

Note from the Field

What Constitutes an Adverse Employment Action in Retaliation Cases?

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Introduction

You have been asked to defend against the judicial complaint of Mr. Craig Johnson, who is alleging reprisal discrimination under Title VII.¹ Mr. Johnson had previously filed a formal Equal Employment Opportunity (EEO) complaint for age discrimination. Mr. Johnson’s employer amicably settled the EEO complaint by moving Mr. Johnson to a different section within the workplace. Several months later, however, Mr. Johnson was threatened with a letter of reprimand, and he was not awarded a discretionary bonus.² Mr. Johnson now claims that these two negative actions resulted directly from his EEO complaint.

On its face, Mr. Johnson’s judicial complaint seems to establish a prima facie case of reprisal discrimination. Generally, to establish a prima facie case for reprisal, a plaintiff must show: (1) he engaged in a protected activity, like filing an EEO complaint; (2) an adverse employment action was taken against him; and (3) a causal connection existed between the protected activity and the adverse action.³ Your supervising attorney wants to prevent discovery in Mr. Johnson’s case. Therefore, she has asked you to draft a motion to dismiss, focusing on

whether the actions of which Mr. Johnson complains—the proposed letter of reprimand and the lack of a bonus—amount to “adverse employment actions.” You begin work and determine that what legally constitutes an adverse employment action in a retaliation context⁴ depends on which judicial circuit the plaintiff filed in and whether the plaintiff is a federal employee. This note explores these two variables as they affect retaliation suits.

The Various Judicial Circuits

The federal judicial circuits have established varying standards for what constitutes an adverse employment action. The standards range from a narrow definition focusing on the “ultimate employment decision,” to a very broad and liberal definition of a decision affecting some term or condition of employment.

The Ultimate Employment Decision Standard

Page v. Bolger

In 1981, the landscape of what constitutes an adverse employment action changed drastically with the advent of *Page v. Bolger*.⁵ Mr. Page, a black postal service employee, applied for two different promotions in 1976. He first applied for the position of General Foreman of Mails. Eight months later, he sought a Senior Postal Operations Specialist position. Different three-member review committees considered Mr. Page’s two applications, and neither committee recommended him; in turn, he was not selected for either position.⁶ Three white males comprised each committee, even though postal regulations required that “[t]he official who designates a review committee is responsible for making every effort to select at least . . . one minority group member.”⁷ Mr. Page filed suit because the review committees that considered his applications for promotion lacked a minority group member.⁸

1. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2000e-17 (2000).

2. The letter of reprimand scenario is taken from *Bonk v. Pena*, 1998 U.S. Dist. LEXIS 7769 (E.D.N.C. Mar. 26, 1998); the denial of the bonus hypothetical is drawn from *Russell v. Principi*, 257 F.3d 815 (D.C. Cir. 2001).

3. See *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 458 (4th Cir. 2002) (citation omitted).

4. This note uses the terms “reprisal” and “retaliation” interchangeably.

5. 645 F.2d 227 (4th Cir. 1981) (en banc), cert. denied, 454 U.S. 892 (1981).

6. The district court in *Page* gave an excellent discussion of the case history. See *Page v. Bolger*, No. 77-0400-R, 1978 U.S. Dist. LEXIS 16006 (E.D. Va. Aug. 16, 1978), aff’d, 645 F.2d 227 (4th Cir. 1981).

7. *Page*, 645 F.2d at 231.

8. *Id.*

The district court judge entered judgment for the Postal Service. On appeal, the Court of Appeals for the Fourth Circuit also rejected the plaintiff's argument, holding that the racial compositions of the review committees were not adverse employment actions sufficient to trigger Title VII protections.⁹ The *Page* court first defined what constitutes discrimination, stating that "Title VII . . . has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions."¹⁰ The court defined ultimate employment decisions to include "hiring, granting leave, discharging, promoting, and compensating."¹¹ Second, the court held that "interlocutory or mediate decisions having no immediate effect upon employment conditions" do not fall within the purview of Title VII.¹²

The Fourth Circuit concluded that the compositions of Mr. Page's review committees were mediate decisions that were "simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc."¹³ In other words, *Page* places two requirements on a plaintiff. First, the action complained of must be an end decision, that is, not mediate. Second, the end decision must be an ultimate employment decision, for example, hiring, firing, and promoting. Because Mr. Page was not complaining about the discriminatory animus of an ultimate employment decision, but rather a mediate process, his claim was not actionable under Title VII.

