *Id.* at 52-57.

<sup>39</sup> 220 Fed. Appx. 120 (3d Cir. 2007).

<sup>40</sup> *Id.* at 132.

<sup>41</sup> No. 05-CV-339, 2007 WL 2027913 (E.D.N.Y. 2007).

## B. Cases Finding No Adverse Employment Action

*Higgins v. Gonzales*,<sup>42</sup> is an extremely favorable case for employers. Plaintiff, a Native American Assistant United States Attorney, lodged an internal complaint against her supervisor for making offensive comments about Native Americans. She claimed that after she complained, she was subjected to a systematic denial of supervision, mentoring and training and was removed from working on a certain project. In affirming summary judgment for the employer, the Eighth Circuit reasoned as follows: “[U]nder *Burlington*, we must look at [plaintiff’s] situation objectively to determine whether a reasonable employee in her shoes would be dissuaded from bringing a complaint. She cannot make her claim based on personality conflicts, bad manners, or petty slights and snubs. It is clear she had a serious personality conflict with her supervisor. The record also shows [her supervisor] was angry with her after she told others [she] was a racist. What is absent from the record is evidence showing [the supervisor’s] anger and related actions materially and adversely affected [plaintiff’s] life such that a reasonable employee in her shoes would be dissuaded from complaining.”<sup>43</sup>

Another favorable Eighth Circuit case is *Weger v. City of Ladue*.<sup>44</sup> A female communications officer for a police department sued the city for sexual harassment and retaliation. The court affirmed summary judgment on both claims (the decision contains an excellent discussion of the employer’s appropriate investigation and response to the sexual harassment claim). On the retaliation claim, the court held that separating plaintiff from her co-workers, “papering” her personnel file, conducting performance evaluations for the first time and ostracizing her did not amount to adverse action to support a retaliation claim. As to separating the employees, the rule applied to all employees equally and thus could not be considered adverse.<sup>45</sup> “Papering” her personnel file was not considered adverse because plaintiff failed to demonstrate any negative impact from it.<sup>46</sup> Indeed, many of the notes were either positive or neutral.<sup>47</sup> Similarly, the performance evaluations were given to all employees and were generally favorable for plaintiff.<sup>48</sup> Finally, the alleged ostracism, which mainly consisted of not being invited to the male police officers’ “happy hours,” was considered a nonactionable petty slight.<sup>49</sup>

*McGowan v. City of Eufala*,<sup>50</sup> affirmed summary judgment for the employer. The court held that failing to assign plaintiff to the day shift and allegedly condoning work-place harassment by co-workers did not constitute an adverse employment action under *Burlington*. As to the former, the court observed that “the shifts offered no differences in pay and benefits, nor was the night shift more arduous. Although claiming it to be a better assignment, [plaintiff’s] stated desire for

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<sup>42</sup> 481 F.3d 578 (8th Cir. 2007).

<sup>43</sup> *Id.* at 591.

<sup>44</sup> 500 F.3d 710 (8th Cir. 2007).

<sup>45</sup> *Id.* at 727.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 727-28.

<sup>50</sup> 472 F.3d 736 (10th Cir. 2006).



change was purely for personal reasons.”<sup>51</sup> As to the latter, the court found “no evidence that the harassment was orchestrated by supervisory personnel or that the City tacitly approved of it.”<sup>52</sup>

*Thomas v. Potter*,<sup>53</sup> is a case from one of the circuits that applied the test ultimately adopted by the *Burlington* Court. Interestingly, *Thomas* held that a shift transfer which may have been undesirable or inconvenient did not rise to the level of an adverse employment action.<sup>54</sup> The court distinguished *Washington v. Illinois Dept. of Revenue*,<sup>55</sup> which concluded that a shift change exploited the employee’s “unique vulnerability” by changing her work schedule knowing that she would be required to take two hours of leave per day to care for her disabled son. In contrast, the record revealed no such unique vulnerability of the plaintiff in *Thomas*.

In *Carpenter v. Con-Way Express, Inc.*,<sup>56</sup> plaintiff, a Caucasian driver for a trucking company, was formerly married to an African American woman. He claimed racial harassment and retaliation by a co-worker. Specifically, he claimed that the co-worker constantly made racist comments about his former wife (including repeated use of the “N” word), mostly behind his back, and on several occasion improperly loaded his trailer and placed garbage inside it. The Eighth Circuit affirmed summary judgment for the employer as to all claims—constructive discharge, hostile work environment and retaliation. As to the latter, the court held that the conduct amounted to nonactionable “trivial harms.”<sup>57</sup>

