

D.C. Circuit Clarifies Threshold for Retaliation in EEO Claims

A recent decision by the U.S. Court of Appeals for the D.C. Circuit has clarified and lowered the threshold of what defines “retaliation” in claims of discrimination. The Court of Appeals held that an agency’s actions can be considered retaliatory if the actions would discourage a reasonable person from making or supporting a discrimination claim. As a result, retaliation does not necessarily need to cause harm to an employee -- such as a poor performance appraisal -- in order for it to rise to the level of retaliation.

In the case of *Moghenhan v. Napolitano* (Secretary, Dept. of Homeland Security), No. 08-5457 (D.C. Cir. Jul. 27, 2010), Ms. Moghenhan, a Secret Service employee since 1990, accepted a position as a management analyst after the agency agreed to workplace accommodations for her migraines. In 1991, her migraines grew more frequent and in response, the agency took necessary actions to better accommodate Ms. Moghenham’s disability.

In July 1991, Moghenhan received her first performance appraisal, which she objected to because she had not been previously told the standards for evaluation. Her supervisor agreed, gave her the evaluation criteria and substituted the next six months for appraisal. In January 1992, after the agency began making the health-related accommodations, Moghenhan received a performance appraisal she found unfavorable and believed that the appraisal was due to her accommodation requests. She filed an EEO complaint alleging gender and disability discrimination. Six months later, Moghenhan received a second performance appraisal she found unfavorable and sought EEO counseling for her original complaint. Her supervisor responded 20 days later by posting her EEO complaint on the agency’s intranet, where Moghenhan’s fellow employees could and did access it. Further, Moghenhan’s workload was increased to five to six times that of her coworkers. Moghenhan filed suit in District Court in 1998, alleging gender and disability discrimination, creation of a hostile work environment and retaliation in violation of Title VII of the Civil Rights Act of 1964. The District Court later found in favor of the agency on all counts.

On appeal, the Court of Appeals agreed with the District Court’s decision in favor of the agency’s disability accommodations, but did not agree with the District Court’s decision concerning the retaliation claim, stating that the incorrect standard for determining retaliation was utilized. They held that the standard is determined not by whether a “materially adverse consequence” had occurred, but by whether the conduct in question would have discouraged a reasonable person from making or supporting a discrimination claim. In this case, the incidents in question included the publishing of Moghenhan’s complaint on an internal network for all coworkers to view as well as increasing her workload to several times that of her coworkers.

The outcome of this case better clarifies the level of behavior acceptable by an employer after a federal employee makes an initial discrimination claim. An employer does not have to take action against the employee – demotion, poor review, further discriminatory acts, etc. – for the

conduct to be considered retaliatory. Any behavior that constitutes intimidation or otherwise discourages an employee from making a claim and seeing it to conclusion may be considered retaliation.

It is important to keep this in mind if and when you file a discrimination claim. Filing a claim does not grant an employer the right to punish you or create a hostile work environment, either directly or indirectly. That said, if you have filed an EEO complaint, it is key to document any changes in your employment status, both blatant and subtle, to show evidence of retaliatory actions in your complaint. Federal employees who file EEO complaints should not be targets for retaliation or further discriminating actions.