



U. S. Supreme Court Expands Right to Sue for Retaliation

BY JONATHAN LEVY, ATTORNEY AT LAW

Sandra White was the only female in the maintenance department at a railroad. Her duties included forklift driving, removing and replacing track, cutting brush, and clearing litter and spillage. Her primary responsibility, however, was driving the forklift, which was considered more prestigious and less physically challenging than the other duties. Ms. White's supervisor told her that women shouldn't be working in the maintenance department and made other inappropriate remarks to her in front of male colleagues. She complained to the company, and the supervisor was disciplined. He then removed her from forklift duty.

As a result, Ms. White filed a claim with the EEOC. Shortly thereafter, she had a disagreement with her supervisor and he suspended her without pay for insubordination. After 37 days of suspension, she was reinstated with back pay as the company found she had not been insubordinate. She then filed a retaliation lawsuit in federal court.

For years, the federal courts have used different and conflicting standards over what is "retaliation" under federal law. Some courts held that it's illegal only if the company retaliated in making "ultimate employment decisions," like hiring, granting leave, discharging, promoting or compensating. Other courts did not limit retaliation to ultimate employment decisions.

Surprising many observers, the U. S. Supreme Court adopted a broad definition of retaliation. The Court held that retaliation includes any materially adverse action such that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination. Retaliatory actions need not even be work or employment related. The Court concluded that based on this standard, White's reassignment to other job duties within her job description and suspension for 37 days without pay (even though back pay was later paid) were illegal retaliation. (*Burlington Northern v. White (June 22, 2006)*)

Continued on page 2

Fall 2006

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"Retaliation Suits" from page 1

What this means to you:

As always, be respectful when working with employees who file internal complaints. HR and/or legal should review any and all changes made to the working conditions of any employee who has a pending complaint, charge or action against the company, especially a harassment or discrimination complaint. Finally, all managers should be trained in understanding the law of discrimination, harassment and retaliation.

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No "Smoking Gun" Needed to Prove Retaliation

A recent case from the influential 7th Circuit Court of Appeals affirms that employees can prove retaliation through circumstantial evidence. In other words, they don't need a "smoking gun."

In this case, Ms. Sylvester and three co-workers sent a letter to the Board of the non-profit agency where they worked, accusing the CEO and other staff members of calling them "bitches," commenting on the sexuality of other women staff, and of responding to harassment of another staff member by saying, "I knew there would be problems with hiring a cute, young blond. She should toughen up."

About 10 days later, Ms. Sylvester and two of the other women who signed the letter were fired. The Court considered the following circumstantial evidence:

Two of the four women who signed the letter were promptly fired; "it is undisputed that they were poor performers, but, if so, why were they not fired until shortly after they signed the letter accusing West of sexual harassment...?"

In contrast, there were no performance issues with Ms. Sylvester; she was fired for "reacting adversely" when she was told the other two women had been fired. As the court said, "A reasonable jury might conclude that she was being set up—that the defendant's officers ... knew she was sure to be upset by the firings,..."

“Putting together these items of circumstantial evidence, a reasonable jury could conclude that the accusations of sexual harassment in the letter signed by Sylvester were a cause of her being fired.” *Sylvester v. SOS Children* (7th Cir 07/12/2006)

What this means to you: In this case, like many others, the employer had “good reasons” for firing at least two of the employees. But because those good reasons came after the employees wrote their letter, a jury could infer that the reasons were bogus, and the real reason was retaliation.

Harassment Victim Wins Retaliation Lawsuit

Now you're probably tired of reading about retaliation cases! But retaliation cases are the latest big trend in employment law. It is much easier for an employee to win a retaliation case than a harassment or discrimination lawsuit. Here's the latest example:

A woman property manager was sexually harassed and ultimately raped by her manager. She told him she was going to report him to the company, but before she could make her report, he called her supervisor and the Regional Human Resource Director and convinced the two men that he and she had an affair that had gone wrong, and that she was making the complaint because of her poor performance. The three men began documenting her alleged performance problems.

The woman reported the harassment and the retaliation to her

manager's Vice President. The VP did not follow up on the complaint except to join the three men in their retaliation. When the woman called him again to complain, he told her he didn't want to get involved and to talk to the HR Director who was part of the retaliation.

The woman decided to put her complaint in writing for HR, and



also sent a copy to her Senior Vice President. That SVP immediately told the VP

that a complaint was being filed against him. The next day, the VP and HR Director fired the woman.

The woman won at trial and was awarded back pay, emotional distress, attorneys fees and punitive damages. The company appealed, and the Court of Appeals not only upheld the verdict, but also directed that she be awarded additional damages for front pay and additional attorneys fees. *McInnis v. Fairfield Communities, Inc.* (10th Circuit, 2006)

What you should do: We can imagine a situation where a man convinces his male colleagues that he is the “victim” of an affair gone wrong. This case is a stark reminder that one person's word should never, ever be taken without speaking to the other person involved. If they have different stories, this is an extremely dangerous situation that should not be handled without legal counsel.

And a word to HR/legal: The Court of Appeals excoriated the company for having a policy that prohibited retaliation, but no procedures for reporting retaliation; the company only had procedures for reporting sexual harassment. Make sure your procedures cover harassment (of all kinds), discrimination AND retaliation.

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