

Management Alert

Supreme Court's Retaliation Decision Spells Trouble For Employers

On June 22, 2006, the U.S. Supreme Court expanded the rights of employees when it held that an employee can bring a Title VII retaliation claim based on retaliatory actions taken by an employer that do not directly impact the terms and conditions of an employee's employment, provided such actions are materially adverse to the employee. *Burlington Northern & Santa Fe Railway Co. v. White*, 2006 U.S. LEXIS 4895 (June 22, 2006). That is, because the Court wants to protect the principle of "unfettered access to statutory remedial mechanisms," an employee need not show that the alleged retaliatory conduct impacted his or her "compensation, terms, conditions, or privileges of employment"; rather, the employee must only show that a "reasonable person" would have been dissuaded from exercising his or her Title VII rights as a result of the employer's actions, even if such actions are unrelated to the workplace.

The result of yesterday's ruling is an inevitable increase in retaliation claims and increased uncertainty for employers. With this expansion of the

law, employers will be forced to walk an even thinner tight rope when confronted with an employee or applicant who may have exercised a protected right, and plaintiffs will have an easier time establishing the basic elements of a retaliation claim.

Background

The plaintiff, Sheila White, was the first female worker hired by Burlington Northern to work in its Tennessee facility. She was hired as a "track laborer," which involved several tasks, the main task being that she operated a forklift. It was not long after being hired that her gender began to cause problems for White. Her immediate supervisor purportedly made insulting and inappropriate remarks to her in front of her male colleagues. White complained, and an investigation ensued that concluded in disciplinary action being taken against White's immediate supervisor.

Shortly thereafter, White was removed from her forklift duties and reassigned to other, less desirable track laborer tasks. It was undisputed that such tasks were more arduous and dirtier than driving a forklift.

White, believing her reassignment was made in retaliation for her complaints against her supervisor, filed an EEOC complaint (alleging gender discrimination and retaliation). She filed a second retaliation claim, claiming that her new supervisor had placed her under surveillance and was monitoring her daily activities. Not long after filing the second charge, White had a verbal disagreement with her immediate supervisor. Later that day, White's supervisor notified another company official that White had been insubordinate. White was immediately suspended without pay which, unbeknownst to her, would ultimately last 37 days during the Christmas holiday season. After an internal grievance proceeding concluded that White had not been insubordinate, the company reinstated her with full back pay.

The case proceeded to trial on two retaliation claims: the first was based on the company's decision to change her job responsibilities; and the second was based on its decision to suspend her without pay. A jury found in favor of White on both her claims and awarded her compensatory damages in the amount of \$43,500. On appeal to the Sixth Circuit Federal Court of Appeals, a divided court ruled in the company's favor. However, following an *en banc* rehearing of the case, the Sixth Circuit, in a split opinion, upheld the jury's findings.

What The Supreme Court Held

At the time the Supreme Court granted *certiorari*, it identified one issue for review: what is the appropriate standard for determining what constitutes an adverse employment action in a retaliation case. That is, must an employer's action amount to an ultimate employment decision (e.g., termination, loss

of benefits, failure to promote) or is it enough that the action merely dissuades an employee from exercising his or her rights under Title VII (e.g., filing a claim with the EEOC, complaining to the employer about discrimination).

At the time it rendered its opinion, however, the Supreme Court took the peculiar step of addressing a second issue: whether Title VII's anti-retaliation provision forbids only those employer actions that are related to an employee's employment or workplace. Given the straightforward facts in *Burlington Northern*, no one would dispute that the actions taken by the company against White were directly related to her employment. The Supreme Court's decision to take on this additional issue (and expand the law by doing so) is nothing short of puzzling.

“Material Adversity” Is Not Limited To The Employee’s Employment Or Workplace

The Court held that Title VII's anti-retaliation provision does not protect an individual from all forms of retaliation, but only from retaliation “that produces an injury or harm.” Thus, the injury or harm must be sufficiently serious or “materially adverse” to be actionable. The Court noted that it is important to separate trivial harms and minor annoyances from significant injuries. After all, “Title VII . . . does not set forth a general civility code for the American workplace.”

But its decision to expand the law of retaliation beyond the employee's employment or workplace is what is most troubling about the decision. In reaching this conclusion, the Court compared the express language of Title VII's anti-discrimination and anti-retaliation provisions and found that the anti-retaliation provision is far broader than the statute's anti-discrimination provision. The Court observed

that the anti-discrimination provision expressly states that employer actions are confined to those that adversely impact an employee's "compensation, terms, conditions, or privileges of employment"; whereas no such limiting language appears in the anti-retaliation provision. Accordingly, the Court held that: "The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."

