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EMPLOYEE RETALIATION CLAIMS UNDER THE SUPREME COURT'S *BURLINGTON*, *CRAWFORD* AND *THOMPSON* DECISIONS: IMPORTANT IMPLICATIONS FOR EMPLOYERS

By David P. Twomey

I. Introduction

Title VII of the Civil Rights Act of 1964 forbids employment discrimination against any individual based on the individual's "race, color, religion, sex or national origin," as set forth in Section 703(a) of the Act¹. A separate section of the Act, Section 704, makes it unlawful for an employer "to discriminate against" an employee or job applicant because the individual "opposed any practice" made unlawful by Title VII (the opposition clause) or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation (the participation clause).² Because federal circuit courts of appeals had reached different conclusions about the scope of Section 704 – the so-called anti-retaliation provision of the Civil Rights Act – and the appropriate legal standard to be applied, as well as the level of seriousness the harm must rise to in order to be actionable retaliation, the U.S. Supreme Court resolved these splits in the circuits in its *Burlington Northern & Santa Fe Railway Co. v. White* decision.³

Subsequently, in the Supreme Court's *Crawford v. Metropolitan Government of Nashville* decision, the Court extended the protections of the anti-retaliation provision of Title VII to an employee who speaks out about discrimination, not of her own initiative, but in answering questions during an internal investigation into rumors of sexual harassment by her supervisor.⁴ In *Thompson v.*

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North American Stainless, LP the Supreme Court set forth a “zone of interest” standard for determining whether third parties’ retaliation claims are protected under Title VII.⁵

This article presents the Supreme Court’s reasoning and resolution of the “reach” of Title VII’s anti-retaliation provision as well as the Court’s standard for actionable retaliation in its landmark *Burlington* decision. The *Crawford* decision and rationale are presented; and the *Thompson* case and the Court’s standard for recognizing third-party claims under Title VII are presented. The article concludes with an evaluation of the impact the decisions are having on Title VII jurisprudence and makes recommendations for employers to manage and mitigate the ever-increasing risk of liability from the surge of retaliation cases being filed with the Equal Employment Opportunity Commission (EEOC) and the courts.

II. The *Burlington* Decision: The Standard And Reach

The *Burlington* decision involved complaints filed with the EEOC by Sheila White, a new employee hired by the Burlington Northern Santa Fe Railway Co. (BNSF) as a track laborer.⁶ She was the only woman working in the track department. Soon after she was hired, she was given the job of forklift operator, as opposed to the ordinary track laborer tasks which involve track and switch maintenance work, cutting brush and clearing litter from the right-of-way.⁷ Three months after being hired she complained to company officials that her foreman treated her differently than male employees, and twice made inappropriate remarks to her. The foreman was suspended without pay for ten days and ordered to attend sexual harassment training.⁸ Also at that time, the Roadmaster, a company supervisor who investigated the matter, reassigned the forklift duties to the former operator who was “senior” to White, and assigned White to track laborer duties. He explained that the reassignment reflected co-worker complaints that in fairness “a more senior man” should have the “less arduous and cleaner job.”⁹ Six months into her

employment, White refused to ride in a truck, as directed by a different foreman, and she was suspended for insubordination.¹⁰ A grievance was filed on her behalf by her union and some thirty seven days later, she was reinstated by the railroad with full backpay; the discipline was removed from her record.¹¹

Subsequently, White filed a complaint with the EEOC claiming the reassignment to track laborer duties was unlawful gender discrimination and retaliation for her complaint about her treatment by the foreman. The 37-day suspension led to an additional retaliation charge.¹² A jury rejected her sex discrimination claim, but awarded her compensatory damages of \$43,500, including \$3,250 in medical expenses on the retaliation claims.¹³ BNSF appealed contending that Ms. White was hired as a track laborer and it was not retaliatory to assign her to do the work she was hired to do. It further asserted that the suspension of 37 days was corrected and she was made whole for her loss. A divided Sixth Circuit Court of Appeals panel reversed the judgment.¹⁴ The full Court of Appeals vacated the panel’s decision and voted to uphold the District Court’s judgment in White’s favor, but differed as to the proper standard to apply.¹⁵

