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Retaliation Claims Likely to Grow

*By Steven E. Hoffman, Esq. and
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Over the past decade, the number of Title VII retaliation claims has steadily increased. Statistics from the Equal Employment Opportunity Commission ("EEOC"), the agency charged with investigating and prosecuting certain types of employment discrimination, show that annual Title VII retaliation claim filings increased from 15,342 (17.5% of all charges) in 1995 to 19,429 (25.8% of all charges) in 2005. This alarming increase is likely to grow even larger following a recent Supreme Court decision, which indicates something as simple as not inviting a subordinate to lunch could be the basis for a retaliation claim.

In *Burlington Northern v. White*, 126 S. Ct. 2405 (June 22, 2006), a unanimous Supreme Court made it easier for employees to establish Title VII retaliation claims. In *Burlington Northern*, the Court affirmed a lower court's ruling that the plaintiff was im-

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LEGAL UPDATE

Insights and Developments in the Law

Summer 2007

Alternative Dispute Resolution— When the Fighting Stops

By Judge Thomas A. Wallitsch (ret.)

I am pleased and honored to be practicing law as a partner at Tallman, Hudders & Sorrentino, the law firm named Best in the Lehigh Valley. After thirty-three years as a trial lawyer and then as a member of the Lehigh County Court of Common Pleas, I hope to bring another dimension to this highly professional and competent law firm. Although I am handling a variety of cases, including commercial and other civil litigation, this article will focus on a particular area of my legal practice, Alternative Dispute Resolution (ADR).

ADR comprises a wide variety of processes which can be fashioned to meet specific needs of parties in resolving disputes. These processes can be used singularly or in combination with others, but the fundamental characteristic is that they all focus on bringing disputing parties together, diffusing adversarial posturing through an impartial third party, and mutually agreeing on terms of settlement. Most disputes between parties can benefit from ADR, whether the matter involves managing community tensions or resolving multi-million dollar disputes. ADR enables flexible settlements to take account of factors other than money or property, focusing on the interests and needs of the parties and enabling the disputants to rebuild relationships.

Often, parties can negotiate a reso-

lution of a dispute on their own. However, negotiations often fail because of one or more of the following:

- (1) bad negotiation skills on the part of the parties;
- (2) lack of trust between the parties;
- (3) inability to communicate due to emotional or other difficulties;
- (4) failure to identify the real issues in dispute;
- (5) the wrong people are at the negotiating table.

With or without prior negotiation between the parties, there is a trend, both nationally and internationally, in order to have trained third party specialists involved in helping resolve the disputes. There are a number of types of alternative dispute resolution techniques that may be useful depending upon the needs of the parties and the nature of the dispute. I will describe three of them briefly and then discuss mediation with more detail.

Early Neutral Evaluation

Early neutral evaluation is a technique whereby impartial senior lawyers, former judges, or others with special knowledge or experience will evaluate the likely outcome of a case if it were to proceed to trial. Such an early evaluation is expected to lead to more realistic negotiations between the parties without any influence on the path

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Announcements

Donald A. Zamborsky was elected Secretary and voting member of the Board of Governors of Lehigh Country Club at their annual meeting. It is his second time as Secretary, having served previously from 1999-2001. Don was also a member of the Board of Governors from 1993-1997 and has been a member of Lehigh Country Club since 1981.

Oldrich Foucek, III was elected Secretary of Saucon Valley Country Club. In addition to the responsibilities conferred upon this office by statute and the Club's By-Laws, as Secretary, Ollie will provide advice to the Board

of Governors, various Committees and the Club's management. Ollie has been a member of Saucon Valley Country Club since 1984 and he's been a member of the Board since 2004.

Matthew R. Sorrentino was selected as a Pennsylvania "Super Lawyer" for 2007 by *Philadelphia Magazine* and *Law & Politics*.

Super Lawyers Selection Process: The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search

for legal counsel. No other legal publisher goes through the unique multi-step process that Super Lawyers employs to find evidence of peer recognition and professional achievement. Only 5 percent of the total lawyers in the state are selected for inclusion in Super Lawyers.

