

# Supreme Court Weighs Meaning of Retaliation

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Imagine being fired for not completing 50 math word problems your employer assigned you to complete in your off time. Especially knowing that the real reason you were fired was a discrimination suit you filed against your employer.

Employer retaliation is against the law.

But what constitutes "retaliation?"

That's what the Supreme Court will define when it decides on a case it agreed to hear last month.

Savannah attorney Gwen Fortson-Waring recently tried to prove a retaliation case for the above outlined scenario, but her client lost because the request didn't seem unreasonable to the jury.

"Retaliation cases can be difficult," Fortson-Waring said. "Once you make a complaint, you can't be late or absent. You really have to dot your I's and cross your T's once you file a claim."

Fortson-Waring said most discrimination cases include a charge of retaliation because to file a discrimination suit an employee has to notify the Equal Employment Opportunity Commission, which in turn notifies the employer.

"What do you think an employer's going to do?" Fortson-Waring asked. "They get mad."

The retaliation prohibition is included in the Civil Rights Act of 1964 to protect employees who complain about discrimination on the job. Various court rulings have allowed several definitions of retaliation, but none has definitively described it.

The justices will attempt to do just that when they take up a case that began in a Memphis rail yard when the only woman working in the maintenance department there complained about sexual harassment by her supervisor.

"It's been a moving target over the years," said Hunter Maclean lawyer Sarah Lamar.

She said the three-prong test for a retaliation claim starts with the employee participating in a protected activity such as filing a complaint or testifying in a discrimination suit followed by an adverse employment action. To win the case, the plaintiff must prove a causal link between the two, which usually is easier, Lamar said, than proving an actual discrimination suit.

Lamar said that discrimination cases are subjective and a worker may perceive a wrong where none can be proven. But if the employer retaliates against the worker for what he or she feels is a false claim, that could give rise to another lawsuit, as happened in Memphis.

While the sexual harassment case eventually was determined to be unfounded, the company

was found guilty of retaliation by the U.S. Court of Appeals for the 6th Circuit in Cincinnati.

The court found that the employer, the Burlington Northern & Santa Fe Railway Company, retaliated both by changing the claimant's job and suspending pay.

Within 10 days of filing a sexual harassment suit, the claimant, Sheila White, was moved from operating a forklift to the perceived less-desirable position, within the same job classification, of working outdoors on the tracks.

Three months later, after she filed a formal complaint with the federal Equal Employment Opportunity Commission, the railroad suspended her without pay. After a union grievance, she was restored to the payroll with 37 days back pay.

Now the Supreme Court will decide if the 6th Circuit correctly concluded that those events amounted to retaliation as prohibited by Title VII of the Civil Rights Act of 1964. The appeals court upheld a jury award of \$43,250 in compensatory damages to White.

In its appeal to the Supreme Court, the railroad is arguing that any injury to White was too minimal and transitory to count as discrimination.

Only "ultimate employment decisions," like dismissal or demotion, should count, the railroad argues, while "minor and interim employment actions should not be actionable retaliation."

"It does present an interesting question under Title VII law," Lamar said.

Lamar added there are three competing theories of what constitutes retaliation.

The statute, she said, prohibits employers from using a "materially adverse employment action," or something that is likely to keep other employees from complaining, testifying or participating in enforcement proceedings.

In the past, Lamar said, "retaliation" has been defined as termination of employment, denial of promotion, cut in pay, substantial change in benefits or suspension of pay.

"Some courts argue that even something less than those should be considered 'retaliation,'" Lamar said.

She said one theory, accepted by two of the 12 federal circuits to have ruled on the question, is as the railroad argued that only an ultimate employment decision should count.

Another agrees with the E.E.O.C. that an action likely to deter employees from making complaints in the future should count as prohibited retaliation.

The 6th Circuit and the eight others have defined it as a "materially adverse change in the terms of employment."

The railroad argues that even if that is the proper definition, the circumstances of this case did not satisfy the test. White's lawyers vigorously disagree, citing in their brief the finding by the judge who heard the case in federal district court in Memphis

that back pay alone could not compensate White for the "total insecurity" and depression she suffered during her suspension. Lamar said she couldn't guess how the justices will decide the case.

"These cases are so fact specific," she said. "A lot will probably depend on the facts of this particular case."

The issue is one of increasing importance in labor law, because retaliation complaints account for the fastest-growing type of discrimination case, according to an article in the New York Times. More than a quarter of all discrimination cases filed with the E.E.O.C., some 20,000 cases in 2004, allege retaliation.

Lamar said the definition could be used for other purposes or the justices could narrow the definition to retaliation cases.

"It could be really big, or it could be really narrow, depending on how the court wants to play it," Lamar said.

The important thing to remember in discrimination cases, she said, is that regardless of the validity of the claim, every worker has a right to complain.

"Even if you think you have a frivolous discrimination claim, do not retaliate," Lamar said. "Often, and in this case, the employer won the discrimination claim but lost the retaliation claim."

If an employee files a discrimination claim, the employer should closely monitor his or her treatment, she said. Employers also should make sure that their written harassment policies include a retaliation prohibition. ■



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Sarah Lamar, Employment-law Attorney, Hunter Maclean