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INSIDE

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A CLEARER STANDARD FOR RETALIATION CASES

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Would you complain about sex or racial discrimination in the workplace if you knew that in return you'd have to work the graveyard shift, or get assigned to cleaning the bathrooms? Or would you be afraid of the repercussions that came from rocking the boat and suffer in silence? In June of this year, the Supreme Court addressed this Hobson's Choice when they ruled that employers were not allowed to change a worker's schedule or job duties as a way to punish employees who complained of discrimination. It is illegal under Title VII of the Civil Rights Act of 1964 to retaliate against a worker who files a discrimination charge (42 U.S.C. § 2000e-3(a)),¹ but until this Supreme Court holding, there hasn't been a clear definition of what constituted a retaliatory act.

The Supreme Court decided that the appropriate standard of review was "material adverse change." Under this benchmark, an employer could incur Title VII liability if it materially and adversely changed the terms of the employee's job. Actions that fall under these auspices include firing, failure to promote, salary reduction, a change in the formal title, significant modification in job responsibilities and continual harassment of the employee.

Economists can use this Supreme Court opinion as a foundation when determining both liability

and damages in retaliation cases. In fact, this new Supreme Court opinion has opened the door to new areas of liability for employers.

What Expertise Can an Economist Bring to Retaliation Cases?

Retaliation cases are important facets of the employment discrimination realm. During 2005 alone, the EEOC received 22,278 retaliation cases.² Economists help attorneys analyze both liability and economic damages by employing a two-step process on the way to determining liability and damages in retaliation cases. The first step is a "but-for" determination of liability, the second is determining evidence of harm for damages analysis.

Liability: How the New Standard Fits In

Economists can use this new standard of "Material Adverse Change" in their analysis of liability. Generally, in order to determine an employer's liability in a retaliation lawsuit, the plaintiff has to show three things: (1) he or she was engaged in a protected activity, like filing an EEOC complaint (2) the plaintiff suffered from an adverse employment action and (3) "but for" the complaint, the plaintiff would not have been subjected to the "retaliatory" adverse action.³

The "but-for" analysis is the backbone of economic liability studies. In order to help attorneys prove liability, economists need to show that "but for" the complaint, the employee would not have been

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subjected to the “retaliatory” employment action. On the flip side, the economists for the employer need to show that the adverse change had nothing to do with the employee’s complaint, but would have happened even in the absence of such an action on the employee’s part.

In order to do the “but-for” determination in a retaliation case, a number of questions have to be considered. Was the complaining worker the only one to get his or her schedule changed? What about the workers who did not file any grievances? Did their schedules change as well? Were these changes company-wide, or specific to the complainant? If more than one person filed a grievance, did all of them suffer seemingly retaliatory adverse changes? Did the adverse change occur soon after the complaint? Each of these questions lends itself to statistical analysis by an economic expert. For example, take the case of a negative performance evaluation that was given after the complainant filed a racial discrimination claim.⁴ Is this adverse action retaliation? An economic expert can address

the merits of the claim by looking at evaluations of similarly situated employees and doing a comparative analysis.

The new standard set out by the Court gives a more detailed definition of what constitutes an “adverse action,” clarifying the second prong of the liability analysis for economists.

Damages: Evidence of Harm Under the “Materially Adverse Change” Standard

In addition to showing that the action was indeed retaliatory, economic experts for the employee need to show that this action caused harm to the employee. Courts have ruled previously that a plaintiff has to show “actual harm” to be entitled to damages.⁵ This new “materially adverse” standard set out by the Supreme Court gives economic experts a clearer sense of what types of actions should be included in the analysis of damages. For example, as was determined by the Supreme Court, the reassignment of a worker to a “dirtier” and more physically strenuous position after she filed a complaint was materially adverse, and therefore entitled her to damages.⁶ This new standard opens the door to new areas of liability for employers and analysis by economic experts.

1 http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42_10_21_20_VI.html

2 http://www.boston.com/business/articles/2006/03/31/court_will_look_at_retaliation_in_sex_bias_cases/

3 <http://www.ballardspahr.com/press/article.asp?ID=980>

4 See *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004).

5 *Doe v. Chao*, 540 U.S. 614 (2004); *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336 (2005)

6 *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. ____ (2006), slip op.