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Is It Retaliation? Exploring the Line Between Justified and Adverse Actions

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Courts reviewing whistleblower retaliation claims generally apply the standard developed in Title VII retaliation cases to determine whether actionable retaliation has occurred. That standard, announced by the Supreme Court in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), requires proof that an employer has taken actions "that would have been materially adverse to a reasonable employee" and "harmful to the point that they could well dissuade a reasonable worker from making or supporting" a complaint about his employer's unlawful conduct.

The Department of Labor Administrative Review Board (ARB) has held that the anti-retaliation provisions in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(a), and the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, are broader than the Title VII provision discussed in *Burlington Northern*. Both whistleblower statutes state that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment," *id.*, whereas Title VII's retaliation provision, 42 U.S.C. § 2000e-3, makes it unlawful "to discriminate" against employees or applicants who engage in protected conduct.

Based on the textual differences in the provisions, the ARB has concluded that, because the whistleblower statutes explicitly prohibit nontangible activity, a broader spectrum of actions are unlawful, and the appropriate standard for judging an adverse action is thus an unfavorable employment action "that [is] more than trivial either as a single event or in combination with other deliberate employer actions alleged." *See Williams v. America Airlines, Inc.*, ARB Case No. 09-018 (2010); *Menendez v. Halliburton, Inc.*, ARB Case Nos. 09-002, 09-003 (2011).

The Menendez Case

The 5th Circuit specifically disapproved of the standard used in *Menendez* and held that the *Burlington Northern* standard applies to SOX actions in that circuit. See *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 260 & n.5 (5th Cir. 2014) (citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.2 (5th Cir. 2008)). The analysis of the challenged actions in this case help to illustrate the overlap in these approaches.

Menendez provided information about Halliburton's accounting practices to the SEC, to various supervisors and company officials, and to Halliburton's audit committee, and participated in the subsequent SEC investigation. He alleged that Halliburton retaliated against him by

1. Breaching confidentiality and telling company officials of his SEC and internal audit complaints
2. Isolating him, removing his duties and demoting him
3. Constructively discharging him.

The ARB found the breach of confidentiality to be an adverse action; the isolation, removal of duties and demotion to be consequences of the breach, but not separately actionable; and the claim of

constructive discharge to be lacking because Menendez resigned rather than return after six months of paid leave – based on fear of future harm and not present intolerable circumstances.

The 5th Circuit affirmed the ruling on breach of confidentiality, holding that such a breach would satisfy the *Burlington Northern* deterrence standard, and also held, as did the ARB, that the resultant ostracism was an inevitable consequence of that breach. The court, however, seemed to suggest that the ostracism itself was actionable because it had further tangible consequences of interfering with Menendez's ability to do work with his colleagues and then being chastised for not being a "team player." 771 F.3d at 262. As the court of appeals put it, the employer's disclosure of the whistleblower's identity and "thus targeted creation of an environment in which the whistleblower is ostracized is not merely a matter of social concern, but is, in effect, a potential deprivation of opportunities for future advancement." *Id.* Ostracism created by employer's targeted disclosure "well might dissuade a reasonable employee from whistleblowing." *Id.*

In short, the adverse actions alleged in this case satisfy either standard.

Other Cases Evaluating Adverse Actions

Does it make a difference whether the ARB or the court applies the *Burlington Northern* deterrence standard or the less demanding standard of any unfavorable nontrivial employment action? In application, these standards often lead to the same outcome because there is little doubt that terminations, demotions, transfers to less desirable jobs, loss of benefits and negative references would meet either standard. But there are some actions that have been held to satisfy the *Williams* standard that do not meet the *Burlington Northern* standard. Below is a review of several decisions involving adverse actions less severe than terminations or demotions, and how courts determined whether those actions constituted retaliation.

Administrative Leave with Pay

Kolchinsky v. Moody's Corp., 2012 WL 639162 (S.D.N.Y. Feb. 28, 2012): In a SOX action, after reporting potential violations of federal securities laws and SEC rules, Moody's excluded the plaintiff from department meetings, demoted him, and reduced his salary and bonus in 2007. In 2008, after he objected to a new ratings methodology, he was transferred to a support role without the possibility of promotion. Finally, in 2009 he was suspended with pay for six months and ultimately constructively terminated. Relying on 2nd Circuit precedent that predated *Burlington Northern*, the district court held all actions to be materially adverse and noted that the suspension with pay was adverse because it was motivated by retaliation, in contrast to cases where suspension was a normal incident of a legitimate investigation of alleged wrongdoing.

Guitron v. Wells Fargo Bank, N.A., 2012 WL 2708517 (N.D. Cal. July 6, 2012): In a SOX retaliation action, the plaintiff was placed on administrative leave after repeated complaints about banking practices of coworkers and managers. Applying the *Williams* standard, the court found this action sufficiently adverse to be actionable.