Dolores A. Laputka was recently selected by the Women's Leadership Initiative of the United Way of the Greater Lehigh Valley to receive the Women's Leadership Initiative Philanthropist of the Year award.

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TH&S Nominated as "Outstanding Corporation"

The Eastern Pennsylvania Chapter of the Association of Fundraising Professionals and the Lehigh Valley Hospital and Health Network nominated the Firm as "Outstanding Corporation" 2006. The nomination states "Over the years, it has generously given not only its time and expertise, but has been a consistent and significant charitable donor." TH&S has sponsored programs and specialty events for non-profit organizations throughout the Lehigh Valley and its attorneys serve in many capacities on the boards of Lehigh Valley's charitable organizations.

The members of the Firm were particularly humbled by the fact that prior recipients of this award include the Lehigh Valley's largest corporations, among them Air Products & Chemicals and PPL Corp.

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properly retaliated against after she complained about sexual harassment. The decision is significant because it establishes a uniform national standard for Title VII retaliation cases, replacing widely divergent standards applied by various circuit courts across the county.

Before addressing the new standard, it is important to understand the significant difference between discrimination and retaliation claims under Title VII. Title VII's prohibition against *discrimination* is expressly limited to work place conduct. It is unlawful to discriminate against an individual with respect to that individual's terms and conditions of employment. In contrast, Title VII's anti-retaliation provision prohibits *retaliation* generally against any employee or applicant who has opposed an unlawful practice or participated in a charge alleging an unlawful employment practice. Thus, the prohibition on retaliation is much broader.

Under the new standard established in *Burlington Northern*, employer ac-

tions are retaliatory (1) if they "would have been *materially adverse* to a reasonable employee or job applicant" and (2) "they could well dissuade a *reasonable worker* from making or supporting a charge of discrimination." There are two important phrases here: the first is "materially adverse," as that eliminates minor or trivial harms; the second key phrase is "reasonable worker," as that is intended to make the legal standard less subjective.

As for the application of this new standard, the Supreme Court offered examples. The most specific example is that of the plaintiff, Sheila White. White was hired for a physical laborer position. Within a short period of time she was promoted to the position of forklift driver. Subsequently, she reported that her supervisor was harassing her. The supervisor was suspended and transferred. Around this same time, White was reassigned from forklift driver back to her previous position. The laborer position, without dispute, included more menial tasks and physical labor and was less prestigious

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ADR

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or process of negotiation, nor any binding judgment imposed.

Mini-Trial

This technique generally involves counsel for the respective parties presenting formal, but abbreviated, cases to a panel of laymen (or perhaps even a smaller panel of experts) who then provide an advisory “verdict.” Based upon the “verdict”, the parties again attempt to settle the case.

Arbitration

The parties agree that one or more impartial third person(s) hear the evidence and make a decision that is binding upon all parties. Often accompanying this procedure is an agreement between the disputing parties as to what the “high” or “low” limits will be that will be paid/received in order to reduce the risk to both sides.

Mediation

Mediation is a voluntary private dispute resolution process in which an impartial third party assists the parties to reach a negotiated settlement which, when reduced to writing and signed by all the parties, becomes binding. The process itself is non-binding in that engagement in the process is voluntary. The mediator is actively involved in the negotiation process but, unlike a judge or arbitrator, has no power to impose a settlement or adjudicate the case. Rather, the mediator assists in shaping solutions to meet the parties’ interests and achieve a resolution. Mediation has emerged as the preferred ADR process for commercial and public sector disputes. The fact that mediation is gaining popularity does not mean that it will work in all cases.

Moreover, those clients wishing to consider mediation should consider carefully the experience and training of the mediators that are being considered. Mediators must be able to establish credibility and rapport with the parties, and be able to educate them about the process. Despite what many lawyers (and mediators as well!) believe, being a mediator requires “people skills” rather than merely experience in knowing what jury verdicts in similar cases have produced.