A. The “Reach” Of Section 704

Because the Courts of Appeals had reached different conclusions about the scope of the Section 704 anti-retaliation provision, particularly the reach of the phrase “discriminate against” as used in that section, the Supreme Court was required to resolve the issue of whether Section 704 confines actionable retaliation only to activity that affects the terms and conditions of employment in the workplace itself as opposed to harm caused both in the workplace and outside the workplace.¹⁶ Further, the Court was required to determine the appropriate standard as to how harmful the adverse actions must be to fall within the scope of Section 704.¹⁷ The Third, Fourth and Sixth Circuits require a plaintiff to show an “adverse employment action,” applying the same standard for retaliation that is applied to a substantive discrimination offense under Section 703(a).¹⁸ The District of Columbia Cir-

cuit and the Seventh Circuit apply a broad view requiring a plaintiff to show that the “employer’s challenged action would have been material to a reasonable employee” and would likely have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”¹⁹

BNSF argued that the Sixth Circuit majority was correct to require a link between the challenged retaliatory action and the terms, conditions, or status of employment as set forth in Title VII’s core anti-discrimination provision, Section 703(a).²⁰ In its analysis, the Supreme Court focused on the language of the Act itself underscoring key terms, as follows:

Section 703(a)

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 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.* § 2000e-2(a)(emphasis added).

Section 704(a) sets forth Title VII’s anti-retaliation provision in the following terms:

“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 subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”²¹

The Court refused to conclude that the different words used by Congress in Section 703(a) and Section 704 should be read to mean the same thing, as asserted by the railroad and the Sixth Circuit majority. The underscored words in Section 703(a) limit the scope of that provision to the workplace.²² No such limitations appear in Section 704, the anti-retaliation provision.²³ The Court pointed out that the anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.²⁴ And the anti-retaliation provision seeks to secure this objective by preventing an employer from interfering through retaliation with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.²⁵ Since an employer can effectively retaliate against an employee by taking actions not directly related to his employment, or causing harm outside the workplace, the court concluded that Title VII’s anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harms.²⁶

B. The Standard for Actionable Retaliation

Focusing on the employer’s challenged retaliatory actions, the Supreme Court set forth a standard to resolve the differing language used by the circuit courts to describe the level of seriousness to which the harm must rise before it becomes actionable retaliation. The Court concluded that a plaintiff must show 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.”²⁷ The Court stated that by focusing on the materiality of the challenged action and the perspective of a reasonable person, it believes that this standard will screen out trivial conduct while capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.²⁸

C. Application to BNSF’s Actions

The jury found that two of BNSF’s actions amounted to retaliation: the reassignment of

White from forklift duty to standard track laborer tasks and the 37 day suspension without pay. The Court reviewed each action under its anti-retaliation standard.

Burlington Northern argued that a reassignment of duties cannot constitute retaliatory discrimination, where both the former and present duties fall within the same job designation.²⁹ The Court disagreed. While the reassignment of job duties is not automatically actionable, the Court stated that whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position.³⁰ The Court quoted the following evidence of record the jury had before it:

...the jury had before it considerable evidence that the track laborer duties were "by all accounts more arduous and dirtier"; that the "forklift operator position required more qualifications, which is an indication of prestige"; and that "the forklift operator position was objectively considered a better job and the male employees resented White for occupying it."³¹

The Court concluded that, based on this record, a jury could reasonably conclude that the reassignment of White's responsibilities would have been materially adverse to a reasonable person.³² BNSF argued that the 37-day suspension lacked statutory significance because, ultimately, the railroad reinstated White to service with full backpay. The Court did not find the argument to be convincing. The Court stated that a reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former.³³ Thus, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.³⁴ The Court determined that the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one.³⁵

