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Retaliation: How to Build and Prove a Case after Burlington Northern.

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In Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), the United States Supreme Court established that employees may challenge "materially adverse" job actions as retaliatory under Title VII. What is a materially adverse job action? According to the Court: "A plaintiff must show that . . . the challenged action . . . might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Below is an outline of how some of the Federal Courts have applied the Burlington Northern standard since the Supreme Court issued its opinion on June 22, 2006.

FIRST CIRCUIT

Carmona-Rivera v. Puerto Rico, 2006 WL 2612231 (1st Cir. Sept. 12, 2006)

CHALLENGED JOB ACTION: The plaintiff claimed her employer retaliated against her by **delaying for several years, her request for a reasonable accommodation**, in this case, special bathroom facilities.

● "While a delay in providing the accommodations needed to meet a disability may cause a significant injury or harm to a disabled person, the record in this case discloses no such harm. Inconvenience, yes, but no actual harm."

● "Additionally, [the plaintiff] has failed to provide any evidence of a retaliatory intent associated with the delay in implementing her requests, or any evidence which shows that the delay was anything beyond that inherent in the workings of an educational bureaucracy. There is no evidence in this record from which a reasonable jury could conclude that the delays resulted from either intentional discrimination or retaliatory behavior."

SECOND CIRCUIT

Kessler v. Westchester County Dept. of Social Services, 2006 WL 2424705 (Aug 23, 2006, 2nd Cir. 2006).

CHALLENGED JOB ACTION: "[W]e conclude that Kessler presented evidence sufficient to create a genuine triable issue as to whether the **reassignment** to

which he was subjected could well have dissuaded a reasonable employee in his position from complaining of unlawful discrimination."

● The Court rejected the employer's claim that the individual who reassigned the plaintiff did not know about his prior protected activity. According to the Court:

> "Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity." (quoting, Gordon v. New York City Board of Education, 232 F.3d 111, 116 (2d Cir.2000)) (emphasis added)

THIRD CIRCUIT

Moore v. City of Philadelphia, 2006 WL 2492256 (August 30, 2006 3rd Cir. 2006)

CHALLENGED JOB ACTION: "A factfinder . . . could reasonably conclude that the **discipline** [the plaintiff] received--having his weapon stripped from him, having his duties changed, being ordered to undergo a psychiatric evaluation, receiving a negative performance evaluation, receiving a 30-day suspension, and being **transferred** . . . was an overreaction and inappropriately severe discipline."

CHALLENGED JOB ACTION: [Another plaintiff] "produced evidence from which a factfinder could reasonably conclude that his supervisors . . . engaged in **a pattern of harassment** against him to retaliate for his opposition to discrimination." The harassment included **false discipline and threats**.

● A "factfinder could not reasonably impute [one supervisor's] expression of retaliatory intent to the entire police department." For events occurring after the plaintiff's transfer to a new department, "there must be an independent basis for the inference of retaliatory animus." (emphasis added)

FOURTH CIRCUIT

Combs-Burge v. Rumsfeld, No. 05-1366 (4th Cir. March 20, 2006) (unpublished)

CHALLENGED JOB ACTION: The Plaintiff alleged that immediately after she engaged in protected activity, her employer **demoted** her.

● Even assuming the Plaintiff established a *prima facie* case of discriminatory demotion, "she could not demonstrate that the [employer's] proffered reason for her demotion was false." According to the Court (affirming the grant of summary judgment to the employer), the employee did not rebut the employer's documentation leading to the need for a performance improvement plan and later a demotion.

● The plaintiff submitted declarations from other employees stating she was performing satisfactorily. According to the Court, the declarations are not useful because the employees were the plaintiff's subordinates and there was no evidence that these employees were competent to asses whether the plaintiff was meeting the employer's legitimate expectations.

