

Employment & Labor Relations Law

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The Employment Retaliation Standard, a New Wrinkle on the Face of Employment Litigation

By Elaine W. Keyser

On June 22, 2006, the Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. White*¹, establishing a uniform standard for what constitutes adverse action for purposes of Title VII retaliation claims. The court concluded that “the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace,” and that “the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.”² The court’s standard mirrors

the one previously adopted by the Seventh and District of Columbia circuits. The new standard broadens the scope of actionable retaliation in several circuits, including the Fifth, Sixth, and Eighth circuits.³

The decision has been both lauded and feared as a significant gain for employees’ rights.⁴ Now that the dust is settling and the case is being applied across the country, is *Burlington* having an appreciable impact? While it is too soon to resolutely tell, recent cases suggest that business has been proceeding as usual in the employment litigation arena. That is,

while *Burlington* certainly complicates matters, it does not yet appear to have radically changed the status quo.

The Burlington Decision

Factually, *Burlington* involved the claims of a female employee, Sheila White, who worked as a track laborer for Burlington Northern & Santa Fe Railway Company. While her position involved manual labor, White primarily operated a forklift.⁵ In September 1997, White complained to Burlington officials that her immediate supervisor repeatedly told her that women

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Are Class Action Waivers in Employment Arbitration Agreements Too Good to Be True for Employers?

By Maureen R. Knight

The employment relationship is no stranger to arbitration agreements. Arbitration has been used in the union environment for decades. In more recent years, with employment-related disputes dominating the court system and staggering jury verdicts crushing employers, more and more employers have sought ways to reduce the growing exposure associated with employment disputes. What better way to protect your-

self against the risk of an excessive jury verdict than to altogether remove an employee’s ability to bring his or her case before a jury? In 1991, the Supreme Court confirmed an employer’s ability to do just that through mandatory binding arbitration agreements between employers and employees.¹

Since the Supreme Court blessed the employment arbitration agreement, employers have continued to push the

envelope with new ways to further reduce their exposure to liability and lower the cost of defending employment disputes, with varying degrees of success. Courts have been called upon to approve arbitration agreement provisions that limit discovery, shorten statutes of limitation, eliminate recovery of certain damages, and include a host of other employer-friendly provisions. With class actions

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Chairs' Column



Diane A. Seltzer



Ann Marie Painter

As we usher in the New Year and reflect on the events of the past year, we offer you the first newsletter of 2007 from the Employment and Labor Relations Law Committee. This past year was full of key developments in the area of employment law, and our authors have tackled several of these subjects, including class action waivers in the context of arbitration agreements, the implications of the Supreme

Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, and the enforcement of the Computer Fraud and Abuse Act when litigating against disloyal employees. We trust you will find their insight and analysis helpful in your practice. If you find these topics interesting, you may want to check some of the related audio program materials and podcasts on the Section of Litigation website.

The next several months are filled with opportunities for Committee members. The Section of Litigation Annual Conference will be held in San Antonio April 11–14, the ABA Annual Meeting will be held in San Francisco August 9–12, and there will be many excellent Section CLE programs and teleconferences in the interim. We encourage you to consider attending one or more of these meetings and making these events a part of your annual calendar. Writing and publishing opportunities abound as well. Our committee has started the process of updating and revising the ABA publication *Employment Litigation Handbook*, and there are still several slots available for individual chapters and editorial assignments. Please contact Jim Gay (jimgay@gmail.com) if you are interested in working on this project. The *Employment Litigation Handbook* has been one of the most popular ABA publications in past years, and the new updates and revisions will

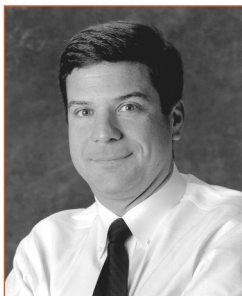
make it an even more valuable tool for litigators. The committee plans to publish four newsletters this year, and this is a great opportunity for our members who may have some excellent materials to share. Please give serious consideration to submitting an article . . . or two!

Finally, we are continuing to do some long-term planning for the growth and development of this committee and for the expansion of its offerings. We want to provide focused, in-depth, and meaningful materials and CLE for members who litigate in the area of labor and employment law and who are looking not just for substantive updates but also for analysis and instruction on how to deal with new developments in the judicial, administrative, or arbitral forum. Expect to hear more from us in the next few months about these plans.

In the meantime, we look forward to seeing you in San Antonio! Don't miss our committee's program, which will feature presentations on workplace investigations in an era of pretexting, class notice, and discovery prior to conditional certification in Fair Labor Standards Act collective actions, and an analysis of how *Burlington Northern* has shaped the pleading of retaliation cases.

—Ann Marie Painter
and Diane Seltzer

Message from the Editor



William C. Martucci

This issue again collects the remarkable insights of our many members and writers. It also indicates the ever-dynamic and changing nature of the employment litigation and policy field.

With so much at stake in connection with the employment relationship, the recent Supreme Court case defining a new

standard in connection with retaliation cases reflects the evolving face of employment litigation. Elaine Keyser's article highlights the practical aspects of this decision and its far-reaching implications.

In light of increasing employment class action litigation, whether in the employment discrimination area or the booming wage and hour arena, Maureen Knight's article addressing class action waivers in the employment arbitration agreement context is most instructive. Of course, the employment relationship is no stranger to arbitration agreements. But, as Ms. Knight wonders, are such waivers "too good to be true for employers?"

Increasing competition among global businesses and the ubiquitous digital world make Laura Lindner's article so pertinent for the labor and employment law practitioner. Ms. Lindner examines the Computer Fraud and Abuse Act and explores how it is an increasingly potent weapon against "disloyal" employees.

Our final article is more along the lines of commentary on a recent Supreme Court case in the public sector. We are delighted with the contribution by Robert Gregg, a Professor in the Critical Skills Program at Nova Southeastern University Law Center in Florida. Professor Gregg's insights are instructive and may well spark contributions from other members of our committee that may be more along the lines of a "commentary" than the traditional article.

As always, we are grateful for all contributions, and we reach out to you to encourage you to contact us with your ideas. You are the best of the best in the labor and employment field.

—William C. Martucci

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Are Class Action Waivers in Employment Arbitration Agreements Too Good to Be True for Employers?

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becoming the most feared of employment disputes, particularly given the alarming increase in the prevalence of wage hour collective actions by employees over the last five to 10 years, employers are now wondering if they can force individual arbitration.

In 2003, employers thought they might get an answer to that question from the Supreme Court. In *Green Tree Financial Corp. v. Bazzle*,² the court considered whether a collection of awards in class arbitrations were appropriate where the underlying arbitration agreements were silent as to class remedies. Parties to arbitration agreements everywhere held their breath in anticipation of the High Court tackling the issue head-on as to whether affirmative class action waivers were enforceable. Opponents of class action waivers collectively exhaled when the Supreme Court did not affirmatively endorse class action waivers, and proponents of class action waivers were encouraged by language from the court that seemed to suggest such waivers may be enforceable. Ultimately, the court decided only that it was for the arbitrator, not the court, to decide whether a particular arbitration agreement provided for class procedures and remedies. Because the courts (not the arbitrators) had done so in *Bazzle*, the cases were remanded.

