

## Multi-Million Dollar Jury Verdicts Serve as Reminder to Beware of Retaliation Claims

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In 2006 the Supreme Court's decision in *Burlington N. & Santa Fe Ry. Co. v. White* changed the standards for evaluating Title VII retaliation claims. Prior to the *White* decision, employees in some circuits could recover only when they demonstrated that they suffered an adverse and ultimate employment decision, such as being fired or other actions affecting the terms and conditions of their employment, in retaliation for the employee's complaint of discrimination (or participation in other protected activity). As a result of the *White* decision, the scope of actionable conduct under Title VII's anti-retaliation provision was expanded, allowing employees to recover with evidence of other minor, materially adverse actions as long as such actions would deter a reasonable employee from pursuing a complaint of discrimination.

Not surprisingly, the number of retaliation charges filed with the EEOC has increased significantly since *White* was issued. In fact, the number of retaliation charges rose from 22,555 in 2006 to 26,663 in 2007 (an 18.2% increase), and to 32,690 in 2008 (a 45% increase over claims brought in 2006). These are significant increases compared to the mere 1.2% increase in retaliation charges brought in the year before *White* was decided. These claims translate to significant awards and settlements by employers. In 2008, the EEOC recovered more than \$111 million in connection with retaliation claims (this figure does not include settlements and verdicts obtained through litigation removed from the EEOC). These statistics, along with two recent multi-million dollar jury verdicts, serve as a stark reminder of how retaliation claims can often lead to significant judgments against employers, even in cases where the employees fail to prove their primary discrimination claim.

### **\$4.6 Million Dollar Jury Verdict Allowed to Stand**

In *Monteiro et al. v. City of Cambridge* (a recent Massachusetts state court decision), the defendant city filed a motion for summary judgment as to the various claims brought by the plaintiffs, including for retaliation. The city's motion was allowed in part and denied in part, based upon the evidence each plaintiff presented and the applicable legal standards for racial discrimination and retaliation claims. Thereafter, the case went to trial on all counts of plaintiff-Monteiro's complaint, in which she alleged disparate treatment on account of her race and national origin (Cape Verdean), including alleged disparity in pay and refusal to recommend her candidacy to a city affiliated graduate school scholarship program. The jury rendered a verdict in the plaintiff's favor on the retaliation claim only, finding that the city retaliated against her after she lodged a discrimination complaint in 1998. The jury awarded the plaintiff nearly \$4.6 million in compensatory and punitive damages, and the Court awarded her over \$600,000 in pre- and post-trial interest, along with attorneys' fees and costs.

The city challenged the jury's verdict on a motion for judgment notwithstanding the verdict and filed a motion for new trial (or alternatively to reduce the verdict), contending that the jury had no basis to infer causation or animus because five years separated the filing of plaintiff's discrimination complaint and her termination. Ordinarily, a retaliatory motive may be inferred from temporal proximity alone where the adverse action occurs very shortly after the protected activity. However, the greater the time between the protected activity and the adverse employment action, the more the plaintiff must rely upon other evidence beyond temporal proximity to establish a causal connection between a complaint and a subsequent termination. In *Monteiro*, the defendant argued that because the jury failed to award the plaintiff damages for any intermediate employment actions

between the 1998 complaint and the 2003 discharge, such actions could not be “materially adverse” since they did not produce any injury or harm as required by *White*.

The Court rejected the city’s challenges to the verdict, including the city’s interpretation of the Supreme Court’s holding in *White*. In doing so, the Court noted that the *White* decision does not require an evaluation of the level of seriousness to which the injury or harm must rise before liability can attach and damages can be awarded. Rather, according to *White*, a court must determine whether an action constitutes legally actionable retaliation by evaluating whether the action would dissuade a reasonable worker from making a charge of discrimination. Based upon this analysis, the Court held that because the jury found that the plaintiff endured materially adverse actions between her discrimination complaint and termination, she proved her case of retaliation, despite the fact that the jury did not award her any specific monetary damages for the retaliatory intra-employment actions. These “materially adverse” actions included documenting a complaint against the plaintiff without informing the plaintiff; removing some of the plaintiff’s responsibilities; forwarding to the police commissioner a newspaper article in which the plaintiff was quoted about racial profiling occurring in the police department; and launching a one-year investigation into the plaintiff’s performance on the police review board.

