

# GIORDANO, HALLERAN & CIESLA

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

PLEASE RESPOND TO:

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(732) 741-3900

FAX: (732) 224-6599

www.ghclaw.com

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## Retaliation Actions Under Title VII, CEPA and LAD

*On June 22, 2006, the United States Supreme Court rendered an employment related decision that extends beyond the workplace.*

*How does this affect New Jersey employers?*

The United States Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White* that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 protects employees from an employer's actions that are "materially adverse," such that they would deter a reasonable employee "from making or supporting a charge of discrimination."

In the *Burlington Northern* matter, the Supreme Court held that an employer's reassignment and suspension of a female employee who had complained of sexual harassment amounted to retaliation. According to the Court's reading of Title VII, a retaliatory action does not need to be related to the terms or conditions of employment. The statute's anti-discrimination provision expressly limits the scope of prohibited employer conduct to actions that impact the employment relationship; conversely, the anti-retaliation provision does not contain a similar limitation. The Court interpreted this difference in language as congressional intent to extend the scope of the anti-retaliation provision beyond actions that affect the terms and conditions of employment. As a result, the Court decided that Title VII's anti-retaliation provision protects employees from any employer actions that a reasonable employee would find to be "materially adverse," or that are likely to deter a reasonable employee from making a discrimination complaint. This standard is highly fact-sensitive. However, the Court noted that, "petty slights, minor annoyances, and simple lack of good manners will not create such deterrence."

In contrast, New Jersey's Conscientious Employee Protection Act (CEPA) defines "retaliatory action" as "discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." This is precisely the limiting language that is noticeably absent from Title VII's anti-retaliation provision, which was the linchpin of the Supreme Court's analysis in *Burlington Northern*. According to a 2005 decision from the New Jersey Appellate Division, "terms and conditions of employment" are "those matters which are the essence of the employment relationship, and include further serious

intrusions into the employment relationship beyond those solely affecting compensation and rank.” *Beasley v. Passaic County*, 377 N.J. Super. 585, 608 (App.Div. 2005). It is clear, therefore, that New Jersey courts have closely adhered to the statutory language and declined any broader construction.

New Jersey’s Law Against Discrimination (LAD) also contains an anti-retaliation provision. This statute provides that it is an “unlawful employment practice” to “take reprisals against any person because that person has opposed any practices or acts forbidden by [LAD] or because that person has filed a complaint, testified or assisted in any proceeding under [LAD].” This provision also prohibits employers from coercing, intimidating, threatening, or otherwise interfering with any person’s exercise of any right protected by LAD. Lastly, employers are prohibited from taking “reprisals” against a person who has *aided or encouraged* another person in the exercise of a protected right. LAD’s anti-retaliation provision does not contain the limiting language that CEPA’s does, which means that “reprisals” under LAD probably do not need to affect the employment relationship. However, LAD only addresses discrimination, so “reprisals” are limited to employers’ reactions to discrimination complaints. In contrast, CEPA is a general whistle-blower statute that addresses any employer conduct that violates the law or public policy.

Based on New Jersey courts’ interpretation of CEPA’s anti-retaliation provision, the *Burlington Northern* decision means that Title VII provides broader employee protection against retaliation than CEPA. Courts will apply whichever law, or combination of the two laws, that provides the greatest measure of protection for employees. Consequently, many New Jersey courts may begin to apply Title VII to employees’ retaliation claims to afford them the broader protections. New Jersey employers should be advised that Title VII’s “material adversity” standard will make it more difficult for employers to win summary judgment and will lead to more questions of fact. Accordingly, employers should take appropriate measures to insulate themselves from retaliation claims under this statute.

GH&C’s labor and employment attorneys have extensive experience in dealing with all aspects of Title VII, CEPA and LAD. If you would like to discuss this issue or any other labor or employment matter, please do not hesitate to contact any of our labor and employment attorneys at the following telephone numbers or e-mail addresses.

Jay S. Becker – [jbecker@ghclaw.com](mailto:jbecker@ghclaw.com) – 732-224-6537  
Tara L. Benson – [tbenson@ghclaw.com](mailto:tbenson@ghclaw.com) – 732-224-6536  
Ari G. Burd – [aburd@ghclaw.com](mailto:aburd@ghclaw.com) – 732 224-6504