Burlington Northern v. White: Just When Is an Employee Engaging in a Protected Activity?

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Title VII of the Civil Rights Act of 1964 prohibits discrimination in the terms and conditions of employment based upon a person's race, color, religion, sex, or national origin. It also prohibits employers from retaliating against employees who oppose unlawful employment practices or who make a charge, testify, assist, or participate "in any manner" in an investigation, proceeding, or hearing under Title VII.[1] The anti-retaliation provisions have provided the basis for employment claims with increasing frequency.

According to the Equal Employment Opportunity Commission (EEOC), of the 26,600 retaliation claims filed in 2007 by employees, 23,300 arose under Title VII—a significant increase in retaliation claims. Indeed, in 1997, retaliation charges under Title VII accounted for just over 20 percent of all charges filed with the EEOC, while in 2007, retaliation charges accounted for over 28 percent of all charges filed. There is no sign that retaliation claims will decrease in the years to come.

In 2006, a unanimous Supreme Court held in *Burlington Northern & Santa Fe Railway. Co. v. White*[2] that the anti-retaliation provisions of Title VII are intended to "prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms . . . by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, or their employers."[3] Title VII provides for two distinct types of claims—participation in a protected activity (participation claims) and opposing unlawful employment practices (opposition claims). An employee who can establish an adverse employment action as a result of either type of protected activity will have a claim for retaliation. Although an employer may often overcome allegations of discrimination on summary judgment, it can be more difficult for employers to succeed on dispositive motions on retaliation claims. That is because, at least as to opposition claims, the only requirement is that the employee have a reasonable good-faith belief that the discrimination laws were violated, regardless of whether the employer actually violated the law.

Although this article focuses on Title VII retaliation, practitioners should be aware that the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act also prohibit retaliation. The EEOC's Compliance Manual and other publications on retaliation claims address retaliation in general under the foregoing statutes, even though there are differences in the scope of the retaliation provisions under each statute.

The EEOC's Interpretation of Retaliation Claims

The EEOC's Compliance Manual addresses both types of retaliation claims at length. About participation claims, the EEOC identifies filing a charge of discrimination, cooperating with an internal investigation, or serving as a witness in an EEOC investigation or litigation as forms of protected activity. An employer is also prohibited from any adverse treatment of an employee that is reasonably likely to deter the employee from engaging in a protected activity under the retaliation clause of Title VII. With the exception of internal investigations, the list of prohibited activities is consistent with the language of Title VII. The inclusion of internal investigations within Title VII's protection, aside from being beyond the scope of the statutory language, would potentially subject employers to suit every time they attempted to investigate employee claims. Appellate courts in both New Jersey and New York have recognized that protection for participation in internal investigations is beyond the scope of their state law equivalents to Title VII.[4] But in *Crawford v. Metropolitan Government of Nashville and Davidson County*,[5] the U.S. Supreme Court recently held that the opposition clause includes participation in an internal investigation as a protected activity. Although the Court did not decide whether the participation clause was triggered by participation in the internal investigation, the point seems moot given that the broader opposition clause can be triggered by participation in an internal investigation.

An employee's participation in a Title VII proceeding is protected regardless of whether the charge of discrimination is valid or even objectively reasonable. Further, an employer may not retaliate against an employee who is closely related to the person filing the charge. For example, if a mother and daughter work together, the employer cannot retaliate against the daughter for a charge of discrimination filed by the mother. In addition, an employer cannot refuse to hire a person because he filed a charge against a previous employer.

Regarding opposition claims, the EEOC identifies the following conduct as protected activity: complaints to anyone about alleged discrimination, threatening to file a charge of discrimination, picketing in opposition to discrimination, or refusing to obey an order reasonably believed to be discriminatory.[6] The EEOC's Compliance Manual also includes employee productivity slow-downs as a form of opposition. (The EEOC does not, however, include employee threats of violence or actions that interfere with the employee's job performance as protected activity.) In essence, the EEOC takes the position that complaining or protesting to virtually anyone, whether an employer or not, constitutes opposition. The limit on opposition activities by the EEOC is that the employee must communicate the opposition to someone, either explicitly or implicitly. For example, if a female employee complains about posters at

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work that are derogatory towards women, the supervisor should reasonably know (according to the EEOC) that the complaint constitutes opposition to sex discrimination.