If it is for the arbitrator to decide whether an arbitration agreement provides for arbitration on a class basis, doesn't that mean that one of his or her options is to decide that an arbitration agreement does not provide for arbitration on a class basis? And if that is a viable option available to the arbitrator, why leave it up to the arbitrator to interpret agreement provisions to determine

whether the arbitration can or cannot proceed on a class basis? Why not affirmatively state that it cannot? While some employers have made conscious decisions to wait for a more clear endorsement of class action waivers (for fear that an overreaching class action waiver will invalidate their arbitration agreement altogether), many employers have indeed amended their arbitration agreements to expressly prohibit arbitration on a class or collective basis.

Since *Bazzle*, numerous courts have addressed the enforceability of class action waivers in arbitration agreements, though mostly in the context of commercial arbitration agreements. This article identifies and analyzes those cases that have addressed the issue in the context of employment arbitration agreements. Thus far, the majority of the courts that have addressed the issue have determined that class action waivers in employment arbitration agreements are enforceable. This article addresses the factors these courts have considered in making their determinations.

Courts' Considerations for Enforceability of Class Action Waivers

The Federal Arbitration Act (FAA³) provides that agreements in writing to submit disputes regarding commerce-related contracts or transactions to arbitration are valid, irrevocable, and enforceable. But then there's the relevant caveat: "Save upon such grounds as exist at law or in equity for the revocation of any contract."⁴ Therefore, despite the well-settled and oft-articulated "liberal" and "strong" federal public policy favoring arbitration as a means of dispute resolution,⁵ the enforceability of arbitration agreements is by no means absolute. State law contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.⁶

Parties seeking to invalidate class action waivers in arbitration agreements generally argue they are unconscionable. Although the standard for unconscionability is dictated by state law, there are generally two recognized forms of unconscionability: procedural and substantive. Procedural unconscionability looks to how the contract was made (with arguments, for example, that the parties had

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unequal bargaining power). Substantive unconscionability looks to the terms of the contract (with arguments, for example, that the terms are one-sided). Some states require that contracts be both procedurally and substantively unconscionable to be invalid; some require only one or the other. Either way, parties seeking to invalidate class action waivers in employment arbitration agreements are certainly arguing both.

Separate from the unconscionability issue, some parties have argued that the class or collective pursuit of federal claims is a nonwaivable statutory right. This

Employees seeking to invalidate class action waivers in employment arbitration agreements are not without ammunition.

argument is similar to the ultimately unsuccessful original arguments that federal antidiscrimination and other employment-related statutes provided employees with a nonwaivable statutory right to vindication before a jury. Current arguments that class or collective procedures are nonwaivable statutory rights have been equally unsuccessful.

Courts That Have Stated Waivers Are Enforceable

In the last few years, several courts have expressly addressed the issue of whether class action waivers (or a provision effectively waiving class action procedures or remedies) are enforceable in an employment arbitration agreement and determined that they are. These courts include the Fifth Circuit, the Eleventh Circuit, and federal and state appellate courts in California.

In 2004, plaintiffs to a proposed Fair Labor Standards Act (FLSA) collective action appealed to the Fifth Circuit the

district court's granting of the defendant's motion to compel arbitration.⁷ The Fifth Circuit affirmed the district court's ruling and in doing so rejected the plaintiffs' argument that their inability to proceed collectively deprived them of substantive rights available under the FLSA. The Fifth Circuit relied on the Supreme Court *Gilmer* language that approved individual arbitration enforcement of rights under the Age Discrimination in Employment Act (ADEA), which is a law that shares the same collective procedural provisions as the FLSA.

In 2005, the Eleventh Circuit reviewed a class action waiver in an arbitration agreement, this time from a conscionability standpoint, and also determined it was enforceable. In that case, the court held that an employment arbitration agreement's waiver of class actions did not render the agreement unconscionable under Georgia law, holding that such prohibition (along with discovery limitations) was consistent with the goals of arbitration: "simplicity, informality, and expedition."⁸

The conscionability of class action waivers was again approved in a significant California case in 2006. In that case, a state appellate court held that a class action waiver in an employment arbitration agreement was neither procedurally nor substantively unconscionable.⁹ The appellate court relied on a recent decision from the California Supreme Court that, while holding that a class action waiver in a small-individual-value consumer matter was substantively unconscionable, stated that class action waivers in arbitration agreements are not per se unconscionable. The appellate court held that the agreement before it was not procedurally unconscionable because the employee had the ability to opt out of the arbitration agreement, and it was not substantively unconscionable because there were substantial damages and penalties available to the plaintiff if he prevailed on an individual basis. This case, however, is currently on review by the California Supreme Court.¹⁰

In an interesting case before the Northern District of California in 2005, the issue was not an express class arbitration waiver but rather a cost-splitting provision that made class arbitration more costly for the employees.¹¹ Specifically,

while the employer agreed to assume the costs of arbitration if the arbitration proceeded on an individual basis, it deferred to the American Arbitration Agreement's Supplementary Rules for Class Arbitration for collective or class arbitrations. The Supplementary Rules provide that class plaintiffs are responsible for one-half of the costs of arbitration. The California federal court rejected the plaintiffs' argument that requiring them to bear this expense imposed a substantial barrier to vindicating their rights. In so holding, the court noted that *Gilmer* (discussed in the following section) "established," in the court's words, that even an inability to proceed on a class or collective basis in arbitration has no impact on a plaintiff's ability to vindicate his or her substantive statutory rights.

For companies operating in the above jurisdictions, these cases provide excellent precedent that class action waivers in arbitration agreements are enforceable.

Courts That Have Suggested Waivers Are Enforceable

In addition to the above express endorsements of class action waivers in employment arbitration agreements, the Supreme Court, the Fourth Circuit, and the Sixth Circuit have each suggested, in dicta, that such waivers are enforceable. In these cases, which involved either claims under the ADEA or the FLSA, the courts rejected arguments that because these statutes provided for collective action procedures, such procedures were nonwaivable statutory rights of employees or otherwise necessary for adequate vindication of the rights provided by the statutes.

As early as the 1991 *Gilmer* case that originally blessed the mandatory employment arbitration agreement, the Supreme Court suggested it had no problems with class action waivers.¹² Although that case involved only an individual plaintiff, one of his arguments in opposition to enforcement of the arbitration agreement was that arbitration was an inadequate forum for resolution of age discrimination disputes because arbitration does not provide for class actions. After noting that the applicable arbitration rules did, in fact, provide for class procedures, the Supreme Court quoted a Third Circuit decision that stated that "[e]ven if the arbitration could not go forward as a

class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”¹³

More than 10 years later, the Fourth Circuit likewise remarked that the FLSA did not appear to mandate a nonwaivable right to class procedures and remedies. Specifically, in 2002, the Fourth Circuit rejected an employee’s argument that an arbitration agreement’s fee structure, coupled with the employee’s inability to proceed on a class action basis, forecloses redress of his or her rights under the FLSA because the high costs of arbitration cannot be avoided by aggregating the claims of numerous employees for the sake of economic efficiency. Because the plaintiff did not carry his burden as to the cost-sharing provisions, the Fourth Circuit held that the plaintiff’s argument regarding his inability to bring a class action was moot. Although it determined that the class action issue was moot, the court did voice its doubt about the employee’s class action argument by pointing out that there is “no suggestion in the text, legislative history, or purposes of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute.”¹⁴

Finally, relying upon the Supreme Court and Fourth Circuit cases discussed in this section, the Sixth Circuit remarked in a 2005 case that “it does not appear ... that [employment] arbitration procedures are required to provide for class actions.”¹⁵ In that case, however, the Sixth Circuit nevertheless upheld the district court’s ruling that the employment arbitration agreement at issue was unenforceable on other grounds.

