

SUPREME COURT CHANGES STANDARD FOR PROVING RETALIATION IN DISCRIMINATION CASES

By Thomas S. Gill

Before June of 2006, Maryland federal courts followed the “term or condition of employment” rule in retaliation cases. Under that rule, an employee had to prove loss of job, loss of pay, or loss of some other tangible job benefit to win a retaliation case. In *Burlington Northern v White*, decided June 22, 2006, the Supreme Court held that changed job duties, suspension without loss of pay, and other employer acts could amount to illegal retaliation. The “term or condition” standard is the one applied to discrimination on the basis of race, religion, and the other categories. Even sexual harassment is subject to the “term or condition” standard. In a hostile environment sexual harassment case, the employee must show the harassment was “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”

How does this case affect the way employers run businesses? In Maryland, an employee could not prove retaliation unless he could show loss of pay or some similar tangible loss. In *Von Gunten v Maryland*, 243 F. 3d 858 (4th Cir. 2001), Ms. Von Gunten alleged that after she complained of sexual harassment, she lost the use of a state car (replaced with mileage payment on her personal car) and was assigned to shore duty, and received a low year end review. The 4th Circuit held that none of these, either individually or taken together, constituted unlawful retaliation. The court said that retaliation occurs only when an “act or harassment results in an adverse effect on the terms, conditions, or benefits” of employment.

Supervisors are often angered by discrimination complaints, especially when those complaints are false. Under Title VII, however, an employee is entitled to make a false complaint as long as it is made in good faith. In *Von Gunten*, Ms. Von Gunten alleged her supervisor deliberately hit her buttocks with an oar. Other employees saw it as an accident. The supervisor was very angry at being accused and Ms. Von Gunten ended up on shore duty at the same pay. The court said, “No lost pay so no retaliation.”

In *Burlington Northern*, the Supreme Court changed the *Von Gunten* standard. Under *Burlington*, Ms. Von Gunten could have collected big bucks for her emotional distress, even though she did not lose any wages. The Supreme Court specifically said that illegal retaliation was not limited to **employment** actions. It could include filing a false criminal report or other outside of work actions. Anything an employer (or supervisor) does which might deter an employee from filing a discrimination complaint or testifying for another employee is illegal.

A common employer problem is the below average employee who blames failure on others. For example, a new accounts payable clerk may make frequent data entry errors and put unpaid bills in a drawer to be found months later. When confronted, the new clerk will say, “You gave Larry more training because he is a (pick one: man, white

person, younger person, not handicapped). The accounts payable clerk's complaint (made to a supervisor, personnel, or a manager) is enough to create retaliation protection. 42 U.S.C. 2000e-3 makes it illegal to discriminate against someone who has "opposed any practice made unlawful" by Title VII. Correcting poor performance is not an illegal practice, but in a retaliation case, the employee only needs to prove a "good faith belief" that she was discriminated against. Many poor employees have a "good faith belief" that the supervisor is responsible for their poor performance.

Is an employee's unfounded (but good faith) complaint of discrimination a get out of jail free card? To a certain extent, yes it is. Any change in work assignment, low performance appraisal, or performance improvement plan can be the basis for a retaliation charge. Some of the very worst employees will have the best possible legal protection.

As retaliation cases are decided, a strategy will emerge for dealing with problem employees who blame their poor performance on discrimination. In the mean time, employers will rely on cautious decision making. They will use a human resource professional to investigate both the employee's complaint and his performance. They will move employment decisions from the immediate supervisor to a manager who has no personal contact with the complaining employee. Judges can often tell the difference between poor performance and retaliation, but *Burlington* will lead to some painful decisions before common sense finds a way.