

Employer's Justified Promotion Doesn't Justify Retaliation

By: Alexander J. Burrige, Workplace Law Practice Group

In a recent Michigan Court of Appeals case, *White v. Department of Transportation*, the Court of Appeals adopted the federal standard for assessing retaliation claims. In *White*, an African American property analyst, sued the Department of Transportation for racial discrimination (failure to promote) and retaliation in violation of Michigan's Elliot Larsen Civil Rights Act ("ELCRA"). The retaliation claim alleged that the plaintiff received a poor performance ratings and was placed on a performance improvement plan ("PIP") because she filed a race discrimination lawsuit.

The trial court granted the employer's motion for summary judgment and dismissed both claims. The Michigan Court of Appeals affirmed the dismissal of *White*'s failure-to-promote claim, but reversed the dismissal of the retaliation claim.

With regard to the failure to promote claim, the Court held that the plaintiff's subjective opinion that she was more qualified for the promotion than the individual who was promoted, was, itself, not sufficient evidence of discrimination.

As to the retaliation claim, the Court adopted the U.S. Supreme Court's *Burlington Northern and Santa Fe Ry Co. v. White* analysis as the standard for assessing retaliation claims under the ELCRA. Under that standard, the scope of anti-retaliation protections extends beyond "ultimate employment decisions" (hiring, firing, rate of pay, or promotion) to any action that might dissuade a reasonable worker from making or supporting a charge of discrimination. Accordingly, the Court of Appeals found that the negative evaluations and the PIP were adverse employment actions, and there was an issue of fact for the jury as to whether these adverse actions were motivated by retaliatory animus.

This case demonstrates retaliation claims are often more problematic than the original discrimination claim. Employers must take care to train supervisors that regardless of whether an employee makes an unjustified discrimination complaint they must continue to treat such employee similar to other employees in all material employment decisions, including performance evaluations. Also, employers should be extra careful to ensure that their legitimate, non-discriminatory reasons for all material employment decisions are well documented.

This article is not, and should not be considered legal advice. Employers with questions regarding how they can mitigate of the risk of discrimination and/or retaliation claims, or any other workplace law question, can contact any member of Bodman's Workplace Law Group. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

WORKPLACE LAW PRACTICE GROUP	AARON D. GRAVES <i>Chair</i> 313.392.1075 agraves@bodmanlaw.com	JOHN T. BELOW 248-743-6035 jbelow@bodmanlaw.com	JOHN C. CASHEN 248.743.6077 ccashen@bodmanlaw.com
	GARY S. FEALK 248-743-6060 gfealk@bodmanlaw.com	STEVEN J. FISHMAN 248.743.6070 sfishman@bodmanlaw.com	JOHN DAVID GARDINER 616.205.3123 jgardiner@bodmanlaw.com
	MELISSA M. TETREAU 248.743.6078 mtetreau@bodmanlaw.com	BRENT R. SCOTT 616.205.3317 bscott@bodmanlaw.com	REBECCA C. SEGUIN-SKRABUCHA 313.393.7594 rseguin-skrabucha@bodmanlaw.com
	KATHERINE F. CSER 248.743.6031 kcser@bodmanlaw.com	MICHELLE L. KOLKMEYER 248.743.6031 mkolkmeier@bodmanlaw.com	DAVID B. WALTERS 248.743.6052 dwalters@bodmanlaw.com
			KAREN L. PIPER <i>Of Counsel</i> 248.743.6025 kpiper@bodmanlaw.com