III. Crawford V. Metropolitan Government Of Nashville: Scope Of The Opposition Clause

In *Crawford v. Metropolitan Government of Nashville*³⁶ the issue before the Supreme Court was whether the protection afforded by Title VII extended to an employee who speaks out about discrimination, not of her own initiative, but in answering questions during an employer's internal investigation into rumors of sexual harassment.³⁷ A Metro human resources officer asked Ms. Crawford if she had witnessed "inappropriate behavior" on the part of Hughes, the employee relations director, and she related several instances of sexually obnoxious behavior by Hughes.³⁸ Two other employees reported being sexually harassed by Hughes.³⁹ Although Metro took no action against Hughes, it did fire Crawford and the two other accusers after finishing the Hughes investigation, saying in Crawford's case her termination was for embezzlement.⁴⁰ Crawford filed a charge with the EEOC claiming Metro was retaliating for her report of Hughes' behavior, followed by a lawsuit in the United States District Court for the Middle District of Tennessee.⁴¹ The district court granted summary judgment for Metro, because Crawford could not satisfy the "opposition clause" of Section 704(a), which makes it an unlawful employment practice for an employee to discriminate against any employee "because he had opposed any practice made an unlawful employment practice of this subchapter."⁴² The court stated that she had not "instigated or initiated any complaint," but had "merely answered questions by investigators in an already-pending internal investigation initiated by someone else."⁴³ The Sixth Circuit Court of Appeals affirmed on the same grounds, holding that the opposition clause "demands active, consistent, 'opposing' activities...to warrant protection against retaliation."⁴⁴ The Supreme Court unanimously reversed the Sixth Circuit, and held that the anti-retaliation provision protects an employee who answers questions during an internal investigation. The Court stated that there is "no reason to doubt that a person can 'oppose' by responding to someone

else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."⁴⁵

IV. The Thompson Decision: Third Party Retaliation Claims

In *Thompson v. North American Stainless, LP*, the EEOC notified North American Stainless (NAS) in February 2003 that Miriam Regalado had filed a charge of sex discrimination against the company.⁴⁶ Three weeks later NAS fired her co-worker Eric Thompson, a person to whom Ms. Regalado was engaged.⁴⁷ Mr. Thompson had worked for NAS for seven years as a metallurgical engineer.⁴⁸ Thompson filed his own charge with the EEOC and a subsequent lawsuit under Title VII of the Civil Rights Act, claiming that NAS fired him to retaliate against Regalado for filing her charge with the EEOC.⁴⁹ The federal district court granted summary judgment to NAS, concluding that Title VII "does not permit third party retaliation claims."⁵⁰ After a panel of the Sixth Circuit reversed the district court,⁵¹ the Sixth Circuit granted a rehearing en banc and affirmed the district court's decision by a 10-to-6 vote.⁵² The court reasoned that, because Thompson did not "engag[e] in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado," he was not included in the class of persons for whom Congress created a retaliation cause of action.⁵³ The U.S. Supreme Court granted certiorari.⁵⁴

The Court addressed two questions in its decision: (1) did NAS's firing of Thompson constitute unlawful retaliation; and (2) if it did, does Title VII grant Thompson a cause of action?⁵⁵ In the procedural posture of the case before the Supreme Court, where NAS challenged the legal sufficiency of Thompson's complaint before the trial court, contending that Title VII does not permit third party retaliation claims, the Supreme Court was required to assume that NAS fired Thompson in order to retaliate against Regalado for filing a charge of discrimination

with the company, reserving its right to later dispute the facts at a trial should the Supreme Court determine that Thompson is an aggrieved person with standing to sue under Title VII.⁵⁶

A. Did NAS's Firing of Thompson Constitute Unlawful Retaliation?

Relying on the statutory language of Title VII's anti-retaliation provision, Section 704(a), as interpreted in the Court's *Burlington* decision, the Court concluded that if the facts alleged by Thompson were true, then NAS's firing of Thompson violated Title VII.⁵⁷ Under the *Burlington* standard, Title VII's anti-retaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."⁵⁸ The Court was undeterred by NAS's "slippery slope" argument about the types of relationships entitled to protection were the *Burlington* standard to apply to third parties, rhetorically asking would it apply to an employee's girlfriend, close friend or a trusted co-worker?⁵⁹ It argued that the *Burlington* standard would place the employer at risk any time it fires an employee who happens to have a connection to a different employee who filed a charge with the EEOC.⁶⁰ The Court responded that the employer's argument did not justify a categorical rule that third party reprisals do not violate Title VII.⁶¹ It explained, "we adopted a broad standard in *Burlington* because Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text."⁶² The Court declined to provide a bright line test for which third party reprisals are unlawful, giving limited guidance based on the polar extremities that "firing a close family member will almost always meet the *Burlington* standard, and inflicting a minor reprisal on a mere acquaintance will almost never do so."⁶³

B. Does Title VII Grant Thompson a Cause of Action?

Section 706(f) (1) of the Civil Rights Act of 1964 provides that "a civil action may be brought...

