On the Legal Front

What Is All the Fuss About? The Implications of the EEOC Deterrence Standard After *BNSF v. White*

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Column Editor's Note: In my October column, I asked for volunteers to speak on various questions I posed related to retaliation. Eric Dunleavy not only spoke up, but wrote an article so special and refreshing that I felt it worthy of a guest column.

As Art described in his last TIP column, the *Burlington Northern Santa Fe (BNSF) v. White* (2006) ruling may affect the frequency and scope of retaliation claims in the future. I contacted Art after the ruling, wondering how this case would affect the second phase of a retaliation claim. I was curious about how "actionable claims" would be defined in employer retaliation cases and how the EEOC and triers of fact could demarcate between trivial and actionable complaints under the new EEOC deterrence standard as the law of the land. This article wrestles with those issues by (a) discussing the difference between "trivial" and "actionable" under the EEOC deterrence standard, (b) considering whether this shift to a deterrence standard is consequentially different from the adverse employment standard, and (c) determining whether retaliation claims will substantially increase under this new standard.

Why Have Retaliation Claims Been on the Rise?

Employer retaliation has recently become a significant topic in employment litigation because retaliation claims have been on the rise; for example, EEOC statistics suggest that retaliation claims have almost doubled since 1992 (Zink & Gutman, 2005). This increase may be due to a number of factors. One potential reason that retaliation claims are on the rise is that retaliation is happening more often, perhaps because employers have a better understanding of the financial and organizational reputation costs associated with traditional discrimination claims and litigation under section 703 of Title VII and take more action to dissuade these claims or forms of opposition. An alternative explanation is that claims are increasing because employees are reporting retaliation more often, perhaps because they are more aware of their protected rights due to the media, the EEOC, lawyers, and so forth.

A number of experts from the I-O realm have suggested other possible explanations for the increase in retaliation claims. For example, Outtz (2005) suggested an increase in retaliation claims may be partially due to (a) broader protection across protected classes under section 704 of Title VII (as compared with section 703) and the (b) EEOC policy of expedited investigations into retaliation claims. Malos (2005) suggested this increase may be partially due to larger damages available under statutes other than Title VII (e.g., 42 U.S.C. 1981, state laws, etc.). A fourth potential reason why these claims have increased in frequency concerns expansion of actionable employer behavior.

It is important to consider that a definition of "adverse" employer action is a socially derived notion and, like all such notions, is partially a function of the sociopolitical context of the times. During the last decade we have witnessed a sociopolitical movement toward defining adverse in the retaliation setting as broader than ultimate employment outcomes. For example, in the late 1990s adverse actions were expanded to include employer behavior outside of the employment setting (see *Berry v. Stevinson Chevrolet*, 1996). Soon after, protection from adverse retaliatory action was generalized to former employees (see *Robinson v. Shell Oil*, 1997). More recently, triers of fact began to take into consideration the context of the action (see *Ray v. Henderson*, 2000; *Hoffman-Dombrowski v. Arlington Intl Racecourse*, 2001; *Scott-Brown v. Cohen*, 2002), regardless of the standard of adverse behavior used.

Also consider that court rulings in the last decade have influenced the internal complaint and grievance mechanisms organizations make available to their employees (see *Faragher v. City of Boca Raton*, 1998, and *Burlington Industries Inc. v. Ellerth*, 1998). After these cases, antiharassment policies, internal complaint processes, and grievance mechanisms were essentially required to defend against claims of harassment. Specifically, employers may avoid liability by showing they exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided. Consequentially, complaint and grievance procedures were substantially more available to employees.

Before these landmark cases, complaints may not have been made immediately after an initial discriminatory action, and a "protected activity" may not have occurred until the EEOC was contacted. Now, the vast majority of complaints occur via internal grievance processes much earlier than EEOC complaints, and, consequentially, employers are aware of who makes a complaint sooner. Because of this earlier awareness, claimants may have more time to experience a retaliatory action. Thus, even before the *BNSF* ruling, the recent expansion of retaliatory protection combined with internal complaint and grievance requirements suggests that statute enforcement and interference with that enforcement was paramount to the sociopolitical zeitgeist.

