

The Supreme Court Expands Employee's Protections Against Retaliation

The United States Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*, vastly expands Title VII's anti-retaliation provision. As a result, employers can expect to see a rise not only in the frequency of retaliation claims, but also in the number of such claims that survive summary judgment and go to trial. The *Burlington* decision is a clear victory for employees.

In its decision, the Court addressed two significant issues. First, the Court held that "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment related retaliatory acts and harm." This, the Court explained, is in contrast to Title VII's anti-discrimination provision, which is confined to those actions impacting an employee's compensation, terms, conditions or privileges of employment. Thus, an employee will have a retaliation claim against an employer under Title VII even if the adverse action is unrelated to the workplace — for example, when an employer files a false criminal claim against an employee in retaliation for the employee making a discrimination complaint.

Second, the Court held that to demonstrate an "adverse employment action" in a retaliation case, an employer's actions need not result in an "ultimate employment decision" such as a termination, failure to promote, or loss of benefits, as several circuit court of appeals had previously held. Rather, an employee is required to show only that the action would be materially adverse to a reasonable person and such action would discourage a reasonable person from exercising his or her rights. While the Court stressed the need to separate significant from trivial harms, such as petty slights, minor annoyances, and simple lack of good manners, the standard adopted by the Court is more beneficial for employees than the standard that required employees to establish that they suffered an "ultimate employment decision." In addition, the Court's use of the term "material adverse effect" and its use of a "reasonable

person" standard will surely lead increased litigation with respect to retaliation claims.

In *Burlington*, the Plaintiff, Sheila White, the only woman in her department, operated the forklift at the Tennessee Yard of defendant, Burlington Northern & Santa Fe Railway Co. ("Burlington"). During her employment, White's immediate supervisor made insulting and inappropriate comments to her. After she complained, her supervisor was disciplined for sexual harassment, but she was removed from forklift duty to standard track laborer tasks. She filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), claiming that the reassignment was unlawful gender discrimination and retaliation for her complaint. She thereafter was suspended without pay for insubordination. Burlington later found that she had not been insubordinate, reinstated her, and awarded her back pay for the 37 days she was suspended. The suspension led to another EEOC retaliation charge. After exhausting her administrative remedies, White filed an action against Burlington in federal court claiming that Burlington's actions in changing her job responsibilities and suspending her for 37 days amounted to unlawful retaliation under Title VII. A jury awarded her compensatory damages. The Sixth Circuit reversed in part and remanded. On rehearing *en banc*, the Court of Appeals affirmed the jury's finding, but remanded as to punitive damages. The Supreme Court granted *certiorari*.

In applying the new retaliation standard, the Supreme Court found that there was sufficient evidence to support the jury's verdict that retaliation had occurred. Specifically, the Court found that a reassignment of duties can constitute retaliatory discrimination even when both the former and present work duties fall within the same job description. As explained by the Court, "[a]lmost every job category involves some responsibilities and duties that are less desirable than others." The Court determined that the jury had considerable evidence that the track laborer duties were more arduous and

dirtier than the forklift operator position and that the latter position was considered a better job by male employees who resented White for occupying it. In rejecting Burlington's argument that no retaliatory discrimination had occurred because White was reinstated and received all of her back pay, the Court explained that many reasonable employees would find a month without pay a serious hardship and an indefinite suspension without pay, even if the employee eventually is reinstated and receives her back pay, could act as a deterrent to the filing of a discrimination complaint.

The Supreme Court's expansion of the retaliation standard under Title VII in *Burlington* inevitably will lead to an increase in retaliation claims for employers. More importantly, under this new, permissive standard, it will be easier for a plaintiff to establish a retaliation claim. As a result, the costs of defending such claims will continue to increase, since the application of the reasonable person/context-based standard will make it very difficult for employers to dismiss these claims on summary judgment and before trial.

In light of this ruling and its far-reaching implications, employers need to exercise even greater caution when managing employees who have made a discrimination complaint or engaged in other protected activity. Specifically, employers will need to exercise increased vigilance and care to monitor and prevent any retaliatory actions or conduct that could have a "materially adverse effect" as construed by a "reasonable person." Given the breadth of this standard, an employer must carefully analyze any employment or other actions that it plans to take against an employee who has engaged in protected activity. And under this new standard, it is more important than ever that employers educate their supervisors on how to avoid retaliation claims. Without well-trained management, employers are sure to see the number of retaliation claims by their workforce increase.