by the person claiming to be aggrieved.”⁶⁴ NAS contends that Thompson had no standing to sue because the words “person...aggrieved” as used in this section of Title VII are terms of art applying only to the employee who engaged in protected activity, that is, Regalado, the person who filed the discrimination charge against the company.⁶⁵ The Court rejected this position, seeing no basis in the statutory text or practice for such a narrow reading of the statute.⁶⁶ Rather, the Court pointed out that a “person aggrieved” under the Administrative Procedure Act means a person adversely affected who falls within the “zone of interest” sought to be protected by the statute.⁶⁷ Adapting this test to Section 706(f)(1), the Court concluded that Thompson fell within the zone of interest protected by Title VII, stating:

Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers’ unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation – collateral damage, so to speak, of the employer’s unlawful act. To the contrary, injuring him was the employer’s intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interest sought to be protected by Title VII. He is a person aggrieved with standing to sue.⁶⁸

V. Recommendations

Since the Supreme Court’s adoption of a broader definition of retaliation than was used in some judicial circuits prior to the 2006 *Burlington* decision, the number of retaliation charges filed with the EEOC has risen dramatically.⁶⁹ Management-side employment lawyers see “retaliation as the number one risk for employers today.”⁷⁰ The litigation costs involved in a single retaliation case are substantial.⁷¹ The time-consuming pre-trial procedures for building cases for jury trials and the trials themselves add significant costs to employers and employees, with the

employers responsible for their attorneys’ fees, damages and attorneys’ fees for the employees should the employees be successful in their litigation. Accordingly employers must develop and implement effective anti-retaliation policies and procedures for their top executives, middle managers and first level supervisors.

The source of unlawful retaliation can emanate from a CEO and other top executives, down through middle managers or first level managers, and can also originate from organizational tolerance of co-worker retaliation.⁷² Retaliation occurs in all types and sizes of organizations in all employment sectors of society.⁷³ The management of this liability area should be a Human Resources function and is best designed according to the nature, function and size of each organization. However, it is critical that each organization’s chief human resources officer (CHRO) have authority to independently investigate and report directly to the chief executive officer, with authority as well to report to an appropriate board of directors’ committee regarding the business justification for proposed or actual employer actions with potential retaliation liability.⁷⁴

A. Practices and Procedures

As part of its employee handbook, each employer should publish the employer’s commitment of no discrimination against employees and job applicants on the basis of age, sex, race, religious beliefs, color, national origin or disability in accordance with applicable federal and state law.⁷⁵

Prominently displayed as a stand-alone policy, employers should publish the employer’s encouragement to employees to notify the employer of perceived violations of its no discrimination policies. And, in bold face type, the notice should express the employer’s commitment to no retaliation should an employee make an internal complaint, or file a complaint with the EEOC or a state agency. Publish the name and telephone number of the chief human resources officer (CHRO) to whom complaints of discrimination and/or retaliation can be made. Avoid any procedure that requires an employee to raise a complaint with an offending supervisor.

1. Complainant Still in Service:

To eliminate or reduce the potential for retaliation where the complainant employee continues in employment after filing charges with the EEOC, the CHRO should meet with the complainant to assure the individual of the employer's commitment to its no-retaliation policy, and to offer continuing assistance with any problems that may exist or occur in the future, and to explore possible protective accommodations that could be made for the individual, such as working under a different supervisor-performance evaluator. Of course, any accommodations developed for the employee would require a written agreement signed by the employee that the accommodation as structured is for the benefit of the employee, lest, at a later time, it could be argued that the accommodation was retaliatory.

The HR officer should also meet individually with supervisors and co-workers who would have knowledge of the complaint in question and know the identity of the complainant. These employees should be individually instructed to make certain they abide by the employer's anti-retaliation policy, and the officer should directly address the need for patience and professionalism where the supervisor and co-workers believe the complaint has little or no merit.