Courts That Have Said Waivers Are Unconscionable

While in the minority, employees seeking to invalidate class action waivers in employment arbitration agreements are not without ammunition. In addition to the courts that have invalidated such waivers in the consumer context, the Ninth Circuit and a federal district court in Massachusetts have held that they are unenforceable in the employment context. As described below, however, the Ninth Circuit cases applying California law are significantly undermined by the state cases discussed above.

To date, the Ninth Circuit has been the only circuit court to hold that a class action waiver in an employment arbitration agreement is unenforceable. In a 2003 case, the employer’s arbitration policy expressly prohibited the arbitrator from consolidating the claims of employees, which, along with numerous other provisions in the agreement, the Ninth Circuit deemed substantively unconscionable under California law.¹⁶ In addition to emphasizing the importance of class actions, the Ninth Circuit determined that the agreement’s class action waiver, although mutual, was essentially one-sided because the court could not fathom a situation in which the employer would desire to bring a class action against its employees.

Two years later, after stating that California and Washington law are virtually identical as to the definition of substantive unconscionability, the Ninth Circuit determined that its 2003 decision noted above—holding class action waivers in employment arbitration agreements unconscionable under California law—was “persuasive authority” that such provisions are also unconscionable under Washington law.¹⁷ Thus, it so held.

Six months later, the Ninth Circuit reiterated its position regarding the unconscionability of class action waivers in employment arbitration agreements under California law, but recognized that a then-pending California Supreme Court case could affect its position.¹⁸ The case to which the Ninth Circuit referred most certainly did. Although the California Supreme Court held in the case before it (which was a consumer claim involving small amounts of damages on an individual basis) that the class action waiver was unconscionable, it expressly stated that not all class action waivers in arbitration agreements are necessarily unconscionable.¹⁹ As described previously, a California appellate court this year used this language in support of its position that a class action waiver in an employment arbitration agreement was not unconscionable. To the extent that appellate court case survives review by the California Supreme Court, the Ninth Circuit’s position will be significantly undermined by these state cases.

On the other coast, class action waivers in employment arbitration agreements also took a hit. In March 2006, a federal court

in Massachusetts analyzed an express class action waiver in an arbitration agreement.²⁰ The court determined that it was procedurally unconscionable because the employer did not follow its own procedures for disseminating a new policy, opting to simply send an email to employees that it was instituting a mandatory arbitration policy. The court noted that the email did not say the new policy was of critical importance, would alter employees’ rights, or that accepting it was a condition of continued employment. The court also noted that the employer’s motive for the

At present, there are not enough cases that have upheld such waivers to finally resolve this issue.

hasty communication was because it knew it had exposure because of problematic pay practices. The court further remarked that the employer did not request signatures from the employees or replies to the email. Therefore, despite the fact that the original email from the employer was followed by various other forms of communication to the employees about the mandatory arbitration agreement, the court held that it was procedurally unconscionable.

Because Massachusetts law requires both procedural and substantive unconscionability for a contract to be deemed invalid, the court also considered whether the class action waiver was substantively unconscionable. The court determined that this was because it was “so one-sided as to be oppressive.” Citing the previously discussed Ninth Circuit (California) case, the court opined that, “in this case,” the class action waiver may effectively prevent employees from seeking redress of FLSA violations because they may be unable to incur the expense of individually pursuing their claims. The employer appealed this decision to the First Circuit, where it remains pending at this time. The employer will no

doubt bring to the First Circuit's attention the tenuous ground on which the Ninth Circuit's decision now rests.

Practical Tips for Drafters of Arbitration Agreements

While the cases holding class action waivers in employment arbitration agreements unenforceable are clearly in the minority, at the present time, there are certainly not enough cases that have upheld such waivers to finally resolve this issue. As a consequence, practitioners considering including an express class action waiver in their arbitration agreements would be wise to review and consider any case law in the applicable jurisdictions and to keep abreast of developments in this area. For those who determine that class action waivers in their employment arbitration agreements are appropriate, practitioners should also ensure that the class action waiver is mutual (meaning that the employer is also prohibited from filing a class action); make the class action waiver language clear and unambiguous; and consider including language that applies the waiver only where

allowed by applicable law. Additionally, if a class action waiver (or, frankly, any other provision that is of questionable enforceability) is included in an arbitration agreement, drafters should ensure that the agreement contains a severability clause. A severability clause is essential to ensure the arbitration agreement's viability in the event a court was to find the class action waiver clause unenforceable. This is precisely what occurred in the previously mentioned case before the Massachusetts federal court.

Employers who decide that it is appropriate to include a class action waiver in their arbitration agreement must be extremely careful not to overreach. Whether objectionable clauses in an arbitration agreement are severed or whether the arbitration agreement is deemed unenforceable as a whole generally depends on how much of the agreement is determined to be objectionable. In the referenced Ninth Circuit cases, the court determined that the objectionable clauses pervaded the entire agreement and, therefore, attempting to sever them would render the arbitration procedure unworkable. Thus, while the only risk associated with including a class action waiver in an otherwise clean arbitration agreement with a severability clause may be that the waiver itself is severed from an otherwise enforceable agreement, an arbitration agreement that contains several questionable provisions in addition to an unenforceable class action waiver may be deemed entirely unenforceable.

Finally, practitioners who have included, or who are considering including, class action waivers in employment arbitration agreements must stay abreast of current developments in this hot legal area. As noted above, significant cases are under review before the First Circuit and the California Supreme Court at the time of the publication of this article. There will no doubt be additional cases in the near future as more and more employers include class action waivers in their arbitration agreements. Time will tell whether these waivers prove too good to be true for employers. ■

Endnotes

1. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
2. 539 U.S. 444 (2003).
3. 9 U.S.C. § 1, *et seq.*

4. 9 U.S.C. § 2.

5. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121-23 (2001) and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

6. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656 (1996).

7. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004).

8. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005).

9. *Gentry v. Superior Court*, 135 Cal.App.4th 944 (2d Dist. 2006).

10. *Gentry v. S.C. (Circuit City Stores)*, 135 P.3d 1 (Cal. 2006). Shortly before this article went to press, the same California state appellate court reached the same conclusion in another case (i.e., that a class action waiver in an employment arbitration agreement was not substantively unconscionable under California law because the plaintiff did not prove that the dispute involved predictably small amounts of damages on an individual basis). *Konig v. U-Haul Co. of California*, 145 Cal.App. 4th 1243 (2d Dist. 2006).

11. *Veliz v. Cintas Corp.*, No. 03-01180(SBA), 2005 WL 104869 (N.D. Cal. May 4, 2005).

12. *Gilmer*, 500 U.S. at 32.

13. *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3rd Cir. 1989) (Becker, J., dissenting).

14. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).

15. *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 388 fn. 8 (6th Cir. 2005).

16. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003). The Ninth Circuit also determined that because of the "stark" inequality of bargaining powers between the employer and its employees and because of the take-it-or-leave-it nature of the arbitration agreement, the agreement was also procedurally unconscionable.

17. *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1261-62 (9th Cir. 2005).

18. *Siordia v. Circuit City Stores, Inc.*, No. 03-56459, 2005 WL 1368083, at *1 fn. 3 (9th Cir. 2005).

19. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

20. *Skirchak v. Dynamics Research Corp.*, 432 F. Supp. 2d 175 (D. Mass. 2006).