The tasks of a mediator are essentially the same regardless of the type of dispute. A mediator assists the parties in examining their interests and needs from an objective standpoint. The mediator then helps the parties negotiate an exchange of promises. Lastly, the mediator will attempt to help the parties redefine their relationship with the other parties in a way that will be mutually satisfactory and will meet their standards of fairness.

Why have mediation and other ADR techniques taken hold in the United States and internationally? First, it is based upon the belief that an individual has the right, and the obligation, to take greater control of decisions that affect his/her life. Secondly, there is a widespread dissatisfaction with court procedures for conflict resolution. There is a worry that some judges are not able, philosophically or due to lack of experience, to handle some types of cases. However, much more significant is the concern that juries, without education or training in the issues disputed, will make final decisions affecting the parties in trial. Lastly, due to an ever expanding court caseload, delay and costs rise exponentially with protracted litigation.

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in the eyes of the workers; however, the position paid the same amount as forklift driver. White was reassigned because co-workers were complaining that a “more senior man” should have the job of forklift operator. White filed a charge of discrimination with the EEOC claiming that this reassignment was both discriminatory and retaliatory.

A few days later, White was charged with insubordination and suspended indefinitely without pay following an argument with a supervisor. After investigation, White was found not to have been insubordinate and reinstated with back pay. White filed another charge with the EEOC claiming that the suspension was retaliation for her original complaint. The district court, circuit court, and U.S. Supreme Court all held that the employer’s conduct amounted to retaliation in violation of Title VII.

As for additional examples of impermissible retaliation, the Supreme Court emphasized that “context matters”, providing the example of a simple schedule change potentially being materially adverse for a young mother with school age children. A simple refusal by a supervisor to invite a subordinate to lunch could become materially adverse if the lunch were a weekly training lunch that advances the subordinate’s career.

The fallout from *Burlington Northern* will be widespread. The Supreme Court has created the potential for transforming an endless number of trivial employer actions into materially adverse retaliation. Courts will be less inclined to dismiss retaliation claims

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Actual resolution of legal issues depend upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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through summary judgment, instead allowing juries to decide whether perceived slights amount to retaliation. Employers could see a valid retaliation claim moving forward even where the underlying discrimination complaint that allegedly led to the employer's retaliatory action is without merit. Lower courts may also decide to interpret more broadly the anti-retaliation provisions of the ADA, ADEA, FMLA, Sarbanes-Oxley and other employment laws.

Employers should take careful notice of the outcome in *Burlington Northern* and the upward trend in retaliation claims, and take the following precautionary measures:

- Provide training for supervisors aimed at recognizing and preventing retaliatory actions.
- Review carefully any personnel or other action taken concerning a complaining individual in the weeks and months following her/his complaint.
- Remember that the complaining employee is *not* entitled to preferential treatment or relaxation of normal workplace rules (as many employees think).
- Continue to quickly, thoroughly, and respectfully investigate complaints of employees.
- Continue to provide appropriate warnings against retaliation in written policies and to those interviewed during internal investigations.
- Follow up with the complaining employees after investigations to identify—and cure—any retaliation concerns.
- Insulate those accused of discrimination from future allegations of retaliation through independent review of subsequent, substantial decisions affecting the complaining employee.

Announcements

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Mission Statement for Women's Leadership Initiative: To mobilize women to become powerful leaders through their philanthropy and advocacy; to engage women in promoting positive change in the lives of women and children in the Lehigh Valley; and to recognize women for their efforts.

Scott B. Allinson is actively involved in bringing new ventures to the Lehigh Valley, such as the development of a New Technology Center which will be built in Lehigh Valley Industrial Park VII on Bethlehem's Southside. The new venture is between LVIP, BEDCO, City of Bethlehem and Northampton New Job Corp. The Tech Center will be dedicated to start-up companies.

Steven E. Hoffman received a pro bono award at the Law Day lunch from North Penn Legal Services.

Jeffrey S. Stewart recently graduated from the Leadership Lehigh Valley program.

Leadership Lehigh Valley is a year-long program that is designed to expose its participants to the issues facing the Lehigh Valley and help them become leaders in the community. Each of the participants also makes a commitment to serve on the board of a non-profit organization for a minimum of 3 years after graduation.

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