

Washington TECHNOLOGY

Infotech and the Law | Supreme Court expands Title VII retaliation claims

08/07/06

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The writers of this column typically focus on government contracts law issues, but anyone running a government IT company knows that the legal concerns of the business are much broader.

IT services companies need to be especially careful about employment discrimination issues, which, if mishandled, inevitably divert management and employee attention from project work and lead to lower productivity and delay.

Title VII prohibits employment discrimination and also protects employees who complain of discrimination from employer-initiated retaliation. Earlier this summer, the Supreme Court significantly expanded Title VII's retaliation protection. All employers, including those engaged in supplying IT services, should realize that this decision increases their exposure to Title VII retaliation claims.

To date, some federal courts have required employees who are making retaliation claims to prove that their employer had made a final or ultimate employment decision, i.e., a termination, a failure to hire or a failure to promote. Other federal courts have applied a different standard, requiring only that employees prove a "material" retaliatory employment action resulted from a complaint of discrimination.

The Supreme Court's decision resolved this split of authority, holding that an employee need only demonstrate that a "reasonable" employee would deem an employment action resulting from having made a claim of discrimination as "materially adverse."

Writing for the court, Justice Stephen Breyer found that Title VII's anti-retaliation provision was meant to be interpreted broadly to accomplish the Act's primary objective of letting employees complain of discrimination without fear of reprisal. Thus, the court held, "employment decisions" extend to materially adverse employer conduct: conduct that would have dissuaded a reasonable employee from making or supporting a discrimination charge. Even if the action or harm does not affect the employee's compensation, terms, conditions or privileges of employment, the employer's retaliatory conduct may be actionable.

Regularly excluding an employee from client meetings while inviting others with similar qualifications or responsibilities who have not made discrimination complaints could be seen as retaliation, because it arguably limits the employee's professional growth, even though the practice had no effect on the employee's compensation or tenure.

The court cautioned against treating its broad interpretation of the antiretaliation provision as immunizing the employee from “those petty slights or minor annoyances that often take place at work and that all employees experience,” and noted that whether or not the conduct was materially adverse will depend on the circumstances. A slight change in an employee’s work schedule might not affect most workers, but it might prevent a mother with young children from complaining about discrimination.

Refusing to invite an employee to lunch may be a nonactionable petty slight, but excluding that employee from a weekly professional training lunch might deter that employee from complaining about discrimination. As the court wrote, “[c]ontext matters.”

Despite the Supreme Court’s best efforts to define materially adverse through its examples and its imposition of an objective standard, it remains difficult for employers to know the potential ramifications of their actions toward employees. Before taking any action against an employee complaining of discrimination, employers should assess each employee’s circumstances and make sure any action taken is legitimate and independently grounded as well as adequately documented. Employers also are advised to review their anti-retaliation policies and review with managers the proper procedures for processing, responding to and most importantly, appropriately reacting to employee discrimination claims.

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