

## LABOR AND EMPLOYMENT

### THE SIXTH CIRCUIT REAFFIRMS THE “LESS BURDENSOME” STANDARD FOR ADVERSE ACTIONS IN RETALIATION CLAIMS AND UPHOLDS PUNITIVE DAMAGES AGAINST EMPLOYER

by Aaron V. Burrell

In a decision designated for publication, the United States Court of Appeals for the Sixth Circuit issued an order reaffirming the “less burdensome” standard for “material adverse actions” in retaliation claims and upheld punitive damages against the employer where it purportedly failed to engage in a good-faith attempt to comply with Title VII. In *Hubbell v. Fedex Smartpost, Inc.*, \_\_\_ F.3d \_\_\_, 2019 WL 354786 (Aug. 5, 2019), FedEx hired the female plaintiff as a part-time parcel assistant and later promoted her to a lead parcel sorter. After five years of employment, a new manager took over as the plaintiff’s “hub manager.” The new manager immediately suggested that the plaintiff “demote herself to an administrative role because he felt ‘that females are better suited to administrative roles and males are better suited to leadership roles.’” *Id.* at \*1. Later he suggested that if the plaintiff did not take a “demotion . . . things would continue to get harder” for her. *Id.* Notably, before this meeting, the plaintiff had never received disciplinary action and, in fact, received a number of certificates commending her performance.

The new manager then waged a vigorous campaign to make the plaintiff’s job more difficult, including: placing low-performing parcel sorters in her area to make her look bad; ensuring she was not given enough workers; giving her conflicting working assignments; and issuing her discipline as a result of her, inevitable, challenges. When the plaintiff attempted to bring these issues to the attention of her human resources manager, the human resources manager responded that “maybe [she] just had a bad review, and to keep [her] head down, and let the managers do their job.” *Id.* at \*2.

The plaintiff filed a sex-discrimination and retaliation complaint with the Equal Employment Opportunity Commission (EEOC). But after she filed the retaliation complaint, she was “watched more closely by management. [Her] daily actions, [and her] work routine was scrutinized. [She] experienced write up after write up after write up.” *Id.* She filed a subsequent complaint with the EEOC, and, in return, her “managers instructed security guards to monitor how long she was taking on her bathroom breaks.” *Id.* Moreover, a manager asked her to “approve changes to her timesheet that would make it look like she had clocked in for work . . . late.” *Id.* Finally, FedEx discharged the plaintiff—she had received no discipline at all prior to the new manager’s arrival, but received “15 or 16 disciplinary actions in total after he became the manager.” *Id.*

The plaintiff filed a discrimination complaint in federal court against FedEx alleging: (1) gender discrimination; (2) retaliation for filing EEOC complaints; (3) hostile work environment; and (4) retaliation for filing suit. *Id.* at \*4. FedEx moved for summary judgment. The district court granted the motion as to the hostile-work environment claim, but

denied it as to the other claims. The remaining claims went to the jury, which awarded the plaintiff \$85,600 in combined front and back pay, \$30,000 in non-economic damages, and \$403,950.00 in punitive damages. The trial court later reduced the punitive damages to \$300,000. *Id.*

On appeal, FedEx argued that it was entitled to judgment on the plaintiff’s retaliation claim. Under Title VII, a plaintiff must establish four elements for a prima facie claim of retaliation: “(1) she engaged in a protected activity; (2) her exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action.” *Id.* at \*6 (citations omitted).

This case hinged on the third element—a materially adverse action. FedEx argued that because the alleged material adverse action happened prior to the first EEOC complaint, it could not have “retaliated” against the plaintiff. *Id.* at \*6-7. But the court held, in contrast, that a “plaintiff seeking Title VII’s protection against retaliation need show only ‘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.” *Id.* at \*7 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58-69 (2006)). The court posited that the showing required for a Title VII retaliation claim is “less burdensome than what a plaintiff must demonstrate for a Title VII discrimination claim.” *Id.* (citations omitted).

The court concluded that, “[v]iewed under the correct standard, a reasonable factfinder could find that a number of the actions [the plaintiff] testified about would be sufficient, on their own or in combination, to dissuade a reasonable worker from filing or pursuing an EEOC complaint.” *Id.* Particularly egregious to the court was FedEx allegedly placing the plaintiff “under close surveillance,” subjecting her “to numerous disciplinary write-ups,” and writing her “up for unexcused absences even when she provided doctor’s notes excusing these absences.” *Id.* The court found that “[e]ach of these actions ‘might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Id.*

Moreover, the court affirmed punitive damages for the plaintiff. To recover punitive damages, a plaintiff must demonstrate, among other things, that the “individuals perpetrating the discrimination acted with malice or reckless indifference toward the plaintiff’s federally protected right. A plaintiff satisfies this prong by demonstrating that the individual in question acted ‘in the face of a perceived risk that its actions will violate the law.’” *Id.* citing (*Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999)). Notably, the employer is vicariously liable for the actions of its managers or supervisors if it fails to engage in “good faith efforts to comply with Title VII.” *Id.*

Here, the court found that the “testimony at trial about FedEx’s anti-discrimination training itself provides support for the jury’s finding

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that [the plaintiff’s] managers acted with malice or reckless disregard toward her federal rights.” *Id.* at \*9. Moreover, the testimony at trial suggested that FedEx conducted no investigation into the plaintiff’s claims at all, noting that there was an “implicit concession that FedEx’s Human Resources department never investigated [the plaintiff’s] claims of gender discrimination.” *Id.* In affirming the punitive damages verdict, the court held that a “reasonable factfinder could determine that, despite its formal anti-discrimination policy, FedEx did not engage in good-faith efforts to comply with Title VII.” *Id.*

## Takeaways:

1. The standard for “material adverse employment action” for retaliation claims is less burdensome than for discrimination claims—an employee need only demonstrate that the challenged action would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”
2. Maintaining a robust antidiscrimination policy, alone, is insufficient—employers must actively train and instruct their employees on how to operate the business in a way that complies with the law.
3. A court will likely uphold punitive damages where it appears that the employer failed to investigate claims of discrimination. Employers should immediately and thoroughly investigate all allegations of discrimination—whether the claims appear to be grounded in fact or not.

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