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Supreme Court Broadens Title VII Protection Against Retaliation

By John F. Goemaat

Court Extends Protection to Actions Unrelated to Employment

The Title VII of the federal Civil Rights Act of 1964 prohibits discrimination because of race, color, sex, national origin and religion as well as discrimination against individuals who oppose or complain of such forms of discrimination. As determined in the most recent United States Supreme Court decision in *Burlington Northern & Santa Fe Railway Co. V. White*, Title VII's protection from an employer's retaliatory conduct, for employees who complain about discrimination or cooperate in an investigation of such complaints, extends to actions both related and unrelated to their employment.

The Case

In the *Burlington Northern* matter, an employee had complained that her supervisor was sexually harassing her. Although Burlington Northern agreed with the employee and disciplined the supervisor with a ten-day suspension, it also took employment action against the complaining employee. Burlington Northern reassigned the complaining employee from her preferred duties to perform the dirtier and less desirable jobs that were within her job title. In addition, Burlington Northern suspended the employee for 37 days for insubordination. After the reassignment and suspension, the employee filed charges alleging retaliation with the Equal Employment Opportunity Commission, the administrative agency that enforces Title VII. Although the job reassignment did not reduce the employee's pay, and the employer reinstated the employee (*cont'd* →)



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with full back pay after an internal grievance process concluded the employee was not insubordinate, the employee filed a lawsuit alleging retaliation.

The Decision

In reaching its ultimate decision, the United States Supreme Court's describes the type of employer action that could be considered sufficiently adverse to an employee to be unlawfully retaliatory. The Court concludes that employer retaliation is not limited solely to adverse treatment in terms and conditions of employment. Rather, any employer action that would be materially adverse to an employee or job applicant, regardless of whether the employer action is related to employment or not, may be considered retaliatory. An employer's action would be considered harmful if its effect would be to dissuade a reasonable worker from making or supporting a charge of discrimination. In all such cases, the individual facts and circumstances of the employer's actions are to be considered.

Applying those principles, the Court determined that Burlington Northern's actions toward its employee could be considered retaliatory. The Court concluded that even though the reassignment of work was within the same job title, the employee was forced to perform dirtier and more physically arduous work following her complaints of discrimination. The 37-day suspension, even though rescinded, also had an adverse impact upon the employee while it was in effect. It created an atmosphere which could easily dissuade employees from future complaints of discrimination. The Court even suggested that the conduct of Burlington Northern in this situation was so blatantly retaliatory that the employee could have been entitled to an injunction prohibiting similar behavior, as well as to a monetary award for compensatory and punitive damages.

Reasonable Person's Standard

The United States Supreme Court decision in *Burlington Northern & Santa Fe Railway Co. V. White* provides a significant caution to employers when dealing with employees who have filed charges of discrimination, complained of discrimination, or otherwise participated in discrimination investigations. While minor workplace annoyances may not be sufficient to be considered retaliation, material adverse action, both on and off the job, may give rise to a claim of retaliation. Moreover, the Court has created a reasonable person's standard for determining when an employer's action may dissuade an employee from making or supporting a charge of discrimination. As such, the ultimate decision of whether the employer's action could dissuade employees from complaining of discrimination and whether the employer's action had a material adverse impact on an employee will be determined by a trier of fact—most often a jury. Even disciplinary action that is subsequently rescinded may support the employee's claims of unlawful retaliation.

As a result of this recent United States Supreme Court decision, we strongly urge all employers to carefully review and document all changes in the terms and conditions of employment, job assignments, or other actions affecting employees who have complained of discrimination, particularly when the changes are implemented in relative proximity in time to the employee's complaints.



The material in this Employment Alert is for information purposes only and is not intended as legal advice. If you have any questions concerning this Alert, please contact John F. Goemaat (jgoemaat@lindabury.com) or John H. Schmidt, Jr. (jschmidt@lindabury.com). For biographical information on our attorneys, see our web site at www.lindabury.com.

