NEW ANTI-RETALIATION STANDARDS EXTEND EMPLOYEE PROTECTION BEYOND THE WORKPLACE

by Joseph DeGiuseppe, Jr., Esq. *

The U.S. Supreme Court in *Burlington N. and Santa Fe Ry. Co. v. White*,[1] announced a new standard of review for Title VII retaliation cases. The *White* Court held that "the anti-retaliation provision [of Title VII], unlike [Title VII's] substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[2] Rather, to prevail on a claim for retaliation under Title VII, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."[3] As a result, "materially adverse" employment decisions which extend beyond the parameters of the workplace may now form the basis for unlawful retaliation claims under Title VII.

The following is a review of Title VII retaliation standards and the potential impact of *White* on federal employment discrimination cases. This article also reviews other federal, New York State and local employment discrimination laws which may be affected by the *White* decision in retaliation cases.

FEDERAL EMPLOYMENT DISCRIMINATION LAWS

Federal employment discriminations laws generally prohibit retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices. These laws include: Title VII of the Civil Rights Act of 1964 (Title VII)[4], which prohibits employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin"; the Age Discrimination in Employment Act of 1967 (ADEA)[5], which prohibits employment discrimination against individuals who are 40 years of age or older; the Americans with Disabilities Act of 1990 (ADA)[6], which prohibits employment discrimination against "qualified individuals with disabilities"; the Equal Pay Act of 1963 (''EPA'')[7], which requires that women and men receive ''equal pay for equal work''; and the Rehabilitation Act of 1973[8], which prohibits

---

* *Joseph DeGiuseppe, Jr., Esq. is a partner at Bleakley Platt & Schmidt, LLP's White Plains office. He is the of the firm's Labor and Employment and Immigration Practice Groups. He has almost 30 years' experience in representing and advising Fortune 500 companies and other corporate clients in labor, employment and immigration law. Mr. DeGiuseppe advises clients on all aspects of labor and employment law including employment terminations and discipline, reductions-in-force, personnel policies and practices, employee benefit cases, and collective bargaining negotiations.*

discrimination against "qualified individuals with disabilities" who work for the federal government.

The U.S. Equal Employment Opportunity Commission ("EEOC") enforces all of the foregoing laws. The EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies. Other federal laws which protect employees against retaliation include the Fair Labor Standards Act ("FLSA")[9]; ERISA[10]; the Occupational Safety and Health Act ("OSHA")[11]; the Family Medical Leave Act ("FMLA")[12]; and the Sarbanes-Oxley Act of 2002.[13]

Federal Civil Rights Laws

The 13th Amendment to the United States Constitution outlaws slavery and involuntary servitude, except as punishment for a crime following a conviction. The 14th Amendment provides in part: ''nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'' These Amendments to the U.S. Constitution provide the authority for subsequent federal civil rights legislation, including the following laws prohibiting discrimination in employment.

The Civil Rights Act of 1866 is a post-Civil War civil rights statute that provides, in relevant part, that ''[a]ll persons shall have the same right to make and enforce contracts as is enjoyed by white citizens.'' Under Section 1981, racial discrimination is unlawful in the employment relationship. Unlike Title VII which requires a complaint to be initially filed with the EEOC, Section 1981 claims are enforced solely through court action. As a result, claims alleging racial discrimination under Section 1981may be filed directly in court.

The Civil Rights Act of 1871 provides additional remedies for individuals who allege that their civil rights were deprived by persons acting as a governmental official under "color of law." Individuals may receive both compensatory and punitive damages, as well as attorneys' fees. Section 1983 actions also must be filed directly in court.

Covered Employment

Title VII and the ADA cover all private employers that employ 15 or more individuals, state and local governments, and education institutions. These laws also cover private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training. The ADEA covers all private employers with 20 or more employees, state and local governments (including school districts), employment agencies and labor organizations. Title VII and the ADEA also cover the federal government.

In addition, the federal government is covered by Sections 501 and 505 of the Rehabilitation Act of 1973, which incorporate the requirements of the ADA. Unlike Title VII which applies only to employers of 15 or more employees, Section 1981 applies to all employers in commerce. Because a showing of a ''state action'' is required, Section 1983 is, in the employment context, most often invoked by public employees against government officials.

The EPA applies to employees engaged in and producing goods for interstate commerce, unless the employer (including public agencies) can claim an exemption from coverage, and to labor organizations or their agents.

