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Retaliation after Burlington

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I. The problem: As enacted, Title VII bit off more than courts were willing to chew

A. The private sector provisions of Title VII prohibit:

1. Discrimination in 42 U.S.C. § 2000e-2 with the following language:

   It shall be an unlawful employment practice for an employer—

   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

   or

   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. Retaliation in 42 USC § 2000e-3 with the following language:

   (1) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or . . . has . . . participated in any manner in an investigation, proceeding, or hearing under this title.”

B. Read literally, this language makes any personnel decision actionable if someone is willing to claim it was discriminatory or retaliatory, no matter how petty or inconsequential.

C. It was predicable that judges would find ways to restrict the reach of Title VII because:

1. Courts are reluctant to second-guess managerial decisions. E.g., St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 528 (1993) (“[E]mployers' autonomy [should not] be curtailed . . . beyond what is needed to rectify the discrimination identified by Congress.”); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) (“Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.”)

2. Conscientious judges reserve limited resources for people with serious claims. E.g. Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (“[I]f every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like

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1 The views expressed in this outline, and the accompanying talk, are those of the author. They do not necessarily reflect the official position of the United States Postal Service, the federal government, or any of its officers, other employees, or agents.
[were actionable] . . . [t]he Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial.”

3. Federal judges do not see themselves as mere labor arbitrators. Cf., e.g., McKenzie v. Milwaukee County, 381 F.3d 619, 626 (7th Cir. 2004) (“[T]he two positions [being compared] ‘were equivalent other than in idiosyncratic terms that do not justify trundling out the heavy artillery of federal discrimination law.’”)

II. The pre-Burlington answer: Limit the reach of Title VII to adverse employment actions.

A. The Fourth Circuit first tackled the problem in Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc), when it refused to hear a Title VII challenge to the composition of a promotion board because Title VII reaches only ultimate employment decisions.

B. By the time of Burlington, a quarter century later, Page had evolved into a generally recognized rule that only adverse employment actions are actionable under Title VII. In most circuits, that means actions that have a significant impact on an employee’s wages, hours, working conditions, or career prospects.

1. “Adverse employment actions,” the Fourth Circuit said a year before Burlington, “include any retaliatory act or harassment if that act or harassment results in an adverse effect on the terms, conditions, or benefits of employment.” Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 188 (4th Cir. 2004)

2. The DC Circuit expressed the same idea in Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999): “[A] plaintiff who is made to undertake or who is denied a lateral transfer—. . . in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities . . . .” Just before Burlington, however, the DC court presciently restricted the concept to discrimination, and held retaliatory acts are actionable even if they do not affect the terms, conditions, or privileges of employment, of future employment opportunities. Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006).

III. The Burlington case: Burlington Northern gets even with a plaintiff who stands on her rights.

A. The facts: Burlington retaliated against White, its only female track laborer, twice: once for complaining about sexual harassment and once for filing a charge with the EEOC.

1. Most Burlington track laborers perform hard manual labor. But White, its only female track laborer, had a plumb assignment: operating a forklift.

2. When White complained about her supervisor’s sexual harassment, he was disciplined and she was reassigned to standard track laborer duties. There was no change in her job title, pay, and hours, but her new duties were considerably less prestigious and much more arduous than her forklift operator duties had been.

3. White filed a retaliation charge with the EEOC over the transfer. Not long after, she was suspended for insubordination.
4. After being suspended for more than a month, White beat the insubordination charge in an internal grievance proceeding and returned to work with backpay.

5. White ultimately sued over the reassignment and the suspension, and a jury found both were retaliatory. She won about $100,000 in damages and attorneys’ fees.

B. The appeal: Burlington tried to convince the Sixth Circuit that it was entitled to retaliate in the ways it did, with impunity.

1. On appeal, Burlington did not challenge the retaliation finding. Instead, it argued the transfer and suspension were not actionable adverse employment actions because:
   a. The transfer was a mere change of work assignment that did not affect the terms of her employment or working conditions, and
   b. The suspension was rescinded and had no effect on the terms of her employment or working conditions.

2. It was thus in the position of conceding it retaliated but there was nothing White could do about it.

3. The Sixth Circuit held White could sue for both retaliatory acts because:
   a. The transfer was the functional equivalent of a demotion, and
   b. Thirty days without pay or any assurance that she would get paid materially changed the conditions of White’s employment.

IV. The Supreme Court expands the scope of the anti-retaliation provision in 2000e-3.

A. The Supreme Court affirmed the Sixth Circuit, but rejected its reasoning.

B. First, based on a comparison of the language of § 2000e-2 and § 2000e-3, the Court eliminated the employment in “adverse employment action” when it comes to retaliation.

