Two Issues of Retaliation Lawsuits Addressed

CLARK COUNTY SCHOOL DISTRICT VS. BREEDEN: THE U.S. SUPREME COURT PROVIDES A TIMELY REMINDER OF THE "BASICS" OF EMPLOYMENT HARASSMENT AND RETALIATION

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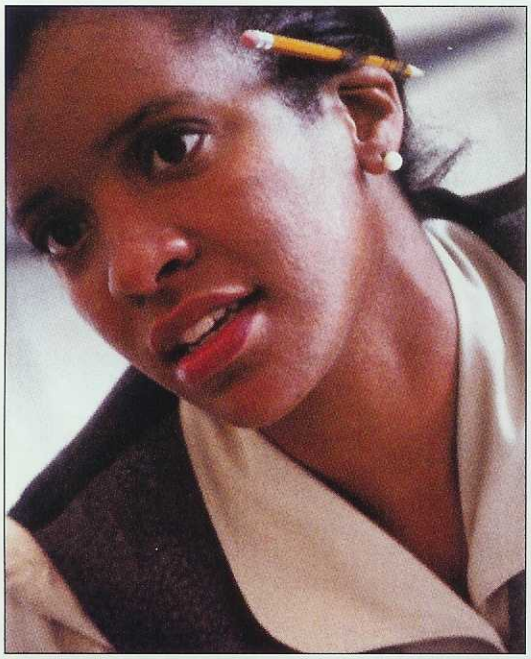


Between 1992 and 2000, the total number of federal civil rights discrimination charges filed with the Equal Employment Opportunity Commission ("EEOC") has decreased. However, during the same time frame, charges asserting violations of the anti-retaliation provisions of the Civil Rights Act of 1964 (Title VII) have nearly doubled, fueling a raging debate over the scope of the federal anti-retaliation laws.[1] In April 2001, the United States Supreme Court provided some long-overdue guidance with respect to these provisions when it issued its unanimous decision in *Clark County School District vs. Breeden*.[2] Breeden characterized as "sexual harassment" a single incident in which a fellow human resources professional read from a report referencing a job applicant's admission that he had told a female that "making love to you is like making love to the Grand Canyon," then said he did not "understand" the relevance, and "chuckled" about it with another human resources professional. Breeden complained internally, then contended that almost every action thereafter by the School District constituted "retaliation" for that complaint.

The Court's holding in *Breeden* addressed two important issues involving the burdens placed upon employees seeking to recover under the anti-retaliation provisions of Title VII: (1) the type of conduct an employee "opposes," and (2) the type of proof required to show a given employment decision was carried out in retaliation for protected activity.

Overview of Title VII's Anti-Retaliation Provisions

Title VII's anti-retaliation provisions are typical of anti-retaliation statutes, and provide that:

> *It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.*[3]

When deciding most statutory anti-retaliation claims, the federal courts generally utilize a specific order of proof.[4] First, the plaintiff must first prove a *prima facie* case:

1. He/she was engaged in protected activity,
2. He/she suffered an "adverse employment action," and
3. A causal link exists between her protected activity and the adverse employment decision.[5]

The causal connection element of this *prima facie* case is usually proved circumstantially, as direct evidence of retaliation is very rare. One frequently cited form of circumstantial evidence of a causal connection is the "temporal proximity" or closeness of time between the protected activity and the alleged adverse employment action that took place in retaliation. If the plaintiff succeeds in proving the elements of a *prima facie* case of Title VII retaliation, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action.

Even though the plain language of Title VII's anti-retaliation Opposition Clause requires the opposed underlying action or practice actually be "unlawful" under Title VII, the courts have not required such a showing of actual illegality as a matter of law. Rather, the federal courts have uniformly construed Title VII to protect employees that have an "objectively reasonable" and "good faith" belief that the conduct about which they complained violated Title VII. The Ninth Circuit Court of Appeals became the first federal appellate court to adopt the "objectively reasonable" standard for "opposition" cases.[6] Unfortunately, the Ninth Circuit has varied its interpretation of the "objectively reasonable" standard. In some cases it has effectively charged complaining employees with knowledge of evidence indicating that

there was no actual discrimination by the employer and rejected the employees' claims.[7] In other cases, however, the Ninth Circuit has applied a very liberal standard giving considerable deference to an employee's personal view of the conduct.[8]

The Facts in Breeden

The *Breeden* case was brought, in part, under Title VII's anti-retaliation provisions. Breeden was a human resources administrator, who, as part of her job, reviewed pre-employment reports. One such report referenced an applicant's admission that he had made sexual remarks to employees at a prior job, quoting him as having told a female, "making love to you is like making love to the Grand Canyon." When Breeden read the report, she was not bothered by the remark. When her supervisor convened a meeting to review these reports, he read the "Grand Canyon" quote, looked up, and said, "I don't know what that means," following which Breeden's male subordinate said, "I'll tell you later," and the two men "chuckled." Breeden characterized this exchange as "sexual harassment" and complained internally, but never reported the incident to the District's affirmative action officer in charge of investigating sexual harassment.