Pre-White Retaliation Tests

Prior to *White*, Second Circuit cases had held that, in order to present a *prima facie* case of retaliation under either Title VII or the ADEA, a plaintiff had to adduce:

> evidence sufficient to permit a rational trier of fact to find [1] that [ ]he engaged in protected participation or opposition under Title VII [or the ADEA], [2] that the employer was aware of this activity,[3] that the employer took adverse action against the plaintiff, and [4] that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the *adverse employment action.*[14]

Section 1981 was interpreted to prohibit retaliatory conduct in the context of Title VII race discrimination. *Taitt v. Chemical Bank*[15] (the elements for establishing a claim of retaliatory discharge under Section 1981 are the same as those required under Title VII). Similarly, to establish a *prima facie* case of retaliation in violation of 42 U.S.C. § 1983, Second Circuit cases had held that the plaintiff had the burden of demonstrating that: (1) he was engaged in protected activity; (2) the employer was aware of the protected activity; (3) he suffered an *adverse employment* action; and (4) the protected conduct was a substantial or motivating factor for the alleged adverse action.[16]

The White Decision

The plaintiff in *Burlington N. and Santa Fe Ry. Co. v. White*[17] had been hired by the defendant Burlington as a railroad "track laborer," a job that entailed removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Some facets of that job involved operation of a forklift. White was thereafter assigned to operate the forklift, and while she also performed some of the other track laborer chores, operation of the forklift became her primary responsibility. After she complained to Burlington officials about sexual harassment by her male supervisor, White was relieved of the forklift duty and assigned to perform only other track laborer tasks. White sued, asserting a claim of retaliation, and a jury found in her favor. The district court denied a post-trial motion by Burlington for judgment dismissing White's claim as a matter of law, a denial that was ultimately affirmed by the Sixth Circuit sitting en banc, and the Supreme Court affirmed.

The Supreme Court thus rejected Burlington's contention that the reassignment of White could not be considered materially adverse because her "former and present duties f[e]ll within the same job description."[18] The Court reasoned that "[c]ommon sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend

more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found '[r]etaliatory work assignments' to be a classic and 'widely recognized' example of 'forbidden retaliation.' " The Court therefore concluded that White's evidence that her tasks after reassignment were dirtier, more arduous, and less prestigious sufficed to support the jury verdict in her favor. "Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee."[19]

The Court cautioned that "reassignment of job duties is not automatically actionable,"[20] and that the standard for assessing such a reassignment is an objective, rather than a subjective, one.[21] "Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."[22] Thus, the Court summarized:

> *We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.* We also conclude that the provision covers those (and only those) employer actions that would have been *materially adverse* to a *reasonable employee or job applicant.* In the present context that means that the employer's actions must be harmful to the point that they *could well dissuade a reasonable worker from making or supporting a charge of discrimination.*[23]

Post-White Retaliation Cases

Since the *White* decision, a number of pending Title VII retaliation cases have been remanded for reconsideration in light of the new retaliation standards.

In *Torres-Negrón v. Merck & Co.*, 100 Fair Empl. Prac. Cas.[24], the District Court initially held that none of plaintiff's allegedly retaliatory acts "amount to adverse employment actions actionable under Title VII" because they "all took place once Plaintiff was no longer employed at Merck Puerto Rico." The retaliatory "adverse employment action" in this First Circuit case consisted of defendant's alleged failure to: (1) timely pay plaintiff her last paycheck; (2) provide her W-2 forms; (3) timely pay her state and federal taxes; (4) pay her Christmas bonus; and (5) make a good faith effort to send her required COBRA notice. While this appeal was pending, however, the Supreme Court decided *Burlington Northern & Santa Fe Railway Co.* v. *White*, causing the First Circuit to remand plaintiff's Title VII retaliation claim to the District Court.

In *Kessler v. Westchester Co. Dep't of Social Serv.*[25], plaintiff-employee, an age-protected Caucasian Jewish male assistant commissioner of county social services agency alleged unlawful retaliation claiming that he was involuntarily transferred in retaliation for filing an EEOC complaint, despite defendants' contention that individual who decided to transfer him was unaware of his complaint. Plaintiff complained that: (1) he was denied promotion and co-workers who were not in his protected groups were granted promotion for discriminatory reasons; (2) the agency was gen-

erally aware of his complaint as shown by submissions in opposition; (3) the alleged retaliatory acts leading to transfer occurred soon after he filed his EEOC complaint; and (4) his allegations that he was told that his skills were not requested or needed in new office and that transfer was simply to remove him from old office supported the finding that the reasons offered for his transfer were pretextual.