2. "Materially Adverse" Action Contemplated:

Where a "materially adverse" action is contemplated by the employer, such as discipline or discharge against an employee who has in the recent past complained about workforce discrimination, a review of the initiating event(s) and the proposed action should be reviewed by the CHRO in consultation with legal counsel when appropriate. The charged employee may be relieved of duty with pay while a thorough investigation is conducted. The HR officer should meet not only with the charging supervisor(s) to make sure that the offense charged is well documented and the proposed discipline is proportionate to the misconduct involved and past similar treatment of other similarly situated employees, but also the HR officer should meet with the charged employee to get that person's position. Weighing

the entire matter from a neutral perspective, the HR officer should determine whether there is solid business justification for the proposed action, lest the organization become enmeshed in litigation, with its staff disruptions and significant expenses. And, even when it is determined that there is a business justification for the action, which later leads to an adverse determination by a jury on the issue of retaliation, the fact that the employer had a well publicized anti-retaliation program and pursued an extensive investigation may well prevent exposure to punitive damages because the employer had made a good faith effort to comply with Title VII.⁷⁶

B. Educational Considerations

The employer should establish ongoing educational programs for all levels of supervisors to ensure that managers understand actions that may be construed as retaliation and the very real consequences to the employer of retaliatory litigation.

1. Discussion of Human Nature and the Consequent Costs of Retaliation:

Employers must recognize that the educational effort is going to be challenging in some cases because of the "human nature" of the controversy. An employee has gone to a supervisor's supervisor, the HR department or the EEOC and has charged his or her supervisor with discrimination based on race, color, religion, sex, national origin, age or disability. If the complaint is valid, the supervisor should be appropriately disciplined. It may well be that the complaint has little or no merit or the activity is seen as part of the workplace culture. How does the accused supervisor or coworkers treat the complainant as though nothing has happened? Is it not human nature for the supervisor to want to take materially adverse action against that individual? Wouldn't the ideal solution for the supervisor be to find a business basis to terminate the complainant? The adverse economic consequences of such an action to the employer could be severe. For example, in the *Crawford v. Metropolitan Government of Nashville* case, discussed in part III of the paper,⁷⁷ on remand to the district court, the employer, Metro contended that it fired Craw-

ford for irregularities in the school payroll office for which Crawford was responsible.⁷⁸ Crawford testified that she had never previously been disciplined during her 30 years of service with Metro, and local officials did not begin to investigate her job performance until after she disclosed the alleged sexual harassment by the school district's employee relations coordinator.⁷⁹ The jury found that the reasons for firing Crawford were pretextual and awarded Crawford \$420,000 in compensatory damages, \$408,762 in back pay, and \$727,496 in front pay for a total monetary award of approximately \$1.56 million.⁸⁰

All employees of all levels should be instructed that because of the adverse impact on the complainant-victim, the potential adverse economic consequence to the employer and the distraction and disruption to the workforce caused by on-going litigation, the employer's no discrimination and no retaliation policy will be enforced with major discipline up to and including discharge!

2. "Protected" Employees Not Immune from Discipline or Discharge:

Seldom is there compelling evidence of record that a supervisor boldly told a complainant that as a result of filing charges of discrimination with the EEOC the complainant and the supervisor were now "enemies" and because the complainant "f**ked him, he was going to f**k him back."⁸¹ Rather, an employer with motivation to retaliate, in taking adverse action against the complainant, will "come up with" a business justification for the action taken. Contrary to such a pretextual scenario, well run organizations will terminate individuals only with solid business justification. Determining whether an employment action is for a valid business reason or pretextual retaliatory conduct is resolved through the *McDonnell Douglas v. Green* burden-shifting framework, adapted to the *Burlington* standard.⁸² The burden of proof is ultimately on the plaintiff to prove his or her case of discrimination and retaliation.

The *Burkhart v. American Railcar Industries Inc.*⁸³ decision can be used in an educational program for executives, managers and staff to

demonstrate that employees who have engaged in protected activities under Title VII are not immune from discipline or discharge for major performance issues.

In March of 2006, Cathy Burkhart complained to the human resources department about her department head Bill Allen's sexual harassment, including sexually offensive e-mails.⁸⁴ After investigation into her complaint and similar other complaints, Bill Allen was suspended for five days and the harassment stopped.⁸⁵ Prior to her sexual harassment complaint to HR, her personnel file showed an extensive disciplinary record, including performance issues regarding inventory adjustment errors.⁸⁶ In August 2006 she was suspended for one day for a \$17,000 accounting error.⁸⁷ After the October 2006 annual inventory showed significant errors made by the department, with the most severe errors attributable to Burkhart, her supervisor Brenda Mobley (not Bill Allen) terminated her employment.⁸⁸ The Court of Appeals for the Eighth Circuit recognized that Burkhart had satisfied the first two elements of a prima facie case of retaliation, (1) that she had engaged in activity protected under Title VII, that of complaining to HR about sexual harassment and (2) that she had suffered a materially adverse action, that of termination.⁸⁹ However, the court determined that no reasonable fact finder could infer a causal connection between her sexual harassment complaint to HR in March and the October disciplinary action that followed because she had an extensive record of poor performance preceding the challenged actions, and her subsequent performance problems in August and October were severe.⁹⁰ The Court stated that even if Burkhart could establish a prima facie case, no reasonable jury could conclude that the employer's stated reason for the termination was pretextual.⁹¹