In *Jones v. Johanns*,<sup>58</sup> plaintiff claimed that his employer retaliated against him for filing an EEOC complaint by sending him three letters. These letters directed him to refrain from contacting co-workers about his pending EEO claims during business hours or on company premises. The Sixth Circuit held that the letters did not create an adverse employment action under *Burlington*.<sup>59</sup>

In *DiCampli v. Korman Communities*,<sup>60</sup> plaintiff sued under the FMLA, claiming that her job transfer was in retaliation for taking leave. Specifically, she claimed that her transfer from operations manager to an IT trainer position constituted an adverse employment action. The Third Circuit disagreed, finding no evidence to suggest that the new position was less prestigious or offered fewer bonus opportunities. While the position required a new location with a longer commute, this was not considered materially adverse under *Burlington*.<sup>61</sup>

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<sup>51</sup> *Id.* at 743.

<sup>52</sup> *Id.*

<sup>53</sup> 202, Fed. Appx. 118 (7th Cir. 2006).

<sup>54</sup> *Id.* at 119

<sup>55</sup> 420 F.3d 658, 662-63 (7th Cir. 2005)

<sup>56</sup> 481 F.3d 611 (8th Cir. 2007).

<sup>57</sup> *Id.* 618-19.

<sup>58</sup> 264 F.App’x 463 (6th Cir. 2007).

<sup>59</sup> *Id.* at 469.

<sup>60</sup> 257 F.App’x 497 (3d Cir. 2007)

<sup>61</sup> *Id.* at 501.

The court in *Anderson v. The Foster Group*,<sup>62</sup> held that a temporary job reassignment, which did not erode the employee's duties or impact his career prospects, was not an adverse employment action.<sup>63</sup>

Another important feature of the *Anderson* decision is that plaintiff was ultimately terminated, an obvious adverse employee action. As to the termination claim, however, the court held that the causation element was lacking given that the termination occurred 3 ½ months after complaint of discrimination.<sup>64</sup> The court cites several cases holding that as little as a one month gap between the protected activity and the adverse job action has been held not to create a genuine and material fact issue on the causation element.<sup>65</sup>

*Reis v. Universal City Development Partners, LTD.*,<sup>66</sup> held that the denial of a transfer did not constitute an adverse employment action under Title VII or the state counterpart. In granting summary judgment for the employer, the court found no evidence that the requested position would have provided greater pay, prestige or advancement opportunities.

In *Rush v. Speedway Buick Pontiac GMC, Inc.*,<sup>67</sup> plaintiff was 18 years old when she went to work for the parts department of an automobile dealership. The department manager sexually harassed her, and she reported the conduct to management. In response, the supervisor was counseled that such conduct would not be tolerated and informed that if he engaged in similar conduct in the future, he would be terminated. Additionally, plaintiff was presented with three alternatives (1) stay in her current position, (2) transfer to another position (which she claimed she was physically incapable of performing) or (3) quit. She chose to quit.

The District Court held that this did not amount to an adverse employment action, reasoning as follows: "Plaintiff's argument might have some merit if [the employer] had actually transferred [her] . . . But in this case, unlike in *Burlington Northern*, [plaintiff] still had the option of continuing to remain in her current position with . . . her supervisor, and she chose not to do . . . A reasonable employee would have felt somewhat vindicated by the fact that her [supervisor] was counseled" and reprimanded.<sup>68</sup>

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<sup>62</sup> 521 F. Supp. 2d 758, 780 (N.D. Ill. 2007)

<sup>63</sup> *Id.* (citing *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (personal perception that job assignment was "personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action"); and *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 745 (7th Cir. 2002) (plaintiff's idiosyncratic preference for one job over another does "not justify trundling out the heavy artillery of federal antidiscrimination law")).

<sup>64</sup> *Id.* at 788-89.

<sup>65</sup> *Id.*; see also *Wallace v. Georgia Dept. of Trans.*, 212 Fed. Appx. 799, 802 (11th Cir. 2006) (court observed that three to four months generally not enough to show temporal proximity; seven months held insufficient in instant case).

<sup>66</sup> 442 F. Supp. 2d 1238, 1253-54 (M.D. Fla. 2006).

<sup>67</sup> 525 F. Supp. 2d 1265 (D. Kan. 2007).

<sup>68</sup> *Id.* at 1278.

In *Moses v. City of New York*,<sup>69</sup> the court held that increased scrutiny and the introduction of intermediate managers to serve between plaintiff and her supervisor did not constitute an adverse employment action.