Applying the new *White* retaliation standard, the Second Circuit concluded, in reversing summary judgment in favor of defendants, that plaintiff had presented evidence sufficient to create a genuine triable issue as to whether his job reassignment could have dissuaded a "reasonable employee" in his position from complaining of unlawful discrimination. The plaintiff's alleged evidence showed that, prior to his transfer to Yonkers, plaintiff had responsibilities and performed functions as set out in the official DSS description of the job of an Assistant Commissioner, and that upon his transfer to Yonkers, although he retained the title of Assistant Commissioner, he was stripped of those responsibilities and not allowed to perform those functions.

The Second Circuit rejected defendants' contention that affirmance of the district court's decision was proper on the basis that plaintiff's transfer to Yonkers was prompted by legitimate budgetary concerns requiring DSS to "utilize its staff in new ways and modify management roles during this period of fiscal constraint," and by its assessment that the Yonkers office "could use plaintiff's skills." Although the budgetary concerns advanced by defendants could be legitimate non-discriminatory reasons for a transfer, the Second Circuit found that plaintiff had adduced evidence that, if credited, could support the conclusion that the alleged legitimate business reasons proffered for his job reassignment were pretextual. Thus, the facts pertaining to defendants' proffer of a non-retaliatory reason for plaintiff's transfer were in dispute, and the Second Circuit remanded the case reasoning that their resolution was a matter for the jury.

In *Ridley v. Costco Wholesale Corp.*, 99 Fair Empl. Prac. Cas.[26], the Third Circuit found sufficient evidence supporting a jury finding that former employee was constructively discharged in retaliation for his racial discrimination complaints, even though the jury found for the employer on his retaliatory demotion claim. After plaintiff's demotion, he was transferred to a worksite requiring a two-hour one-way commute, issued three counseling notices within five weeks for minor incidents, and ignored when he complained that these actions were retaliatory where the new manager who testified that she was unaware of his discrimination complaints had access to his personnel file. The *Ridley* Court held that defendant-employer's invitation to plaintiff to transfer to a nearer worksite did not preclude a constructive discharge after plaintiff had tendered his resignation finding inasmuch as he was *not* required to prove constructive discharge to demonstrate that he suffered intolerable working conditions in retaliation for his complaints.

As to the sufficiency of the evidence that defendant knowingly permitted plaintiff to suffer "intolerable working conditions," defendant argued that its invitation to plaintiff to apply for a transfer to a warehouse closer to his home precluded the jury from finding that plaintiff had been constructively discharged and that the verdict for

plaintiff on this claim should therefore be reversed. Citing the Supreme Court's decision in *White*, the Third Circuit held that plaintiff was not required to prove that he was constructively discharged in order to prevail on his claim for Title VII retaliation based on the actions taken by defendant after plaintiff's demotion.

The Third Circuit therefore did not need to determine whether there was sufficient evidence for the jury to find that defendant's actions cumulatively amounted to a "constructive discharge" because, under *Burlington Northern*, the jury was not required to make this finding in order to return a verdict in favor of plaintiff on his retaliation claim. The *Ridley* Court found that it need only determine whether there was sufficient evidence to support the jury's finding, implicit in the finding that these actions constituted a "constructive discharge," that defendant's post-demotion actions against plaintiff were "materially adverse." The *Ridley* Court concluded that the evidence was sufficient for the jury to find that defendant-employer's actions following plaintiff's demotion "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[27]

The Third Circuit accordingly affirmed the district court's denial of defendant's motion for judgment as a matter of law.