VI. Conclusion

The *Burlington* decision set forth the standard for actionable retaliation and extends the reach of Section 704 protections beyond the workplace and employment related retaliation acts and harms, widening the range of employer conduct

subject to Title VII. The *Crawford* decision extends the opposition clause of Section 704(a), protecting employees who answer questions at an investigatory interview from retaliation. And, the *Thompson* decision applying the broad *Burlington* standard, extends the protection of the Act to third parties, deciding in the case that the retaliatory firing of the fiancé of a person who filed a discrimination charge with the EEOC was a violation of the anti-retaliation provision of the Act, and that the fiancé had standing to sue the employer.

The broad legal issues regarding Title VII retaliation claims are now settled and individual employers are becoming aware of the national

surge in retaliation claims as they confront retaliation claim(s) in their own workplace. Full responsibility and authority for individualized management of discrimination and retaliation issues should reside with the chief human relations officer, with lines of communication open to the board of directors, and as triaged and delegated within the human resources department, depending on the size of the organization. Education programs and strict policy enforcement may not eliminate all claims, but a well managed anti-retaliation program may help the employer avoid punitive damages where one of its managers acts contrary to the employer's good faith effort to comply with Title VII. ■

ENDNOTES

¹ Pub. L. No. 88-352, § 703(a), 78 Stat. 257 (1964) (current version at 42 U.S.C. § 2000e-2(a) (2006)).

² Pub. L. No. 88-352, § 704, 78 Stat. 257 (1964) (current version at 42 U.S.C. § 2000e-3(a) (2006)).

³ 548 U.S. 53 (2006).

⁴ 129 S. Ct. 846 (2009).

⁵ 131 S. Ct. 863 (2011).

⁶ *Burlington N.*, 548 U.S. at 57.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* For more factual development on this incident see *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 793 (6th Cir. 2004) (en banc) [hereinafter *White II*], and *White v. Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443, 448 (6th Cir. 2002) [hereinafter *White I*].

¹¹ *Burlington N.*, 548 U.S. at 59.

¹² *Id.*

¹³ *Id.*

¹⁴ *White I*, 310 F.3d 443 (6th Cir. 2002).

¹⁵ *White II*, 364 F.3d 789 (6th Cir. 2004) (en banc).

¹⁶ *Burlington N.*, 548 U.S. at 59.

¹⁷ *Id.*

¹⁸ *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997); *Von Gunten v. State of Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *White II*, 364 F.3d at 795.

¹⁹ *Rochon v. Gonzales*, 438 F.3d 1211, 1217-1218 (D.C. Cir. 2006), rehearing denied, 2006 U.S. App. LEXIS 17535 (D.C. Cir. July 11, 2006); *Washington v. Department of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

²⁰ *Burlington N.*, 548 U.S. at 61.

²¹ *Id.* at 62 § 2000e-384 (emphasis added).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 63.

²⁵ *Id.*

²⁶ See *Rochon v. Gonzales*, 438 F.3d at 1213 (concerning employer-FBI retaliation against employee in "the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife"); *Berry v. Stevinson Chevrolet*, 74 F.3d

980, 984, 986 (10th Cir. 1996) (finding actionable retaliation claim as to employer who filed false criminal charges against a former employee who complained about discrimination). The *Burlington* Court did not have to address the issue of the "reach" of Section 704 beyond the workplace, to harm caused outside the workplace, as the employer actions at issue taken against Ms. White were both workplace-related actions. Rather than wait for a case involving an outside-the-workplace employer action, the Court took the opportunity to settle the issue and policy questions regarding Sections 703(a) and 704 as a foundation for its settling the standard for actionable retaliation claims under Section 704.