Fortunately, the EEOC maintains that the manner of protest or opposition must be reasonable. The commission recognizes that the employee's right to protest must be balanced against the employer's need for a productive workforce. For instance, the EEOC supports the judicial decisions holding that an employee's copying of confidential documents and showing them to coworkers, making numerous complaints based upon unsupported allegations, and intimidating a subordinate into giving a statement in support of an EEOC charge are not forms of opposition protected by Title VII.

Similar to the EEOC's interpretation of participation claims, the EEOC states that an employer can be held liable for retaliating against someone closely related or associated with the person who opposed the discriminatory practice. It is also important to remember that the employee need not establish that the employer actually discriminated against an employee to establish an opposition claim. Instead, to support the opposition claim, the employee need only establish a good-faith belief that the employer committed an unlawful practice.

Since 2006, the federal courts have decided multiple retaliation claims in light of the Supreme Court's decision in *White*. Several relevant decisions involving both opposition claims and participation claims are discussed below.

Opposition Claim Decisions Since *White*

In *Crawford*, a 9–0 decision, the U.S. Supreme Court reviewed the retaliation claim of a woman who participated in an employer's internal investigation into claims of sexual harassment by the defendant's employee relations director. The woman had not previously made any complaints, and there was no pending EEOC charge. The employer's human resources director asked the plaintiff if she had witnessed any inappropriate behavior by the director. The woman, together with two other women, described several instances of sexually harassing conduct. The director was not disciplined, but, instead, the employer terminated the women who responded to the questions asked by the employee relations director. The Court reversed the Sixth Circuit's affirmation of summary judgment for the employer, rejecting the argument that the opposition clause requires active opposing activities rather than responding to an internal investigation. The Court described a rule to the contrary as "freakish" and not intended by Title VII.

In *Wilkerson v. New Media Technology Charter School, Inc.*,[7] the Third Circuit reviewed an employee's claim that she was required to attend a dinner where there was ancestor worship in violation of her Christian beliefs. The Third Circuit affirmed the dismissal of the "failure to accommodate" religious discrimination claim, but reversed the dismissal of the retaliation claim. Thus, the employer exposed itself to liability because of potential retaliation, even though it did not otherwise violate Title VII.

The Fourth Circuit in *Jordan v. Alternative Resources Corp.*,[8] affirmed the dismissal of an employee's retaliation claim arising out of his complaint regarding an alleged racially discriminatory remark. This case involved the infamous killing spree by a sniper over several weeks in 2002 in the Washington, D.C., metropolitan area. According to the plaintiff, employees were watching a news broadcast announcing that two African-American men had been captured in connection with the shootings, when a co-employee shouted, "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes f--- them." The plaintiff, who was African-American, was in the room at the time of the statement, and reported the comment. One month later, the plaintiff was terminated.

The plaintiff and the defendants agreed that the complaint constituted opposition activity and that the only possible unlawful employment practice that the employee could have opposed was a hostile work environment. The primary issues, therefore, were whether a hostile work environment existed or, if not, whether the plaintiff could have reasonably believed the statement created a hostile work environment. The Fourth Circuit quickly dismissed the plaintiff's argument that the single comment constituted a hostile work environment. Although acknowledging the statement was "crude and racist," the Court described the comment as an "isolated response directed at the snipers through the television set. . . ."[9] The remark was not directed at any employee and was not repeated, nor did it alter the terms and conditions of plaintiff's employment. While the remark was unacceptably racist and should not have been made, the court nonetheless concluded that it was a "far cry" from constituting a hostile work environment.[10]

The court then analyzed whether the plaintiff could have reasonably believed he was opposing a hostile work environment based on race. The court concluded that no objectively reasonable person could have believed that the office was "in the grips of a hostile work environment or that one was taking shape."[11] In short, the court wrote, "the mere fact that one's *coworker* has revealed himself to be racist is not enough to support an objectively reasonable conclusion that the *workplace* has likewise become racist."[12] Therefore, the opposition claim could not survive.