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Computer Fraud and Abuse Act: An Increasingly Potent Weapon Against Disloyal Employees

By Laura A. Lindner

In today's electronic age, one of the greatest risks faced by businesses is theft of intellectual property by a former employee who joins a competitor. Employers have a variety of tools to try to prevent disloyal employees from stealing trade secrets and other confidential information, such as requiring employees to sign noncompete and confidentiality agreements. In addition, most states have adopted the Uniform Trade Secrets Act, which prohibits misappropriation of trade secrets. However, the enforceability of the noncompete agreements is often challenged, and not all confidential information meets the statutory definition of a protected trade secret.

The federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (CFAA), has become an increasingly potent tool available to private businesses to protect their confidential information. While originally enacted in 1984 to protect the computer systems of governmental and financial institutions from hackers and provided only criminal penalties, Congress has expanded the CFAA's protection to private businesses' electronically stored confidential and proprietary information and also provides a private right of action.

General Statutory Provisions

The CFAA now covers any computer "used in interstate or foreign commerce or communication"¹—which, as a practical matter, is virtually any computer linked to the Internet (i.e., any computer that sends and receives email). The CFAA prohibits those "without authorization" from accessing a protected computer and prohibits those with access from "exceeding authorized access."² Many employee defections to

competitors involve some use of the former employer's computer data, often by emailing confidential information to the competitor or a personal email account or downloading the information onto a computer disk or other electronic storage device.

The CFAA provides a private right of action to any person who has suffered at least \$5,000 in loss or damage in any one-year period. The CFAA defines loss to include "any reasonable cost of any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."³ While proof of loss has been generally limited to computer-related losses, courts have broadly interpreted response costs to include the cost of hiring a computer forensics expert to discover evidence of wrongdoing and the cost of making a company's computer system more hacker-proof.⁴ Several courts have held that misappropriation of trade secrets or confidential information is enough to satisfy the \$5,000 threshold.⁵

The civil action provision of the CFAA provides compensatory damages, injunctive relief, and other equitable relief.⁶ In most CFAA actions, compensatory damages will be limited to economic damages, such as (1) the recovery of computer consultant fees for investigating and repairing any problems caused by unauthorized access; (2) the loss of actual business and of business goodwill; and (3) the value of the information wrongfully obtained.

Unlike most state trade secret misappropriation laws, the CFAA does not allow recovery of exemplary or punitive damages, or of attorney fees. The CFAA contains a two-year statute of limitations. A claim must be brought

within two years of the act violating the statute or within two years of the date of discovery of damage caused by a violative act.⁷

Recent Judicial Interpretations

The CFAA was first used by a private business to obtain a remedy for misappropriation of trade secrets and other confidential information in *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121 (W.D. Wash. 2000). In that case, the plaintiff's former employees (while still working for plaintiff) used its computers to send trade secrets and other proprietary information (e.g., confidential business plans) to the defendant, a competitor who the employees had previously agreed to join. The plaintiff filed suit alleging violations of the CFAA as well as state law trade secret misappropriation and other common law claims.

The defendant moved to dismiss plaintiff's CFAA claims, arguing, among other things, that the former employees had authorization to access plaintiff's computers as they were still on plaintiff's payroll when they did so. In a significant ruling, the district court concluded that the authority of the former employees ended when they started acting as agents for defendant and used the plaintiff's computers and information on the computers for a purpose adverse to the plaintiff. The court therefore held that the employees were acting "without authorization" when they sent plaintiff's trade secrets and proprietary information to defendant via email.⁸ The court noted that the legislative history of the CFAA makes clear that the "statute is intended to punish those who illegally use computers for commercial advantage."⁹

Following *Shurgard*, numerous other courts have also ruled that the CFAA provides private businesses remedies for misappropriation of electronically stored intellectual property by former employees—conduct that has traditionally been

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the subject of state law trade secret misappropriation, breach of fiduciary duty, breach of contract, and other common law claims.¹⁰

In another significant case, the Seventh Circuit recently held that the CFAA applies to former employees who steal confidential information and then engage in efforts to cover up their wrongdoing. In *International Airport Centers, LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006), defendant, a former employee of the plaintiff, decided to quit and go into business for himself. Before returning his company-provided laptop computer to the plaintiff, he deleted all of the data in it, including the data he collected in the course of his work, as well as data that would have revealed he had engaged in improper conduct before he quit. To prevent recovery of the data, the former employee loaded into the laptop a secure-erasure program, which is

designed to write over deleted files and made it impossible for the plaintiff to recover any of the deleted information.

The plaintiff filed suit, alleging that the former employee violated a provision of the CFAA that provides that whoever “knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer” violates the act.¹¹ The district court granted defendant’s motion to dismiss the suit for failure to state a claim, but the Seventh Circuit reversed and ordered the suit reinstated.

The Seventh Circuit found that the former employee’s loading of the secure-erasure program into the computer constituted unlawful “transmission” under the CFAA. In reaching this conclusion, the court recognized that in enacting the CFAA, “Congress was concerned with . . .

attacks by disgruntled programmers who decide to trash the employer’s data system on the way out (or threaten to do so in order to extort payments).”¹² The Seventh Circuit also found that the former employee acted “without authorization” because:

his authorization to access the laptop terminated when, having already engaged in misconduct and decided to quit [plaintiff] in violation of his employment contract, he resolved to destroy files that incriminated himself and other files that were also the property of his employer, in violation of the duty of loyalty that agency law imposes on an employee.¹³

As *Citrin* illustrates, the CFAA can be used to protect employers from sabotage of electronic files by departing employees

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even where there is no evidence that the employee used the employer's confidential information in a competing business.

Advantages of Using the CFAA

The CFAA provides private businesses several strategic advantages. In many situations, it might be easier for private businesses to obtain remedies under the CFAA than under state law when disloyal employees misappropriate their trade secrets and confidential information. Employers can seek remedies under the CFAA even if the disloyal employee has not signed a confidentiality or noncompete agreement.

Furthermore, the CFAA provides broader protection for confidential information because it is not limited to information that constitutes a legally defined trade secret. The plaintiff need only show that the improperly accessed information was stored on a computer linked to the Internet. For example, while a business might not have a remedy under a state trade secret misappropriation law for a former employee's theft of customer lists and information, the business might have a remedy under the CFAA.

In addition, the CFAA does not require proof that the business took reasonable steps to protect the confidentiality of the stolen information, such as by obtaining confidentiality/nondisclosure agreements from employees and/or restricting access to the information. Again, the business need only demonstrate that the stolen information was electronically stored and that the former employee lacked or exceeded his or her authority in accessing the information. Furthermore, bringing a claim under the CFAA avoids restrictive state noncompete or unfair competition laws.

The CFAA might also provide recourse against both the former employee and the deeper-pocketed competitor. Several courts have interpreted the CFAA as imposing vicarious liability against competitors on whose behalf defecting employees have accessed the confidential data of their former employer.¹⁴

As the CFAA is a federal statute, it provides access to the federal courts based on federal question jurisdiction. The option of filing suit in federal court

might provide a strategic advantage to pursuing a remedy in state court.

Measures to Enhance the CFAA Protection

Employers can take steps to ensure that they can take advantage of the CFAA protection if it becomes necessary. One of the most hotly litigated issues in CFAA cases is whether the former employee was acting "without authorization" or "exceeded" his or her authorization when the employee accessed the former employer's computer. Whether an employer is able to establish the no-authorization element is likely to be determined, at least in part, by what is stated in its computer usage policy. Thus, it is critical that employers adopt detailed computer usage policies, or even written agreements, which expressly set forth what is and what is not permissible computer access, and the circumstances under which such permission is revoked.

