

Client Alert

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for clients
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of the firm June 2006

U.S. Supreme Court Interprets Title VII To Provide Broad Protection from Retaliation

In yesterday's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ____ (June 22, 2006), the U.S. Supreme Court ruled that Title VII's anti-retaliation provision did not require the alleged retaliatory act directly to impact a term or condition of employment. Rather, the Court held that the anti-retaliatory provision prohibits any materially adverse treatment by an employer, either on or off the job, which is reasonably perceived by the employee as being related to a previously made complaint. This decision addresses the issue of what constitutes an act of retaliation taken by an employer after an employee complains or grieves that there was a violation of the substantive protections of Title VII. Rejecting arguments that the anti-retaliation provision should reach only "ultimate" or "tangible" adverse employment actions, the Supreme Court held that Title VII covers those employer actions that "would have been materially adverse to a reasonable employee or job applicant" as a result of the employee filing a complaint. The Court explained 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." The Court's decision potentially opens up the floodgates of litigation by employees seeking to take advantage of an untested and imprecise standard that may impose liability on employers for a wide-ranging scope of conduct within or outside the workplace.

To resolve the conflict among the lower courts regarding the type of conduct necessary to support a retaliation claim under Title VII, the Supreme Court undertook the review of a retaliation claim by Sheila White, an employee of Burlington Northern. Specifically, after she lodged a complaint of sexual harassment with Burlington Northern, the company disciplined the alleged harasser and reassigned White from her job operating a forklift to the track laborer position that she originally applied for and had held previously, retaining the same pay and benefits. White then filed a charge with the EEOC, claiming that the reassignment constituted retaliation and sex discrimination. Later, in an unrelated incident, White was suspended without pay temporarily. When, after 37 days, the internal grievance regarding the suspension was resolved in her favor, Burlington Northern reinstated White with full back pay.

Both the Sixth Circuit and the lower court's opinion determined that the reassignment and temporary suspension constituted unlawful retaliation because White suffered "a materially adverse change in the terms of her employment," and therefore rose to the level of an "adverse employment action." In reaching this conclusion, the Sixth Circuit rejected the tests applied by other courts. Some lower courts had held that to be actionable retaliation, the employer's conduct must constitute an "ultimate employment decision"; other lower courts had required a showing of a "materially adverse change in the terms and conditions of employment." The District of Columbia and Seventh Circuits had adopted an expansive view of retaliation, holding that any material employment disruption could constitute actionable retaliation. Guidance from the EEOC, which was followed by only the Ninth Circuit, similarly required a plaintiff to establish that the challenged conduct was "based on a retaliatory motive and [was] reasonably likely to deter employees from engaging in protected activity."

The Supreme Court chose to give deference to certain aspects of the EEOC position and adopt the test followed by the Seventh and District of Columbia Circuits. Explaining its rationale, the Supreme Court stated that the adverse action must be “material” because only significant harms should be actionable, and “normally petty slights or minor annoyances” are not the type of employer conduct that would deter victims of discrimination from complaining to the EEOC, the court, or their employers. The Court stated further that the objective “reasonable employee” standard will avoid the uncertainties and discrepancies that would result in trying to determine a plaintiff’s subjective feelings. At the same time, the Court emphasized that the standard is phrased in general terms because “[c]ontext matters.” Thus, a reviewing court must consider the plaintiff’s particular circumstances when determining the significance of the challenged conduct. The Court stated: “By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.” In reaching its decision, the Court gave the following example to show that an act that would be immaterial in some situations is material in others: “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.”

Applying this standard to White’s situation, the Supreme Court concluded that there was sufficient evidence to support the jury’s verdict in White’s favor. More particularly, the jury reasonably could conclude the reassignment was materially adverse to a reasonable employee because the track laborer duties were dirtier and more arduous than the forklift operator duties. Similarly, the jury reasonably could conclude that a temporary suspension would be a serious hardship to many reasonable employees, and an indefinite suspension could well act as a deterrent to filing a discrimination complaint. The Supreme Court explicitly rejected the argument that the reinstatement of White with full back pay was sufficient to preclude employer liability.

After the *Burlington* decision, all lower courts reviewing future claims of unlawful retaliation must determine whether the plaintiff has shown that a reasonable employee or job applicant would have found the challenged employer actions “materially adverse,” meaning that the actions were “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”

While the *Burlington* decision was unanimous, Justice Alito did not join in the Court’s reasoning. In his concurring

opinion, Justice Alito stated that the Court’s adoption of this standard may lead to practical problems, and was unworkable. Justice Alito particularly disagreed with the Court’s holding that the anti-retaliation provision of Title VII was broader than the actual protections of Title VII insofar as there was a much wider reach of employer action that could be deemed illegal if considered retaliatory than if the same actions were taken in the absence of a complaint. Nonetheless, Justice Alito concurred in the judgment of the Court, concluding that Burlington Northern retaliated against White because the challenged actions were proximate to White’s complaints and even though the employer eventually reversed the adverse actions, the fact that they occurred did violate Title VII, and White was properly awarded compensatory damages.

Commentary

Unfortunately, the Supreme Court did not provide guidance to help employers identify “materially adverse” actions and avoid claims of actionable retaliation. As a result, employers will be walking on eggshells, trying to predict whether particular actions within or outside the workplace might dissuade a particular individual—taking into account that individual’s particular circumstances and personal characteristics—from complaining about or supporting a claim of discrimination.

Thus, employers must take particular care to ensure that any actions taken against an employee (whether on or off the job) after a complaint of discrimination or retaliation are thoroughly and independently grounded in legitimate employment concerns. There remain many issues which will have to be developed in future litigation, including the proximate relationship between a complaint and any employer action; whether a complaint has to be well grounded in a legitimate belief that the law was violated in order for the retaliation prohibition to apply; and what actions do satisfy the “objective” standard the Court stated it adopted. What is certain is that an increase in retaliation claims can be expected, and it will be more difficult to resolve those claims short of a jury trial.

Proskauer Rose (Allan H. Weitzman, Paul Salvatore, Edward Cerasia II, and Heather G. Magier) filed an *amicus* brief on behalf of the Society for Human Resource Management and the National Federation of Independent Business Legal Foundation.

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