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### Retaliation: The Fastest-Growing Discrimination Claim

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## Retaliation: The Fastest-Growing Discrimination Claim

### Abstract

Many employers were shocked and alarmed when the U.S. Supreme Court in June 2006 unanimously established a relatively broad standard regarding employees' complaints of retaliation by employers when employees have made discrimination complaints. An examination of case law as well as comments made by those attending the 2006 Labor and Employment Law Roundtable at the Cornell University School of Hotel Administration allow us to conclude that although employees who make complaints need to be treated carefully, employers need not panic. Instead, they must thoroughly document any personnel actions and base them on actual performance, making sure that any termination or demotion is, in fact, not a retaliation.

### Keywords

retaliation, protected expression, discrimination, employment, roundtable

### Disciplines

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### Comments

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# Retaliation

## The Fastest-Growing Discrimination Claim

by DAVID SHERWYN, ZEV EIGEN, and GREGG GILMAN

Many employers were shocked and alarmed when the U.S. Supreme Court in June 2006 unanimously established a relatively broad standard regarding employees' complaints of retaliation by employers when employees have made discrimination complaints. An examination of case law as well as comments made by those attending the 2006 Labor and Employment Law Roundtable at the Cornell University School of Hotel Administration allow us to conclude that although employees who make complaints need to be treated carefully, employers need not panic. Instead, they must thoroughly document any personnel actions and base them on actual performance, making sure that any termination or demotion is, in fact, not a retaliation.

**Keywords:** retaliation; protected expression; discrimination; employment; roundtable

**E**ach year, the Labor and Employment Law Roundtable sponsored by the Center for Hospitality Research at the Cornell University

School of Hotel Administration features discussions concerning various aspects of employment discrimination. In the past, we have discussed sexual harassment, mixed-motive jury instructions, dress codes, and wage and hour class actions. The 2006 Roundtable was the first in which participants discussed retaliation, a cause of action where an employee alleges that the employer has made a detrimental job decision in response to the employee's having made a discrimination claim. Claims of this type are among the fastest growing and have become one of the most prevalent type of discrimination case.<sup>1</sup> The Supreme Court issued a decision on retaliation shortly after the Roundtable concluded, leading to articles in the *Wall Street Journal*, the *New York Times*, and numerous other media outlets, making retaliation a much-discussed discrimination-law claim. As a result of the prevalence of retaliation claims being discussed in the media and decided in the courts, employers are wise to understand the law regarding retaliation. Employers should (1) understand how to take the necessary precautions

to avoid violating the law in this area; and (2) prevent, or at least defend, frivolous claims. The purpose of this article is to explain the law of retaliation, to suggest ways to avoid running afoul of the law, and to provide strategies for employers to anticipate and defend against such claims. Before we address these issues, however, we examine the statistical increase in retaliation claims and hypothesize why these cases are on the rise.

### The Rise of Retaliation Claims

As many readers know, employees may not file discrimination charges in federal court without first filing charges of discrimination with either the Equal Employment Opportunity Commission (EEOC) or with an affiliated state or local agency (commonly referred to as “FEPA”—Fair Employment Practice Agency. As a result of this requirement, one may track the percentages of the different types of employment discrimination claims by analyzing EEOC or FEPA charge statistics. In the 1980s and early 1990s, the EEOC and state FEPAs received a similar number of charges each year. FEPA charge data are often difficult to find, but EEOC data are readily available. There is no reason to believe that evaluating FEPA charges would result in different findings from the EEOC numbers. Consequently, EEOC data are evaluated herein to distinguish trends in the different types of claims filed.

The EEOC provides information on each of the statutes that this federal agency enforces: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), and the Equal Pay Act. Title VII prohibits employment discrimination on the basis of race, color, religion, national origin, and gender. The other statutes add further protection, as suggested in their titles. Each statute makes

it unlawful to retaliate against an employee who complains about discrimination based on any of the protected classes.