The Court's decision effectively creates even more confusion for employers and naturally enhances their vulnerability to retaliation claims. The Supreme Court does little to provide much in the way of helpful guidance in identifying the kinds of employer actions that would be unrelated to the employee's employment but are nevertheless actionable under Title VII's anti-retaliation provision. In its discussion of the issue, the Supreme Court cites to two federal appellate court cases. In the first case, an FBI agent who, after having filed a race discrimination claim, suffered retaliation at the hands of the agency when it refused to investigate death threats that were made by an inmate against the plaintiff and his wife. The second case cited by the Court involved an employer who filed criminal charges against a former employee who had complained about discrimination.

Reading between the lines, it is possible that the distinction the Supreme Court has drawn is, in fact, a subtle one. A passage from one of the concurring opinions issued by the lower court in *Burlington Northern* may provide some illumination. In explaining why adverse employment actions should include actions that do not materially affect the terms and conditions of employment, the Sixth Circuit stated:

From a policy (and logical) perspective, many factors support an interpretation of adverse employment actions that extends beyond the boundaries of an employment decision that materially affects the terms and conditions of employment.

For instance, the D.C. Circuit has held that negative job references to prospective employers and canceling public events honoring an employee constitute retaliatory behavior, even though such retaliatory actions do not affect the terms and conditions of one's employment.

White v. Burlington Northern & Santa Fe Railway Co., 364 F.3d 789, 813 (6th Cir. 2004) (en banc) (concurring op.). What the Supreme Court is trying to say is that an employer will not escape liability by engaging in retaliatory conduct that does not directly impact an employee's terms or conditions of employment, but nevertheless is just as effective at discouraging an employee from exercising his or her Title VII rights. The problem arises, however, in the unintended consequences of the Court's decision to expand the law beyond the employee's employment. Employers are likely to see an uptick in future retaliation cases that are based entirely upon an employer's perceived retaliatory conduct that has absolutely no connection to the workplace. Before *Burlington Northern*, such allegations would likely not pass the "laugh test" in most jurisdictions. After *Burlington Northern*, however, these allegations must be taken seriously.

Court Adopts "Reasonable Person" Standard When Determining "Material Adversity"

The Supreme Court chose to adopt the standard previously applied in the Seventh and D.C. Circuits

when determining whether the employee has suffered “material adversity.” That standard dictates that harm is judged based on how an objective “reasonable” employee would respond to the employer’s challenged action. The Supreme Court further explained that it chose to outline the standard in general terms because “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” Resolution of these cases, therefore, will now require a far more fact-specific review to determine whether the employer’s action dissuaded the employee from exercising his or her Title VII rights. Furthermore, because the Supreme Court chose to adopt a general standard, courts will have little guidance to go by in their initial efforts to apply the new standard -- creating a great deal of uncertainty for employers with respect to what constitutes “retaliatory” conduct, while simultaneously increasing a plaintiff’s chances of surviving summary judgment and taking their case to a jury.

The Impact Of Burlington Northern On Future Litigation and The Workplace

Time will tell whether *Burlington Northern* will have a significant impact on Title VII retaliation claims in the long term. In the short term, the Supreme Court’s ruling is likely to cause a further increase in the number of retaliation claims being filed by employees -- a boon for the plaintiff’s bar. Look to the plaintiff’s bar to try and expand this decision beyond Title VII retaliation cases. This will not come as good news to employers, given that retaliation claims were already on the rise before yesterday’s ruling. Although the total number of claims filed with the U.S. Equal Employment Opportunity Commission has been decreasing since FY 2003, both the number and proportion of retaliation claims filed has been on the

rise since FY 1999. In FY 2005, retaliation claims represented 29.5% of the total charges filed. Ten years ago, such claims only represented 19.5% of the charges filed -- a whopping 10% increase.

Another likely impact of the Court’s ruling is that employers may have a more difficult time dismissing these claims on summary judgment. Because these cases will now involve a more fact-specific review, courts may be more comfortable denying summary judgment and will instead permit these cases to go to trial. Thus, in the future, retaliation cases are likely to become more costly for employers to defend. Until the lower courts begin to apply the standard set out in *Burlington Northern*, employers are sure to face uncertainty regarding which of these cases will be viewed by the courts as having merit. Consequently, employers will need to move quickly to re-evaluate their litigation exposure in retaliation cases.

Regardless of the ultimate impact of this case, employers should exercise even greater caution when dealing with employees who have exercised their Title VII rights. Actions that are not workplace or employment related may now be considered retaliatory under Title VII. At minimum, employers will need to undertake additional training of their managers and supervisors so they do not run afoul of the Supreme Court’s now more expansive definition of retaliation.

If you have any questions regarding this decision, please contact the Seyfarth Shaw attorney with whom you work or any Labor & Employment attorney on our website at www.seyfarth.com

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