1. Because the language of § 2000e-2 protects the right to work on equal terms, the court reasoned, the statute does not “prohibit anything other than employment-related discrimination.” Presumably then, the reach of § 2000e-2 is still limited to employment actions.

2. But § 2000e-3, it went on to hold, ensures “unfettered access to Title VII’s remedial mechanisms,” and “extends beyond workplace-related or employment-related retaliatory acts and harm.” White, therefore did not have to show that the adverse action she was subjected to was an employment action.
C. Second, it raised questions about the “adverse” in “adverse employment action.”

1. Although the Court held that plaintiffs claiming retaliation must show that a reasonable employee would have found the challenged action materially adverse, it seemed to strip the word “materially” of substance by saying the action need only be one that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

   a. Getting employees to support a co-worker’s EEO complaint is never easy; people are generally reluctant to anger the boss in a cause that is not their own.

   b. Therefore, almost any reaction by a supervisor to an EEO complaint—a frown, a dirty look, bursting into tears, a long silence—well might dissuade employees from supporting a co-worker’s EEO complaint.

2. Yet, the Court also said:

   a. The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.

   b. We speak of material adversity because we believe it is important to separate significant from trivial harms. . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. . . . [N]ormally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.

   c. Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relations which are not fully captured by a simple recitation of the words used or the physical acts performed.

   d. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

D. In sum, Burlington holds that § 2000e-3:

1. Extends beyond the workplace, and

2. Reaches any action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination,” if they are “materially adverse,” rather than “trivial,” “petty slights, minor annoyances, [or] simple lack of good manners.”

V. The Court’s examples of retaliation give little guidance as to the reach of § 2000-3.

A. Many commentators see significance in the Burlington Court’s suggestion that denying mothers with small children preferred schedules may be actionable retaliation.

1. But the Court cited Washington v. Ill. Dep’t of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) for that suggestion. The supervisor in Washington changed the employee’s schedule because he knew it would interfere with her ability to care for her Down syndrome child and would force her to cut back her hours, resulting in a loss of pay.
2. That transfer would have almost certainly been actionable in any Circuit prior to Burlington, because it led to a loss of pay.

B. Commentators have also made much of the Court’s suggestion that a supervisor’s refusal to invite an employee to a “weekly training lunch that contributes significantly to the employee’s professional advancement” may be actionable retaliation. Yet, refusing to give an employee training she needs to do her job is an adverse employment action.

1. 42 U.S.C. § 2000e-2(d) prohibits discrimination in "admission to, or employment in, any program established to prove apprenticeship or other training").


VI. Quo vadis? Are we back where we started, with a statutory prohibition that reaches virtually any decision by an employer?

A. Burlington clearly made at least one change in Title VII jurisprudence: plaintiffs claiming retaliation no longer need show they are complaining about actions that affected their employment conditions. See e.g., Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (Ex FBI employee allowed to sue for retaliation even though ex-employees have no working conditions to affect.) This holding is not likely to change the result in many cases, however, as most Title VII retaliation claims arise in the workplace.

B. Burlington may have made another, more significant, change by extending Title VII to retaliatory acts that “well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.’” I would bet, however, it did not.

1. To be sure, employers can in the short run find it more difficult to win summary judgment on the ground that there was no actionable retaliation. Many judges who would have once granted such motions will probably let cases go to trial rather than run the risk of reversal. In the long run, however, I suspect the lower courts will resist a literal reading of the Court’s language, for the same reasons that they refused to read § 2000e-3, itself, literally

2. I have yet to see any published post-Burlington cases in which a retaliation claim has proceeded without something that was at least arguably serious enough to qualify as adverse employment under the old standard.

3. I have seen several published decisions holding that acts are not actionable even though they appear to me to be capable of deterring people from engaging in protected activity. E.g.:

a. McGowan v. City of Eufala, 472 F.3d 736, 742-743 (10th Cir. 2006) holds that denying a request for a shift change did rise to the level of actionable retaliation “in the wake of Burlington Northern.” Although plaintiff “may have desired a change in shift, she identified no specific rationale for the transfer other than an undefined subjective preference for the change. . . . Although claiming it to be a better assignment, her stated desire for change was purely for personal reasons.” Yet, the threat of losing a work assignment an employee wants for purely per-
sonal reasons “well might . . . ‘[dissuade] a reasonable worker from making or supporting a charge of discrimination.”

b. Szymanski v. County of Cook, 468 F.3d 1027 (7th Cir. 2006) hold that a reference that was “decent,” but “not a great reference,” was not actionable. Yet, the threat of losing a great reference “well might . . . ‘[dissuade] a reasonable worker from making or supporting a charge of discrimination.”