Jordan v. Alternative Resources Corp., 458 F.3d 332 (4th Cir. 2006)

The issue in Jordan is whether the plaintiff engaged in protected activity -- not whether he suffered a materially adverse job action. (He was fired). The opinion is mentioned here because of its relevance to any Maryland lawyer intending to bring a retaliation claim.

In October 2002, authorities captured two snipers (both African-American) who had terrorized the Washington area. At the time of the capture, co-workers Robert Jordan and Jay Farjah were watching TV at work in Maryland. Farjah said: "they should put those two black monkeys in a cage with a bunch of black apes and let the apes f--k them." Mr. Jordan reported Mr. Farjah's comments to other employees who stated they had heard Farjah make similar comments. Pursuant to company policy Mr. Jordan then reported Mr. Farjah's comments to management. Shortly thereafter, the company imposed harsher working conditions on Mr. Jordan and ultimately terminated his employment.

The principal issue was whether Mr. Jordan reasonably believed that Mr. Farjah's derogatory remarks constituted a violation of federal or local anti-discrimination laws.

●The majority (Judge Niemeyer joined by Judge Widener) held that Mr. Jordan could not have reasonably believed that Mr. Farjah's single outburst constituted a violation. This is so because a single racially derogatory remark does not rise to the level of actionable racial harassment.

●The dissent (Judge King) stated that "it was entirely reasonable . . . for Jordan to believe that, in reporting the racially charged 'black monkeys' comment . . . he was opposing a racially hostile work environment."

Fernandez v. Alexander, 2006 WL 2473439 (D.Md. Aug 24, 2006) (Motz, J)

CHALLENGED JOB ACTION: Fernandez alleged in the complaint that her superiors retaliated against her by, among other things, subjecting **her work to increased scrutiny** and putting **unfavorable information in her performance evaluation**.

● Granting the employer's motion for summary judgment, according to Judge Motz, the record did not show that the challenged actions were materially adverse to a reasonable employee.

● According to the Court:

> "First, besides Fernandez's bare allegation, there is no evidence of increased scrutiny of Fernandez's work. Second, there is no evidence the delay . . . cost her a promotion or harmed her in any way. Third, the "unfavorable information" in the evaluation was merely the observation that, on one occasion, 'Fernandez forwarded information that was not ready for field consumption.'"

FIFTH CIRCUIT

Pryor v. Wolfe, 2006 WL 2460778 (5th Cir. Aug. 22, 2006)(unpublished)

CHALLENGED JOB ACTION: The plaintiff alleged that his former employer **withheld his last paycheck** to retaliate against him for engaging in protected activity.

● According to the Court:

> "Deprivation of earned compensation would almost certainly 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.' " (citations omitted)

SIXTH CIRCUIT

Watson v. Cleveland, 2006 WL 2571948 (6th Cir. Sept. 8, 2006)(unpublished)

CHALLENGED JOB ACTION: The plaintiff claimed that the employer **reduced her responsibilities**, **excluded her from some meetings**, and **refused to give her a raise** to retaliate against her for engaging in protected activity.

● Granting the employer's motion for summary judgment, Judge Motz held that the challenged actions would not dissuade a reasonable employee from invoking the protections of Title VII.

● "A reasonable employee would have realized that Watson's responsibility for the two EEO investigations was taken away to prevent a conflict of interest and that Watson's exclusion from meetings was an oversight or reflected that the meetings were unrelated to Watson's work for the City. Likewise, a reasonable employee would have realized that Watson did not receive a raise because raises were given in conjunction with promotions or in commemoration of long-term service to the City. Given that a reasonable employee would not have found the actions Watson complains of materially adverse, the defendants are entitled to summary judgment on her retaliation claim."

Randolph v. Ohio Dept. of Youth Services, 453 F.3d 724 (6th Cir. 2006)

CHALLENGED JOB ACTION: Plaintiff was first **placed on administrative leave**, then **terminated**, then later **reinstated with seventy-percent back pay**.