Dollis and Ledergerber

The Fifth and the Eighth Circuits have followed the holding in *Page*, both requiring an ultimate employment decision to

trigger Title VII. In *Dollis v. Rubin*,¹⁴ the Fifth Circuit held that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."¹⁵ Ms. Dollis, the plaintiff and a federal employee, requested a desk audit of her EEO specialist position to determine if her grade level was proper or should be increased.¹⁶ Her request for a desk audit was denied; Ms. Dollis filed suit, claiming retaliation, among other theories of discrimination.

The district court granted the government's motion for summary judgment, and the plaintiff appealed. The Fifth Circuit affirmed, citing *Page* and holding that a denial of a request for a desk audit was "not an actionable 'adverse personnel action' under Title VII."¹⁷ The court found that "a desk audit is not the type of ultimate employment decision that Title VII was intended to address."¹⁸

Two years later, the Eighth Circuit in *Ledergerber v. Stangler*¹⁹ likewise mandated that an adverse employment action must "rise to the level of an ultimate employment decision" to trigger Title VII.²⁰ Ms. Ledergerber, a Caucasian income maintenance supervisor, claimed race and retaliation discrimination when management replaced her staff with different employees. The Eighth Circuit found that the replacement of Ms. Ledergerber's staff did not affect "the terms and conditions of her employment."²¹ Although the *Ledergerber* court admitted that the replacement of Ms. Ledergerber's staff might have a "tangential effect on her employment," the prevailing test under Title VII is whether the action was an ultimate employment decision.²² Unlike *Dollis*, the Eighth Circuit did not mention *Page*. Instead, the court listed a series of Eighth Circuit deci-

9. The Fourth Circuit heard this case twice, first by panel and then en banc. The panel reversed the lower court, holding that the lack of a minority on the review committee had been racially constituted in violation of the postal regulations. See *Page v. Bolger*, 1979 U.S. App. LEXIS 9530 (4th Cir. Dec. 19, 1979). In 1980, sitting en banc, the Fourth Circuit reconsidered *Page*, reversed itself, and affirmed the lower court's decision. See *Page*, 645 F.2d at 228.

10. *Page*, 645 F.2d at 233.

11. *Id.*

12. *Id.*

13. *Id.*

14. 77 F.3d 777 (5th Cir. 1995).

15. *Id.* at 781-82 (citing *Page*, 645 F.2d at 233).

16. *Id.* at 779.

17. *Id.* at 782.

18. *Id.*

19. 122 F.3d 1142 (8th Cir. 1997).

20. *Id.* at 1144.

21. *Id.*

22. *Id.*

sions that help define what changes in duties or working conditions can establish “materially significant disadvantage[s]” sufficient to constitute adverse employment actions.²³ A plaintiff who does not incur a “reduction in title, salary or benefits” cannot look to Title VII for relief.²⁴

The Reasonably Likely Standard

Not every circuit has embraced the ultimate employment decision standard first articulated by the Fourth Circuit. The most recent break with this standard occurred in the Ninth Circuit. In *Ray v. Henderson*,²⁵ Mr. Ray, a postal employee, complained about the harassment of his female co-workers in the workplace.²⁶ As a result of Mr. Ray’s numerous complaints, management allegedly took four adverse actions: (1) elimination of employee involvement meetings (a forum for employees to communicate with management about workplace issues); (2) elimination of the flexible starting time policy; (3) institution of a lockdown policy in which the loading docks were kept locked at all times; and (4) reduction of the number of postal boxes serviced by Mr. Ray, costing him about \$3000 a year. Mr. Ray filed a charge of retaliation in federal district court.²⁷

The district court granted the Postal Service’s motion for summary judgment. The Ninth Circuit, however, reversed, focusing on “whether Ray suffered cognizable adverse employment actions.”²⁸ The *Ray* court noted the different positions on what constitutes an adverse employment action among the circuits; mainly, that some circuits define adverse employment action “broadly,” and some circuits have the “most restrictive view of adverse employment actions.”²⁹ The circuits using the broadest definitions—the First, Seventh, Tenth, Eleventh, and D.C.—have “take[n] an expansive view of the type of actions

that can be considered adverse employment actions.”³⁰ The Ninth Circuit adopted this approach and held that “an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.”³¹ The Equal Employment Opportunity Commission (EEOC) sets forth this same standard.³²

