

August 2, 2006

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# Supreme Court Eases Standard for Title VII Retaliation Claims

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SPECIAL TO LAW.COM

AUGUST 2, 2006

In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. \_\_, No. 05-259 (June 22, 2006), the U.S. Supreme Court held that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) is broader than Title VII's anti-discrimination provision, resolving differences among the circuit courts of appeal over what constitutes actionable retaliation.

Specifically, the Court addressed:

1. whether the action challenged as retaliatory must be employment- or workplace-related; and
2. how harmful that action must be to constitute retaliation.

The Court adopted the approach used by the 7th and D.C. Circuits, stating:

"We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. 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."

## FACTUAL AND PROCEDURAL HISTORY

Burlington Northern & Santa Fe Railway Co. hired Sheila White in June 1997 as a track laborer, which required the performance of duties including removing and replacing track components, transporting track material, cutting brush and clearing litter and cargo spillage from the right-of-way.

Shortly after her hire, Burlington's roadmaster, Marvin Brown, assigned White to operate a forklift as her primary job responsibility, although she continued to perform some of the other track laborer tasks. White was the only woman working in the Maintenance of Way department at Burlington's Tennessee yard.

In September 1997, White complained to Burlington officials that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in the Maintenance of Way department and had also made insulting and inappropriate remarks to her in front of her male colleagues. After an internal investigation, Burlington suspended Joiner for 10 days and ordered him to attend a sexual harassment training session.

On Sept. 26, 1997, Brown told White about Joiner's discipline. At the same time, he told White that he was removing her from forklift duty and assigning her to perform only standard track laborer tasks. He explained that the reassignment reflected co-workers' complaints that, in fairness, a "more senior man" should have the "less arduous and cleaner job" of forklift operator.

On Oct. 10, 1997, White filed a sex discrimination and retaliation complaint with the EEOC about the reassignment. In early December 1997, White filed a second retaliation charge, claiming that Brown had placed her under surveillance and was monitoring her daily activities.

A few days later, White and her new immediate supervisor, Percy Sharkey, disagreed about which truck should transport her from one location to another.

Sharkey reported to Brown that White had been insubordinate, and Brown immediately suspended White without pay. White invoked internal grievance procedures, which led Burlington to conclude that White had not been insubordinate. Burlington reinstated White to her position and awarded her back pay for the 37 days she was suspended. White filed an additional retaliation charge with the EEOC over the suspension.

After exhausting administrative remedies, White filed suit in federal court alleging that the change in her job responsibilities and the suspension without pay amounted to unlawful retaliation in violation of Title VII. A jury found in favor of White, awarding her \$43,500 in compensatory damages. The Court of Appeals affirmed.

## RETALIATION STANDARDS SET

The Supreme Court granted certiorari to resolve:



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1. whether an action challenged as retaliation has to be employment or workplace related, and
2. how harmful that action must be to constitute retaliation.

As to the first point, the Supreme Court rejected the contention that Title VII's anti-retaliation provision, like Title VII's substantive anti-discrimination provision, prohibits only conduct that affects an employee's compensation, terms, conditions or privileges of employment.

First, the Court concluded that the language of the substantive anti-discrimination provision explicitly limits that provision's scope to actions that affect employment or alter workplace conditions, while the anti-retaliation provision has no such limiting language.

Second, the Court concluded that Congress intended the differences the language suggests due to the differing purposes of the anti-discrimination and anti-retaliation provisions. The anti-discrimination provision seeks a workplace free from discrimination. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from retaliating against an employee's efforts to secure or advance enforcement of Title VII's basic anti-discrimination guarantees. The substantive anti-discrimination purpose could be achieved by limiting prohibitions to employment related discrimination. But the objective of the anti-retaliation provision would not be achieved through limiting actionable retaliation to actions directly related to employment and the workplace because an employer can effectively retaliate against employees by taking actions outside employment and outside the workplace.

Third, the Court concluded that both court precedent and EEOC interpretations supported the conclusion that the anti-retaliation provision is not limited to the same employment related activity covered by the anti-discrimination provision.

Last, the Court did not see any anomaly in reading Title VII to provide broader protection for victims of retaliation than those complaining of substantive discrimination. The Court concluded that interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of Title VII's primary nondiscrimination objective depends.

As to the second point, the Supreme Court held that a plaintiff alleging retaliation must show that a reasonable employee would have found the challenged action to be materially adverse, which means that the action might have dissuaded a reasonable employee from making or supporting a charge of discrimination.

The Court emphasized that the material adversity requirement made the important distinction between significant and trivial harms, noting 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 emphasized that the reasonable employee standard assured that the challenged action would be judged objectively. The Court explained that it phrased the standard in general terms as opposed to specific prohibited acts, because the significance of any given action would often depend upon the particular context. As an example, the Court noted that 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.

## THE APPLICATION OF THE NEW STANDARDS TO THE CASE

Applying this new standard to the facts of the case, the Supreme Court concluded that there was a sufficient evidentiary basis to support the jury's verdict in favor of White on her claims that Burlington retaliated against her in her reassignment from forklift duty to standard track laborer tasks and in suspending her without pay for 37 days.

While noting that reassignment of job duties is not automatically actionable, the Court concluded that whether a particular reassignment is materially adverse depends upon the circumstances of the case. In the case at hand, the jury could have easily concluded that the track labor duties were more arduous and dirtier and that the forklift operation position required more qualifications, had more prestige and was a better job.

The Court also rejected Burlington's argument that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with back pay.

First, the Court noted that a court could have issued an injunction and that, since 1991, White would have been entitled to also recover compensatory and punitive damages, remedies necessary to help make victims whole.

Moreover, while White eventually received back pay, she and her family had to live for 37 days without income and without knowing whether or when she would return to work. White testified that the hardship caused her emotional distress for which she obtained medical treatment.

Last, the Court noted that an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay.

The Supreme Court decision in *Burlington* expands the types of actions that can be challenged as retaliation from those actionable as discrimination. Employers faced with employees who have filed discrimination charges will have to take greater care to assure that the employee is not subject to any actions which could be viewed as retaliatory. Even before the Supreme Court's decision in *Burlington*, management of employees who have filed charges of discrimination has proven challenging to employers.

Further, it is not uncommon in such cases for an employer to prevail on the underlying substantive discrimination charge while losing the retaliation claim.

Employers should consider immediate and follow-up training and counseling of managers and supervisors of employees who have filed charges of discrimination on how to avoid creating actionable claims of retaliation.

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