Because previous case law had suggested lateral transfers to less prestigious and skillful work and temporary suspensions for insubordination may be considered adverse, those familiar with the case expected Sheila White would win without the EEOC deterrence standard. Given the recent expansion of the notion of what constitutes substantial interference with statute enforcement, perhaps we shouldn't have been surprised the EEOC deterrence standard was used. So, will the EEOC deterrence standard as applied to retaliation change what is trivial and what is actionable? As Art suggested, there is a clear conceptual distinction between these two standards, but no one is sure whether a practical distinction exists.

Reactions to BNSF

The popular press and employment blogs have offered interesting reactions to *BNSF*. For example, more than a few employment law newsletters and blogs have suggested that the more liberal EEOC deterrence definition of adverse may create a scenario where employers are defenseless against retaliation claims and have no way of preventing them. That is to say, just about any action an employer makes after an employee complains about an employment practice or charges discrimination may be considered an adverse employment action as "reasonably likely to deter." Still others imply that weak discrimination claims under section 703 of Title VII might now allow for much stronger 704 claims. These reactions, of course, are in stark contrast to those of the EEOC, who is an obvious proponent of the deterrence standard.

The first round of retaliation rulings after *BNSF* will be critical to understanding how trivial and actionable employer behaviors are now defined by the courts. Because these aren't yet available, I considered what sources might help us to predict the potential implications of the EEOC deterrence standard in differentiating trivial from actionable. A return to the compliance manual that originally codified the EEOC deterrence standard seemed to be a reasonable starting point.[1] In addition, some triers of fact in the 7th, 9th, and D.C. circuit courts have been using the EEOC deterrence standard well before *BNSF*. Case law from these circuits may provide a narrow body of rulings to consider in understanding the implications of this standard relative to the adverse employment standard.[2]

A Quick Review of the Adverse Employment Standard

The most popular standard used in retaliation claims prior to BNSF was adverse employment (Gutman, 2006), which defines adverse action as "any

[1] This is available on their Web site at www.eeoc.gov/policy/docs/retal.html.

[2] It is worth mentioning the EEOC is certainly willing to talk about the implications of *BNSF v. White*. After a few calls to the EEOC I was put in contact with an associate general counsel who had worked on a *BNSF v. White* brief when the case was in the 6th circuit. We have had informative conversations about the case and its implications.

action that materially changes the terms, conditions, and privileges of employment." This standard has covered numerous employment actions that are less tangible in nature as compared with ultimate employment decisions like discharge or promotion, including:

- actions designed to interfere with a former employee's prospective employment (e.g., *Robinson v. Shell Oil Co*., 1997)
- negative changes to performance appraisal (e.g., *Winarto v. Toshiba American Electronics Components,* 2001)
- increased employee surveillance (e.g., *EEOC vs. Navy Fed. Credit Union*, 2005)
- denial of sick time use for maternity leave (*Scott-Brown v. Cohen*, 2002)
- denial of common "hardship transfer" to care for a dying parent (*Randlett v. Shalala*, 1997)

The EEOC Deterrence Standard and Compliance Manual

In the late 1990s, a number of courts ruled that retaliation provisions required ultimate employment outcomes to be actionable (e.g., *Lederberger v. Stangler*, 1997; *Mattern v. Eastman Kodak Co*., 1997). Partially in response to these decisions, the EEOC formally advocated a "reasonable person deterrence" standard of actionable retaliatory behavior in their 1998 compliance manual. This standard defined actionable employer behavior as "any action reasonably likely to deter the charging party from engaging in a protected activity." Note that this definition does not necessitate material changes in the terms, conditions, and privileges of employment like the "adverse employment" standard, as Art summarized in his last column. Although these material changes will likely be sufficient to meet the EEOC deterrence standard, this standard also allows for immaterial changes to be considered. In defining deterring action, the manual provides guidance on what is deterring and what is not. Deterring actions include:

