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Employment Law Alert
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The Second Circuit Revisits Legal Standard for Retaliation Claims

On August 7, 2023, the U.S. Court of Appeals for the Second Circuit in *Carr v. New York City Transit Authority* (No. 22-792-cv, 2023 WL 5005655) ("*Carr*") revisited and clarified the appropriate legal standard for analyzing claims of retaliation under Title VII of the Civil Rights Act of 1964. The Second Circuit held that employees have broader protections under Title VII's anti-retaliation clause than they do under the anti-discrimination clause of the same statute. We discuss some important aspects of this decision below.

Background

Title VII of the Civil Rights Act of 1964 forbids employers from discriminating against any individual on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. This provision ("the anti-discrimination clause") seeks to provide protections in workplaces so that employees are not discriminated against on the basis of protected characteristics. Title VII also forbids employers from retaliating against employees who file or participate in claims involving unlawful employment discrimination under the statute. 42 U.S.C. § 2000e-3(a). This provision ("the anti-retaliation clause") is intended to allow employees to secure their statutory rights without suffering adverse consequences for their actions.

Jennifer Carr, a Black woman of Caribbean descent, sued the New York City Transit Authority ("Transit Authority") under Title VII's anti-discrimination clause because she was passed over twice for promotion in favor of younger non-Black employees. Carr also claimed that the Transit Authority retaliated against her for complaining about discrimination. Judge Broderick of the U.S. District Court for the Southern District of New York dismissed both claims, and a panel of the Second Circuit comprising of Judges Pooler, Parker, and Nathan unanimously affirmed. Although courts typically use the familiar *McDonnell-Douglas* burden-shifting framework for assessing claims under both the anti-discrimination clause as well as the anti-retaliation clause, the Second Circuit in *Carr* pointed out that the burden-shifting framework for analyzing claims under the anti-retaliation clause is distinct and broader in scope.

Analyzing Claims of Discrimination and Retaliation

Under the *McDonnell-Douglas* framework in the anti-discrimination context, the plaintiff must first establish a *prima facie* case of discrimination. Once this is established, the burden shifts onto the employer to "articulate some legitimate, nondiscriminatory reason" for their conduct. If the employer articulates this reason, then the burden shifts back to the plaintiff to show that the proffered reason is pretextual. Claims under the anti-retaliation clause have a similar structure. If the plaintiff establishes a *prima facie* case of retaliation, then the employer must offer a "legitimate non-retaliatory reason" for the complained conduct. If the employer does so, then the plaintiff must demonstrate that "desire to retaliate was the but-for cause" of the complained conduct. *Chen v. City Univ. of New York*, 805 F.3d 59, 70 (2d Cir. 2015).

The Scope of the Anti-Retaliation Clause

Notwithstanding this similarity between the structure of these two clauses, the Second Circuit observed that "the definition of 'adverse action' in the Title VII antiretaliation context is broader than in the antidiscrimination context." *Carr*, *supra*, at 10-11. Following the decision of the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006), the Court held that the protections afforded by these two clauses are "not coterminous and should be interpreted differently." *Id*. at 11. The scope of the anti-retaliation clause is not confined to "workplace-related or employment-related retaliatory acts and harm," *id*. (cleaned up), but extends to

an employer's actions outside the workplace. This means that an employer's conduct outside the workplace context, such as bringing civil actions or making statements to the media or governmental authorities, could potentially fall within the scope of this anti-retaliation clause.

To establish a *prima facie* case under the anti-retaliation clause, plaintiffs are required to demonstrate that "the retaliatory actions . . . were materially adverse, meaning that the actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id*. at 12 (cleaned up). The plaintiff could make out a *prima facie* case either by pointing out a single action by an employer or multiple actions that were in the aggregate "materially adverse." *Id*. at 13. Under the revised *McDonnell-Douglas* framework within the retaliation context, the plaintiff is required to "demonstrate that (1) she engaged in protected activity, (2) the defendant was aware of that activity, (3) she was subjected to a retaliatory action, or a series of retaliatory actions, that were materially adverse, and (4) there was a causal connection between the protected activity and the materially adverse action or actions." *Id.*

The Second Circuit clarified that plaintiffs are not required to show that employer's acts of retaliation were "sufficiently severe and pervasive that they altered the terms and conditions of . . . employment." *Id*. at 13-14. Even for establishing claims of a "retaliatory hostile work environment," it suffices for a plaintiff to establish that the employer took a series of actions that "would dissuade a reasonable employee from making a complaint of discrimination." *Id*. at 16. Any action by an employer, within the workplace or without, that would dissuade a reasonable employee from complaining of discrimination would *prima facie* meet the requirement of retaliation under Title VII.

Despite lowering the threshold for demonstrating retaliation claims, the Court nevertheless held that a retaliation claim would ordinarily not succeed if an employer subjected an employee to "generally applicable workplace policies" that were in fact evenly applied to all the employees at the workplace. *Id*. at 14.

Key Takeaways

Assessing an employer's liability under Title VII's anti-retaliation clause remains a fact-intensive inquiry. Although the scope of this anti-retaliation clause remains unclear at the moment, it is imperative for employers to either formulate or clarify their company policies explicitly prohibiting retaliation. Employers are also advised to train their supervisory staff on the types of employment-related and non-employment related conduct that might potentially be construed as retaliation. Finally, in the wake of any complaint alleging discrimination, employers must take precautions to ensure that the complainant, and any other person who participates in the claim, are not subjected to any policies or rules that are not generally applicable in the workplace.

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