In an unpublished Fifth Circuit decision, *Tureaud v. Grambling State University*,[13] the African-American police chief of Grambling State University alleged he was terminated because of his attempts to hire a white assistant chief of police. A jury returned a unanimous verdict for the plaintiff awarding several hundred thousand dollars in damages. On appeal, the university argued that the plaintiff had not established that he engaged in a protected activity for purposes of a Title VII retaliation claim. The court affirmed the award.

The plaintiff argued that he opposed an unlawful employment practice, that is, the rejection of a white applicant for the assistant police chief position. The court had no difficulty concluding that opposition claims can be based on opposition to unlawful practices directed at other employees or applicants other than the

plaintiff. The court also concluded that the plaintiff's informal complaint to a supervisor regarding the unlawful employment practice satisfied Title VII's opposition requirement. The court, accordingly, affirmed the jury verdict for the plaintiff on the retaliation claim.

In contrast, in two cases arising out of the same allegedly gender-biased comment, the Eighth Circuit affirmed the dismissal of retaliation claims on the grounds that there was no objectively reasonable belief that discrimination occurred. In *Brannum v. Missouri Department of Corrections*[14] and *Barker v. Missouri Department of Corrections*,[15] a female supervisor allegedly told a male employee in a special needs unit that women were by and large better at the job than men because women are more patient and nurturing. The plaintiffs in both cases witnessed the comment and signed a memorandum attesting to it. In the *Barker* case, the plaintiff claimed he received an unfavorable review, had to attend a special appraisal session, and was suspended five days, all in retaliation. In the *Brannum* case, the plaintiff claimed she was permanently removed from her post and reassigned to a lesser position, wrongfully investigated, and reprimanded. Thereafter, both plaintiffs filed retaliation claims. In each case, the court found that no reasonable person could have believed that the single, isolated comment implying that women are better suited for a position constituted sexual harassment. Therefore, the plaintiffs did not have an objectively reasonable belief that they were opposing an unlawful employment practice, and their retaliation claims were appropriately dismissed.

Participation Claim Decisions Since *White*

A recent Tenth Circuit decision demonstrates just how far the participation clause reaches to protect aggrieved employees. In *Kelley v. City of Albuquerque*,[16] the court held that an attorney representing the defendant in an EEOC mediation is participating in a Title VII proceeding for purposes of Title VII. The attorney, therefore, was protected against retaliation by his employer. The court rejected the city's numerous arguments against protecting the attorney, focusing on the statutory language, which protects people who participate "in any manner" in a Title VII proceeding in reaching its holding. This decision is similar to a Second Circuit decision from 2003, *Deravin v. Kerik*,[17] where the court held that a defendant in a Title VII proceeding is "participating" for purposes of the anti-retaliation provision of Title VII.

Disclosure of Confidential Information as a Protected Activity

In a favorable decision for employers seeking to protect confidential information, the Sixth Circuit held that an employee's disclosure of confidential documents does not constitute "participation" for purposes of a Title VII retaliation claim. In *Niswander v. Cincinnati Insurance Co.*,[18] a plaintiff asserted a retaliation claim based on her participation in a class-action lawsuit against the employer for gender discrimination. The plaintiff, a claims adjuster for the employer, alleged several acts of retaliation by her supervisor after she opted into the class action. The plaintiff was eventually terminated after the employer learned that the plaintiff turned confidential company documents over to her attorney in the class-action lawsuit. The employer claimed the termination was the result of a breach of the company's privacy policy, that is, the disclosure of confidential documents, which were unrelated to the class action. That, the employer claimed, was a legitimate ground for dismissal.

