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Fenwick Employment Brief

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U.S. SUPREME COURT EXPANDS EMPLOYEE PROTECTION AGAINST RETALIATION

In an unfavorable decision for employers, the U.S. Supreme Court held that adverse actions which do not cause tangible economic harm to employees may nevertheless constitute retaliation in violation of Title VII. In *Burlington Northern v. White*, the Court substantially expanded the legal protection for employees who complain about discrimination or harassment, and suffer adverse action as a result of such complaints. The Court held that a plaintiff can establish retaliation by showing that, in response to a complaint of harassment or discrimination, s/he experienced a materially adverse employment action that "might have dissuaded a reasonable worker" from complaining about discrimination or harassment.

Ms. White was a female forklift operator who complained about sexual harassment by her supervisor. Shortly after, Burlington reassigned her to a position with the same pay and benefits, but involving dirtier, more strenuous duties. Later, Burlington suspended White for 37 days for alleged insubordination. However, following a grievance process, Burlington reinstated White and gave her full backpay. White sued Burlington for retaliation in violation of Title VII. Appealing a jury verdict for White, Burlington argued that she did not suffer any tangible economic harm necessary to support the claim. Rejecting Burlington's argument, the Supreme Court held that, to state a prima facie case of retaliation, a plaintiff need only show a "materially adverse" action that would "dissuade a reasonable worker from making or supporting a charge of discrimination." The Court reasoned that White's reassignment to "dirtier" and more strenuous work, and her suspension without pay (notwithstanding Burlington's subsequent restoration of pay), may dissuade others from bringing a complaint.

It is now clearly established that a plaintiff can prevail on a Title VII retaliation claim based on adverse action less severe than a termination, demotion or pay cut. Conversely, trivial actions that would not deter a reasonable worker from filing a complaint will not support a retaliation claim.

EMPLOYER PROPERLY REPLACED RECEPTIONIST DURING MEDICAL LEAVE

In a favorable decision for employers, a California Court of Appeal held that an employer lawfully replaced a receptionist after she exhausted her FMLA-leave entitlement, and later terminated her employment after she was released to return to work (and there was no job open that she could perform).

In *Williams v. Genentech, Inc.*, plaintiff commenced a work-related stress leave in October 2000. Under the employer's leave policy, an employee was entitled to six months of paid medical leave. However, after 12 weeks of FMLA-covered leave, the employee lost her guarantee of reinstatement in the same or comparable job if she did not return to work. In January 2001, plaintiff exhausted her FMLA entitlement, and requested additional medical leave into March. As

a result, the employer notified her that, though her medical leave would continue, the company would fill her position. The employer further notified her that, upon her release to return to work, she would have up to 60 days to find another position within the company. In February 2001, a regular, full-time receptionist was hired to fill plaintiff's position. In May 2001, after several more extensions, plaintiff was released to return to work without restrictions. During the next 60 days, plaintiff applied for various open positions, but was rejected as unqualified. There was no receptionist position open during this period. After an unsuccessful 60-day job search, the employer terminated plaintiff. Thereafter, she sued alleging violation of the state disability discrimination laws.

Affirming summary judgment in the employer's favor, the court ruled that the employer properly replaced plaintiff after she exhausted her FMLA leave entitlement. The court accepted the employer's showing that continued use of temporary employees to fill the receptionist position after 12 weeks was a hardship due to the extensive training required for the job, the lack of qualified candidates, and the high turnover of temporary employees. Further, Plaintiff offered no evidence that she was able to return to work before February 2001 when the replacement receptionist was hired. The court also rejected plaintiff's argument that the employer was required to reinstate her upon her release to return to work in May. The court accepted the employer's evidence that there was no opening for a receptionist during the 60-day job search, and plaintiff was unqualified for other open positions. The court opined that, although an employer may be required, as a reasonable accommodation, to afford a disabled employee with a leave of absence for a defined period of time, in this case the employer proved that in January (when it decided to fill the receptionist position), it could no longer accommodate plaintiff due to hardship.

Accordingly, employers are cautioned that federal and state disability laws may require an employer to provide additional leave as a "reasonable accommodation" after an employee has exhausted FMLA entitlement. The present case is an example where the employer exhibited patience with the employee, provided the employee with the leave that she was entitled to, and then reasonably and lawfully terminated her.

NEWS BITES

In *Gelfo v. Lockheed Martin*, a California court held that an employer which regards an employee as disabled, even if the employee is not, in fact, disabled, must engage in the interactive process with the employee regarding reasonable accommodations for disabilities. Following Gelfo's work-related back injury, Lockheed refused his request for reinstatement on the grounds that he could not perform the essential functions of the job, and there were no reasonable accommodations to enable him to return to work. Gelfo sued, arguing that he was not disabled, he could perform the essential functions, and Lockheed should have reinstated him. Lockheed argued that, where an employee admits he is not disabled, there can be no duty to reasonably accommodate or engage in the interactive process. The court rejected Lockheed's defense, and held that such a duty does exist, even in "regarded as" situations.

In *Issa v. FedEx*, an Alameda County jury awarded $61 million to two Lebanese-American package-delivery drivers on their claims for national origin discrimination and harassment against FedEx and one of the company's managers. The plaintiffs, independent contractors for FedEx, claimed they were called "camel jockeys," "terrorists," and other derogatory names over a two-year period by the FedEx

manager. Plaintiffs also claimed that the harassment continued after they complained to senior management and human resources. The jury awarded plaintiffs $11 million in compensatory damages and $50 million in punitive damages, including $1 million individually against the harassing manager. This is believed to be the first jury verdict in favor of independent contractors pursuant to the 2000 amendment to California's anti-harassment statute, which amendment expressly extended such protections to persons providing services pursuant to a contract.

COBRA BITE

Employers with 20 or more employees and a group health plan are reminded of their numerous responsibilities under COBRA. For example, the employer must give employees and their covered spouses and dependents an initial COBRA notice when they first become enrolled under the plan. The employer must also provide a COBRA election form and notice to any qualified beneficiary who subsequently has a "qualifying event" and becomes eligible for health care continuation coverage under COBRA. Failure to provide these notices can expose employers to significant ERISA statutory penalties (up to $110 per day per qualified beneficiary) as well as excise tax penalties ($100 per day per qualified beneficiary for willful violations). In addition, the employer may have to pay the qualified beneficiary's medical expenses attributable to the period of non-coverage, either (i) as damages awarded to the qualified beneficiary in a lawsuit, or (ii) as part of a corrective effort to make the qualified beneficiary whole and thereby escape imposition of the Internal Revenue Code excise tax.

As an example, in *Shephard v. O'Quinn*, an employer failed to give a terminated employee the required COBRA election notice, and neglected to turn over to the insurer health coverage premiums that were deducted from the employee's last few paychecks. A federal court in Tennessee awarded the employee his medical expenses and attorneys' fees, and $90,860—the maximum $110 per day ERISA statutory penalty for a total of 826 days.