In the past thirteen years, the number of employment discrimination charges filed with the EEOC has ranged from a low of seventy-two thousand charges in 1992 to a high of ninety-one thousand in 1994. In 2005, seventy-five thousand charges were filed. Because of this year-to-year fluctuation, using raw numbers to evaluate which claims are most prevalent is not informative. Instead, we analyzed the annual change in the percentage of claims filed. The largest single-year percentage change occurred with the number of ADA claims filed in 1992 and in 1993. Only 1.4 percent of the cases filed in 1992 were ADA cases, while in 1993 the ADA made up 17.4 percent of the total EEOC cases. This jump is easily explained by the fact that the ADA took effect in July 1992. Thereafter, the ADA cases made up between 17.4 percent and 23.1 percent of discrimination claims. Other than the fluctuation in disability claims, claims based on other protected classes have exhibited a fluctuation no greater than 7.2 percentage points. Claims based on age (ADEA), for instance, made up 27.1 percent of the case load in 1992 but dropped to 19.9 percent of the cases in 1995. In 2005, ADEA cases made up 22.0 percent of the total claims filed. These fluctuations seem to be nothing more than random variability, and we can report little in terms of a trend for these causes of action. One cause of action, however, has exhibited a dramatic increase that is not easily explained. That cause is retaliation.

In 1993, retaliation claims made up 15.3 percent of the total cases brought. By 2005, that percentage almost doubled, to 29.5 percent. Retaliation claims now account for more than a quarter of the EEOC’s docket. Moreover, unlike any other category, the percentage of retaliation claims

did not rise and fall, but instead has risen each year (except for a slight pause in 2001 and 2002).

### Why Retaliation Claims Increased

We can only speculate on the reasons for the increase in claims. One theory is that expanded employee training leads to more retaliation claims. In summer 1998 the Supreme Court, in *Burlington Industries v. Ellerth* and *Faragher v. Boca Raton*, held that employers could avoid liability for sexual harassment if the employee did not suffer a tangible loss and the employer proved that (1) the employer “exercised reasonable care to prevent and promptly correct any sexually harassing behavior” and (2) the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.”<sup>3</sup> On the theory that “reasonable care” required training, many employers implemented programs to train employees. Some Roundtable participants argued that such education increased employee awareness and ultimately increased retaliation claims. However, the large increase in retaliation claims began before this decision. In the eight years after the decision, from 1998 to 2005, retaliation cases rose from 22.6 percent to 29.5 percent of the total charges, an increase of 30 percent. From 1992 to 1997, however, the retaliation claims rose from 15.3 percent to 22.6 percent, a 48 percent increase. We consider it difficult to attribute the growth in retaliation claims to the training programs implemented in the wake of *Ellerth* and *Faragher*.

Another theory is that the increase in retaliation claims results from employees (or their counsel) recognizing that they are more likely to prevail in retaliation claims than with other types of discrimination

charges. To begin with, it is difficult to prevail on a discrimination claim because the employee must show membership in a protected class, a truly adverse employment action, and evidence of discrimination. Because it is difficult to find evidence of discrimination in failure-to-hire cases, most discrimination cases are filed after the employer terminates the employee.

After the claimant has lost a job, it is often easy to tack on a retaliation claim to the broader discrimination case. Roundtable participants explained that employees often make less than genuine discrimination complaints as a temporary means of establishing job security, particularly when the threat of losing one’s job is high. After the flimsy discrimination case is terminated, the only legitimate claim is one of retaliation.

In both “tack-on cases” and stand-alone cases, employees can file retaliation claims even though they are not members of a protected class, they have not suffered a severe adverse employment action, and the only evidence of discrimination involves the timing of the filing. Thus, retaliation opens the door to arguably less meritorious claims.