In *Gilmore v. Potter*,<sup>70</sup> the Arkansas District Court held that being called “worthless” and told not to talk to co-workers amounted to petty slights which were not actionable as Title VII retaliation.<sup>71</sup> Additionally, the evidence showed that confining plaintiff to work in an office rather than the workroom floor was in response to her disability and thus could not be considered an adverse employment action.<sup>72</sup>

In another Arkansas case, *O’Brien v. Johanns*,<sup>73</sup> white females filed charges of discrimination claiming that they were subjected to racial harassment. They contended that they were then retaliated against by being treated harshly, overly scrutinized, considered for disciplinary action, limited from contact with their superiors and having certain authority removed. The district court found that this did not meet the *Burlington* standard for adverse employment action.<sup>74</sup>

## **V. Practical Strategies for Dealing with Employees Who Engage in Protected Activity**

### **A. Don’t Retaliate**

This may sound obvious, but it is the single most important piece of advice that can be given in the area of workplace retaliation—don’t do it. Considering the amount of verdicts and settlements paid in retaliation claims each year, employers seem to be getting it wrong consistently. The bottom line is this: when an employee engages in protected activity, that employee should not be retaliated against in any respect whatsoever. If a supervisor asks what constitutes retaliation, it may be a good indication that whatever he/she has in mind should be avoided. No doubt, continuing to supervise an employee who, perhaps wrongly, has accused the supervisor of discrimination or harassment may be one of the most difficult assignments the supervisor will ever be given. Nevertheless, if the supervisor treats the employee differently in any respect after he/she engaged in protected activity, the company is at risk for a retaliation claim. Since the conduct that constitutes an adverse employment action is less than obvious since *Burlington*, the better practice is to err on the side of caution.

### **B. Act Consistently**

Consistency is the touchstone of effective personnel management. Inconsistent treatment of different employees under similar circumstances is typically the way causation is proven in a discrimination case. In a retaliation case, causation can be established by inconsistent treatment of the same employee. If a plaintiff can show that his employer treated him a certain way in one situation, but differently (worse) in a similar situation after he/she engaged in protected activity,

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<sup>69</sup> No. 06-CV-5974, 2007 WL 2600859 (S.D.N.Y. 2007).

<sup>70</sup> No. 4:04-CV-1264, 2006 WL 3235088 (E.D. Ark. 2006).

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.*

<sup>73</sup> No. 4:06-CV-00674, 2007 WL 1443674 (E.D. Ark. 2007).

<sup>74</sup> *Id.* at 8.

the employer likely will lose the case. This comparison is easy for a jury to comprehend and correspondingly dangerous for the employer. Therefore, employees should be treated consistently in all aspects of employment before and after engaging in protected activity.

For example, employers must avoid suddenly enforcing policies or work rules that were previously overlooked or treated lightly. If the employee attendance policy had not been strictly enforced previously, after an employee engages in protected activity is not the time to clamp down. Caution also should be applied in requiring the employee to perform different tasks after the protected activity. Finally, managers should always be instructed to enforce company policy, without exception. Exceptions often become the rule, which easily can become the central focus of an employee's retaliation claim.

### **C. Employee Training**

Many, if not most, companies train their employees on the legal prohibitions against discrimination and harassment. Seemingly, far less educate their workforce on the prohibition against retaliation toward employees who engage in protected activity. It is human nature for an employee to want to retaliate against an individual who has accused him/her of wrongdoing, especially if the allegations are false. Unfortunately, many employees do not understand that retaliation is illegal, and most simply do not know how to act when accused by a fellow employee. The employer's duty is to take steps to halt an employee's natural instinct to retaliate when attacked. This is why repeated education and training are essential.

### **D. Do Not Discuss Allegations with Accuser**

Nothing productive can result from management discussing with an employee his/her participation in protected activity. Any mention of the activity surely will be used as evidence of an employer's retaliation. If the employee brings up the subject, do not be drawn into a discussion about it. If asked, simply emphasize that you and the company respect the employee's right to engage in that activity and it will not affect the employee's employment status in any way. Never express disappointment or criticize the employee, directly or indirectly, for engaging in the protected activity.

### **E. Conduct Appropriate Investigation**

When an employee makes an internal complaint of discrimination, harassment or retaliation, the company's obligation to investigate is triggered. While the employer is not required to conduct a flawless investigation, the investigation should be reasonable under the circumstances. This includes conducting the investigation in a timely manner. Managers and human resources personnel should be disabused of any notion that conducting an investigation is taking them away from their "real work." A protracted lawsuit resulting from a failure to investigate might leave those who dropped the ball looking for other "real work."

If the alleged harasser is a senior member of management, consider retaining an outside, independent investigator. Note that if the investigator is an attorney, the attorney-client privilege

likely will be waived and the attorney will have a conflict in representing the company in a future action brought by the employee.

The employee also should be asked what he/she would consider to be an acceptable resolution of the matter. The employee should be told that his/her recommendation ultimately might not be followed, but at least it will be considered. If it is followed, it may provide a defense in future litigation. For example, if the employee requests a transfer and the request is granted, the employee should not be heard to complain about the transfer later.