- threats
- reprimands
- negative performance evaluations
- harassment
- suspending or limiting access to an internal grievance
- giving an unjustified negative job reference
- refusing to provide a job reference
- informing an individual's prospective employer about the individual's protected activity
- putting an employee under surveillance

Note that the vast majority of these examples would likely be considered conditions or privileges of employment as defined by the adverse employment standard. The manual then states that "petty slights and trivial annoy-

ances are not actionable, as they are not likely to deter protected activity." The manual also differentiates an actionable example of employer behavior from a trivial one: Excluding an employee from a regular weekly lunch with professional development opportunities after a discrimination complaint would be actionable, although excluding an employee from a single lunch after a claim would be trivial and not reasonably likely to deter a protected activity. Elsewhere on the EEOC Web site,[3] trivial actions are exemplified as:

- stray negative comments in otherwise positive or neutral evaluations
- snubbing a colleague; and
- negative comments justified by poor performance or history.

In comparing the lists of deterring and trivial actions, there appears to be a distinction based on the subjective magnitude of deterrence. Note that some of these examples represent immaterial actions, which necessitate a subjective judgment of deterrence magnitude. However, subjectivity may also be required to determine what actions affect the conditions and privileges of employment used in the adverse employment standard.[4] As expected, the manual cannot provide an exhaustive laundry list approach to retaliation because forms of retaliation are, as the case law has demonstrated, essentially unlimited.

Some Case Law to Consider

A review of cases from circuits that have used the EEOC deterrence standard offered some insight. Unfortunately, I found no "smoking gun" case where an action was deemed trivial under adverse employment and actionable under EEOC deterrence.[5] However, I was able to identify a trend or two by comparing actions deemed trivial in some cases to actions considered actionable in others. The following cases illustrate trivial actions under EEOC deterrence:

- In *Pinero v. Specialty Restaurants Corp* (2005), the court ruled that criticisms about work performance in the form of "nitpicking" are not reasonably likely to deter. The court decided this action met neither adverse or EEOC deterrence standards.[6]
- In *McRae v. Department of Corrections* (2005), (a) a letter of instruction, (b) internal performance investigation, and (c) interfacility transfer were deemed trivial. This court also presented the following examples as trivial: (a) changing offices, (b) having additional responsibilities, (c) having more employees added to a unit, (d) a new dress code, and (e) a change in opening or closing time. The court eventually differentiated "materially less desirable" from "somewhat less than pleasant."

[3] eeoc.gov/types/retaliation.html

[4] "Terms" of employment generally capture material employment outcomes like promotion, discharge, and so forth.

[5] If anyone knows of a case where this occurred, I would love to hear about it.

[6] Note that this court eventually decided to use the adverse employment standard but considered whether the action was trivial under both standards.

- In *Herrnreiter v. Chicago Housing Authority* (2002), a lateral transfer was deemed trivial because it was considered consistent with the experience and ability of the plaintiff. The court held that it appeared the plaintiff was “sulking” after being transferred.
- In *Brooks v. City of San Mateo* (2000), the court held that declining to hold a job open for an employee and badmouthing an employee outside the job reference context did not constitute actionable employer behavior. Further, ostracism suffered at the hands of coworkers did not constitute a deterring action. Moreover, having to go to a training session that all city employees were required to participate in was also not considered deterring. In addition, working with an employee that made the plaintiff feel uncomfortable, when all employees had to work with that employee equally, was also not considered deterring. Lastly, an unfavorable shift and denial of vacation preference was also considered trivial because these actions were not final, and when the plaintiff complained, the defendant accommodated plaintiff preferences by allowing her to switch shifts and vacation dates with other employees.

In contrast to the above cases, the following cases illustrate actions that were considered reasonably deterring under the EEOC deterrence standard:

- In *Rochon v. Gonzalez* (2006), deterring behavior took the form of death threats made by a federal prisoner toward an FBI agent plaintiff’s family; this action was likened to the IRS retaliating against an employee with an audit.
- In *Noviello v. City of Boston* (2005), the following chronology of actions was deemed, in sum, to be reasonably deterring: false accusations, general harassment (“do you smell a rat” comments), ostracism at a holiday party, suggested shift changes, and being told by a supervisor to eat alone.
- In *Ray v. Henderson* (2000), withdrawn permission to start and end work earlier than scheduled shift was considered reasonably deterring. The plaintiff had previously been given the OK to work earlier in the day so he could care for his sick wife later in the day.

