

The Right to Complain

The boss retaliated when you claimed discrimination? A new ruling makes him pay.

BY JUSTINE F. ANDRONICI AND DEBRA S. KATZ

CLARISE (A COMPOSITE OF several women) works at a large auto dealership. After a week on the job, her new boss comes up behind her and massages her shoulders. He tells her he likes the way she moves and invites her to have drinks with him at a nightclub. She declines. The next day, he tells her she looks "hot" and asks her out for a drink after work. Once again, she says no. Then she reviews her company's sexual harassment policy and reports him to the owner. Soon afterward, her boss begins to behave in a hostile manner, excluding her from meetings, using a nasty tone of voice and assigning her to wash all the cars in the lot.

Janice (also a composite) is a manager at a Fortune 500 company. She overhears her supervisor making racist comments about her and other African American employees. She complains about these statements to the human resources representative, and days later her supervisor removes her from high-profile projects and begins criticizing her work. A month later, he gives her the first-ever negative evaluation of her 11-year career with the company.

Until recently, Clarise, Janice and others who complained about discriminatory practices at work—whether involving sexual harassment or based on gender, race, age, religion, national origin or disability—were often not afforded adequate

protection under the anti-retaliation provisions of Title VII and other federal laws that prohibit workplace discrimination. Those provisions are especially important in cases like those above, where the conduct an employee complains about, while discriminatory, might not rise to the level of violating Title VII or other federal antidiscrimination statutes.

In fact, until recently many courts routinely refused to find an employer liable for retaliation unless the retaliatory action involved an "ultimate" employment decision such as termination, demotion or reduction in pay.

Even exclusion from lunch invitations at the workplace can support claims of retaliation.

This allowed employers to take less-than-ultimate actions that, nonetheless, were designed to deter complaints or drive out those who complained.

Fortunately, thanks to a landmark U.S. Supreme Court ruling issued last summer, women like Clarise and Janice now have a powerful new legal tool to combat discriminatory treatment and retaliation.

Burlington Northern & Santa Fe Railway Co. v. White concerned a woman who was reassigned to less desirable duties and later suspended after complaining about sexist statements made by her supervisor. The court pointed out that such reassignments, suspensions and, under some

circumstances, schedule changes, could be sufficient to support a claim of retaliation. So, too, could exclusion from invitations to lunch and, by extension, shunning at the workplace. The court held that employers may be liable for retaliation when they engage in actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

This new and more expansive understanding of retaliation has opened the door for employees to take legal action against employers who engage in a range of intimidation tactics.

Post-*Burlington*, employers may pay a price if they're not careful to protect those who complain about discrimination at work. ■

If subjected to discrimination or retaliation at work, you may file a complaint with the Equal Employment Opportunity Commission or any EEOC referral agency in the state where you are employed. See www.eeoc.gov for more information.

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