

Labor & Employment Practice Group

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Labor & Employment Update

Non-Traditional Retaliation Can Still Violate *Title VII*

By Nicholas Anaclerio and Keith E. Edeus, Jr.

Actionable Title VII retaliation is not limited to firings, demotions, pay cuts or other obvious forms of workplace punishment. Other, more insidious types of retaliation, particularly those that exploit an employee's special vulnerabilities, may also be illegal. If an action would have dissuaded a reasonable worker from making or supporting a discrimination charge, it may render an employer liable for retaliation. So held the Seventh Circuit Court of Appeals in *Washington v. Illinois Department of Revenue*.

For sixteen years Chrissie Washington worked from 7 a.m. to 3 p.m. so that she could care for her son, who had Down's Syndrome. Her coworkers worked a standard 9-to-5 schedule. Beginning in 1995 some of her duties were assigned to others, and because she believed this was the result of race discrimination, she filed a formal charge. Shortly afterward her employer rescinded her flexible schedule and reassigned her to a new supervisor who required her to work 9-to-5. She sued under Title VII, attacking the schedule change as illegal retaliation for her original race discrimination charge. The trial court dismissed her case, holding that the change in her hours, absent any alteration in her salary or duties, was not a sufficient "adverse employment action" to sustain a claim of Title VII retaliation. But the Seventh Circuit Court of Appeals overturned this decision.

On appeal, the Seventh Circuit initially rejected Washington's argument that she need not show an adverse employment action to support a claim of retaliation. The Court reasoned that a materiality requirement is built into Title VII's prohibition of "discrimination." Because retaliation is merely one form of discrimination, it follows that this materiality requirement governs retaliation claims. The Court explained that to hold otherwise would be to permit retaliation claims for any perceived slight, no matter how *de minimis*.

But the Seventh Circuit also held that what constitutes a "materially adverse" retaliatory action depends upon a case's individual circumstances, including the peculiar idiosyncrasies or vulnerabilities of an employee that are known to, and arguably exploited by, her employer. Thus an employer is not free to retaliate against employees in ways that would be harmless to most workers but which it knows will do real harm to the targeted employee. While a change in work hours unaccompanied by any change in pay or promotion opportunities would rarely be actionable for most employees, if the same change could dissuade a particular employee from filing or prosecuting a claim of discrimination it could be actionable retaliation. Thus, where an hours change inflicted peculiar harm to a particular employee, and the employer knew this, it could constitute the basis for a retaliation claim.

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In reviewing the district court's summary judgment against plaintiff Chrissie Washington, the appellate court was bound to review the evidence in the light most favorable to her. Doing so, it concluded that her employer's change of her hours could be a material adverse job action and support her claim of Title VII retaliation. Based on the record evidence, the appellate court found that a jury could find that Washington's employer intentionally and illegally set out to exploit the known vulnerability her child care circumstances created. Consequently, the Court reversed the summary judgment against her and remanded her case for a trial.

While Title VII retaliation most frequently takes the form of obvious workplace punishment (firings, pay cuts, or refusals to promote), the *Washington* case makes it clear that more creative, less traditional forms of retaliation can still be actionable. Employers contemplating changing the employment terms of workers who have exercised protected rights must carefully consider whether their actions may expose them to liability for illegal retaliation, whether a termination, demotion, pay cut or other recognized adverse job action is part of the plan or not.

To receive future editions of the Labor & Employment Update via email, please send your name, company or firm name and email address to Jennifer Morrison at jcmorrison@uhlaw.com

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