What Can We Take Away From These Cases?

Although none of the above cases offer a “smoking gun” case that clearly differentiates actionable behavior under EEOC deterrence that might be trivial under the adverse employment standard, they may foreshadow such differences.

First, a number of cases described in this article have considered whether slight changes to work schedules were reasonably deterring or adverse. In some of these cases, specific work schedules affected care for family members such as children, parents, or sick relatives. In some cases the schedule

change had clear material implications (i.e., the cost of external care), but in others the implications were immaterial yet deemed reasonably deterring (i.e., less time with a sick loved one). Employer action that affects family care may become the prototypical example of actions where context matters regardless of materiality. Note that these family care responsibilities often fall to women. According to the EEOC, the deterrence standard specifically allows for such contextual consideration. As such, slight changes to a work schedule might be reasonably deterring to a mother with a disabled child in need of care or to an employee trying to visit with a sick family member in the hospital. The notion of context will likely increase in importance under the EEOC deterrence standard and may become an important factor in differentiating actionable from trivial.

Second, the potential implications of aggregating the effect of multiple individual retaliatory actions upward in deterrence magnitude may also be important in future cases. Although individual immaterial acts may be considered trivial, they may, over time, sum to the effect of reasonably likely to deter. In other words, courts may find that individual immaterial acts that are not deterring may be actionable collectively if they are part of a pattern of systematic retaliatory behavior. This aggregation issue may also become an important factor in differentiating actionable from trivial.

Conclusions

So, will application of the EEOC deterrence standard substantially increase the number of retaliation claims in the future? If I had to guess right now, probably not.[7] Actionable retaliatory behavior has expanded in the last decade, and although the EEOC deterrence standard may subsume some immaterial actions that the adverse employment standard may not, I am not sure what those actions are based on available case law. In other words, if there is a substantial difference between an action that is "reasonably likely to deter the charging party from engaging in a protected activity" and an action that "materially changes the terms, conditions, and privileges of employment," **I haven't found it yet**. Perhaps future cases will make this distinction, and perhaps this distinction will involve the context and aggregation issues described above. Perhaps this distinction will never exist in practice.

There are other reasons why the adoption of the EEOC deterrence standard might not substantially affect the frequency of retaliation claims. First, some of the above cases came from the 9th circuit, which represents the northwest portion of the country, including California, and handles around 20% of our nation's litigation. It is also one of the circuits that has been using the EEOC deterrence standard in recent years. If the 9th and similar circuits that have been using the EEOC deterrence theory aren't overwhelmed by investigating trivial actions, why would others?

[7] The EEOC agrees.

Second, in Phase 3 of demonstrating retaliation, claimants must still demonstrate a causal nexus between the employee complaint or opposition and reactive employer behavior that is reasonably deterring. This is something that the EEOC strongly considers in its investigation stage. Even after an action is deemed reasonably deterring, the claim may be thrown out because the claimant (a) experienced similar nondiscriminatory actions before making a complaint or opposing an action, (b) the organization has a reasonable nonretaliatory explanation, or (c) the nondiscriminatory action is common and most employees experience it at one time or another.

Third, according to the EEOC, the vast majority of retaliation claims, at least under Title VII, still generally involve ultimate standards like discharge or suspension. Thus, if a tangible difference exists in the implications of deterrence versus adverse standards, it may not affect the vast majority of cases.

Finally, as described by Zink and Gutman (2005), the EEOC is very good at differentiating meritious claims from frivolous ones. For the EEOC deterrence standard to function as the EEOC intends, the EEOC will have to continue to effectively combine objective information and subjective judgment to differentiate trivial from actionable.

I would imagine employer retaliation will receive some attention at the SIOP conference in New York this year. Perhaps by then more case law will be available to determine whether the EEOC deterrence standard substantially changes what is "trivial" and what is "actionable" in practice.

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