We cannot support the “tack-on” explanation from discrimination-law statistics, in part because of statistical quirks in the EEOC data. The quirkiness of the EEOC statistics arises as follows. A fifty-two-year-old Canadian-American female alcoholic who believes she was unlawfully terminated from her job can allege discrimination based on an age, national origin, gender, and disability. Even though one might say that there are four discrimination causes in this situation, the EEOC counts this filing as one claim. When breaking the claims down by types of discrimination, however, this one claim is counted in each of the four categories under which the claimant filed. If the claimant also filed a retaliation claim, her charge would appear

in five distinct categories. As stated above, the Roundtable participants agreed that it is common for a retaliation claim to be attached to another type of claim even though the law of retaliation does not make this a necessity. As a result, it is possible that retaliation claims have not replaced other claims and instead are just tacked onto an increasing number of cases that would have been filed under other theories. Regardless of the reasons for the increase, retaliation claims are on the rise and managers need to understand the law of retaliation.

## The Law of Retaliation

Retaliation, under the discrimination law, occurs when an employee engages in a “protected expression,” suffers discrimination, and there is a link between the protected expression and the adverse employment action.<sup>4</sup> For this discussion, we need to examine what constitutes (1) protected expression, (2) discrimination, and (3) a causal link. The recent Supreme Court case defined “discrimination,” but first we discuss “protected expression.”

### Protected Expression

A protected expression, in its most general terms, occurs when an employee complains that the employer is violating discrimination law. The discrimination does not have to involve the complaining employee. For example, a male employee who complains that women are being sexually harassed may be engaging in a protected expression.

In *Payne v. McLemore’s Wholesale and Retail Stores*, the question before the court was this matter of what constituted a protected expression.<sup>5</sup> In this case, the employee, Payne, believed that his employer refused to hire people of color into positions where employees would have to handle money. Payne, who was laid off each year

during the summer slow months, joined a civil rights group that picketed in front of the employer’s store. After the picketing occurred, the employer did not rehire Payne, who alleged retaliation. The employer argued that by picketing, Payne had not engaged in a protected expression for two reasons. First, the employer argued that Payne’s allegations of racial discrimination were unfounded and, thus, could not be a protected expression. That is, the employer argued that employees cannot succeed on a retaliation claim unless they first prove that the underlying claim of employment discrimination about which they complained did occur and that the employer did, in fact, violate the law. Next, the employer argued that even if this is not the case, Payne had not engaged in a protected expression because picketing is not covered under retaliation law. The court addressed the first issue fully but did not really address the second.

In rejecting the employer’s first claim, the court held that the employee engaged in a protected expression even if the underlying claim failed and the employer had not, in fact, violated the law. Instead, the court held that the employee only needed to have a “good faith reasonable belief” that the subject of the complaint was true. The reason for allowing a good faith reasonable belief to suffice is that such a standard prevents any chilling effect on expression. If employees had to prove that their employer violated the law before they could make any allegation, employees would be reluctant to take advantage of company antiharassment policies and to file EEOC claims. The *Ellerth* court contends that the key to ending discrimination is employee complaints followed by swift employer action (as do numerous other opinions, law review articles, and other commentary). The chilling effect that would occur if courts accept the employer’s argument in *Payne* runs counter to that contention.

Having underlined the importance of avoiding a chilling effect on employees' complaints, we note, however, that the "good faith reasonable belief" standard is fraught with problems. For the sake of argument, what if Payne's argument was simply false? Let us assume that the employer in *Payne* offers the jobs in question to its two most senior employees, both of whom are individuals of color. For their own reasons, however, each employee turns down the employer's offer of the cash-handling job. The employer moves on and offers the position to the third-most-senior employee, who happens to be white, and who accepts the job. Payne, however, has no way of knowing the true facts and jumps to the conclusion that the two most senior employees, both of whom are African American, were passed over in favor of white employees for the cash-handling job. In good faith but totally wrong, Payne notifies the EEOC that the employer violated the law. The EEOC begins an investigation that the local newspaper makes into a front-page story. Soon there is a protest going on outside the employer's front door. People are holding signs accusing the employer of being a racist. The employer's business is suffering, the owners' standing in the community is greatly diminished, and the owners' families are being harangued—all because of a completely false accusation. Furious, the owners simply do not wish to continue to employ the individual who caused all of this pain and suffering by making a false accusation. The owners wish to terminate the employee, but retaliation law prohibits it.