²⁷ *Burlington N.*, 548 U.S. at 68 (quoting *Rochon*, 436 F.3d at 1219; *Washington*, 420 F.3d at 662) (citing with approval the formulation set forth by the Seventh and District of Columbia Circuits).

²⁸ *Id.* at 69, 70.

²⁹ *Id.*

³⁰ *Id.* at 71.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 72.

³⁴ *Id.*

³⁵ *Id.* at 73.

³⁶ 129 S. Ct. 846 (2009).

³⁷ *Id.* at 849.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 849, 850.

⁴² See Memorandum Opinion, No. 3:03-cv-00996 (M.D. Tenn., Jan. 6, 2005), App. C. to Pet. For Cert., 16a-17a.

⁴³ *Id.*

⁴⁴ 211 Fed. Appx. 373, 376 (6th Cir. 2006).

⁴⁵ *Crawford*, 129 S. Ct. at 851.

⁴⁶ 131 S. Ct. 863, 867 (2011).

⁴⁷ *Id.* at 867.

⁴⁸ See *id.*

⁴⁹ See Brief of Petitioner, *Thompson v. North American Stainless, LP*, No. 09-291, at 40, available at supremecourtreview.org.

⁵⁰ 435 F. Supp. 2d 633, 639 (E.D. Ky. 2006).

⁵¹ 520 F. 3d 644 (6th Cir. 2008).

⁵² 567 F. 3d 804 (6th Cir. 2009) (en banc).

⁵³ *Id.* at 807-808.

⁵⁴ 130 S. Ct. 3542 (2010).

⁵⁵ *Thompson*, 131 S. Ct. at 867.

⁵⁶ See *id.*

⁵⁷ *Id.* at 868.

⁵⁸ *Id.*

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 42 U.S.C. 2000e-5(f)(1).

⁶⁵ See *Thompson*, 131 S. Ct. at 869, 870.

⁶⁶ *Id.*

⁶⁷ See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990).

⁶⁸ *Thompson*, 131 S. Ct. at 870.

⁶⁹ The number of retaliation charges filed with the EEOC increased from 19,560 for FY 2006 and 23,371 in FY 2007 to 30,948 charges for FY 2010, with the number of retaliation charges for all statutes administered by the EEOC going from 22,555 in FY 2006 and 26,663 in FY 2007 to 36,258 for FY 2010, available at EEOC National Database, <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm?renderforprint=1>.

⁷⁰ See *Cari Tuna, Employment Retaliation Claims Rise*, WALL ST. J., B-7 (Oct. 5, 2009) available at <http://online.wsj.com/article/SB124570380636663209.html#printMode>.

⁷¹ See for example the opening statement of counsel for the employer in the 2006 *Burlington* case.

As the Solicitor General's brief and a couple of the other amici briefs point out, the number of—the number of these claims has increased by more than 100 percent over the course of the last decade, more than 30 percent of the EEOC's docket is now made up of retaliation claims, and the cost of an average contested claim exceeds \$130,000 per case.

Transcript of Oral Argument at 35, *Burlington N.*, 548 U.S. 53 (No. 05-259) (2006), http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-259.pdf.

⁷² See *Fine v. Ryan International Airlines*, 305 F.3d 746, 751 (7th Cir. 2002) (where the Vice President of Flight Operations fired pilot Lisa Fine for sending a letter to the Human Resources Director charging sex discrimination, which action was condoned by the airline's president, stating "If I were her boss, I would fire her ass"). See also discussion of *Burlington N. v. White*, 548 U.S. 53, 58 (2006) in Part II (where a railroad middle manager reassigned Sheila White from her forklift duties to standard track laborer tasks following her complaint of sex discrimination and later suspended her without pay while a charge of insubordination was investigated, and returned her to service after 37 days with full backpay and removal of all reference to the charge of insubordination).

⁷³ See an example of retaliation in the public sector where police lieutenant Hernandez was unsuccessful in proving charges of intentional discrimination based on his race but the jury found that he was retaliated against by the public employer, Metropolitan Atlanta Rapid Transit Authority (MARTA), for filing discrimination charge with the EEOC, awarding him \$100,000 in lost wages and benefits, \$150,000 for emotional pain and mental anguish, and \$150,000 against the Chief of Police, Wanda Dunham. Barney Tumey, *Jury Awards \$700,000 to Police Lieutenant who Alleged Retaliation by Transit Agency*, Daily Lab. Rep. (BNA), No. 46, at A-9, (Mar. 9, 2011).