● "In this case, as in Burlington Northern, the termination and concomitant loss of income constitutes a materially adverse action under Title VII, notwithstanding Randolph's later reinstatement with back pay."

SEVENTH CIRCUIT

Minor v. Centocor, 457 F.3d 632 (7th Cir. 2006)

CHALLENGED JOB ACTION: Plaintiff claims that the employer **increased her work load** to harass her because of her age and sex. (Note: this is not a retaliation case. However, the decision contains an excellent discussion of what job actions are "material.")

● "Although hundreds if not thousands of decisions say that an "adverse employment action" is essential to the plaintiff's prima facie case, that term does not appear in any employment-discrimination statute or McDonnell Douglas, and the Supreme Court has never adopted it as a legal requirement. The statutory term is "discrimination," and a proxy such as "adverse employment action" often may help to express the idea-which the Supreme Court has embraced-that it is essential to distinguish between material differences and the many day-to-day travails and disappointments that, although frustrating, are not so central to the employment relation that they amount to discriminatory terms or conditions. See, e.g., Burlington Northern & Santa Fe Ry. v. White, --- U.S. ----, 126 S.Ct. 2405, 2417, 165 L.Ed.2d 345 (2006) (additional citations omitted)

● Extra work can be a material difference in the terms and conditions of employment

● "The plaintiff contends that the employer "required her to work at least 25% longer to earn the same income as before. That is functionally the same as a 20% reduction in Minor's hourly pay, a material change by any standard. . . So [the Plaintiff's] suit may not be dismissed on the ground that her grievances are too niggling to come within Title VII and the ADA."

NINTH CIRCUIT

Freitag v. Ayers, 2006 WL 2614120 (9th Cir. September 13, 2006)

CHALLENGED JOB ACTION: Employer **temporarily transferred** the plaintiff and **initiated an internal affairs investigation** after she engaged in protected activity.

- The defendant argued that the Ninth Circuit should overturn a jury verdict and remand this case for a new trial. Defendant argued that Burlington requires the jury instruction to state that an adverse action "is defined as any action that is reasonably likely to deter the plaintiff or others from engaging in protected activity."

- "The instruction, if erroneous, was harmless because the jury almost certainly would have found that the adverse employment actions it considered with respect to Freitag's Title VII claim--her temporary removal from duty . . . , the psychiatric evaluation, and the internal affairs investigations--would be considered materially adverse by a reasonable employee."

TENTH CIRCUIT

Mickelson v. New York Life Ins. Co., 2006 WL 2468302 (10th Cir. 2006)

CHALLENGED JOB ACTION JOB ACTION: An employee on FMLA-qualifying leave asks to **return to work part-time**. The employer **denies the employee's request**.

● "NYL's denial of Ms. Mickelson's request to work part-time before she exhausted her FMLA leave prevented her from earning income on a part-time basis. It also caused her to exhaust her FMLA leave sooner. . . . Moreover, if Ms. Mickelson was permitted to return on a part-time basis, she may have recovered from her depression before her FMLA leave expired, and consequently, would not have lost her job. . . We easily conclude that the prospect of losing wages,

benefits, and ultimately a job would "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." (Citation to Burlington Northern omitted)

ELEVENTH CIRCUIT

Taylor v. Roche, 2006 WL 2613659 (11th Cir. September 12, 2006) (unpublished)

CHALLENGED JOB ACTION: Employer denied the **employee's request for a shift change**.

- "[W]e conclude that the district court erred in concluding that Taylor failed to establish a *prima facie* case of retaliation based on the denial of Taylor's shift-change request. . . . First, Taylor's supervisor's repeated refusal to transfer Taylor to the night shift constituted an adverse employment action. In considering the context, as we must under Burlington, and drawing all inferences in Taylor's favor, a reasonable worker who (1) had experienced a tense work environment with a particular supervisor; (2) had requested a return to the shift he previously worked before serving abroad in order to take his children to school and avoid a tense environment; and (3) whose request was denied for more than one year, would have considered his employer's actions a significant change in the terms and conditions of employment."