NEW YORK FAIR EMPLOYMENT PRACTICES LAWS

New York State Human Rights Law

Article 15 of the New York Executive Law, known as the New York State Human Rights Law ("NYSHRL"), makes it an ''unlawful discriminatory practice'' for an employer ''to refuse to hire or employ or to bar or to discharge from employment,'' or ''to discriminate against [an] individual in compensation or in terms, conditions or privileges of employment'' because of an individual's age (18 or over), race, creed, color, national origin, sex, sexual orientation, disability, genetic predisposition or carrier status, or marital status.[28] The NYSHRL applies to employers with 4 or more employees, employment agencies and labor organizations.[29]

The retaliation provision of the NYSHRL is set forth in Section 296(3-a)(c) which prohibits "any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article."[30]

To establish a *prima facie* case of retaliation under the New York State Human Rights law, Plaintiff must demonstrate that: (1) he was engaged in protected activity; (2) the County was aware of the protected activity; (3) he suffered an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse action.[31] The New York courts frequently rely on federal Title VII standards in evaluating retaliation claims brought under state law.[32]

New York City Human Rights Law

The New York City Human Rights Law ("NYCHRL") prohibits employment discrimination based on an employee or job applicant's actual or perceived age, race,

creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status.[33] The NYCHRL applies to employers with 4 or more employees, employment agencies, and labor organizations.

With respect to retaliation claims, the NYCHRL provides that it is unlawful for any employer "to retaliate or discriminate in any manner against any person because such person has: (i) opposed any practice forbidden under this chapter; (ii) filed a complaint, testified or assisted in any proceeding under this chapter; (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter; (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title; or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter."[34]

The NYCHRL further provides that the "retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity."[35]

The retaliation test set forth in the NYCHRL appears to reflect standards similar to *White*.

Westchester County Human Rights Law

The Westchester County Human Rights Law ("WCHRL") protects job applicants and employees against discrimination because of their actual or perceived "group identity," which includes race, color, religion, age, national origin, alienage or citizenship status, ethnicity, familial status, creed, gender, sexual orientation, marital status or disability.[36] The anti-retaliation provisions are set forth in Section 700.3(a)(6). The WCHRL applies to employers with 4 or more employees, employment agencies, and labor organizations.[37]

OTHER NEW YORK STATE ANTI-DISCRIMINATION LAWS

New York State Disability Law

Under the NYS Disability Benefits Law ("DBL"), whenever an employee of a covered employer is absent from work due to disability for more than seven consecutive days, the employer shall, within five days thereafter, provide the employee with prescribed Form DB-271, Statement of Rights under the DBL. N.Y. Workers Comp. Law § 204. An employee must be employed for at least four consecutive weeks before he/she becomes eligible to file for benefits under the DBL.[38]

Once an eligible employee decides to file for STD benefits, he/she is protected from discrimination or retaliation under Section 241 of the DBL. Section 241 incorporates by reference Section 120 of the Workers' Compensation Law which provides a remedy for employees who are discharged or discriminated against by their employers for pursuing their rights under the statute.[39]

New York State Labor Law §201-c

Section 201-c of the New York State Labor Law prohibits discrimination in child-care leave "[w]henever an employer or governmental agency permits an employee to take a leave of absence upon the birth of such employee's child, an adoptive parent, following the commencement of the parent-child relationship... ."[40] Section 201-c further provides that:

> "the adoptive parent shall not be entitled to such equal child care leave, or any portion thereof, at any time after the adoptive child reaches the minimum age set forth [i.e., over 5 years old] in . . . the education law for attendance in public school without the payment of tuition. With respect to the adoption of a hard-to-place or handicapped child as defined in . . . the social services law who is under the age of eighteen, an adoptive parent, following commencement of the parent-child relationship, shall be entitled to such leave of absence."[41]

With respect to available legal remedies, Section 201-c provides that "whenever an employer or governmental agency has refused to extend available child-care leave to an adoptive parent in violation of this section, an aggrieved individual may commence an action for equitable relief and damages. In all actions brought pursuant to this section, reasonable attorney's fees, as determined by the court, shall be awarded to the prevailing plaintiff."[42]

New York State Labor Law §201-d

Section 201-d of the New York State Labor Law prohibits discrimination against employees for engaging in legal activities during non-working hours.[43]

More specifically, the non-working hours activities protected by Section 201-d, N.Y. Lab. Law § 201-d(2), include: (1) lawful political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property; (2) legal use of consumable products (e.g., cigarettes) prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property; (3) legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or (4) membership in a union or any exercise of rights granted under either federal labor law or under Article 14 of the New York Civil Service Law (i.e, the Taylor Law).

