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Point of View

EMPLOYMENT ALERT

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SUPREME COURT RELAXES STANDARD FOR RETALIATION CLAIMS EXPOSING EMPLOYERS TO MORE LAWSUITS by Rebecca Bouchard, Esq.

Laws prohibiting employment discrimination based on membership in a protected class often also prohibit retaliation against an employee who complains of or opposes discrimination. Frequently, an employee's discrimination complaint is followed by a retaliation charge alleging that the employer - or other employees - reacted in a hostile manner to the original complaint. These retaliation claims have doubled in the past ten years, and now comprise almost thirty percent of the charges before the EEOC. Despite this, until the Supreme Court's decision in *Burlington Northern Santa Fe Railroad v. White*, No. 05-259 (June 22, 2006), there was no uniform standard determining what constitutes retaliatory behavior by an employer. Unfortunately for employers, the Court set forth a broad, employee-friendly standard that opens the door to increased retaliation charges and lawsuits.

I. What was the case about?

Sheila White was the only woman working in the maintenance department of the Burlington Northern's Memphis train yard. After she complained of sexual harassment by her supervisor, White was moved from her duties as a forklift operator to less desirable duties as a track laborer. Although her job classification remained the same, the track laborer position required "more arduous and dirtier" work. The company told White that she was getting transferred to track laborer duties because other employees complained

that she was given the forklift job over more experienced male employees. White responded to the re-assignment by filing complaints with the Equal Employment Opportunity Commission for sexual discrimination and retaliation.

Approximately six months after White was re-assigned to the track laborer position she was suspended for thirty-seven days, without pay, for alleged insubordination. She was eventually given back pay when she was found not to have been insubordinate. However, White sued Burlington Northern in federal court, claiming her job re-assignment and pay suspension were retaliatory acts under Title VII of the Civil Rights Act of 1964 (which forbids employment discrimination based on "race, color, religion, sex, or national origin").

The jury rejected White's claim of sex discrimination but awarded her damages of \$43,000, finding that she had been retaliated against for her complaints. On appeal, Burlington Northern argued that White had not suffered an "adverse employment action," and therefore could not bring the suit, because she had not been fired, demoted, denied a promotion, or denied wages. The appeals court found that White's suspension without pay - even if back pay was eventually awarded - was an "adverse employment action," as was the change of responsibilities within the same job category. Although the appeals court upheld the district court's decision, the judges disagreed as to the proper standard to apply to White's retaliation claim.

II. What did the Supreme Court decide?

The Court's decision addresses two important issues: (1) Does Title VII's anti-retaliation provision confine actionable retaliation to activity that affects the terms and conditions of employment, such as failure to hire, discharge, demotion, or loss of pay and benefits; and (2) How harmful or serious must the conduct be to constitute actionable retaliation?

In response to the first question, the Court held that the anti-retaliation provision does not confine the actions and harms it forbids to those actions that are related to employment or occur at the workplace. Therefore, the Supreme Court unanimously agreed that White suffered retaliatory discrimination when she was reassigned to less desirable duties and suspended without pay. In response to the second question, the Court held that the anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." In reaching this conclusion, the Court explained that "in the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Thus, the Court found that even though the duties were within the same classification and the pay was eventually reinstated, the action was nevertheless "sufficiently harsh" to constitute retaliatory discrimination.

The Court emphasized that the "materially adverse" standard was intended to "separate significant from trivial harms," explaining that "an employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." The Court also explained that the "reasonable employee" standard was an objective one. By way of illustration, the Court gave two examples. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." Likewise, "a supervisor's refusal to invite an employee to lunch is normally trivial, a non-actionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination."

III. What does it mean for employers?

In the wake of *Burlington Northern*, employers should consider the following:

- *Prohibited activity is not confined to activity related to employment or occurring at the workplace.* It could now include a change in schedule, failure to invite an employee to lunch, or the off-site conduct of a fellow employee.
- *This decision also expands the categories of conduct that could give rise to a retaliation claim under laws patterned after Title VII.* This includes, for example, the Age Discrimination in Employment Act, Americans with Disabilities Act, and the Family and Medical Leave Act.
- *Employers can be found to have retaliated even if the employee does not have a valid claim.* Therefore, once an employee puts the employer on notice of a potential claim of discrimination, the employer must carefully consider any action it takes with regard to that employee.
- *Employers must ensure that no one in the workplace, including other employees, responds inappropriately to charges of discrimination.* Employers should review their complaint investigation and resolution procedures to ensure that they explicitly prohibit retaliation. All employees should be made aware of the procedures and, especially, the prohibition of retaliation.

Perhaps the most important response that an employer could take is to ensure that their supervisors are properly trained regarding retaliation and the Court's new standard.



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