To discourage employee wrongdoing, employers should educate their employees about the employees' obligations to protect the confidentiality of the employers' trade secrets and confidential information, as well as the consequences for failing to do so, including potential personal liability under the CFAA and other state laws. When affected by the misuse or potential misuse of confidential information, employers should consider whether they might have remedies under the CFAA in sending "cease and desist" letters and in bringing litigation.

Because CFAA litigation is a two-way street, employers must also take action to avoid potential CFAA claims. Employers should advise new hires of their obligation to return electronically stored information to their former employers before starting their new jobs, and ensure that new hires do not use their former employer's data without permission.

In light of amendments to the CFAA and expansive judicial interpretations of the statute, the CFAA is becoming an increasingly powerful weapon against theft of intellectual property by disloyal employees. Employers should consider how they can use it, both to discourage misconduct in training employees about their obligations and,

if necessary, to stop wrongdoing by a defecting employee. Employers should also take steps to ensure that if they need to bring a CFAA action for injunctive relief and/or damages, they are well-positioned to satisfy their burden of proof by adopting policies concerning authorized computer usage and engaging forensic computer experts to marshal evidence of unauthorized computer access. ■

Endnotes

1. 18 U.S.C. § 1030(e)(2).
2. 18 U.S.C. § 1030(a).
3. 18 U.S.C. § 1030(e)(11).
4. *See, e.g.*, EF Cultural Travel BV, *EF v. Explorica, Inc.*, 274 F.3d 577, 584 n.17 (1st Cir. 2001); *Pacific Aerospace & Electronics Inc. v. Taylor*, 295 F.Supp.2d 1188, 1197 (E.D. Wash. 2003).
5. *See, e.g.*, *Four Seasons Hotel & Resorts BV v. Consorcio Barr, SA*, 267 F. Supp. 2d 1268, 1324 (S.D. Fla. 2003); *Shurgard Storage Centers Inc. v. Safeguard Self Storage Inc.*, 119 F.Supp.2d 1121, 1126–27 (W.D. Wash. 2000).
6. 18 U.S.C. § 1030(g).
7. 18 U.S.C. § 1030(g).
8. *Shurgard*, 119 F. Supp. 2d at 1125.
9. *Shurgard*, 119 F. Supp. 2d at 1129.
10. *See, e.g.*, *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930 (9th Cir. 2004) (plaintiff brought CFAA claims against a competitor that hired away one of plaintiff's employees who, while still working for plaintiff, downloaded and sent to his home email account, trade secrets and confidential information); *George S. May Int'l Co. v. Hostetler*, 2004 WL 1197395 (N.D. Ill. May 28, 2004) (consulting firm brought CFAA claim against a former employee who accessed the firm's computer system and removed copyrighted material for the benefit of himself or a competitor).
11. 18 U.S.C. § 1030(a)(5)(A)(i).
12. *International Airport Centers*, 440 F.3d at 420.
13. *See id.*
14. *See, e.g.*, *Charles Schwab & Co. v. Carter*, 2005 WL 2369815 (N.D. Ill. Sept. 27, 2005); *Shurgard*, 119 F. Supp. 2d at 1123–25.

Official Communications, Official Consequences: A Look at *Garcetti v. Ceballos*

By Robert E. Gregg

Nearly every student of the law has had the experience of reading a majority opinion in a constitutional case and thinking, “Yes, that must be right,” only to reverse his or her opinion after reading a well-crafted dissent, and then changing it back again upon rereading the majority opinion. At a recent question and answer session with law students at Nova Southeastern University, Supreme Court Justice John Paul Stevens admitted that, in a number of cases, the justices themselves are persuaded of the absolute correctness of a petitioner’s position after reading the “blue brief,” then change their minds after reading the “red brief” of the respondent (and then change back again after reading the petitioner’s “yellow brief” in reply). Once in while, though, a lawyer or student reads the opinions in a constitutional case and gets the troubling feeling that no one “got it right.” The recent Supreme Court decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) is one of those cases.

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By now, most employment law practitioners are familiar with the facts underlying *Ceballos*. Briefly, Richard Ceballos, a “calendar” deputy district attorney for the Los Angeles County District Attorney’s Office, was asked by a defense attorney to investigate allegations of misconduct by an arresting deputy sheriff in a case his office was prosecuting. After examining a search warrant affidavit and visiting the location it described, Ceballos concluded that the deputy sheriff had either lied or seriously misrepresented the facts on the affidavit, and drafted a memo to his supervisors (pursuant to his employment duties) relating his conclusions. Ceballos also informed defense counsel of those conclusions. His supervisors ultimately decided to proceed with the prosecution of the case, and Ceballos was subpoenaed to testify at a hearing on the defendant’s motion to traverse. Ceballos was thereafter removed from the prosecution’s team.

Ceballos filed a lawsuit against the county and his supervisors, which included a claim under 42 U.S.C. § 1983, for retaliatory employment actions consisting of reassignment to trial deputy, transfer to a more remote courthouse, and denial of a promotion. The Los Angeles County District Attorney asserted that no retaliatory actions were taken against Ceballos. After the United States District Court for the Central

District of California granted a motion for summary judgment in favor of the defendants, and the Court of Appeals for the Ninth Circuit reversed, the Supreme Court decided to hear the case, rendering its decision on May 30, 2006. The crux of that decision addresses the susceptibility of public employees to employer discipline for statements made “pursuant to their official duties,” and the lack of First Amendment protection for those statements.

Perhaps more so than in many other close cases, the court seemed flummoxed (*Ceballos* was reargued after Justice Alito joined the court mid-term, due to a 4–4 split) as to whether a “good” rule could be formulated under the facts. The dilemma the court faced was whether it was more desirable to render a decision that denies First Amendment protection to public employees whenever they speak in the course of their official duties (they are, after all, often in the best position to speak intelligently on many matters of public concern), or to recognize such constitutional protections and thereby subject public employers to potential litigation every time an unfavorable personnel action is taken consequent to the performance of a public employee’s duties where statements of public concern are made.

To put it another way, while it may be self-evident to many that the public should not (and probably does not) want a public employee at the level of district attorney afraid to speak frankly and honestly with his or her bosses where candor is not only desirable, but necessary, to the impartial administration of justice, it is arguably just as clear that the government as employer should not have to defend against constitutional

The Employment Retaliation Standard, a New Wrinkle on the Face of Employment Litigation

continued from front cover

should not be working in the railroad’s Maintenance of Way department and had made other inappropriate remarks. In response to White’s complaint, the supervisor was disciplined. Later that month,

White’s forklift duties were removed and she was assigned to perform only the more arduous standard track laborer tasks. The company cited seniority reasons in effecting the reassignment.

In October of 1997, White filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging gender discrimination and retaliation. Just days after notice of the charge was sent to Burlington, White’s immediate supervisor accused White of being insubordinate and suspended her

without pay. After pursuing an internal grievance, White was reinstated to her original position with back pay covering her 37-day suspension. Thereafter, White filed an additional retaliation charge with the EEOC, asserting that her suspension was unlawful.⁶

At issue in *Burlington* was the scope of Title VII’s retaliation provision. Prior to *Burlington*, the circuits were divided over the breadth of the retaliation provision. The Sixth (where the *Burlington* litigation originated), Fourth, and

claims every time it takes corrective action upon determining that an employee's work is substandard, "inflammatory or misguided," if the employee claims he spoke upon a matter of public concern. The inherent frustration of the case was summed up during oral arguments by Justice Steven Breyer, who commented,

[I]t's very hard for me to believe that never is there an instance where the First Amendment offers protection. But the only choice you've [Ceballos's attorney] given me is a rule that says every dispute of public interest is going to go right into constitutional litigation. And I don't like that either. So, I am hopelessly forced to choose which is the lesser of two evils.