DISTRICT OF COLUMBIA CIRCUIT

Lee v. Winter, 439 F.Supp.2d 82 (D.D.C. 2006) (Roberts, J.)

CHALLENGED JOB ACTION: Employer **reassigned the plaintiff's major work responsibilities** in retaliation for her statement and testimony against a supervisor in a sexual harassment investigation. This alleged retaliation left the plaintiff with virtually no work to do as the Navy implemented a performance-based compensation structure.

- Allowing the plaintiff to amend her complaint to add a retaliation claim, the Court stated: "jeopardizing an employee's compensation by substantially assigning away her work duties would . . . discourage a reasonable employee [from filing or supporting discrimination claims]."

Pegues v. Mineta, 2006 WL 2434936 (D.D.C. August 22, 2006)(Kessler, J)

CHALLENGED JOB ACTION: **Retaliatory harassment** including: public rebukes, low performance evaluations; telling plaintiff his EEO complaint would "come back to haunt [him];" and unfairly scrutinizing and altering compensatory time for travel.

- "[T]he sheer number of actions taken against Plaintiff weigh in his favor. The Court concludes that these allegations are sufficient to establish the second prong of the prima facie case. Plaintiff's allegations cannot be considered 'trivial,' 'petty,' or 'minor.'"

Howard v. Gutierrez, 2006 WL 1888953 (D.D.C. July 10, 2006) (Friedman, J)

CHALLENGED JOB ACTION: **Retaliatory harassment** including: receiving a poor evaluation, being denied the opportunity to telework from home, and other actions that allegedly exacerbated her condition such that her health has actually deteriorated.

- "Ms. Howard's retaliation claims in her proposed second amended complaint fall well within the scope of the actions that might "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination" and therefore the amendment of her complaint is not futile."

Gardner v. District of Columbia, 2006 WL 2423333 (D.D.C.)(August 23, 2006) (Urbina, J)

CHALLENGED JOB ACTION: Plaintiff alleges that her supervisor "**treated her badly** and that he transferred her from her post at the Greater Southeast Community Hospital to the George Washington University Hospital for four days.

- In granting the employer's motion for summary judgment, the Court found the actions complained of were subjective and amounted to mere "snubbing" by a supervisor.

Coleman v. District of Columbia, 2006 WL 2434926 (D.D.C. August 22, 2006) (Kessler, J).

CHALLENGED JOB ACTION: Plaintiff alleges Defendant retaliated against her by: (1) **denying her access to two training classes**, and (2) **issuing disciplinary write-ups** for "false accusations."

The Court concluded that Plaintiff "alleged sufficient facts to show that a "reasonable employee would have found the action[s] materially adverse," and "might have [been] 'dissuaded ... from making or supporting a charge of discrimination.' "

Browne v. Potomac Elec. Power Co., 2006 WL 1825796 (D.D.C. July 3, 2006) (Roberts, J)

CHALLENGED JOB ACTION: **Retaliatory harassment** including: threatening disciplinary action allegedly for inquiring into a subordinate's failure to get an

upgrade, taking disciplinary action, and downgrading Browne's performance appraisal from "outstanding" to "needs improvement."

- "Just as insisting that an employee spend more time performing more arduous work would discourage a reasonable employee from bringing discrimination charges, so too would formal disciplinary action and a poor performance evaluation."

- The Court also notes that "the same standards apply in evaluating claims of ... retaliation under Title VII and § 1981." Kidane v. Northwest Airlines, Inc., 41 F.Supp.2d 12, 17 (D.D.C.1999). The same is true for retaliation claims under the DCHRA. See Howard Univ. v. Green, 652 A.2d 41, 45 (D.C.1994) (stating that the standard for retaliation claims under the DCHRA mirrors the standard under Title VII).