Unfortunately, we cannot resolve this knotty situation. Even though the hypothetical employee was wrong and caused much grief, the employer cannot lawfully terminate this employee. Doing so would be a clear case of unlawful retaliation and would result in back pay, reinstatement, attorneys' fees, and possibly punitive and

compensatory damages. This does not mean that all retaliation complaints will result in short- or even long-term job security. Not all complaints are considered to be in made in good faith or considered reasonable. All that we can do here is to provide more information on how courts have defined the term good faith reasonable belief.

In most jurisdictions, the term good faith reasonable belief means that (1) the complaining party subjectively believes that the employer violated the law and (2) a reasonable person would also believe that the employer violated the law. The first element is relatively simple for employees to prove. Absent evidence to the contrary, the employees must simply testify that they believed that they were complaining about a violation of the discrimination law. However, the "objective" (reasonable person) element of the test is much more complex.

A number of courts have held that for a complaint to be "reasonable" and, thus, a protected expression, the facts, if true, must violate the law. For example, in *Hammer v. St. Vincent Hospital and Health Care Center*, the employee contended that he was terminated in retaliation for complaining that he was being "sexually harassed" because of his homosexuality.<sup>6</sup> In dismissing the case, the court held that because harassment based on sexual orientation is not prohibited by Title VII, an employee cannot make out a case of unlawful retaliation based on a complaint about orientation. In other words, because an employer can legally harass an employee due to sexual orientation, an employer can terminate an employee who complains of such conduct. While this concept may seem unfair to some, it does make sense, and we do not see any legal problems for employers who terminate employees when they complain of conduct that is, by definition, outside the purview of Title VII. The law gets more complex,

however, when the complaint concerns an action that is not yet a legal violation but could develop into unlawful activity.

In *Clark County v. Breeden* the plaintiff (a woman), a male employee, and their male supervisor met to review the psychological evaluation reports of four job applicants.<sup>7</sup> The report for one of the applicants disclosed that one applicant had once commented to a coworker, “I hear making love to you is like making love to the Grand Canyon.” At the meeting the supervisor read the comment aloud, looked at the female employee, and stated, “I don’t know what that means.” The other employee then said, “Well, I’ll tell you later,” and both men chuckled. The plaintiff later complained to several different supervisors about the comment. She subsequently suffered an adverse employment action and filed a retaliation claim. In dismissing the case, the Supreme Court held that employee could not make out a case of retaliation because no reasonable person would consider this one comment to rise to the level of unlawful harassment. This holding is on point with *Hammer*. The facts alleged, even if true, do not violate the law, and thus the employee cannot have a reasonable belief (of unlawful action). Thus, under *Breeden*, one can argue that a complaint about harassment that is not yet severe or pervasive enough to be unlawful sexual harassment does not constitute a protected expression.

There is, however, a problem with this analysis. In *Ellerth*, the Supreme Court made it clear that employees should complain of harassing actions before they rise to the level of being unlawful. Indeed, subsequent case law has held that employees who wait too long to report are unreasonable and will have their cases dismissed. It simply makes no sense to require employees to report before the harassment becomes unlawful and then not to protect such a complaint. Therefore, we believe that

employers should not dismiss complaints over harassment that does not rise to the unlawful level, because courts, in the future, may find these complaints to be protected expressions.

There is another reason to not dismiss these complaints. As explained above, the *Ellerth* defense requires employees to exercise reasonable care to prevent and correct sexual harassment. Employers who retaliate against those who complain about conduct that does not rise to the level of unlawful harassment may prevail in that retaliation claim but will likely jeopardize the company’s ability to ever invoke the *Ellerth* defense. Employees will contend that they did not complain because an employee who did complain experienced retaliation. We believe a court will likely accept this argument and find the noncomplaining employee to be reasonable.