Ultimately, the majority held for the government, finding that while "[t]he Court's [prior, public-sector employee speech] decisions . . . have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions," this case was different from those prior decisions because Ceballos was not speaking "as a citizen" in drafting his disposition memorandum. He was simply doing part of what he was hired to do, and his employer wasn't happy with his work product. According to the majority, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the

employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."

Moreover, according to the majority, other avenues exist for pursuing alleged retaliatory actions in the "powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing." That is a small comfort, according to the dissent of Justice David Souter (joined by Justices John Paul Stevens and Ruth Bader Ginsburg), who noted that the degree of protection under that "patchwork" will vary depending on the state in which one happens to live. And, according to Justice Souter, meeting the high burden of proof under the federal Whistleblower Protection Act—or even finding protection if one does—will usually be unattainable to the public employee.

Both "sides" have important concerns and strong points; neither seems to have a satisfactory solution. Is it really possible to separate the "citizen" from the "employee," for First Amendment purposes, when an individual's job responsibilities include blowing the whistle? On the other hand, is it practicable to efficiently run a government agency when an employee can pursue a lawsuit for every act of employer discipline that follows speech that is arguably upon a matter of public concern? Perhaps Justice Breyer (in the third of three dissents) did get this one right after all: The answer to the question of whether a public employee should have First Amendment protection against

employer discipline when making statements pursuant to his official duties should be "sometimes" rather than "never" (or "always"). Perhaps the court should have fashioned a rule (or modified an existing balancing test) that would at least leave open the possibility of constitutional protection when a public employee's speech is required by "professional and special constitutional obligations." As it stands, good government stewards will, in some cases, be needlessly forced to choose between their

Good government stewards will, in some cases, be forced to choose between their paychecks and the public good.

paychecks and the public good, or take the chance of "going public" with information of government malfeasance (and have the possibility of constitutional protection) rather than take the risk that their supervisors will be receptive to their revelations. Placing public employees in that position probably isn't good for anyone. ■

Third circuits utilized a test in which the plaintiff was required to demonstrate a close relationship between the retaliatory action and his or her employment. For example, the Sixth Circuit required an "adverse employment action," which it interpreted as a "materially adverse change in the terms and conditions of employment." The Fifth and Eighth circuits adopted an even more restrictive approach, which required an "ultimate employment decision," limited to such acts as "hiring,

granting leave, discharging, promoting, and compensating."⁷

In contrast, the Seventh and District of Columbia circuits utilized a more relaxed standard, requiring only that the plaintiff show that the "employer's challenged action would have been material to a reasonable employee." The Supreme Court adopted this relaxed standard and concluded as follows:

In our view, a plaintiff must show that a reasonable employee would

have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth a general civility code for the American workplace.

We refer to reactions of a reasonable employee because we believe that the provision's standard for judging harm must be objective.⁸

The question posed in this article is whether or not this standard, "cover[ing] those (and only those) employer actions that would have been materially adverse to a reasonable employee," has or will result in a significant change in the status quo. From an employment litigation perspective, *Burlington* will likely make it easier for some plaintiffs to establish a prima facie claim, but it is not clear that

adverse action. If the employer proffers a nonretaliatory reason, the plaintiff must then carry the ultimate burden of proof that the reason provided by the employer is a pretext for prohibited, retaliatory conduct.

Burlington is directed at the second element of the plaintiff's prima facie claim. Under the rejected standards employed by the Fifth and Eighth circuits, adverse actions that did not constitute "final" employment actions did not satisfy this element of the prima facie showing. Complaints concerning such actions as being moved to a smaller office or subjected to less desirable working conditions would fail under this standard.

Likewise, in the Sixth Circuit, any adverse action deemed unrelated to the terms and conditions of employment failed to establish a prima facie claim. Thus, for example, if the plaintiff's only allegation of retaliation focused on not being invited to coworkers' golf outings and the like, the plaintiff's claim would likely be dismissed because he or she could not establish an actionable adverse action to support a prima facie claim.¹¹

For employers in circuits formerly employing these more stringent standards, the fear expressed by employers is that the judiciary will suddenly be called upon to micromanage such things as invitations to golf outings and the routine assignment of job responsibilities.

For example, in *Easterling v. Sch. Bd. of Concordia Parish*¹², the plaintiff, a school teacher, alleged constructive discharge based upon the following:

She alleges that the School Board (1) assigned her to two working offices ten miles apart without increasing her compensation, (2) placed her in an office that was inferior to those of other employees in her position and had a foul odor, (3) forced her to work outdoors for the first time in her twelve-year employment history with the School Board, (4) hindered her success in her coaching efforts by removing certain students from her teams, (5) removed her privilege of writing directive memos, (6) prevented her from having weekly Friday practices, (7) prevented

her from routinely doing community outings with students, (8) did not allow her access to files and records during her preparation period, (9) prevented her from reporting to other locations when needed, and (10) excluded her from school-oriented social activities. Finally, [plaintiff] alleges that the School Board denied her a transfer to a higher paying behavioral interventionist position. Instead, the School Board hired two applicants who lacked teacher certification but held master's degrees.¹³

In *Easterling*, the district court granted summary judgment in favor of the employer as to plaintiff's retaliation claim holding, prior to *Burlington*, that the plaintiff could not establish actionable adverse action as a matter of law.¹⁴ Applying *Burlington*, the Fifth Circuit reversed, stating "[t]he district court, applying precedent from this Circuit, conducted its analysis under the old, now rejected, standard. For that reason, we vacate the award of summary judgment on Easterling's retaliation claim and remand for a determination consistent with *Burlington Northern*."¹⁵ The Fifth Circuit, however, did not provide a substantive analysis of these facts under *Burlington*.

At the time of the drafting of this article, *Easterling* is on remand, and a ruling on the employer's partial motion for summary judgment remains pending. Not surprisingly, though, the employer argues on remand that the *Burlington* analysis would result in the same decision.¹⁶ In so arguing, the employer essentially contends that *Burlington* distinguishes actionable from trivial conduct and that the plaintiff's allegations fall within the purview of trivial conduct. As would be expected, the plaintiff asserts that her allegations of "lesser retaliatory acts" should be reexamined in light of the *Burlington* decision.¹⁷

Importantly, *Burlington* does not invite courts to micromanage routine employment decisions. On the contrary, the court stressed the requirement that the adverse action be objectively and materially adverse. "[A] plaintiff must show that

Employers fear the judiciary will be called upon to micromanage such things as job responsibilities and golf invitations.

the decision will increase the likelihood of these cases surviving a motion for summary judgment.

Burlington and the Plaintiff's Prima Facie Case

Burlington's impact is most apparent in the plaintiff's ability to establish a prima facie case of retaliation. Absent direct evidence, Title VII retaliation claims are generally analyzed pursuant to the *McDonnell Douglas* burden-shifting framework.⁹ In particular, the plaintiff must first establish a prima facie showing demonstrating that (1) he or she participated in a protected activity; (2) he or she was subjected to adverse action; and (3) a causal connection exists between the participation in the protected activity and the adverse action.¹⁰ Where the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to proffer a legitimate, nonretaliatory reason for the

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a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”¹⁸ In reaching this conclusion, the court reiterated its now common refrain that Title VII should not be interpreted as a general civility code.¹⁹ “An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.”²⁰ *Burlington*’s facts are illustrative. Applying this standard, the court held that the change in White’s job duties and her 37-day unpaid suspension (for which she eventually received her pay after grieving the matter) was sufficiently adverse to support a jury verdict. In contrast, an adverse action, such as being ostracized by one’s coworkers, is unlikely to be considered materially adverse under even the *Burlington* standard.