The Superior Court likewise rejected the city’s argument that punitive damages could not be awarded for the city’s post-complaint conduct where the jury found that the employment actions did not produce any injury or harm to the plaintiff. Again, in denying the city’s post-trial motions, the Court held that because the jury affirmatively found that the city’s conduct was retaliatory, punitive damages could be awarded even where the plaintiff sustained no compensatory damages as a result of the conduct.

### **Jury Awards Former Employee \$3 Million in Damages**

A Federal Court jury in Colorado recently awarded plaintiff Jennifer McInerney, a former United Airlines ramp-services supervisor, \$3 million in damages after finding that she was retaliated against due to her complaint of sex discrimination. The former employee became pregnant in May 2005, and requested consideration for alternative positions because she anticipated complications with her pregnancy. She claimed that she was denied alternative positions because she was a pregnant woman and complained in December 2005 that United’s failure to consider her for open positions was discriminatory. Her son was born 11 weeks premature in November 2005 and she took family and medical leave, vacation leave and sick time until her available time off expired in March 2006. United denied her request for additional unpaid leave, and instructed her to return to work in March 2006. When she did not return to work, United terminated her employment. United contended that there was a shortage of ramp supervisors, and that when the plaintiff requested additional leave, the company could not hold her job open any longer.

As in the *Monteiro* case, the jury found that the plaintiff failed to establish her underlying discrimination claim. Rather, the jury found that the plaintiff was terminated in retaliation for the gender discrimination complaints she made in December 2005. Although it is unclear what ultimately led the jury to reject the plaintiff’s discrimination claim, yet credit her retaliation claim, the jury’s decision provides a general warning to employers to use caution when considering requests for leave or other accommodations and to avoid taking adverse actions against employees in such circumstances, particularly following an employee’s complaint of discrimination.

## General Guidance

The importance of avoiding exposure to retaliation claims is highlighted by the fact that in both *Monteiro* and *McInerney* the respective juries found in favor of the defendant-employers on the underlying claim of discrimination, but determined that the employers' post-complaint actions were retaliatory. As a result, liability was created for the employers which, perhaps, could have been avoided by making appropriate employment decisions concerning those employees following their complaints. In essence, in cases such as this, the retaliation claims have become the proverbial tail wagging the dog, and are exposing employers to multi-million dollar verdicts when they did not discriminate against the employee in the first instance. Given the increasing frequency of retaliation claims since the *White* decision, and the higher likelihood that retaliation claims will go to trial, employers should not take the potential for retaliation claims lightly when making employment decisions about employees engaged in protected activity. Rather, employers are encouraged to evaluate their current anti-discrimination policies and take steps to ensure that they do not inadvertently expose themselves to liability for a retaliation claim. In particular, employers can:

- Revise and/or develop policies to ensure that they contain an express prohibition against retaliation and describe the consequences of violating the prohibition against retaliation;
- Encourage employees to report complaints of retaliation, report actions believed to be retaliatory and provide alternative channels for complaints to be reported;
- Educate and train supervisors and employees alike on anti-retaliation policies to ensure that employees understand that retaliation against individuals who engage in protected activity is illegal and strictly against company policy;
- Involve counsel or human resource management in any employment actions impacting employees who have raised complaints of discrimination or engaged in other protected activity;
- Consider carefully whether job transfers, shift changes or changes in employee's responsibilities following a claim for discrimination are appropriate or necessary, and whether they might deter a reasonable employee from engaging in protected activity;
- Maintain files concerning the claim of discrimination separate from any personnel file, so that only those personnel with a need to know have access to and knowledge of the complaint;
- Whenever possible avoid having a supervisor conduct the employee's evaluation, who is involved in (or accused of) the discriminatory action, and consider whether a supervisor who is not privy to the employee's complaint or protected activity can properly evaluate the employee;
- Act consistently in enforcing anti-retaliation policies as well as in enforcing any other workplace policies; and
- Evaluate and document all employment actions taken against employees carefully, including the legitimate business reasons for such actions, while avoiding targeted monitoring of such employees, which is inconsistent with the treatment of other similarly situated employees.