c. Harper v. Potter, 456 F. Supp. 2d 25, 29 (D.D.C. 2006) holds that a 7-day suspension did not require the plaintiff to be absent from work or reduce his pay, and it was rescinded six weeks later. The court held it not actionable, although a narrow escape from a seven-day suspension “well might . . . ‘[dissuade] a reasonable worker from making or supporting a charge of discrimination.”

d. Gardner v. District of Columbia, 448 F. Supp. 2d 70, 76 (D.D.C. 2006) hold that a plaintiff could not sue when she was “treated . . . badly,” because “‘purely subjective injuries, ‘such as dissatisfaction with a reassignment, public humiliation, or loss of reputation, are not adverse actions,’” even though her treatment “left her feeling ‘alone and . . . [believing] she could [not] rely upon anyone's assistance in the performance of her duties.’” One might think such treatment “well might . . . ‘[dissuade] a reasonable worker from making or supporting a charge of discrimination,’” but the court quoted Burlington for the proposition that “‘snubbing by supervisors and co-workers are not actionable’ under the retaliation provisions [of Title VII].”

VII. Defending a retaliation claim: more than one way to skin a cat.

A. While waiting to see what the long-range impact of Burlington will be, defendants should keep in mind the many defenses to retaliation claims Burlington did not affect.

1. The plaintiff did not exhaust her administrative remedies.

   a. Tisdale v. Fed. Express Corp., 415 F.3d 516, 527 (6th Cir. 2005) (“[W]e have held that ‘retaliation claims based on conduct that occurred before the filing of the EEOC charge must be included in that charge.’”)

   b. Martinez v. Potter, 347 F.3d 1208 (10th Cir. 2003) (holding that discrete retaliatory acts occurring after an EEOC charge is filed must be exhausted on their own.)

2. The plaintiff did not engage in activity protected by Title VII.


have an objectively reasonable belief in light of all the circumstances that a Title VII violation has happened or is in progress." (Emphasis added.)

c. *Harrison v. Spellings*, No. 03-2514 (D.D.C. March 13, 2007) ("Plaintiff’s [retaliation] argument . . . fails because she identifies no protected activity that occurred prior to her initial contact with an EEO counselor . . . ")

3. The plaintiff’s opposition to discrimination was disruptive, illegal, or otherwise intolerable.

   a. *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980) ("A question of retaliation is not raised by a removal for conduct inconsistent with those duties, unless its use as a mere pretext is clear.")

   b. *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 551 (4th Cir. 1999) ("[A]s long as an employee complains to his or her employer or participates in an employer's informal grievance procedure in an orderly and nondisruptive manner, the employee's activities are entitled to protection under § 704's opposition clause.")

4. The employer was not motivated by the employee’s protected activity.

   a. Employers should talk in terms of intent or at least in terms of “motive,” not in terms of “causation.” It is psychologically easier for a judge to find “causation” between an act and protected activity than to find someone’s intent.

      (1) *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("[T]here is no indication that Rice even knew about the right-to-sue letter when she proposed transferring respondent.")

      (2) *Jenson v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006) ("The ultimate question in any retaliation case is an intent to retaliate *vel non.*") (Judge Alito’s last decision as a circuit judge.)

      (3) *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 122 (2d Cir. 1996) ("A plaintiff asserting a retaliation claim ‘has the ultimate burden of persuasion to demonstrate that the challenged employment decision was the result of intentional retaliation.’")

      (4) *Harrison v. Spellings*, No. 03-2514 (D.D.C. March 13, 2007) ("[T]o make out her *prima facie* case for retaliation, plaintiff must establish that . . . the . . . reassignment decision maker . . . knew about plaintiff’s EEO complaint at the time she decided to transfer plaintiff.")

   b. When plaintiffs rely on temporal proximity to prove intent, the proximity has to be close.

      (1) *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-274 (2001) ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the

(2) Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299, 309 (4th Cir. 2006) (“The actions that led to Francis' probation and termination began before her protected activity, belying the conclusion that a reasonable factfinder might find that BAH's activity was motivated by Francis' USERRA complaints.”)

(3) Singletary v. District of Columbia, 351 F.3d 519, 525 (D.C. Cir. 2003) (“[A] close temporal relationship may alone establish the required causal connection. . . . Singletary was denied promotion to the acting supervisor position . . . the month after he filed his appeal with the D.C. Court of Appeals. . . . We . . . remand for the district court to determine whether the close temporal relationship . . . in the context of other evidence . . . persuades the court that the defendants unlawfully retaliated against the plaintiff . . . .” (Emphasis added.))

c. At the pretext stage, employers should talk not in terms of “pretext,” but of “lies.” It is psychologically easier to find that a reason is pretextual than that a witness is a liar.