Consistent with *Burlington*’s guidance that “trivial” harms are not actionable,²¹ many post-*Burlington* decisions have attempted to distinguish material adversity from trivial harms. For example, in *Devin v. Schwan’s Home Service, Inc.*,²² the Court held that a single write-up would not constitute a material adverse action. Under the Court’s view, it clearly fell within the category of a trivial harm.”²³

A similar example granting summary judgment to the employer is *Reis v. Universal City Development Partners*.²⁴ In *Reis*, the plaintiff worked outdoors as a guest services agent charged with selling tickets and providing other services. She requested a transfer to an indoor position, but the request was denied. The plaintiff alleged that the denial of her transfer request was materially adverse. The court disagreed, noting that the only differences of record were that (1) the indoor job enjoyed heating and air conditioning; (2) the indoor job began work earlier in the day; and (3) the indoor job also handled customer complaints. The court specifically noted that there was no evidence of a difference in prestige or wages, nor did the new position have greater potential for advancement.²⁵ The *Reis* decision is

illustrative of the fact that, even where the *Burlington* standard is applied, summary judgment remains a very real hazard for employees seeking to assert employment claims.²⁶

Courts that focus on the materiality of the adverse action appear more likely to grant summary judgment than those that emphasize reasonableness. What is “materially adverse” is technically defined in *Burlington* to mean that which would dissuade a reasonable employee. However, materiality implies a connection to the terms and conditions of employment, whereas the “reasonable employee” conveys a jury issue. Courts that frame the inquiry as materially adverse (as opposed to trivial) harms seem more amenable to summary judgment than courts that place emphasis on what a factfinder could reasonably conclude under the circumstances. For example, in *Moore v. City of Philadelphia*,²⁷ the Third Circuit’s analysis focused on whether or not the employer’s action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”²⁸ There, the court held that “a reasonable jury could conclude that a lateral transfer from the district where a police officer had earned goodwill and built positive relations with the community over time is the kind of action that might dissuade a police officer from making or supporting a charge of unlawful discrimination within his squad.”²⁹ Accordingly, the court reversed the district court’s grant of summary judgment.

Retaliatory transfers make an interesting study, as they remain one of the more contentious gray areas between what is trivial and what is materially adverse. In *Burlington*, the Supreme Court held that “reassignment of job duties is not automatically actionable.”³⁰ The Fifth Circuit precedent, pre-*Burlington*, established that “in cases where the evidence produces no objective showing of a loss in compensation, duties, or benefits, but rather solely establishes that a plaintiff was transferred from a prestigious and desirable position to another position, that evidence is insufficient to establish an adverse employment action.”³¹ *Burlington*, however, clearly changed this ultimate employment action requirement.

However, as a practical matter, *Burlington* does not appear to have a significant impact on the “terms and conditions of employment” requirement. Literally speaking, *Burlington* abrogates the terms and conditions of employment requirement formerly used by the Sixth and Fourth circuits. Practically speaking, though, transfer cases that are determined to be “materially adverse” are those in which the terms and conditions of the plaintiff’s employment have been affected. Thus, the end result is likely the same.

For example, in *Thomas v. Potter*,³² the Seventh Circuit, prior to *Burlington*,

In most cases, plaintiffs are able to cite at least one instance of alleged retaliation related to the conditions of employment.

affirmed summary judgment in the employer’s favor. Following *Burlington*, the Supreme Court granted certiorari and remanded the case for further consideration in light of the *Burlington* decision. The Seventh Circuit, affirming summary judgment once again, held that the purported retaliatory act—the change to [plaintiff’s] shift schedule—is directly related to his employment. Therefore, *Burlington* does not alter the outcome of this case unless there was intentional, nonemployment-related harm to [the plaintiff] from the shift change. . . . [The plaintiff] identifies no evidence that the [employer] imposed the shift change with the knowledge or intention that [the plaintiff] would consider it undesirable or inconvenient.³³

The Second Circuit also discussed at length the issue of transfers in *Kessler v. Westchester County Dept. of Social Svcs.*³⁴ In *Kessler*, the court reversed the district court’s grant of summary judgment in favor of the employer. In particular, the

court held that the plaintiff had raised an issue of fact as to whether his transfer was materially adverse. In that case, the plaintiff was a management-level employee who alleged a de facto demotion by virtue of being transferred from the employer's central administrative office to a district office. In his former position, the plaintiff was "part of the top management of the department" and supervised a large number of managerial, professional, and clerical staff. By comparison, in his new position, the plaintiff no longer performed the "broad discretionary and managerial functions" of his former

and the employer's legitimate, non-retaliatory reason. In most cases, plaintiffs are able to cite at least one instance of alleged retaliation that is directly related to the terms and conditions of their employment. *Burlington* will no doubt complicate matters for defense counsel by requiring that employers address a litany of allegedly retaliatory actions while placing added emphasis on causality. In this respect, the Eleventh Circuit remarked,

[I]n most employment discrimination cases the issue of a plaintiff's subjective preference need not arise, because the plaintiff has alleged an employment action that would appear adverse to any reasonable person. Where a plaintiff has allegedly suffered termination, demotion, reduction in pay, loss of prestige, or diminishment of responsibilities, for example, a court normally has no cause to consider its standard for adversity; the relevant question in such cases is whether such patently adverse actions actually took place.³⁸

As noted by the Eleventh Circuit, the pressing issue in most retaliation cases is causality and the employer's legitimate, nonretaliatory reasons for its actions. To the extent that the standard outlined in *Burlington* makes it easier to satisfy the adverse action element in retaliation cases, the natural consequence of the Court's decision will likely be to further shift the emphasis in these cases to arguments regarding causation and pretext.

For example, in *Amodio v. Wild Oats Marketing, Inc.*, the plaintiff challenged as retaliatory a job transfer that resulted in a reduction in hours, a loss in the opportunity to participate in profit sharing, and an increase in more arduous job duties.³⁹ Based upon *Burlington*, the court held that the plaintiff had "presented sufficient evidence to create a genuine issue of material fact as to whether her transfer . . . was materially adverse to a reasonable employee in her position."⁴⁰ Nonetheless, the court granted summary judgment in favor of the employer based upon its finding that

the plaintiff could not establish a prima facie claim as to causality. In that case, there was no evidence that the plaintiff's supervisor had knowledge of plaintiff's complaints at the time of the transfer.

Similarly, in *Murry v. Gonzales*, the plaintiff alleged retaliation in a number of forms, both job-related and otherwise: the lowering of her personnel evaluation scores, a forced physical fitness exam, a temporary transfer to another position, and "a litany of other comments and events which she claims were in retaliation for her EEOC charge," such as a coworker spraying a room deodorizer in a room where plaintiff was sitting, causing a severe allergic reaction.⁴¹ While the court held that there was a genuine issue of material fact as to whether the transfer was materially adverse, the court granted summary judgment for the employer based upon the lack of causation as well as the plaintiff's failure to establish pretext.

