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Of Working Lunches, Golf Outings and Retaliation Claims

By: Philip S. Holloway

"But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination."

With these fateful words, in *Burlington Northern & Santa Fe Railway Co. v. White*, Justice Stephen Breyer of the United States Supreme Court ushered in a new era of retaliation jurisprudence under Title VII of the Civil Rights Act of 1964. In *Burlington*, the Court set out to establish a general rule for application of Title VII's anti-retaliation provision which states that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees... 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."

In some courts of appeal, the Court observed, a close relationship was required between the retaliatory action and the plaintiff's employment such that any adverse employment action must create a materially adverse change in the terms and conditions of employment. Other courts of appeal, however, had applied a more lenient standard whereby the plaintiff need only establish that, whatever the employer's action, it might dissuade a reasonable worker from making or supporting a charge of discrimination. The Court resolved this disagreement between the courts of appeal by concluding that the anti-retaliation provision does not confine the actions and harms it forbids to those that are solely related to employment or that occur at the workplace. The Court explained that the anti-retaliation provision covers those employer actions that would have been materially adverse to a reasonable employee, meaning that the employer's actions must be harmful to the point that the actions (whatever those actions may be) might dissuade a reasonable worker from making or supporting a charge of discrimination. The Court, citing itself, stated that, "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."

With this more expansive definition of what might be a retaliatory action, gone are the days where an employer could, without a great level of difficulty, predict what actions might or might not result in a retaliation claim. If an employee complains of discrimination or files an EEOC charge, an employer knows that terminating or demoting the employee contemporaneous with the complaint will, in all likelihood, result in a retaliation claim. Under the newer retaliation standard, how is an employer to determine what actions short of termination or demotion it may or may not take with respect to an employee who has complained of discrimination under Title VII?

Given that courts will now consider the "constellation of surrounding circumstances" in determining whether any action or omission of the employer is retaliatory, there is no easy answer to this question. As always, an employer must be wary

of taking actions with respect to an employee that result in an adverse effect on the terms, conditions, or benefits of employment. Now, employers must also be careful of how an employee who has complained of discrimination is treated in every facet of her/his employment both inside *and outside* of the workplace. For instance, as the Court established, excluding an employee from a working lunch could now be considered retaliatory if such a lunch could affect the employee's professional advancement. So too, could exclusion from any manner of outside work activities that arguably impact on professional development. Exclusion from lunches or dinners with clients, golf outings, the office softball team, even the occasional office birthday celebration, can now form the basis for a retaliation claim if said activities can be shown to assist employees in professional advancement. As long as the employee can demonstrate that the possibility of being left out of such activities might dissuade a reasonable worker from making or supporting a charge of discrimination, her/his claim will stand.

It is clear that employers must now, more than ever, treat cautiously employees who have complained of discrimination. If there is a work-related activity inside or outside of the workplace in which the employee is in any way eligible to participate, employers should refrain from excluding the employee without some clearly legitimate reason. Employers should also respond seriously to claims by employees that they are being marginalized or ostracized following a discrimination complaint. To do otherwise dramatically increases the likelihood of a retaliation claim.

"It has nothing to do with your complaint ... I didn't invite you

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