Title VII Circuit Review: When "Other Actions" of Employers Become Materially Adverse

By Anthony M. Rainone

Employment law practitioners are familiar with the *McDonnell Douglas* burden-shifting test applicable to intentional discrimination and retaliation claims under Title VII. The test requires, in part, that the plaintiff suffer a materially adverse employment action, which is an action that affects the terms and conditions of employment. A few years ago, in *Burlington Northern & Santa Fe R.R. v. White*, the U.S. Supreme Court interpreted that term to include, for purposes of the anti-retaliation provisions of Title VII, any action that may have "dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. 53, 64 (2006).

Where the employer terminates, demotes, refuses to hire, or reduces an employee's salary, there is no dispute that the employee has suffered a materially adverse employment action under Title VII. But there is often a battle over what can simply be described as "other actions" taken by an employer, which are adverse and affect the terms and conditions of employment yet do not cross the line to become "material." This issue is often where the summary-judgment battle is fought (and the case won) by one of the parties.

But it is often difficult to determine whether these "other actions" are actionable or are simply part of the petty slights and insults that employees suffer and that courts reject as a basis for liability under Title VII. Complicating matters is that many of us practice in multiple jurisdictions whose courts can have vastly different interpretations of whether an adverse action is materially adverse. To best serve our clients, both in evaluating whether to file a lawsuit as a plaintiff's attorney or in the early evaluation of the lawsuit by the employer's attorney, it is critical to understand how the courts in their jurisdiction are currently interpreting materially adverse employment actions.

This article reviews relevant published decisions throughout the circuit courts of appeals issued in 2010 to understand how each court decided whether those "other actions" constituted a materially adverse employment action. I also note a few published decisions from 2010 where Title VII caselaw regarding adverse employment actions on "other actions" has influenced the same issue under other statutes applicable to the employer-employee relationship.

Title VII and the Circuits in 2010

First Circuit

Starting with the First Circuit, in *Morales-Vallellanes v. Potter*, the court vacated a jury award for the plaintiff on his gender-discrimination and retaliation claims. The plaintiff argued, and the jury agreed, that selective enforcement of a break policy for employees constituted an adverse employment action. The First Circuit disagreed, and it also held that the temporary rotation of the employee's "preferred distribution" duties to another clerk did not constitute an adverse employment action. And as to the retaliation claim, the court also held that the employer's changing of the date posting a position in which the plaintiff was interested did not constitute an adverse employment action. In so holding, the court reminded that "[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate the act or omission to the level of a materially adverse employment action." 605 F.3d 27, 35 (1st Cir. 2010).

In another First Circuit decision, *Lockridge v. The University of Maine System*, the court held that the denial of a professor's request for better office space did not constitute a materially adverse employment action on the plaintiff's retaliation claim. In reaching this conclusion, the court reasoned that the denial did not leave the plaintiff in any worse position than that held by similarly situated faculty. 597 F.3d 464 (1st Cir. 2010).

Second Circuit

Turning to the Second Circuit, the court in *Kaytor v. Electric Boat Corp.* found a question of fact as to whether the treatment of the employee prior to her dismissal constituted an adverse employment action. The plaintiff alleged she was effectively demoted, in retaliation for filing an internal discrimination complaint, by being reassigned to work for a person who, in turn, worked for the supervisor about whom plaintiff had complained. Additionally, she was placed in an office containing health hazards, was repeatedly summoned by human resources to meetings that were "superfluous," was given no work to do, was constantly yelled at by the new supervisor, and was otherwise ostracized. 609 F.3d 537 (2d Cir. 2010).

Sixth Circuit

In the Sixth Circuit, the court in *Spees v. James Marine, Inc.* grappled with a mixed-motives pregnancy-discrimination claim under Title VII. The plaintiff, a welder, was transferred from working in the welding room to the tool room because she was pregnant and, thereafter, was terminated on the same basis. The Sixth Circuit wrote that, in many respects, the transfer did not appear to be materially adverse, noting that the plaintiff received the same salary and benefits, and that the working conditions in the tool room were better than in the welding room (i.e., the summer heat was more tolerable and the plaintiff was not subject to toxic fumes in the tool room). But the record also contained evidence that the transfer to the tool room *could* be seen as a demotion citing to the fact that the plaintiff had to complete a 30-day training course to become a welder whereas no such training was required for the tool-room position. Additionally, the plaintiff felt unchallenged by the tool-room position and found it "more

Anthony M. Rainone is a partner with Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C. in Newark, New Jersey.

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boring" than welding. Those facts, coupled with evidence that the transfer to a night shift (the record contained evidence that the plaintiff requested the night shift at the prompting of her supervisor to keep her job) and that plaintiff was not "happy" with the transfer because she was a single mother, provided enough disputed facts to permit a jury to decide if the plaintiff had in fact suffered an adverse employment action. 617 F.3d 380, 391–92 (6th Cir. 2010).

However, one judge in *Spees* dissented from the portion of the majority's opinion that the transfer to the tool room could constitute an adverse employment action. The dissent disagreed that evidence of the plaintiff's inconvenience, coupled with her feeling that the new position was less challenging and required less qualifications was sufficient to send the issue to the jury. Rather, the dissent stated that the record showed the transfer was more akin to a "bruised ego," which is insufficient as opposition to a "significant change in employment status." *Id.* at 399–401.

