

SUPREME COURT EXPANDS SCOPE OF RETALIATION CLAIMS

In the case of *Burlington Northern & Santa Fe Railway Co. v. White*, decided June 22, 2006, the U.S. Supreme Court addressed, and significantly expanded, the types of employer action which can constitute retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, ("Title VII"). Employers must take note of the decision and be particularly aware of its impact when dealing with employees who have previously complained of discriminatory conduct in the workplace. Now, any employer action which would be considered "materially adverse" by "a reasonable employee or job applicant" may be the basis for a claim if taken in retaliation for the employee's complaining, supporting, or filing of a charge regarding discrimination.

Background

Title VII prohibits employment discrimination on the basis of race, sex, national origin, color or religion. Claims of discrimination have only been recognized where the employer, because of an employee's protected class status, takes an "adverse employment action." Typically, these actions include discharge, refusal to hire, disciplinary action, demotion and the like. To be considered an adverse employment action, there had to be a direct impact on the terms and conditions of employment.

The lower federal courts had differed when it came to the application of Title VII's anti-retaliation provision. Some courts required the same type of adverse employment action required to support a substantive discrimination offense before a retaliation claim would be recognized, other courts utilized a more general, less exacting analysis which allowed for retaliation claims based on any retaliatory conduct which would likely deter a reasonable employee from pursuing a charge of discrimination or opposing discriminatory practices.

Burlington Northern & Santa Fe Railway Co. v. White

In *White*, the Supreme Court adopted a form of the less exacting standard. Specifically, the Supreme Court held that any retaliatory employer action which would be "materially adverse to a reasonable employee or job applicant," constitutes "actionable retaliation." The Court went on to explain that the actions "must be harmful to a point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

In *White*, the employee had been suspended for 37 days, but later reinstated with back pay after an investigation, and was reassigned certain less pleasant duties, albeit duties which were within her existing job description. The Court found both actions to support

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the retaliation claim. In particular, the Court found that a suspension, even though later remedied, can create a hardship for employees and, as a result, is adverse action which a reasonable employee could find harmful to such an extent that it would dissuade him or her from challenging discriminatory conduct. Likewise, the assignment of more difficult duties, even if within the person's job description, was found to support the retaliation claim.

Impact on Employers

The *White* decision unquestionably expands the scope of employer action which can give rise to retaliation claims. Thus, there would appear to be little doubt that there will be an increase in lawsuits alleging retaliation. While the Court was careful to state that trivial harms are not sufficient to support a retaliation lawsuit, it offered little guidance on how the lower courts are to distinguish between trivialities and material adverse action. The Court also noted that each case will have to be judged on its own particular facts and circumstances. The lack of clear definition in the prohibited conduct, coupled with the emphasis on the need

for a case by case assessment, will likely result in fewer cases being disposed of on motions for summary judgment. Accordingly, the likely increase in the number of claims brought will be accompanied by an increase in the number allowed to go to the jury.

The upshot for employers is the heightened need to be diligent and careful when dealing with employees who have in some way challenged an employer's practice as discriminatory. Before any changes are implemented that affect any such employee, it must be confirmed that the change is for a legitimate, non-retaliatory business reason and, just as important, that the employer can convincingly document that reason.

The *White* decision also underscores the need for a well understood, well disseminated, and well administered procedure for receiving and addressing internal complaints of discrimination. Having a well established, uniform procedure will substantially aid employers in properly responding to complaints of discrimination. This in turn will reduce the risk of action which might be considered retaliatory.

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

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