The Sixth Circuit addressed for the first time whether, and under what circumstances, an employee's delivery of confidential documents in violation of a company policy constitutes protected activity for purposes of a participation or an opposition claim. About the participation claim, the court reasoned that had the documents related to the gender discrimination claim, their production would clearly have constituted participation in that lawsuit and, therefore, the plaintiff's conduct would have been protected by Title VII. Because, however, the plaintiff conceded the documents had no relevance to the gender discrimination lawsuit, the production of the documents did not constitute participation in the lawsuit. The court observed that a decision to the contrary "would provide employees with near-immunity for their actions in connection with antidiscrimination lawsuits, protecting them from disciplinary action even when they knowingly provide irrelevant, confidential information solely to jog their memory regarding instances of alleged retaliation."[19]

As for the opposition claim, the court recognized the need to balance the employer's legitimate interest in maintaining an orderly workplace and in protecting confidential business information against the equally legitimate need of employees to be protected from retaliatory actions. The court explained:

> Allowing too much protection to employees for disclosing confidential information may perversely incentivize behavior that ought not be tolerated in the workplace—namely, the surreptitious theft of confidential documents as potential future ammunition should the employee eventually feel wronged by her employer. On the other hand, inadequate protection to employees might provide employers with a legally sanctioned reason to terminate an employee in retaliation for engaging in activity that Title VII and related statutes are designed to protect.[20]

The court, discussing Eighth and Ninth Circuit precedent, observed that in all cases applying this balancing test, heavy weight was placed on how the employee obtained the documents and to whom they were given. The ultimate question for the Sixth Circuit was whether the employee's disclosure was reasonable under the circumstances, a test the court would apply regardless of whether the claim arose under the participation or opposition clause of Title VII. The court then set forth a six-prong test for analyzing the reasonableness of the employee's disclosure. In the end, the court concluded that producing confidential documents for the sole purpose of refreshing one's recollec-

tion, when there are readily available alternatives to accomplish the same goal, does not constitute reasonable opposition that justifies violating a company's confidentiality policy. To hold otherwise, the court concluded, would be to turn the opposition clause into an employee's license to ignore company rules.[21]

The *Niswander* decision is in conflict with the decision in *Vaughn v. Epworth Villa*,[22] where the Tenth Circuit held that an employee's production of unredacted medical records to the EEOC in violation of company policy, and most likely in violation of state and federal law, constituted participation in a Title VII proceeding. Although the *Vaughn* court rejected any application of a reasonableness standard to participation-based claims, it concluded that the employee could not show that the reason for the termination (the wrongful production of the medical records) was pretextual or that the real reason was retaliation for the plaintiff's filing of an age and race discrimination complaint with the EEOC. In fact, the court explicitly stated that the egregious conduct—disclosing medical records in violation of company policy, and likely in violation of state and federal law—warranted the severe punishment or termination.

No Disloyalty Defense under Title VII

In *DeCaire v. Mukasey*,[23] the First Circuit rejected the district court's application of a disloyalty defense—which the defendants did not raise—to bar a retaliation claim after a bench trial. In *DeCaire*, a deputy U.S. marshal filed gender discrimination complaints with the local EEOC office claiming that the U.S. marshal for the District of Massachusetts retaliated against her. The plaintiff alleged that after she filed her complaints with the EEOC, her employer transferred her to lesser positions, refused to transfer her to positions she had requested, denied promotions, denied assignments and appointments, and required her to work at times with limited or no breaks. Not surprisingly, the plaintiff did not have difficulty establishing an adverse employment action.

At trial, the district court found that the U.S. marshal had discriminated against the plaintiff and treated her adversely after she complained. Although the court further found that the proffered reasons for the treatment were not persuasive, it sua sponte held that the treatment was motivated by the marshal's perception that the plaintiff was disloyal to him personally, rather than gender animus or retaliation. The court entered a verdict for the employer, dismissing the retaliation claim. In a harshly worded opinion, the First Circuit reversed the lower court, holding that the filing of an EEOC complaint cannot be an act of disloyalty that would justify any retaliatory actions as a matter of law. The First Circuit thus vacated the verdict for the employer and remanded the matter for a new trial.