Employees interviewed during the investigation, including the complaining employee, should be told that the investigation and witness interviews cannot be kept confidential, but will be disclosed to those with a need to know.

Finally, if the investigation will take more than a couple of days, the employee should be updated periodically on its status. The employee should never be made to feel that the company has forgotten about the complaint or is not taking it seriously.

#### **F. Take Appropriate Action Following Investigation**

The complaining employee need not be informed of the details of the investigation, but should be informed of its resolution. If the company's investigation determines that the complaint is founded, the wrongdoer should be disciplined according to company policy. However, whether or not the complaint is founded, the alleged wrongdoer, and everyone else involved in the process, should be counseled not to retaliate in any way against the accuser. This should be done both during and after the investigation. Again, this means not treating the employee differently because he/she engaged in protected activity. It may be wise to redistribute the company policy against retaliation to those involved in the investigation.

#### **G. Job Transfers**

Many employees resent job transfers; not surprisingly, many of the retaliation cases since *Burlington* involve transfers. Sometimes, the transfer is a well-intentioned measure to separate the wrongdoing supervisor from the complaining employee. Other times, it is necessitated by the operational needs of the company. In some circumstances, the transfer is motivated by a retaliatory animus. As seen above, one of the key questions will be whether the new position is materially adverse, that is, whether it would dissuade a reasonable person from making or supporting a charge of discrimination. While the test is supposed to be objective, the line is not bright. Therefore, the employer should be extremely cautious in making any transfer decisions within several months after the employee has engaged in protected activity. As the above cited cases demonstrate, the longer the time lapse between the protected activity and the employment action, the less likely the causation element will be satisfied.

#### **H. Adverse Employment Actions**

Engaging in protected activity does not immunize the employee from legitimate adverse employment actions, not even a demotion or termination. As a practical matter, however, an

employer must be extremely cautious before it enforces an adverse employment action against an employee who engages in protected activity. The file must be well documented, and lesser discipline, if warranted, should have been exhausted. Yet even with a well documented file, courts and juries generally do not look favorably upon personnel files that were “clean” prior to the protected activity and suddenly riddled with corrective actions following it. Nevertheless, appropriate action should be taken if the situation truly warrants it. If possible, a person who was not the target of the protected activity should decide on the adverse employment action. Additionally, as stated above, the more time that lapses between the protected activity and the adverse employment action, the less likely a court will find that the two are causally related.

## I. Less Obvious Retaliation

**1. Performance Evaluations, Pay Raises and Promotions.** Supervisors should be careful not to let their employee’s protected activity color their performance evaluations, pay raises or promotions of subordinates. This is particularly true where the treatment is less favorable than before the employee engaged in the protected activity.

**2. Job References.** The employer’s obligation to refrain from retaliation applies even to past employees. It is unlawful for an employer to give a negative employment reference to a prospective employer in retaliation for the employee having engaged in protected activity.<sup>75</sup> According to the *EEOC Compliance Manual*, an employer should not provide an unjustified negative reference, refrain from giving a reference when its normal practice is to provide them or disclose to a prospective employer that the employee previously engaged in protected activity.<sup>76</sup> As a best practice, companies should consider providing neutral references with the employee’s dates of employment, job titles and final salary.

**3. Relatives and Friends.** The employer should refrain from retaliating against relatives and friends, as these types of retaliation may be actionable as well.<sup>77</sup>

**4. Snubs and Slight.** While snubs and slights may not be actionable under *Burlington*, the better practice is not to test it. The line between a nonactionable snub and an actionable adverse employment action is not bright, and even a successful defense in a lawsuit still involves a lawsuit.

## VI. Conclusion

There’s a riddle that goes like this: How do you beat Bobby Fischer, the former world chess champion? The answer: Don’t play him in chess.

The question of how to get even with an employee who makes or supports a claim of discrimination evokes a similar response: You don’t. The best outcome is to resolve the

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<sup>75</sup> See *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

<sup>76</sup> *EEOC Compliance Manual* § 8-11.

<sup>77</sup> *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 544 (6th Cir. 1993) (allegation of reprisal for relative’s protected activity states claim under Title VII).

underlying claim in an appropriate manner, whether it is founded or not. Retaliating against the employee will only compound the company's problem. While the question of what constitutes retaliation since *Burlington* is somewhat amorphous, the company should err on the side of caution in its treatment of employees who engage in protected activity.

The employer is always best served by avoiding retaliation claims altogether, but if a claim is filed, the goal is to prevail. This objective is only accomplished by doing the right thing from the start when the employee engages in protected activity.