

Employment Practices Liability

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Seventh Circuit Affirms Summary Judgment for Employer in Title VII and Title IX Retaliation Case

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Executive Summary: Recently, the United States Court of Appeals for the Seventh Circuit in *Burton v. Board of Regents of the University of Wisconsin System*, affirmed the district court's order granting summary judgment in favor of the employer in a Title VII and Title IX retaliation case. The Court of Appeals found that the plaintiff failed to offer evidence of an employer action which met the requirements for a "materially adverse" employment action protected by Title IX. The Seventh Circuit also found that the plaintiff failed to meet the "but for" causation requirement for a retaliation claim under Title VII.

Background: In 2009, plaintiff Sabina Burton began working as a "tenure-track" professor at the University of Wisconsin-Platteville in the criminal justice department. Burton was promoted to associate professor in January 2012.

In October 2012, a female student complained to Burton about a perceived incident of sexual harassment by a male professor. The next day, Burton contacted the Dean of the College of Liberal Arts, Elizabeth Throop, about the student's complaint. Burton next contacted the chair of the criminal justice department, Thomas Caywood, about the student's complaint. Caywood addressed the complaint and subsequently issued a memo to the department directing that all student complaints about faculty be brought to him, which represented a change in policy. At a later faculty meeting, Caywood explained he made the change because someone took a student complaint outside the department. Thereafter, Burton perceived that Caywood acted less collegially towards her.

Burton also claimed that Throop and Caywood started withdrawing support for the cybersecurity curriculum she was working on, although Caywood had signed a grant application for the curriculum several months before, which was denied by the donor. A smaller grant application from another donor was later approved for the cybersecurity curriculum.

Caywood failed to respond to Burton on a request for a meeting to discuss the grant process in November 2012. Throop and Caywood also had issues with the wording of a press release prepared by the donor about the awarded grant, and Caywood, for the first time, confronted Burton about inaccuracies in two websites she prepared for the proposed cybersecurity curriculum. Press release language was eventually approved, and Burton appeared at a public program to receive the grant, which was attended by the University's provost.

In January 2013 Burton applied for tenure, which was approved in March 2013. Caywood voted in favor of tenure for Burton despite his initial opposition. Caywood then stepped down as chair of the department and was replaced by Michael Dalecki.

In August 2013, Burton filed a charge of discrimination with the state human rights agency claiming sex discrimination and retaliation, among other things. Thereafter, Dalecki and others pressured Burton to drop the charge, telling Burton that she could not expect to be promoted to dean or department chair if she continued with her charge.

In April 2014, Burton filed a federal lawsuit claiming sex discrimination and retaliation. Burton also filed an EEOC charge in October 2014. A few days after filing the EEOC charge, Throop sent a "letter of direction" to Burton setting out seven events of "inappropriate behavior" by

Burton. The letter also set forth "five specific directions" for Burton to follow, but Burton declined to follow the directions, claiming that Throop "mischaracterized the facts." Thereafter, Throop filed a complaint with the Board of Regents against Burton requesting a formal letter of reprimand. In December 2014, Throop accused Burton of cancelling class without approval, which Burton rebutted after she sought the cooperation of her students. No discipline was issued to Burton. Burton then filed a second EEOC charge and later amended her federal court complaint. The district court granted summary judgment to the Board in March 2016, and Burton appealed to the Seventh Circuit.

The Seventh Circuit's Decision: The Court of Appeals began its analysis by reviewing the essential elements for a claim of retaliation under Title VII and Title IX, which are the same. On this point the Seventh Circuit stated:

The elements of those claims are the same: Burton must produce enough evidence for a reasonable jury to conclude that (1) she engaged in a statutorily protected activity; (2) the Board took a materially adverse action against her; and (3) there existed a but-for causal connection between the two. *Milligan v. Bd. of Trs.*, 686 F.3d 378, 388 (7th Cir. 2012); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (causation standard).

First, the Court of Appeals held that it would not consider facts Burton inserted into her arguments for the first time on appeal. The Court stated that Burton's failure to raise certain facts before the district court in her opposition to the motion for summary judgment precluded her from relying on them on appeal.

Next, the Seventh Circuit considered the merits of Burton's Title IX retaliation claim. Because the Board conceded that Burton's report of the student's complaint amounted to protected activity, the Court focused its inquiry on whether the two adverse actions asserted by Burton before the district court were "materially adverse" i.e. "(1) the supposed criticisms of Burton after she reported the note; and (2) the apparent withdrawal of support for Burton's cybersecurity initiative." Under established precedent, "an adverse action is one that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in the protected activity." [Citations omitted]. The Court of Appeals noted that not all bad experiences in the workplace are actionable such as "those petty slights or minor annoyances that often take place at work and that all employees experience." [quoting] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Applying the standard to the facts, the Seventh Circuit found that the two adverse actions asserted by Burton in the district court were not materially adverse actions. The Court noted that Caywood did not directly criticize Burton with regard to her handling of the student complaint, and his issuance of a new policy, even if it could be construed as an "implicit reprimand," was insufficient to meet the standard. Moreover, the Court of Appeals stated that no reprimand or a lack of collegiality by Caywood resulted in any employment consequences for Burton, noting that Burton received tenure within a few months of the incident. The Court also rejected Burton's argument with regard to the cybersecurity program, noting that the press release language was eventually approved with modification after some initial legitimate concerns were expressed, Caywood had concerns about inaccurate

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information on the websites, and Burton received a grant at a public ceremony attended by University officials. The Court concluded that summary judgment was properly granted by the district court on Burton's Title IX retaliation claim.

Finally, the Court of Appeals turned to address Burton's Title VII retaliation claim, noting that Burton had engaged in protected activity by filing administrative charges and a lawsuit and noting the Board's concession that Burton was subjected to materially adverse employment actions, i.e. Throop's letter and complaint to the Board that sought a formal reprimand. The Court also noted that Burton asserted two other adverse actions, namely the pressure to drop her administrative charges and Throop's threat of disciplinary action for Burton for allegedly cancelling class without approval. However, the Seventh Circuit concluded that the complained-of conduct, "unfulfilled threats," was not actionable because Burton suffered no injury. The Court concluded its analysis by finding that the Board had offered legitimate non-retaliatory reasons for Throop's conduct and that Burton had failed to offer sufficient evidence to raise a triable issue of pretext. Thus, summary judgment was proper as to Burton's Title VII retaliation claim.

In sum, while the Court found that Burton may have felt that she was treated unfairly, the Court noted that Burton was granted tenure, was

recognized in a public ceremony for the grant she received, and that Throop sought an increase in salary for Burton after she filed her administrative charge. Consequently, the record did not support her claims of retaliation under Title VII or Title IX.

Employers' Bottom Line: Retaliation claims remain a constant threat for employers, particularly in situations where current employees have pending administrative claims or lawsuits. While employers often feel as if they are "walking on egg shells" when dealing with litigious employees, it is important to hold such employees to workplace standards and performance expectations. The Seventh Circuit's decision in *Burton* illustrates that positive employment actions following protected activity can mitigate actions that could be construed as retaliatory. Moreover, every workplace incident that is subjectively perceived by the employee as unfair does not rise to the level of a materially adverse action without some concrete negative impact on the employee's terms and conditions of employment.

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