

Termination for Refusal to Sign Dispute Resolution Agreement was Retaliation, holds Eleventh Circuit. A number of courts have ruled in the wake of the U.S. Supreme Court's 2006 ruling in the *Burlington* case that the scope of retaliation is broad enough to encompass acts other than ultimate employment actions such as demotion or discharge. Another example of this is a recent decision of the U.S. Court of Appeals for the Eleventh Circuit (which covers Florida, Georgia and Alabama) which upheld a jury verdict against the employer—including \$500,000 in punitive damages—arising from a racial harassment case. The evidence in the case showed that both lower level supervisors and senior management had used “the N word” and other racial slurs. The plaintiff filed a charge with EEOC and six months later was fired after refusing to sign an agreement that all disputes with the Company would be settled by a dispute resolution process rather than in the court system. The Company defended by arguing that all employees—including senior management—were required to sign the agreement, that the plaintiff was the only employee to refuse to sign it, and that the plaintiff's discharge came eight months after he filed the charge, thus being too remote in time to constitute evidence of retaliation. However, the Court disagreed. Particularly important to its decision were the facts that the plaintiff was fired one day after he refused to sign the agreement, that he was the only employee with a pending EEOC charge at the time, and that the Company rejected an amended version of the agreement proposed by the plaintiff whereby he would have agreed to submit all *future* disputes to dispute resolution. Also, a white employee who initially refused to sign the agreement (but who did not have a pending charge) was approached by management and encouraged to reconsider, an effort not made with respect to the black plaintiff. The Court distinguished an earlier decision in which it had ruled that an employer did not violate the law in terminating an employee because he refused to sign a dispute resolution agreement. This case was distinguishable, held the Court, because the plaintiff had a *pending* EEOC charge and the evidence was sufficient to support the jury's finding of a causal connection between that charge and the plaintiff's dismissal for failure to give up his statutory right to a jury trial arising out of the pending charge. The Court also may have been persuaded by evidence that a racially harassing environment did exist at the workplace. Goldsmith v. Bagby Elevator Co., 513 F.3d 1261 (11th Cir. 2008).

Company can be held Liable for Co-Worker Retaliation for Failure to Adequately Respond to Reported Harassment, holds federal Court of Appeals. The general rule in retaliation cases is that the employer is liable for its own acts, not for the acts of individual employees whose conduct is not condoned by the Company. However, a U.S. Court of Appeals recently held—at least in the circumstances of that case—that an employer might be liable (the actual holding was a reversal of summary judgment in the Company's favor) for the acts of a co-worker who was not a supervisor of the plaintiffs. That case involved a male who the evidence showed had sexually harassed several female employees, threatened them with bodily harm, and committed violent acts outside the plant. One plaintiff had her car set ablaze in the parking lot, another's house was set on fire. After the first complaint about the co-worker was received and investigated, the Company fired him. However, the union grieved the discharge and a Grievance Committee reinstated the co-worker. Further complaints were reported, including one

from the employee whose car was torched in the parking lot at work. The Company apparently failed to investigate that incident fully, although it did transfer the employee away from the co-worker. The complaints continued and the evidence showed that even a male supervisor was afraid of the co-worker, who once threatened to kill one of the female plaintiffs. The Company defended by stating that it did investigate each of the harassment complaints and did take action by transferring the complaining employee away from the co-worker. Several years later, the Company terminated the co-worker a second time, again due to the harassment complaints. The union again grieved the discharge, but this time the Grievance Committee upheld it. The co-worker shot his girlfriend and killed himself a month later. The female employees who had been harassed by the co-worker sued, among other things alleging that it was retaliation by the Company for failing to protect them from the serially harassing co-worker. The Court of Appeals agreed that such a claim is possible. An employer will be liable for co-worker retaliation, it held, where “(1) the co-worker’s retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination; (2) supervisors or members of management have actual or constructive knowledge of the co-worker’s retaliatory behavior; and 3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff’s complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.” Here, the Court faulted the employer for inadequate investigation and for failing to train, warn or monitor the co-worker. Merely transferring the complaining employee was not enough to meet the Company’s obligations. As shown by this case, an employer can face a “double whammy” when attempting to punish harassment in the workplace. The Company here did terminate the co-worker after the first complaint, but then had to reinstate him after the union grieved the firing. However, it appears the Company did not do enough thereafter in the face of the information it had (e.g., continuing harassment complaints, evidence of property damage to vehicles and homes owned by the employees who complained) to protect the plaintiffs and its actions ultimately would have to be judged by a jury because of these shortcomings. Hawkins v. Anheuser-Busch, Inc., 2008 U.S. App. LEXIS 3430 (6th Cir. 2008).