Seventh Circuit

The Seventh Circuit had a busy year, publishing three relevant decisions. In *Berry v. Chicago Transit Authority*, the court affirmed a finding that there was no evidence of an adverse employment action for a sex-discrimination claim where the plaintiff made an unsupported allegation that she was not placed on "injured-on-duty status," which the plaintiff claimed would have entitled her to workers-compensation benefits. 618 F.3d 688 (7th Cir. 2010).

In *Jones v. Res-Care, Inc.*, the plaintiff challenged as retaliatory a corrective-action plan she received that was related to a prior warning for unilaterally varying her work schedule. While the plaintiff conceded that unfair reprimands and negative performance evaluations, absent tangible consequences on employment, do not constitute adverse employment actions, she nonetheless argued that because she subjectively perceived "a palpable tension" when she received the corrective action and the corrective action plan, this should be sufficient to constitute an adverse employment action. The Seventh Circuit rejected the plaintiff's argument. 613 F.3d 665 (7th Cir. 2010).

Finally, in *Everroad v. Scott Truck Systems, Inc.*, the Seventh Circuit also commented that a lateral transfer, which did not constitute a demotion in form or substance, involved no reduction in pay, and only involved a minor change in working conditions, could not constitute an adverse employment action as a matter of law. 604 F.3d 471 (7th Cir. 2010).

Eighth Circuit

Traveling to the Eight Circuit, the court affirmed, in a retaliation case, a finding that neither a minor delay in receipt of disability benefits, nor an internal email discussion about the disability benefits, constituted a materially adverse employment action. *Fanning v. Potter*, 614 F.3d 485 (8th Cir. 2010). Similarly, in *Fercello v. County of Ramsey*, the plaintiff unsuccessfully claimed she was functionally demoted in retaliation for complaints of discrimination by, inter alia, the change of her parking-space location and relocation to an office without a window. With regard to the parking space, the court rejected the claim because the plaintiff did not have an assigned parking space prior to complaining of sexual harassment, and the particular spot was assigned to her due to her fear of running into the alleged harassing supervisor. With regard to the office relocation, the court rejected the claim, finding it to be the type of "petty slight" the court had previously held not actionable. Because the plaintiff did not offer any evidence that the relocation rendered her unable to perform her job duties or otherwise interfered with her employment, it was insufficient to constitute a materially adverse employment action. 612 F.3d 1069 (8th Cir. 2010).

Tenth Circuit

In the Tenth Circuit's 2010 decision of *Johnson v. Weld County, Colorado*, the court addressed, and rejected, a variety of allegations in the context of a retaliation claim. 594 F.3d 1202 (10th Cir. 2010). In particular, the court rejected the plaintiff's claimed adverse employment actions, which she described as receiving the "cold shoulder," people sitting farther away from her at meetings, supervisors being too busy to answer her questions, and workers generally trying to avoid her. The court found these alleged snubs, although unpleasant, could not support a retaliation claim. Likewise, the court also rejected the plaintiff's claim that she was subjected to retaliation when a supervisor urged her not to consult an attorney, relying upon prior precedent that held that a suggestion that an employee not involve lawyers is not materially adverse for purposes of a retaliation claim. *Id.* at 1217 (citing *Garrison v. Gambro, Inc.*, 428 F.3d 933 (10th Cir. 2005)).

Eleventh Circuit

In an interesting factual scenario in *Alvarez v. Royal Atlantic Developers, Inc.*, the Eleventh Circuit agreed with the plaintiff that she suffered an adverse employment action where she was dismissed *sooner* than she otherwise would have been in retaliation for sending a letter to the company CEO, complaining of illegal discrimination. The court rejected the plaintiff's underlying discrimination claim, citing with approval the "Vince Lombardi rule" that "someone who treats everyone badly is not guilty of discriminating against anyone." The court agreed that the plaintiff was "indiscriminately persnickety" and a perfectionist, which provided a basis for the employer to terminate the plaintiff and, therefore, the discriminatory-termination claim was properly dismissed. But, because that termination occurred sooner as a result of the plaintiff's discrimination complaint, the employer, which had an entirely defensible discrimination claim, wound up with an indefensible retaliation claim. 610 F.3d 1253 (11th Cir. 2010).

In a more typical factual scenario than *Alvarez*, the Eleventh Circuit in *Howard v. Walgreen Co.* found that a voice mail message left for an employee that his job was in jeopardy did not constitute an adverse employment action on a Title VII retaliation claim. 605 F.3d 1239 (11th Cir. 2010).