A protected expression exists when the conduct that draws the complaint, if true, would violate the law. It does not exist when such conduct does not violate the law. We believe, however, that employers need to take a closer look at this concept and treat an expression as protected if the conduct could violate the law if it continued or became more severe. If the expression is protected, the next question is, What does constitute discrimination?

### Discrimination

On June 22, 2006, in a 9-0 ruling, in the case of *Burlington Northern & Santa Fe Railway Co. v. White*, the U.S. Supreme Court “settled” the split among circuit courts over the definition of discrimination in retaliation cases.<sup>8</sup> Before *White*, the Fifth and Eighth Circuits held that retaliatory action must involve some “ultimate” employment decision like a failure to hire or a termination of employment. The Third, Fourth, and Sixth Circuits, though,



held that the alleged retaliation must yield an adverse effect on the terms, conditions, or benefits of employment. The Supreme Court rejected both of these approaches, holding instead that Title VII's retaliation provisions are much broader.

In *White*, the plaintiff alleged that in retaliation for complaining about sexual discrimination, she was (1) removed from her forklift duty and assigned to perform standard track labor duties and (2) suspended for thirty-seven days without pay.<sup>9</sup> The suspension was then rescinded and back pay provided after White invoked the company's internal grievance procedures. In the initial trial, the jury found that (1) the employee did engage in a protected expression and (2) the expression motivated the employer to reassign and suspend the employee. The remaining question for the Court was whether these two actions constituted discrimination under the retaliation law. The employer argued that neither the transfer nor the suspension constituted unlawful "discrimination." To support this contention, the employer relied on the holdings of several circuits, all of which held that the challenged action must "result in an adverse effect on the 'terms, conditions, or benefits' of employment." To further support its case, the employer cited the fact that the Fifth and the Eighth Circuits had, as stated above, adopted a more restrictive approach that limited actionable retaliatory conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating."

In rejecting both of these standards, the Court established a standard similar to that of the Seventh and D.C. Circuits. To establish discrimination, the employee must prove "that a reasonable employee would have found the challenged action materially adverse," which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge

of discrimination." In other words the employee needs to prove that the employer's action would have a chilling effect on employee complaints.

Employers' reaction to this broad holding has been a combination of shock and fear. Employers are shocked that the first employment case from the supposedly conservative Roberts Court (so named for Chief Justice John Roberts) would be a unanimous, employee-friendly decision. Employers fear that this holding will have a huge impact on the workplace. We understand the shock but disagree with the fear.

We believe that the effects of this new standard on employers are overstated. First, the two actions that the employee complained about—that is, the reassignment and the suspension—are not trivial. We believe that most employers would accept the idea that basing such decisions on the fact that an employee alleged sexual discrimination would be unlawful. Second, adverse actions that would not carry a claim under sex discrimination (or any other type of discrimination based on a protected class) are unlikely to make it into court or even catch the attention of the EEOC. The starting point for most discrimination lawsuits is the amount of the back pay that the employer owes. When there is no termination, there is no back pay. While an employee who has not been terminated can request punitive and compensatory damages, the conduct must be reckless or malicious—a standard that is deemed more extreme than the conduct necessary to receive back pay under the discrimination laws. Similarly, the employee can claim a constructive discharge, but again this adverse action must be more serious than that which would satisfy the discrimination law. Accordingly, we simply do not believe that this will open the door to a large number of new meritorious claims.

Most important, the *White* case does not change the advice that we would provide to managers. If an employee complains about discrimination, (1) do not retaliate in any way against that person because of the complaint and (2) make sure that you have a legitimate reason for any subsequent negative treatment of the employee for the foreseeable future. In other words, make sure you can support any employment decision that in any way punishes an employee who had previously complained of discrimination. This does not mean, however, that the *White* case is meaningless. A common practice for employers who were faced with a harassment complaint from an underperforming employee was to put the employee on a performance improvement plan. Under *White*, such a plan would likely be seen as satisfying the discrimination element of the test. Thus, employers need to be more careful in their treatment of complaining employees and must consult with counsel before they make any such decision. The obvious question that arises from this advice is, How long must the employer treat a complaining employee with kid gloves?