In reaching its conclusions, the Ninth Circuit cited 42 U.S.C. § 2000e-3(a), the retaliation statute, which states “it is unlawful ‘for an employer to discriminate’ against an employee in retaliation for engaging in protected activity.”³³ The *Ray* court further opined that the statutory language to bring a retaliation suit “does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination.”³⁴ The Ninth Circuit concluded that § 2000e-3(a) does “not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion.”³⁵

What Type of Employee: Federal or Non-Federal?

The Ninth Circuit, like the other circuits that have interpreted adverse employment actions broadly, relied on the language of § 2000e-3(a).³⁶ A plain reading of the retaliation statute does not limit its reach to “ultimate employment decisions.” What each of these courts have seemingly ignored, however, is the statutory provisions controlling federal employees.

Congress has waived sovereign immunity so that a federal employee can sue the United States under Title VII. The exclusive vehicle for a federal employee to bring suit is 42 U.S.C. § 2000e-16, which begins with the words “[a]ll personnel

23. *Id.* (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994); *Thomas v. Runyon*, 108 F.3d 957, 959 (8th Cir. 1997)).

24. *Id.*

25. 217 F.3d 1234 (9th Cir. 2000).

26. *Id.* at 1237-38.

27. *Id.* at 1238-39.

28. *Id.* at 1240.

29. *Id.* The Second and Third Circuits hold an intermediate position: “an adverse action is something that materially affects the terms or conditions of employment.” *Id.* at 1242 (citing *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)).

30. *Id.* at 1241.

31. *Id.* at 1243.

32. See *Elmore v. Potter*, No. 01997056, 2001 EEO PUB LEXIS 8540 (EEOC 2001); *Reyes v. Norton*, No. 01981572, 2001 EEO PUB LEXIS 3416 (EEOC 2001).

33. *Ray*, 217 F.3d at 1243 (quoting 42 U.S.C. § 2000e-3(a) (2000)).

34. *Id.*

35. *Id.* (quoting *Passer v. Am. Chem. Soc.*, 935 F.2d 322, 331 (D.C. Cir. 1991)).

actions.”³⁷ Any suit brought by a federal employee must be viewed through this prism. When an employee, like Mr. Ray, works for the federal government, that employee must bring a discrimination case against the United States under § 2000e-16.³⁸ This specific provision, exclusive to federal employees, provides that “all personnel actions” shall be free from discrimination. The term “personnel action” is never mentioned in the retaliation statute, but it is required under § 2000e-16 for federal employees to bring suit under Title VII. To trigger Title VII protections, the action Mr. Ray complained of must be a “personnel action.” This statutory requirement, in turn, mandates that the underlying action is an ultimate employment decision, “the general level of decision contemplated” by § 2000e-16.³⁹

The distinction between federal sector employees and private sector employees must not be blurred when analyzing the issue of adverse employment actions. The protections of § 2000e-16 for federal employees were added to Title VII in 1972.⁴⁰ The legislative history indicates that the change to Title VII “would extend *some* protection to Federal employees.”⁴¹ This addition extended the same procedural protection against unlawful discrimination under Title VII to federal employees as had already been codified for private sector

employees.⁴² Instead of using the same language, however, Congress chose to use the phrase “personnel action” as the benchmark of discrimination in the federal sector.⁴³

The legislative history of the Equal Employment Opportunity Act of 1972 provides no clear indication why Congress chose the phrase “personnel action.”⁴⁴ Because § 2000e-16 does not clearly define “personnel action,” the practitioner is left with the definition applied to the term by the courts. Unlike the abundant number of courts interpreting what constitutes an “adverse employment action,” few courts have grappled with what Congress meant by the term “personnel action.” Those courts that have addressed this issue, however, have concluded that federal employees must show an ultimate employment decision.