Breeden contended that almost every action thereafter by the District constituted "retaliation" for those complaints. In 1995, she filed a charge with EEOC and NERC, alleging both harassment and retaliation. Both agencies found a lack of support for her claims and the EEOC issued its standard "Notice of Right to Sue" letter. Breeden subsequently filed suit in April 1997.

During early 1997, as part of reorganization, the Assistant Superintendent for Human Resources had been considering reassigning Breeden as the Director of Professional Development Education, a lateral move, but with different duties. Before learning of the suit, the Assistant Superintendent discussed this possible move with Breeden's union representative and finalized the transfer in the months thereafter.

The trial court held that Breeden's internal "harassment" complaint was not protected oppositional conduct. It also found that the decision to transfer Breeden had been contemplated before the Assistant Superintendent knew of this protected activity and was not an actionable "adverse employment action" because it was a lateral change.[9] The Ninth Circuit Court of Appeals reversed the district court and held that Breeden could reasonably have believed the exchange in the meeting constituted "sexual harassment." The Court also held there had to have been facts sufficient for Breeden to establish the 1997 transfer constituted retaliation for the lawsuit.[10]

The Supreme Court's Holding

Ordinarily, the Supreme Court grants certiorari, then orders briefing and hears oral argument before issuing an opinion. However, in *Breeden*, the Supreme Court decided the case *per curiam*, based upon the parties' briefing on the petition for certiorari and the record from both the district and appellate courts. It unanimously and strenuously disagreed with the Ninth Circuit's majority holding, finding that the Circuit Court should have affirmed the summary judgment. Without expressly deciding whether the "objectively reasonable good faith belief" standard for protected "opposition" was an appropriate interpretation of Title VII's anti-retaliation provisions, the Court applied that standard and held that "no one could reasonably believe that the incident . . . violated Title VII." The Justices relied upon the Court's earlier sexual harassment rulings in *Faragher v. City of Boca Raton*,[11] *Burlington Industries v. Ellerth*,[12] and *Oncale v. Sundowner Offshore Services, Inc.*,[13] noting that Title VII forbids only behavior so objectively offensive as to alter the

"conditions" of the victim's employment. It held that the supervisor's "Grand Canyon" discussion was "at worst an 'isolated incident' that cannot remotely be considered 'extremely serious' as our cases require . . ."[14]

Additionally, the Court also held that Breeden's claim of retaliation based upon her lateral transfer was legally insufficient. At the district court level, Breeden had relied upon the temporal proximity between the filing of the lawsuit and her transfer to try to create an issue of material fact regarding causation. However, because the lawsuit was not served until the day *after* the assistant superintendent's discussion, the Supreme Court rejected Breeden's argument. It also flatly rejected the Ninth Circuit's contention that the temporal proximity element was satisfied by the fact the decision was finalized and implemented after service of the lawsuit, holding that, "[e]mployers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along these lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."[15]

The Court also rejected Breeden's claim of the temporal

continued on page 30

continued from page 7

proximity between the EEOC's issuance of the Right-to-Sue letter and her transfer, an issue raised for the first time on appeal to the Ninth Circuit, finding that Breeden had presented no evidence that the assistant superintendent had knowledge of the letter. The Court held that neither the 1995 charge-filing nor the issuance of the Right-to-Sue letter raised any issue regarding causation because of the lack of temporal proximity, citing with approval holdings from the Tenth and Seventh Circuits that four and three-month gaps between the protected activity and alleged adverse action are not sufficient to preclude summary judgment.[16]

Practical Effect of the Breeden Holding in Retaliation Law

By its unanimous ruling, the Court made clear pronouncements regarding the circumstances in which federal courts can and should grant summary judgment in Opposition Clause cases, even under the "objectively reasonable belief" standard. The Justices clearly signaled that no one - either court or individual - should believe that every time a sexual remark is uttered there has been "sexual harassment," such that any person who protests assumes "protected" status so as to be able to claim "retaliation" should there be later job actions with which the employee disagrees. The Justices indicated that a lower court in the future likely will be affirmed when it applies a common sense approach in examining alleged "opposition" conduct. This will be by looking at the total circumstances - rather than just one, sexual aspect - when deciding whether the plaintiff had an objectively reasonable "belief" the complained-of conduct violated the law. This ruling encourages courts to focus upon both the nature of the alleged "discrimination" or "harassment" as well as the context and the relative positions of the parties, then determine whether there is a real indication of different treatment "because of" a prohibited characteristic such that an individual should be protected from retaliation.