### The Causal Link

We see an EEOC retaliation claim as one of the best short-term job-security measures for an at-risk employee, given that employers will always be reluctant to terminate an employee who has made such a claim. If the employer has done its homework, however, filing a claim will not always buy time for an underperforming employee. While employers can never base a decision on the fact that the employee made a complaint, employers who have documented poor performance or unacceptable behavior can, with the advice of counsel, make an adverse employment decision, including termination. The key is documentation and a history of making similar decisions to similarly

situated employees regardless of whether they have engaged in protected expressions. With documentation and consistent human resources practice, it may make sense to go forward with any type of discipline up to and including termination. Without those elements, there is no way to predict how long a protected expression, absent evidence to support cause, will be seen as being a link to a future adverse action. There are, however, a number of cases that do weigh in on the issue.

When an adverse employment action is made soon after a protected expression, courts will almost always infer retaliation.<sup>10</sup> The problem is that no law states when this inference would end. The Second Circuit, for instance, has held that there is no finite answer.<sup>11</sup> Other circuits have come to a number of different conclusions, holding that three,<sup>12</sup> four,<sup>13</sup> or five<sup>14</sup> months are too long to make an inference of retaliation with any evidence of discrimination. Employers who wish to make a decision negatively affecting an employee who has made a protected expression need to check with counsel to see whether the circuit where the employer is located has made a bright-line ruling on the time issue. After a certain point, the protected expression will no longer carry much weight.

### Implications for Managers

Before the *White* case, retaliation was the fastest growing of all discrimination claims. As is often the case with Supreme Court decisions, the reaction to *White* was swift and loud. Employers (and their advocates), playing their best Chicken Little role, screamed that the sky was falling. Employees (and their advocates) declared victory. We, on the other hand, believe that *White*'s effects will be typical of that of recent Supreme Court decisions on employment law. In the past several years, cases

on the ADA, arbitration, and sexual harassment have all been hailed as changing the face of discrimination law. The effects of each decision have been minimal at best. We therefore predict that while *White* will lead to an initial increase in tack-on claims, as well as stand-alone claims, the holding should not really affect employers' ability to operate or defend claims. Still, because of *White*, employers need to make sure that they document anything that could be construed as a protected expression, that they never let a complaint be the basis of any decision, and, most important, that they have full documentation before they make employment decisions. Employees who see a termination on the horizon have an incentive to engage in a protected expression in hopes of establishing a claim of retaliation when the inevitable occurs. While the basis of the protected expression may fail, the retaliation claim can stand on its own and cost the employer hundreds of thousands of dollars in time, legal fees, and damages. Employers need to think about retaliation before making any decisions.

#### Endnotes

1. See EEOC.gov discrimination statistics.
2. Different state agencies have different names.
3. The Court explained this defense by asserting "proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law." However, the Court did not explain how an employer could satisfy this burden without a policy. With regard to the employee's actions, the Court was again less than exact: "And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ellerth*, 118 S.Ct at 10. *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
4. *Payne v. McLemore's Wholesale and Retail Stores*, 654 F.2d 113 (5th Cir. 1981).
5. *Ibid.*
6. 224 F. 3d 701 (7th Cir. 1981).
7. 532 U.S. 68 (2001).
8. No. 05-259 (June 22, 2006).
9. The forklift duty is described as a "less arduous and cleaner job" than general laborer duties.
10. *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir.1996) (holding that twelve days will lead to an inference of retaliation).
11. *Gorman-Bakos v. Cornell Co-op Extension of Schenectady*, 252 F.3d 545, 554 (2nd Cir. 2001).
12. *Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997).
13. *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (CA7 1992); and *Filipovic v. K&R Express Sys., Inc.*, 176 F.3d 390, 398-99 (7th Cir.1999).
14. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1112 (3d Cir.1997).



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