

CLIENT ALERT

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Supreme Court Decision Makes It Easier To Prove Title VII Retaliation

In *Burlington Northern and Santa Fe Railway Co. v. White*, the U.S. Supreme Court resolved a split among the Circuit Courts and set forth a standard that will make it easier for Title VII plaintiffs to establish retaliation claims. The Court held that a plaintiff alleging retaliation under Title VII is not required to demonstrate that the employer's conduct adversely affected the terms and conditions of her employment. The Court also held that in determining whether an employer's conduct constitutes actionable retaliation, courts must consider whether a reasonable employee in the same situation would be dissuaded from complaining about discrimination.

The Facts

Plaintiff Sheila White worked as a "track laborer" for defendant Burlington Northern & Santa Fe Railway Company ("Burlington"), and was the only woman in the Maintenance of Way department at its Tennessee Yard. Her primary responsibility was operating a forklift.

In September 1997, White reported to Burlington that her supervisor had repeatedly told her that women should not be working in the Maintenance of Way department. She further reported that he had made inappropriate and insulting remarks to her in front of her coworkers. Burlington conducted an investigation, suspended the supervisor for ten days, and required him to attend sexual harassment training.

In late September, Burlington's "roadmaster," Marvin Brown, removed White from forklift duty. Brown said that other workers had complained that, "in fairness, a 'more senior man' should have the 'less arduous and cleaner job' of forklift operator."

On October 10, White filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that reassigning her duties constituted unlawful gender-based discrimination, and retaliation. In December, White filed another retaliation charge, alleging that Brown had placed her under surveillance and was monitoring her activities.

After White filed this charge, she and a supervisor, Percy Sharkey, had a disagreement, after which Sharkey told Brown that White had been insubordinate. Brown suspended White without pay. White followed internal grievance procedures, and Burlington concluded that she had not been insubordinate. Burlington reinstated White and awarded her backpay for the 37 days of her suspension. Based upon the suspension, White filed a third retaliation charge. After exhausting her administrative remedies, she sued Burlington in federal court.

The Trial Court

White's lawsuit included retaliation claims against Burlington for: (1) changing her job responsibilities; and (2) suspending her without pay. The jury returned a verdict in White's favor on both of these claims and awarded her \$43,500 in compensatory damages. Burlington appealed.

The Sixth Circuit

A divided panel of the Sixth Circuit reversed, but that decision was vacated by the full Court of Appeals, which heard the matter *en banc* and affirmed the judgment of the district court.

Disagreement Among The Circuits

The anti-retaliation provision of Title VII prohibits employer actions that "discriminate against" an employee or job applicant because he or she "opposed" a practice forbidden under Title VII or "made a charge, testified, assisted, or participated in" a Title

VII “investigation, proceeding, or hearing.” 42 U.S.C. § 2000e-3(a). Circuits have differed about whether the challenged actions must be employment or workplace related, and about how harmful the actions must be to amount to retaliation.

The Supreme Court

On appeal to the Supreme Court, Burlington argued that, like Title VII’s anti-discrimination provision, its anti-retaliation provision only applies to employer conduct that affects the employee’s compensation or other terms, conditions, or privileges of employment. The Court disagreed and affirmed the judgment of the Sixth Circuit.

First, the Court explained that the language of the anti-discrimination provision includes the words “hire,” “discharge,” “compensation, terms, conditions, or privileges of employment,” “employment opportunities,” and “status as an employee,” which limit its scope to conduct that affects employment or alters workplace conditions. The anti-retaliation provision, however, contains no such limiting words.

Second, the Court indicated that achieving the anti-discrimination provision’s objective of a workplace in which individuals are not discriminated against based upon their race, ethnicity, religion, or gender, would be realized if all employment-related discrimination were “miraculously eliminated.” In contrast, achieving the anti-retaliation provision’s objective of preventing an employer from interfering with an employee’s efforts to secure enforcement of Title VII’s basic guarantees, could not be realized by focusing only on employment-related conduct. The Court explained that “an employer can effectively retaliate against an employee by taking actions not directly related to his employment or

by causing him harm *outside* the workplace” (emphasis in original).

The Court then addressed the “level of seriousness to which [the] harm must rise before it becomes actionable retaliation.” The Court held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse,” meaning in this context that it might well have dissuaded a reasonable employee from making or supporting a discrimination charge.

Explaining that “[c]ontext matters,” the Court stated that the significance of a retaliatory act often depends upon the circumstances. The Court explained that, for instance, changing an employee’s work schedule may make little difference to many employees, but matter enormously to a young mother with school age children.

Thus, the Court explained, the standard focuses on the materiality of the challenged conduct from the perspective of a reasonable person in the plaintiff’s position, which “will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.”

Applying its standard, the Court addressed Burlington’s argument that reassigning White’s duties did not amount to actionable retaliation because both the new and old duties fell within the same job description. The Court disagreed, indicating that “one good way” to discourage an employee from bringing a discrimination charge is to insist that she spend more time performing her less desirable job responsibilities. The Court noted that reassignment of job duties is not automatically actionable, but depends upon the circumstances. In light of the evidence, the Court determined that the jury could have reasonably concluded that White’s reassignment

of responsibilities would have been materially adverse to a reasonable employee.

The Court also rejected Burlington’s argument that the 37-day suspension without pay was not actionable because the company reinstated her with backpay. According to the Court, an indefinite suspension without pay could deter a reasonable employee from reporting discrimination, even if the employee eventually received backpay.

Conclusion

As *Burlington* makes clear, retaliatory actions under Title VII include not only changes in the terms and conditions of an individual’s employment, but also the individual’s treatment in and out of the workplace. Moreover, although courts will apply a “reasonable person” standard, they will consider the individual’s particular circumstances. Overall, it is not only important for employers to prevent and correct workplace discrimination, but also they must vigilantly ensure that complaining employees are not subjected to retaliation in any form.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

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