EMPLOYMENT LAW BRIEFING

September 2006

Retaliation Claims: A prompt response to an employee allegation of protected class discrimination, including any appropriate remedial action, is more of a beginning than an end. An employer may still face liability if subsequent "adverse employment actions" are determined to have been in retaliation for opposing prohibited practices, or raising discrimination allegations in an internal complaint, administrative claim or lawsuit. Retaliation claims are on the rise. Over the last fifteen years, the number of protected class discrimination claims under Title VII has declined. During the same period, the number of Title VII retaliation claims has doubled.

Title VII Retaliation Standard Expanded: How adverse does an employment action have to be before it can be the basis of a retaliation claim? "Not very," according to the recent U.S. Supreme Court decision in ***Burlington Northern & Santa Fe Railway Company v. White***. The case involved a forklift driver claiming sexual harassment by her supervisor. The employer investigated, disciplined the supervisor and reassigned the employee to general labor tasks. Although considered less desirable then operating a forklift, the duties were within the scope of her position and did not lead to a reduction in pay or benefits. Several days later, after a dispute with another supervisor, the employee was suspended, without pay, for insubordination. The suspension was overturned after thirty-seven days and the employee received backpay. The Court noted that the anti-retaliation provisions of Title VII were designed to prevent employers from interfering with employee efforts to secure or advance protected rights. As a result, a retaliatory "employment action" need not affect terms and conditions of employment if it would be considered "materially adverse" by a reasonable employee. Applying this broad standard, the Court held that either reassignment to less desirable, less prestigious duties, or going without wages for more then a month **-** even with subsequent reimbursement, was sufficiently "adverse" to support a Title VII claim of unlawful retaliation.

Military Service Retaliation: The Uniformed Services Employment and Reemployment Act ("USERRA") prohibits employer retaliation against employees for exercising military service rights. In August, the Ninth Circuit Court of Appeals, in ***Wallace v. City of San Diego,*** overturned the lower court's rejection of a claim for a retaliatory "constructive" discharge in violation of USSERA. A "constructive" discharge occurs when a reasonable person in the employee's position would feel forced to quit by intolerable working conditions. Wallace was a police sergeant and military reservist. In addition to annual tours of duty, he served longer periods of active duty in Iraq, in 1991, and later in Bosnia. After returning, he was denied promotions, given undesirable assignments, evaluated unfavorably, disciplined and recommended for termination. The Court ruled that the cumulative effect of such treatment supported a finding of constructive discharge and that a jury could conclude that the "discharge" was retaliatory.

Limiting Liability: Carefully monitor and evaluate potentially adverse employment actions for employees who have exercised protected rights, or alleged protected class discrimination. Consistently enforce clear standards, document adequately and consult counsel when in doubt.

Please contact our office if you have questions about the material in this newsletter, potential retaliation issues, or other employment law compliance concerns.

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