Molina v. Phoenix Union High School Dist., 2007 WL 1412530 (D. Ariz. May 14, 2007): In a Title VII case, a female security assistant was placed on administrative leave during an external investigation of her sexual harassment complaint. The court found she had not suffered a materially adverse action under the *Burlington Northern* standard.

Negative Performance Reviews

Kubiak v. S.W. Cowboy, Inc., 2016 WL 659305 (M.D. Fla. Feb. 18, 2016): In a retaliation complaint

under the Fair Labor Standards Act, which uses the *Burlingon Northern* standard, the court found that a write-up alone, without any indication that it was accompanied by a reduction in pay, benefits, responsibilities or some other adverse effect, was insufficient to establish an adverse employment action. The court noted that such an action, without more, would be insufficient to dissuade a reasonable worker from making or supporting a charge.

Maverick Transp. v. U.S. Dept. of Labor, 739 F.3d 1149, 1157 (8th Cir. 2014): In an action under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105(a)(1), the court held that the placement of an abandonment notation in an employee's trucking DAC report was an adverse action where it actually interfered with plaintiff's obtaining future employment.

AuBuchon v. Geithner, 743 F.3d 638, 644 (8th Cir. 2014): In a Title VII retaliation case, the court found that accelerating work deadlines, assigning extra work and failing to laud performance adequately in the narrative portion of a performance evaluation were not adverse actions because such an action must be "material, not trivial, and must produce some injury or harm."

Nichik v. New York City Transit Authority, 2013 WL 142372 (E.D.N.Y. Jan. 11, 2013): In an action under the National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142, the plaintiff alleged that, after he reported unsafe conditions to the president of the Transit Authority, he received reinstructions (a written reminder to conform his actions to the Transit Authority's requirements), marginal managerial performance reviews and disciplinary action notifications. Applying the *Burlington Northern* standard, the court held that the reinstruction, citation and performance review could all dissuade a reasonable worker from reporting hazardous safety or security conditions.

Guitron v. Wells Fargo Bank, N.A., 2012 WL 2708517 (N.D. Cal. July 6, 2012): In a SOX retaliation action, the court found that poor performance reviews were sufficient to state a claim under the *Williams* standard.

Turner v. Gonzales, 421 F.3d 688, 696 (8th Cir. 2005): In a Title VII case, the court found that a poor performance rating was not an adverse action unless it had a tangible effect on employment, as when it is used to detrimentally alter terms or conditions of employment. In this case, the court found that the negative employment report was an adverse action because it led to the denial of the employee's automatic step salary increase.

Ostracism or Exclusion from Meetings

Krause v. Nevada Mutual Insurance Co., 2015 WL 3903587 (D. Nev. June 24, 2015): In a Title VII case, the court found that issuing customer satisfaction surveys, calling for benchmark audits, canceling meetings and withdrawing management support were not adverse actions because no harm resulted, and there were no material consequences for purposes of *Burlington Northern* standard.

Halliburton v. Admin. Review Bd., 771 F.3d 254, 262 (5th Cir. 2014): In a SOX case, the court found that the undesirable consequences of a supervisor telling colleagues that the whistleblower reported them to authorities for what were allegedly fraudulent practices, thus resulting in an official investigation, were obvious: The breach led to ostracism and thus an inability to collaborate with colleagues, which in turn led to performance criticism that the whistleblower was not a team player.

Kolchinsky v. Moody's Corp., 2012 WL 639162 (S.D.N.Y. Feb. 28, 2012): In a SOX case, the court held that exclusion from meetings, demotion, reduced salary and bonuses, transfer to a support role without possibility of promotion, suspension, and termination were each adverse actions under a 2nd Circuit standard similar to the definition of material adversity in *Burlington Northern*.

Hellman v. Weisberg, 360 F. App'x 776, 778 (9th Cir. 2009): In a Title VII retaliation case, the court

held that social ostracism and threat of termination were not adverse employment actions.

Miles v. Wal-Mart Stores, Inc., 2008 WL 222694 (W.D. Ark. Jan. 25, 2008): This SOX claim involved allegations of hostile treatment by supervisors and coworkers, including destruction of the plaintiff's personal property, menacing surveillance of her activities, intimidating commentary relating to her complaints of mistreatment, ridicule, insults, and a pattern of exclusion and isolation. The court found that isolation at work and exclusion from events would dissuade a reasonable worker from supporting a complaint and was thus actionable under the *Burlington Northern* standard.

Mahoney v. KeySpan Corp., 2007 WL 805813 (E.D.N.Y. Mar. 12, 2007): In a SOX claim, the court found actionable retaliation where the plaintiff was isolated within the company, his performance evaluations were changed dramatically, and he fell out of favor with the CEO of the corporation.