Von Gunten v. Maryland

Twenty years after *Page*, the Fourth Circuit indirectly addressed what constitutes “personnel actions” in *Von Gunten v. Maryland*.⁴⁵ Ms. Von Gunten, a non-federal employee, claimed reprisal for complaining about sexual harassment. The

36. Section 2000e-3(a) states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

37. *Id.* § 2000e-16. Sovereign immunity exists absent an unequivocally expressed waiver. *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981). Suits against the government may proceed “only if Congress has consented to suit; a waiver of the traditional sovereign immunity cannot be implied but must be unequivocally expressed.” *Army & Air Force Exchange Serv. v. Sheehan*, 456 U.S. 728, 734 (1982). Section 2000e-16 is such a waiver.

38. Section 2000e-16(a) states:

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin

42 U.S.C. § 2000e-16(a).

39. *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1991).

40. Equal Employment Opportunity Act of 1972, § 717, Pub. L. No. 92-261, 86 Stat. 103 (amending the Civil Rights Act of 1964).

41. H.R. REP. NO. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137 (emphasis added).

42. *See generally* *Chandler v. Roudebush*, 425 U.S. 840 (1976) (holding that federal employees have the same procedural right to a trial de novo as private employees enjoy).

43. *See* 42 U.S.C. § 2000e-16(a).

44. *See, e.g.*, H.R. REP. NO. 92-238.

45. 243 F.3d 858 (4th Cir. 2001).

district court granted Maryland's motion for summary judgment. On appeal, the Fourth Circuit affirmed; however, the court abandoned the ultimate employment decision standard in retaliation cases for non-federal employees. The *Von Gunten* court held that "[w]hat is necessary in all Section 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected 'the terms, conditions, or benefits' of the plaintiff's employment."⁴⁶

The Fourth Circuit did not, however, limit or overrule the *Page* standard for federal employees. Rather, the court made a distinction between federal employees and non-federal employees. Maryland argued in *Von Gunten* that the ultimate employment decision standard of *Page* should control, and the district court agreed.⁴⁷ The Fourth Circuit disagreed because Ms. Von Gunten was a non-federal employee; therefore, *Page* was never triggered. The Fourth Circuit stated: "We reasoned in *Page* that inclusion of the term 'personnel action' in § 2000e-16 indicated that 'ultimate employment decisions' arose to 'the general level of decision' targeted by Congress in that statute."⁴⁸ The court further stated that "§ 2000e-3 does not confine its reach to 'personnel actions.'"⁴⁹ The Fourth Circuit distinguished between non-federal and federal employees. When the circuit abandoned the ultimate employment decision standard for non-federal employees, *Page* remained intact only for federal employees.

Wideman v. Wal-Mart Stores, Inc.

The Eleventh Circuit, a circuit that broadly interprets what constitutes an adverse employment action, also has hinted that federal employees are governed by a different standard than non-federal employees because of the language of § 2000e-16.

In *Wideman v. Wal-Mart Stores, Inc.*,⁵⁰ another non-federal case, the court rejected the defendant's attempt to use the *Page* standard. The *Wideman* court stated: "We find [*Page v. Bolger*] inapposite because it did not involve a case arising under 42 U.S.C. § 2000e-3(a). Instead, it involved a claim . . . under 42 U.S.C. § 2000e-16."⁵¹ The court did not explicitly state that federal employees suing under § 2000e-16 are different from non-federal employees suing under § 2000e-3(a); however, the Eleventh Circuit's effort to distinguish *Page* in a non-federal case compels the conclusion that federal employees are statutorily different.⁵²

Peterson v. West

The Fourth Circuit confirmed this view in *Peterson v. West*.⁵³ In *Peterson*, the plaintiff, a federal employee, complained about management's reducing the number of employees he supervised; management claimed its action was due to reorganization. Mr. Peterson filed an EEO complaint, and the final agency decision found no discrimination. Mr. Peterson then filed suit alleging reprisal. The district court and the Fourth Circuit both agreed with the agency finding of no discrimination.⁵⁴

In affirming the district court, the Fourth Circuit held that Mr. Peterson "failed to show an adverse employment action was taken against him."⁵⁵ The court noted that Mr. Peterson's official title, pay grade and level, benefits, and salary remained constant.⁵⁶ The court explained that a federal employee who claims retaliation must sue under § 2000e-16. Under this section, "to establish an adverse employment action, [the federal employee] must show discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensation."⁵⁷ The

46. *Id.* at 865 (quoting *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

47. *Von Gunten v. Maryland*, 68 F. Supp. 2d 654, 662 (D. Md. 1999), *aff'd*, 243 F.3d 858 (4th Cir. 2001).