(1) Price v. Thompson, 380 F.3d 209, 215 n.1 (4th Cir. 200) (“[M]ere mistakes of fact are not evidence of unlawful discrimination. See, e.g., Jordan v. Summers, 205 F.3d 337, 344 (7th Cir. 2000) (“Pretext is a lie, not merely a mistake.”)

(2) Cones v. Shalala, 199 F.3d 512, 519 (D.C. Cir. 2000) (“As we said in [Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998). ‘If the jury can infer that the employer's explanation is not only a mistaken one in terms of the facts, but a lie, that should provide even stronger evidence of discrimination.”’)

d. Evidence of pretext must not only draw the explainer’s credibility into question, but must also support an inference of a retaliatory intent.

(1) Reeves v. Sanderson Plumbing Prods., Inc, 530 U.S. 133, 147 (2000) (“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . . This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.” (Emphasis added.))
(2) St. Mary's Honor Center v. Hicks, 590 U.S. 502, 514-515 (1993) ("[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different . . . that the employer's explanation of its action was not believable. . . . ([A] reason cannot be proved to be a pretext for discrimination unless . . . the reason was false, and that discrimination was the real reason.")

(3) Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1310 (10th Cir. 2005) ("While Ms. Donovan's initial explanation was factually incorrect, a reasonable jury could find that she confused the two test scores . . . or that she wanted to spare Ms. Jaramillo's feelings. Accordingly, Ms. Donovan's isolated statement simply is not outrageous enough to undermine the CJD's legitimate explanation for its decision.")

VIII. Federal Employment: “Well,” as the Church Lady used to say on Saturday Night Live, “aren’t we special”?


All personnel decisions [by most federal agencies] affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

B. The Supreme Court has said, in dicta: “In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government.” Morton v. Mancari, 417 U.S. 535, 547 (1974)

C. In Rochon v. Gonzales, 438 F.3d 1211, 1216 (D.C. Cir. 2006), the D.C. Circuit seemed to follow Mancari when it:

1. Considered the argument that “there is in § 2000e-16 no specific and unequivocal waiver of sovereign immunity with respect to claims of retaliation”;

2. Noted:

a. 42 U.S.C. § 2000e-16(d) permits courts to invoke § 2000e-5(g)(1) in federal-sector cases;

b. § 2000-e5(g)(1) allows courts to award equitable relief, including back pay to persons aggrieved by an “in an unlawful employment practice,”; and

c. § 2000e-3(a) defines retaliation as "an unlawful employment practice."

3. Concluded “Congress has made the United States amenable to suits seeking equitable relief and back pay for retaliation.”

D. However, the Solicitor General filed an amicus brief in Burlington stating: “[T]he federal government’s potential liability under Title VII and its waiver of sovereign immunity are limited to retaliation that rises to the level of a “personnel action,”: i.e., an action relating to the terms, conditions, or privileges of employment.” Brief at 19, n.5.
1. It is not clear if the Solicitor General meant to suggest that a “personnel action” differs in some significant way from a traditional “adverse employment action.”

2. The *Burlington* decision relies heavily on the precise wording Congress used in the private-sector provisions of Title VII, but says nothing about the significance, or lack of significance, of the use of “personnel actions” in the federal-sector provision.

E. *Burlington* has had some surprising results in federal sector Age Discrimination in Employment (ADEA) actions, as 29 USC § 633a(a) forbids age discrimination in federal employment, in the same way that Title VII forbids other forms of discrimination in the federal sector.

   All personnel actions [by most federal agencies] affecting employees or applicants for employment . . . shall be made free from any discrimination based on age.

1. But in *Gomez-Perez v. Potter*, 476 F.3d 54 (1st Cir. 2007), a federal employee claimed retaliation for opposing age discrimination, and the court:

   a. Used the logic of *Burlington* to find that the statutory focus on discrimination, without mention of retaliation, was significant: “The clear difference between a cause of action for discrimination and a cause of action for retaliation leads to the conclusion that if Congress had meant to provide for both causes of action, it would have said so explicitly in § 633a.”

   b. Held the ADEA differs from Title VII in that “the provisions of the ADEA that apply to federal employees state that ‘[a]ny personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Chapter.’ 29 U.S.C. § 633a(f).”

   c. Rejected the pre-*Burlington* holding in *Forman v. Small*, 271 F.3d 285, 297 (D.C. Cir. 2001) that: “It is difficult to imagine how a workplace could be ‘free from any discrimination based on age’ if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee. To treat Congress's mandate as other than comprehensive would produce absurd results, which courts are to avoid. . . . Nothing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace.”