

U.S. SUPREME COURT ESTABLISHES NEW STANDARD FOR EMPLOYER LIABILITY FOR RETALIATION CLAIMS

by Diane Geller

The balance of power in employment cases dramatically shifted in favor of the employee in 2006. Delivering the opinion of the Supreme Court in Burlington Northern & Santa Fe Railway Co. v. White, 2006 WL 1698953 (June 22, 2006), Justice Breyer stated, "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."

In the Burlington case, the United States Supreme Court affirmed a sex discrimination jury award for a female forklift operator who was transferred to a more physical job and temporarily suspended after she filed a lawsuit accusing her employer of sexual harassment.

The facts of the case follow. Ms. White, the only woman in her department, operated the forklift at the Tennessee Yard of her employer, Burlington Northern & Santa Fe Railway Co. (Burlington). After she complained, her immediate supervisor was disciplined for sexual harassment, and Ms. White was removed from forklift duty and assigned to standard 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. Subsequently, she 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, among other things, 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. In affirming, the Sixth Circuit applied the same standard for retaliation that it applies to a substantive discrimination offense, holding that a retaliation plaintiff must show an "adverse employment action," defined as a "materially adverse change in the terms and conditions" of employment.

Upon further appeal, the U.S. Supreme Court's decision decided the standard to be applied in determining whether an employer's conduct rises to the level of retaliation. Prior to this decision there was a split in the circuit courts as to whether

the challenged action had to be employment or workplace related and the level of harm that the action had to cause before it constituted retaliation.

In the Burlington decision, the Supreme Court, after a review of the standard being applied by the various circuits, decided to adopt the standard applied by the Seventh and District of Columbia Circuits. Those Circuits had applied the standard that when attempting to prove employer retaliation under Title VII, the employee need only show that the conduct was materially adverse and such conduct might have dissuaded a reasonable employee from making or supporting a charge of discrimination.

Simply, the Supreme Court has ruled that any action on the part of the employer that is serious enough to possibly, or does in fact, deter an employee from making or assisting in making a charge of discrimination will be considered unlawful and actionable retaliation. The result of this broad new standard is to recognize that an employer may be liable for activity not directly related to an employee's employment and measures the employer's liability on an objective standard.

Under the new standard, the employee is not required to rely on actions that affect some aspect of his or her employment. If the conduct of the employer harms the employee outside of the workplace there will be a basis for a retaliation claim. The Supreme Court found that limiting actionable retaliation to only employment-related actions would not deter the various forms of retaliation that can take place and would fail to carry out the purpose of the anti-retaliation statute.

As a result, even if the conduct by the employer may not be something the employer views as retaliation, if a reasonable person would view the conduct in that light, it will be considered retaliatory. In the Burlington case, Ms. White was moved from forklift duty to more physical laborer tasks. While the company considered this a reassignment of duties within the employee's same job category and not a retaliatory act, the Supreme Court disagreed, saying that while each set of duties was within her job description, the reassignment to less desirable duties was in fact retaliation from the viewpoint of a third party considering all the circumstances. In addition, the Court found that even though Ms. White after being placed on suspension without pay, was reinstated and received the back pay, the fact that she and her family had to live for 37 days without income could well have been a deterrent to her from filing a discrimination complaint.

While the Burlington case only presents a standard for Title VII retaliations cases, there is a good possibility that it will be applied to other retaliation cases such as those arising under the Age Discrimination in Employment Act and under the Americans with Disability Acts. Clearly it establishes that retaliation may include actions taken with the best of intentions -- if those actions have a negative impact on the employee.

We recommend that employers review their anti-harassment and anti-discrimination policies and procedures to make sure that they are clear and easily accessible to all employees. All these policies should be reviewed to ensure that they contain a clear prohibition against retaliation. Your policy should state exactly what constitutes retaliation and should make perfectly clear that the company will not tolerate retaliation from any of its managers or other employees. It should also advise employees of the steps to take if they feel they are being retaliated against.

When an employee reports harassing or discriminatory conduct, fully address the employee's concerns and investigate the claims. Be sure to inform that employee of the anti-retaliation policy and that if retaliatory conduct takes place it should be reported immediately and will not be tolerated. It is important that you communicate to the complaining employee that you are taking their complaint seriously.

Keep confidential any complaints received. Treat the release of information on a need to know basis only. Make certain to advise all involved that retaliation in any form will not be tolerated.

If an employee does make a report of retaliatory conduct, fully address the employee's concerns and investigate the claim. Consider appropriate options for stopping the alleged retaliatory conduct.

Before taking any kind of adverse action against an employee who has engaged in protected activities, consider how third parties might view this conduct. Since the Burlington decision, transfers and reassignments may be considered retaliatory even when used as an answer to stopping retaliatory behaviors.

Always document all aspects of interaction and communication with employees. If you must take adverse action against an employee who has complained, be prepared to show that you had valid reasons for discipline, unrelated to the complaint. Those reasons should be supported, if possible, by prior documented warnings to the employee.

Ruden McClosky's employment lawyers are fully familiar with all aspects of investigating and addressing employee issues. Please consider consulting us before taking any actions regarding discrimination complaints or before taking any action that could be perceived as retaliatory.

Diane Geller is a partner in the Corporate Law Practice Group. For more information about this topic, please contact Ms. Geller or any member of the Corporate Law Practice Group.