48. *Page*, 243 F.3d at 866 n.3 (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981)).

49. *Id.*

50. 141 F.3d 1453 (11th Cir. 1998).

51. *Id.* at 1456 n.2.

52. The U.S. Court of Appeals for the District of Columbia Circuit has held that "[d]espite the difference in language between [the Title VII provisions governing private and Federal employers], . . . Title VII places the same restrictions on federal and District of Columbia agencies as it does on private employers, and so we may construe the latter provision in terms of the former." *Brown v. Brody*, 233 F.3d 446, 452 (D.C. Cir. 1999) (quoting *Barnes v. Costle*, 561 F.2d 983, 988 (D.C. Cir. 1977)). The D.C. Circuit, however, never really grappled with the wording of § 2000e-16, other than stating that "federal employees are governed by the same rules as those controlling suits by private employees." *Id.* at 455.

53. 2001 U.S. App. LEXIS 19726 (4th Cir. Sept. 5, 2001) (unpublished).

54. *Id.*

55. *Id.* at 6.

56. *Id.* at 2.

57. *Id.* at 5.

court drew its rationale directly from *Page* and *Von Gunten*: ultimate employment decisions for federal employees “illustrate the general level of decision contemplated by § 2000e-16.”⁵⁸

Conclusion

If Mr. Johnson filed suit in a jurisdiction that adheres to the ultimate employment decision standard, then his proposed letter of reprimand will not trigger Title VII protections. Likewise, the denial of his bonus most likely will not trigger Title VII.⁵⁹ Neither action amounts to the ultimate employment decision of hiring, granting leave, discharging, promoting, and compensating the employee. The actions taken by the employer must be more than mere inconveniences to be classified as adverse employment actions.

On the other hand, if Mr. Johnson is in a jurisdiction that views an adverse employment action as “reasonably likely to deter employees from engaging in protected activity,” then the denial of the bonus will meet the plaintiff’s prima facie case for retaliation. The proposed letter of reprimand will be a closer call, but Mr. Johnson will most likely be able to show that the “threat” of a letter of reprimand will “deter employees from engaging in protected activity.”⁶⁰

If Mr. Johnson is a federal employee, however, an excellent argument exists that the proper standard, regardless of the jurisdiction, is that Title VII is triggered by a “personnel action.” This personnel action, in turn, has been interpreted to mean an ultimate employment decision. Neither a proposed letter of reprimand nor a denial of a discretionary bonus meets this higher standard, and your motion should be successful.

Because of the varied standards that the federal circuits and the EEOC apply to this issue, labor counselors should consider several avenues during the administrative process:

a. Pursue the *Page v. Bolger* standard. Labor counselors should apply this standard in federal-sector cases. The *Page* court relied on the language in § 2000e-16 to articulate that Congress intended a separate standard for federal employees. Because Congress decided to treat federal employees differently, absent some statutory change, counselors should argue that the *Page v. Bolger* standard applies.

b. Build a solid administrative record. A solid and complete administrative record is imperative to defend the Army in federal court. During the complaint-investigation stage of the administrative process, labor counselors should gather evidence that focuses on the “adverse” effects of the alleged discriminatory act. In any administrative hearing, counselors must be prepared to thoroughly examine and cross-examine witnesses on this issue. They must build a record that will support the Army’s actions in the event that the complainant files a judicial complaint.

c. Do not lose sight of the applicable federal standard. This may be challenging when addressing this issue before an Administrative Judge of the EEOC. Labor counselors must remember that the applicable federal law in their jurisdictions can be used to guide their cases in the administrative process. Even though the EEOC uses a broader standard in determining whether a complainant has suffered an adverse personnel action,⁶¹ the EEOC standard will not carry the day in federal court.

58. *Id.* at 6 (citations omitted).

59. *Rabinovitz v. Pena*, 89 F.3d 482, 488-89 (7th Cir. 1996) (holding that loss of a bonus is not an adverse employment action when the employee is not automatically entitled to the bonus).

60. *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (holding that making negative comments about an employee can amount to an adverse employment action).

61. *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL §§ 8-11 to 14 (May 20, 1998) (stating that “adverse actions need not qualify as ‘ultimate employment action’ or materially affect the terms or conditions of employment to constitute retaliation”).