D.C. Circuit

The D.C. Court of Appeals issued a number of relevant published decisions regarding this issue in 2010. In *Porter v. Shah*, the court held that an oral negative interim performance assessment was not a materially adverse employment action but that a negative written performance evaluation accompanied by a performance improve-

ment plan *was*, for purposes of a Title VII retaliation claim. With regard to the oral interim performance assessment, which was never reduced to writing or placed in the plaintiff's personnel file, the court found it did not affect his position, grade level, salary, or promotional opportunities and, therefore, did not suffice to establish a materially adverse employment action. But the court took a different view with regard to the written assessment issued the next year, placed in the employee's personnel file contrary to the employer's policy, and which was accompanied by a performance improvement plan outlining areas for improvement. Under civil-service regulations and company policies, the performance improvement plan could have exposed the plaintiff to removal, reduction in grade, and withholding of a grade increase or reassignment. As a consequence, this action by the employer constituted a materially adverse employment action. 606 F.3d 809 (D.C. Cir. 2010).

In *Pardo-Kronemann v. Donovan*, the D.C. Circuit found a question of fact as to whether an attorney/employee's transfer constituted a materially adverse employment action. The court compared the employee's new position with the prior position in an effort to determine if the positions were sufficiently different. A question of fact was found where, although the plaintiff's salary, benefits, title, and grade remained the same, the record contained evidence that the two attorney positions had significantly different responsibilities. 601 F.3d 599 (D.C. Cir. 2010).

In *Guajacq v. EDF, Inc.*, the employer allowed the plaintiff's employment contract to expire, reassigned her, and then discharged her after she refused to accept the reassignment. The court found that the plaintiff had no right to remain in her position at the expiration of the contract and that the company elected to use the plaintiff's expertise on another project, which the plaintiff conceded was important for the company. The plaintiff also alleged that her supervisor told her that if she filed a discrimination claim, her career at the company would be "dead." Although the court accepted that a single verbal threat could constitute a materially adverse employment action, it rejected the claim in this case because the record showed that, in context, the company went out of its way before and after the plaintiff filed her complaint to accommodate her despite her "increasing insubordination and refusal to consider any future employment decisions that did not meet her precise demands." According to the court, nothing the company did satisfied the plaintiff and she "persisted in disparaging [her supervisor's] . . . authority and refusing to cooperate with him." 601 F.3d 565, 578 (D.C. Cir. 2010).

Beyond Title VII

The circuits were also busy this year deciding adverse-employment-action issues under several other federal statutes. For example, in *Rodriguez-Garcia v. Miranda-Marin*, the First Circuit affirmed a jury verdict and found, on a First Amendment retaliation claim, that a public employee established an adverse employment action based upon a substantial alteration of job duties and working environment, notwithstanding that the plaintiff's title and salary remained the same. 610 F.3d 756 (1st Cir. 2010).

In *Fincher v. Depository Trust and Clearing Corp.*, the Second Circuit affirmed the dismissal of discrimination and retaliation claims under section 1981. The court acknowledged there "are no bright-line rules with respect to what constitutes an adverse employment action for purposes of a retaliation claim . . . ." But the court then stated that "at least in a run-of-the-mine case," an employer's failure or refusal to investigate a discrimination complaint is not considered an adverse employment action in retaliation for filing the complaint. In so holding, the court recognized that the employee's situation had not changed due to the failure to investigate the complaint, but it also left open the possibility that the refusal to investigate a complaint could constitute an adverse employment action in some circumstances. 604 F.3d 712, 721 (2d Cir. 2010).

In another section 1981 case, the Third Circuit held that a transfer resulting in only a few extra miles' daily commute constituted a "trivial harm" that did not meet the adverse employment standard. *Estate of Oliva v. State of NJ*, 604 F.3d 788 (3d Cir. 2010).

In *Jones v. Oklahoma City Public Schools*, an ADEA retaliation claim, the Tenth Circuit found that a plaintiff established an adverse employment action. The court relied upon a reassignment in which the plaintiff's salary would be decreased by $17,000 the next year, notwithstanding that her salary would not be reduced during the current year. Further, the plaintiff's vacation benefits were immediately reduced and her retirement benefits would be reduced the following year. Although there was no formal demotion, the court found that she suffered "lost professional prestige and fell to a lower position" in the district's organizational hierarchy. Finally, the court labeled the employer's argument that a five-dollar pay reduction is not sufficient to constitute an adverse employment action, "simply incorrect." 617 F.3d 1273, 1279–80 (10th Cir. 2010).

Finally, in *Mogenhan v. Napolitano*, the D.C. Circuit applied Title VII retaliation law to a Rehabilitation Act claim. The court found that a supervisor's posting of an employee's Equal Employment Opportunity Commission complaint on the Secret Service's intranet where fellow employees could and did access it, coupled with the increase of the plaintiff's workload to over five times the workload assigned to the plaintiff's coworkers, were efforts designed to keep the plaintiff busy and prevent her from filing complaints, which could fulfill the *Burlington Northern* retaliation standard. 613 F.3d 1162 (D.C. Cir. 2010).

Conclusion

In 2010, the circuit courts continued to show a willingness to look beyond typical adverse employment actions and to consider those "other actions" of the employer that may have been taken because an employee complained of discrimination or for discriminatory reasons alone. For plaintiffs' lawyers, these cases should assist you in screening potential claims and in valuing existing claims. For the employers' attorneys, understanding your jurisdiction's treatment of the employer's "other actions" is of paramount importance in both defending discrimination claims and for providing guidance to employers to avoid these claims altogether.