No "Belief of Bad Faith" Defense

The decision in *Sanders v. Madison Square Garden, L.P.*[24] is notable for its consideration, and ultimate rejection, of an employer's "belief of employee bad faith" defense to employee retaliation claims. This case involved claims by a former employee against the New York Knicks' owner, James Dolan, and former National Basketball Association player and general manager, Isaiah Thomas. In an unpublished summary judgment decision denying cross-motions for summary judgment, the court indicated that an employer may have a defense to a retaliation claim where an employee acted in good faith if the employer believed the employee acted in bad faith. The court's reasoning was that in such instance, there was no retaliatory motive.[25]

In a published decision on the employee's motion for reconsideration, however, the court concluded that its prior reasoning was flawed. The district court acknowledged that Title VII does require that the employee's complaint be made in good faith with an objectively reasonable belief that the employer's conduct was illegal. The court also agreed that if the complaint is not made in good faith, but instead is fabricated to extort money from an employer, then Title VII does not protect the employee from retaliation. The court included as an example of bad-faith behavior by an employee, attempts by the employee to coerce subordinates under his or her supervision to conform their stories to the employee's, thereby obstructing an employer or administrative agency's investigation, or a court proceeding. The district court stated, "[t]he way in which an employee presses complaints of discrimination can be so disruptive or insubordinate that it strips away protections against retaliation."[26] Nonetheless, the court found no merit to the defendants' argument that an employer who believes an employee acted in bad faith—even though the employee acted in good faith—should be protected from a retaliation claim. The employee only loses Title VII retaliation protections if he or she in fact acted in bad faith.

Conclusion

Although the *White* decision established a workable standard for determining whether or not an employee has engaged in a protected activity for purposes of Title VII retaliation claims, gray areas remain. These areas include an employee's disclosure of confidential documents in connection with a Title VII proceeding, and the EEOC's interpretation of Title VII to include participation in an internal investigation as a protected activity. The Sixth and Tenth Circuits have already applied differing standards to the former. And there will certainly be litigation over the latter given that some state courts have disagreed with the EEOC's interpretation under comparable state laws. The defense of retaliation claims will not be any simpler for employers after *White*. As such, employers should avail themselves of legal counsel prior to making employment decisions to ensure that they do not turn an otherwise baseless discrimination claim into a well-supported retaliation claim.

Endnotes

1. 42 U.S.C. § 2000e-3(a).
2. 548 U.S. 53, 126 S. Ct. 2405 (2006).
3. 548 U.S. at 68, 126 S. Ct. 2405 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346, 117 S. Ct. 843 (1997)).
4. *See* Hunts Point Multi-Service Center, Inc. v. Bizardi, 45 A.D.3d 481 (N.Y.A.D. 1st Dept. 2007); Spinks v. Township of Clinton, 402 N.J. Super. 465 (App. Div. 2008).
5. 555 U.S. ____ (2009).
6. *See* Retaliation, www.eeoc.gov/types/

retaliation.html (last visited on Nov. 7, 2008).

7. 522 F.3d 315 (3d Cir. 2008).
8. 458 F.3d 332 (4th Cir. 2006).
9. *Jordan*, 458 F.3d at 339–40.
10. *Id.* at 340.
11. *Id.* at 341.
12. *Id.*
13. 2008 WL 4411438 (5th Cir. Sept. 30, 2008).
14. 518 F.3d 542 (8th Cir. 2008).
15. 513 F.3d 831 (8th Cir. 2008).
16. 542 F.3d 802 (10th Cir. 2008).
17. 335 F.3d 195 (2d Cir. 2003).
18. 529 F.3d 714 (6th Cir. 2008).
19. 529 F.3d at 722.
20. *Id.*
21. *Id.* at 727.
22. 537 F.3d 1147 (10th Cir. 2008).
23. 530 F.3d 1 (1st Cir. 2008).
24. 525 F. Supp.2d 364 (S.D.N.Y. 2007).
25. 2007 WL 2254698 (S.D.N.Y. Aug. 6, 2007).
26. 525 F. Supp.2d at 366 (quoting Matima v. Celli, 228 F.3d 68, 79 (2d Cir. 2000)).