Section 201-d(3) provides that the law does not protect an employee's activity which creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest. In addition, Section 201-d(3) further provides that the law does not protect the activities of public-sector employees who are knowingly violating any of the conflict of interest provisions found in certain state or municipal statutes, executive orders, policies, directives, Attorney General's rules, collective bargaining agreements, mayoral directives and the kind. Moreover, the activities of private-sector employees are not protected if the conduct violates a collective bargaining agreement or a certified or

licensed professional's contractual obligation to devote his/her entire compensated working hours to a single employer. This exception applies only to professionals whose annual compensation is at least $ 50,000.[44]

Under Section 201-d(4), an employer is not in violation of the law "where the employer takes action based on the belief either that: (i) the employer's actions were required by statute, regulation, ordinance or other governmental mandate; (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement; or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct."[45]

In *State v. Wal-Mart Stores, Inc.*[46], the Third Department dismissed the Attorney General's complaint seeking reinstatement of two employees discharged for violating the employer's ''fraternization'' policy, prohibiting a ''dating relationship'' between a married employee and another employee other than his/her spouse. The Appellate Court held that "dating" did not fall within the legal recreational activities protected by Section 201-d.

CONCLUSION

The Supreme Court's decision in *White* is likely to have a significant impact on the interpretation and enforcement of the anti-retaliation provisions of federal, state and local labor and employment laws. Courts will now have to attempt to differentiate "materially adverse" actions from "trivial harms" including those that occur outside the workplace from the viewpoints of the "reasonable employee" and "common sense" making summary judgments less likely in alleged employment retaliation cases.

ENDNOTES

[1] 126 S. Ct. 2405 (2006).

[2] 126 S. Ct. at 2412-13 (emphasis added).

[3] *Id.* at 2415 (quotation marks omitted).

[4] 42 U.S.C. § 2000e *et seq*.

[5] 29 U.S.C. § 621 *et seq*.

[6] 42 U.S.C. §12101 *et seq*.

[7] 29 U.S.C. § 206(d).

[8] 29 U.S.C. § 791 *et seq*.

[9] 29 U.S.C. § 215(a)(3),

[10] 29 U.S.C. § 1140.

[11] 29 U.S.C. § 660(c).

[12] 29 U.S.C. § 2615.

[13] 18 U.S.C. §§ 1513, 1514A.

[14] 42 U.S.C. § 1981.

[15] 42 U.S.C. §1983.

[16] *Cifra v. General Electric Co.*, 252 F.3d 205, 216 (2d Cir. 2001)(quotation marks omitted)(emphasis added).

[17] 849 F.2d 775 (2d Cir. 1988).

[18] *See Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998).

[19] 126 S. Ct. 2405 (2006).

[20] *Id.* at 2416.

[21] *Id.* at 2417.

[22] *Id.*

[23] *See Id.* at 2415 ("We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective." (emphasis in original)).

[24] *Id.* at 2417 (quotation marks omitted).

[25] *Id.* at 2409 (emphasis added).

[26] (BNA) 897 (1st Cir. 2007).

[27] 461 F.3d 199 (2d Cir. 2006).

[28] (BNA) 1193 (3d Cir. 2007).

[29] (Quoting *Burlington Northern*, 126 S. Ct. at 2415 (quotations omitted).

[30] N.Y. Exec. Law § 296(1)(a).

[31] N.Y. Exec. Law § 292.

[32] N.Y. Exec. Law § 296(3-a)(c).

[33] *See Kodengada v. IBM*, 88 F. Supp.2d 236, 244 (S.D.N.Y. 2000).

[34] *See New York State Office of Mental Retardation & Developmental Disabilities v. State Div. of Human Rights* , 164 A.D.2d 208, 563 N.Y.S.2d 286 (3d Dept. 1990) (federal retaliation standard applied to state law retaliation claim).

[35] N.Y.C. Admin. Code § 8-107(1)(a).

[36] N.Y.C. Admin. Code § 8-107(7).

[37] N.Y.C. Admin. Code § 8-107(7).

[38] WCHRL § 700.3(a).

[39] WCHRL § 700.2(7).

[40] N.Y. Workers Comp. Law § 203.

[41] N.Y. Workers Comp. Law § 241.

[42] N.Y. Lab. Law § 201-c(1).

[43] *Id.*

[44] N.Y. Lab. Law § 201-c(3).

[45] N.Y. Lab. Law § 201-d.

[46] N.Y. Lab. Law § 201-d(3).

[47] N.Y. Lab. Law § 201-d(4).

[48] 207 A.D.2d 150, 621 N.Y.S.2d 158 (3d Dept. 1995).