In the same vein, in *Kestner v. Stanton Group, Inc.*, the Sixth Circuit held that, in the event that the employee was able to make a showing of adverse action under *Burlington*, her retaliation claim failed because she failed to introduce evidence that the employer's proffered reasons for her dismissal were pretextual.⁴²

Thus, while *Burlington* may have increased the plaintiffs' likelihood of establishing a prima facie claim, the case should not decrease the likelihood of summary judgment granted on the basis of causality or because of the employer's nonpretextual legitimate reasons.

In conclusion, the criticism levied by employers regarding *Burlington*—that employees will enlist the judiciary in an effort to micromanage a myriad of routine employment decisions—seems premature at this time. It does not appear likely that courts will assume oversight of routine employment decisions, given that the courts applying *Burlington* have clearly taken the material adversity element seriously in assessing the merits of defense summary judgment arguments. While many commentators have focused on *Burlington*'s holding regarding the actionability of adverse actions that do not affect the terms or conditions of employment, it may well be that *Burlington*'s most significant holding will

Employers should be cognizant that a greater range of decisions will be reviewable.

position, "no one would report to him, and he would be forced to do work normally performed by clerical and lower-level personnel."³⁵ The Second Circuit noted that under its former precedent, "we have generally looked to whether the plaintiff has suffered a materially adverse change in his employment status or in the terms and conditions of his employment."³⁶ As the Second Circuit noted, in light of *Burlington*, the terms and conditions inquiry is absent, and the issue becomes whether or not there is an objective, materially adverse action. In this case, the court determined that an issue of fact remained as to this element, precluding summary judgment for the employer. This case does not appear, however, to be a departure from the Second Circuit's pre-*Burlington* precedent.³⁷

Increased Significance of Causality and Legitimate Nondiscriminatory Reason Defenses

Insofar as *Burlington* redefines the meaning of an adverse action, it may increase the significance of both the causality element of a prima facie case

be the court's discussion of this materiality element. Nonetheless, employers would be well served to be cognizant that a greater range of decisions will be reviewable and should act accordingly to ensure that their decisions will withstand scrutiny if challenged.

The full impact of *Burlington* is not yet clear, and the case's impact will certainly continue to be a hot topic in the immediate future. Practitioners should continue to stay abreast of emerging case law as *Burlington* is applied by the circuit courts—particularly as to how courts define what actions are considered “materially adverse,” and thus actionable, as opposed to “trivial,” and therefore not actionable. ■

Endnotes

1. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 548 U.S. ___ (2006).
2. *Id.* at 2409.
3. *Id.* at 2410–11.
4. *See, e.g.*, Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*. N.Y.Times, June 23, 2006. “The Supreme Court substantially enhanced legal protection against retaliation for employees who complain about discrimination or harassment on the job[.]” <http://www.nytimes.com>.
5. *Burlington*, 126 S.Ct. at 2409–10.
6. *Id.* at 2409.
7. *Burlington*, 126 S.Ct. at 2410, citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997), and *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).
8. *Burlington*, 126 S.Ct. at 2415 (internal citations omitted).
9. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
10. *See, e.g.*, *Brown v. Snow*, 440 F.3d 1259, 1266 (11th Cir. 2006).
11. This is assuming, of course, that the place of employment is not golf-related, and/or the golf course is not a principal place at which business is conducted. Golf may, in some circles, be the bastion of discrimination. *See Burlington* at 2415–16. “A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.”
12. *Easterling v. Concordia Parish Sch. Bd.*, Case No. 05-30868, 2006 WL 2092503 (5th Cir. 2006) (unreported).
13. *Id.* at *1.
14. *Easterling v. Concordia Parish Sch. Bd.*, Case No. 03-0985 (W.D. La. 2005).
15. *Easterling*, Case No. 05-30868, 2006 WL 2092503 (5th Cir. 2006).
16. *Easterling*, Case No. 03-0985 (W.D. La. 2006). Docket No. 63-3, pp.12–14.
17. *Id.*
18. *Burlington*, 126 S.Ct. at 2415 (internal quotations omitted).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Devin v. Schwans’s Home Service, Inc.*, Case No. 04-4555, 2006 WL 2590611 (D. Minn. 2006).
23. *Id.* at *10, citing *Burlington* at 2415.
24. *Reis*, 442 F. Supp. 2d 1238 (M.D.Fla. 2006). Notably, in this case, the Court addressed an ADA-retaliation-type claim, brought pursuant to Florida state law. However, such claims are expressly “analyzed under the same framework that courts employ for retaliation claims arising under Title VII.” *Id.* at 1252.
25. *Id.* at 1252–54.
26. As the Middle District of Florida Court stated, the Eleventh Circuit has, for some time, been using the same standard as set forth in *Burlington*: “Although not cited by the Supreme Court, the Eleventh Circuit articulated substantially the same standard in *Doe v. DeKalb County Sch. Dist.*,” and “[t]his Court finds no appreciable difference in applying the standard articulated by the Supreme Court in *White* and the standard articulated by the Eleventh Circuit in *Doe*.” *Id.* at 1253, citing *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1447 (11th Cir. 1998).
27. *Moore v. City of Philadelphia*, 461 F.3d 331, 346 (3d Cir. 2006). As a purely editorial comment, from the facts as presented by the Court, this case has a number of instances of overt use of racial epithets. As the Supreme Court stated, “context matters,” and context may very well have guided the Court’s analysis. *Burlington*, 126 S.Ct. at 2415.
28. *Moore*, 461 F.3d at 347–48, citing *Burlington*, 126 S.Ct. at 2415.
29. *Id.* at 348.
30. *Burlington*, 126 S.Ct. at 2417.
31. *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 283 (5th Cir. 2004). It is worth noting, however, that in the same case, the Fifth Circuit held that the plaintiff nevertheless raised an issue of material fact on the issue of his transfer because the old position had a higher potential incentive pay than the new position had, and thus the potential compensation for the two positions could have been unequal.
32. *Thomas v. Potter*, Case No. 05-1454, 2006 WL 2929952 (7th Cir. 2006) (unpublished order).
33. *Id.* at *1, citing *Burlington*, 126 S.Ct. 2415-16, and *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).
34. *Kessler v. Westchester County Dept. of Social Svcs.*, 461 F.3d 199, 206–11 (2d Cir. 2006).
35. *Id.* at 209–10.
36. *Id.* at 207, citing *Williams v. R.H. Donnelley Corp.*, 368 F.3d 123, 128 (2d Cir. 2004) (internal quotations omitted).
37. *See de la Cruz v. New York Human Resources Admin. Dept. of Social Svcs.*, 82 F.3d 16, 20 (2d Cir. 1996)(an adverse employment action may be found where the plaintiff was transferred from an elite unit to one of lesser prestige) and *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000)(holding that “a transfer is an adverse employment action if it results in a change in responsibilities so significant as to constitute a setback to the plaintiff’s career”).
38. *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998).
39. *Amodio v. Wild Oats Marketing, Inc.*, Case No. 3:05cv714, 2006 WL 2800903 (D. Conn. 2006). Notably, Plaintiff also challenged her termination as retaliatory. Summary judgment was granted as to both the transfer and termination; only the transfer is addressed herein.
40. *Id.* at *6.
41. *Murry v. Gonzales*, Case No. 5:04cv498, 2006 WL 2506963 at *7 (M.D.Fla. 2006).
42. *Kestner v. Stanton Grp., Inc.*, Case No. 05-6770, 2006 WL 2930108 (6th Cir. 2006) (unreported).

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