⁷⁴ In *Hernandez v. MARTA*, N.D. Ga., No. 1:08-cv-1852-TCB 3/2/11, discussed *supra* note 73, the employer crafted a job promotion posting which had the effect of excluding only Lt. Hernandez from applying for the job. In the context of EEOC charges having been filed by Lt. Hernandez, a CHRO with full authority to investigate potential retaliation liability for the agency, could have blocked the Chief of Police's retaliatory acts by forbidding the retaliatory job posting and other actions against the complainant. See also *Fine v. Ryan*, 305 F.3d 746 (7th Cir. 2002), *supra* note 72, where the letter setting forth Ms. Fine's complaint was addressed to the Director of Human Resources yet the director did not

investigate the charge of discrimination as required by the company's policy, but turned the letter over to the vice president who ordered Pilot Fine fired, which decision was backed by the airline's president. If a CHRO had authority to investigate and communicate with an appropriate committee of the airline's board of directors it is likely that the litigation and the \$300,000 punitive damages award could have been avoided.

⁷⁵ As set forth in Section 704 of the Civil Rights Act, employees and applicants are protected from employer discrimination for opposing any practice made an unlawful employment practice by this subchapter – that is discrimination based on race, color, religion, sex or national origin. 42 U.S.C. section 2000e-3(a) (2006). The Age Discrimination in Employment Act also explicitly prohibits practices made unlawful by that act. 29 U.S.C. § 623(d) (2006). The EEOC's position is that claims may be filed for retaliation under the Americans with Disabilities Act and the Equal Pay Act. See EEOC Directives Transmittal, No. 915.003 (May 20, 1998), available at <http://www.eeoc.gov/policy/docs/retal.html> (providing guidance and instructions for investigating and analyzing claims of retaliation under the statutes enforced by the EEOC). Finally, corporate whistleblowers are protected from retaliation under Section 806 of the Sarbanes-Oxley Act. See 18 U.S.C. § 1514A (2006) (providing protections for employees from employer retaliation against employees who provide evidence of fraud).

⁷⁶ See Section 1981 a(b)(1) of the Civil Rights Act of 1991 and *Kolstad v. American Dental Ass'n.* 127 U.S. 526 (1999) where punitive damages would not apply when an employer reasonably, but erroneously believed its discrimination satisfied a statutory exception to liability.

⁷⁷ 129 S. Ct. 846 (2009).

⁷⁸ See Kevin McGowan, *Jury Awards \$1.5 Million to Plaintiff Whose Claim Reached Supreme Court*, Daily Lab. Rep. (BNA), No. 19, at A-7 (Feb. 1, 2010).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ In her concurring opinion in *Thompson*, 131 S.

Ct. at 871, Justice Ginsburg added her fortifying observation that the EEOC's interpretation of Title VII is consistent with other federal agencies regarding employer retaliation against a relative, citing the *Tasty Baking Co. v. NLRB* decision, 254 F.3d 114, 127-128 (D.C. Cir. 2001). In *Tasty Baking Co.*, a supervisor told a protected employee that he and the employee, Michael Flannery, were "enemies" because Flannery was a union supporter, and another supervisor told a union advocate "if you f**k me, I'll f**k you back". *Id.* at 119.

⁸² *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework adapted to the *Burlington* standard, a plaintiff must establish a prima facie case by showing: (1) that he or she was engaged in an activity protected under Title VII; (2) that he or she suffered a "materially adverse" action at the hands of the employer, showing that the employer action would have dissuaded a reasonable worker from making or supporting a charge of discrimination; and (3) he or she must show there was a "casual link" between the employee's protected activity and the adverse employment decision. The closer of the "temporal proximity" between the employer's knowledge of the protected activity and the adverse employer action, the more likely it is to be found a motivating factor regarding the causation element. If the plaintiff is able to establish a prima facie case, the employer must respond with evidence of a nondiscriminatory reason for the employer's action against the plaintiff. The plaintiff then has the right to rebut the employer's asserted reason for its action as "pretextual".

⁸³ 603 F.3d 472 (8th Cir. 2010).

⁸⁴ *Id.* at 475.

⁸⁵ *Id.*

⁸⁶ *Id.* at 474.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 477.

⁹⁰ *Id.*

⁹¹ *Id.*