Furthermore, the Supreme Court's view of the causation issue increases the likelihood that summary judgment will be granted on this issue in future cases. Frequently, employees oppose summary judgment in retaliation cases by arguing temporal proximity. By holding the temporal relationship must be "very close," the Supreme Court has undoubtedly signaled that more summary judgments will be affirmed where the only causation argument made is temporal proximity.

The other "causation" pronouncements in *Breeden* have far greater practical consequences for all companies that, in the course of running a business, make personnel decisions. In no uncertain terms, the Court made clear that if a supervisor decides upon a course of action and does not know of the protected conduct, the decision couldn't be "retaliatory." Allaying a frequent employer concern, the Court also explicitly held that that an employer does not have to alter a planned course of action once it learns of protected conduct. Thus, an employer that can document or otherwise show it had contemplated such an action before learning of protected conduct is likely to be able to avoid a jury trial on a retaliation claim.

Issues Left Open by the Supreme Court

The Court's decision left unanswered two important issues in retaliation law. First, the Court did not decide whether the federal courts' unanimously articulated "objectively reasonable good faith belief" standard for oppositional conduct cases is in fact consistent with Title VII's plain language. In *Breeden*, the Court assumed this standard applied; leaving open the possibility the Court could later decide this broad construction is impermissible. Second, the Court did not make any pronouncements regarding the second prong of the *prima facie* case, the "adverse employment action" requirement. Currently, there is a split among the Circuit Courts as to what constitutes an adverse employment action, particularly with regard to lateral transfers.[17]

CCSD v. Breeden and Verbal Harassment Cases

Despite the fact that *Breeden* involved a retaliation lawsuit, rather than a sexual harassment case, the Supreme Court's holding provides a clear indication of the Court's views on verbal sexual harassment: Courts should reject sexual harassment claims based upon relatively minor, single-act, or infrequent verbal harassment or ambiguous actions of any type. Before *Breeden*, in *Faragher*, and *Oncale*, the Justices had reiterated that the harassment laws were not meant to create a "general civility code" and the complained-of conduct must be extreme.[18] The Court's specific reference to its prior sexual harassment cases provided a clear indication that, to be actionable, harassment behavior must satisfy two conditions: (1) the harassing behavior must have taken place "because of the sex" of the plaintiff; sexual statements or other such conduct not carried out for that reason or not having that effect simply will not be actionable even if they are in whole or in part "sexual;" and (2) the alleged harassment must be "extremely serious" before such harassment will be found to have adversely affected the victim's employment. This view of the law likely will result in greater ability of employers to obtain summary judgment in harassment cases, particularly those alleging verbal

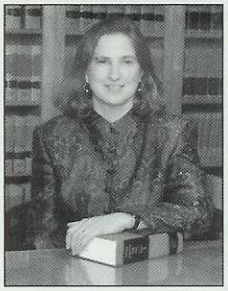
harassment, even where there is a sexual element to the harassment behavior.

Conclusion

With the burgeoning volume of retaliation cases, the Supreme Court's decision in *Breeden* will hopefully serve as the beginning of an effort to round out the contours of retaliation law. The decision certainly provided some badly needed guidance to courts and employers in this area, and will no doubt serve as the basis for continued discussion and debate.

ENDNOTES

1. U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1992 through FY 2000 (January 18, 2001). See www.eeoc.gov/stats/charges.html.
2. No. 00-866, 532 U.S., 121 S. Ct. 1508, *rehearing denied*,121 S. Ct. 2264 (2001).
3. See 42 U.S.C. §2000e-3(a) (emphasis added).
4. *E.g., Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).
5. *See, id.* at 1240.
6. *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 n.5 (9th Cir. 1978).
7. *See, e.g., Folkerson v. Circus-Circus*, 107 F.3d 754, 756 (9th Cir. 1997); *Jurado v. Eleven-Fifth Corp.*, 813 F.2d 1406, 1410-1412 (9th Cir. 1987); *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978).
8. *See, e.g., Trent v. Valley Electric Ass'n. Inc.*, 41 F.3d 524 (9th Cir. 1994); *EEOC v. Crown Zellerbach*, 720 F.2d 1008, 1013 (9th Cir. 1983).
9. 121 S. Ct. at 1510.
10. *Breeden v. Clark County Sch. Dist.*, No. 99-15522, 2000 WL 991821, at *3 (9th Cir. 2000).
11. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998).
12. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 724, 752 (1998).
13. 523 U.S. 75, 81 (1998).
14. 121 S. Ct. at 1510.
15. *Id.*
16. *Id.*
17. *See, e.g., Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000); *Smith v. First Union National Bank*, 202 F.3d 234, 249 fn.11 (4th Cir. 2000); *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998).
18. Faragher,524 U.S. at 788; Oncale, 523 U.S. at 80-81.



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