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Employers, Be Careful With Complainers Retaliation Claims Gain Favor In Supreme Court Ruling

January 2, 2007 | by

Most employers know that an employee cannot be fired for making a legitimate discrimination complaint. However, the law is not so simple. An employer cannot retaliate with an “adverse employment action”. For many years, our judicial system has wrestled with the question – what is an adverse employment action? A recent decision by the United States Supreme Court, [Burlington Northern & Santa Fe Railway Company v. White](#), has clarified what constitutes an adverse employment action in the context of a retaliation claim by an employee.

Sheila White was the only female forklift operator in the Tennessee yard of Burlington Northern. White began working as a track laborer. Her responsibilities included removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right of way. Soon after she started, a co-worker left, and operating the forklift became her main responsibility. For a track laborer, operating the forklift was a coveted assignment. White testified that shortly after she got the forklift work, her supervisor repeatedly told her that women should not be working in the maintenance-of-way department. He also made insulting and inappropriate remarks to her in front of male colleagues.

Following an investigation, Burlington Northern suspended the supervisor for ten days and ordered him to attend a sexual harassment training session. Although her job title never changed, White was removed from forklift duty and assigned to perform only standard track laborer tasks. In reassigning her, the roadmaster said that in light of co-worker complaints “a more senior man” should have the “less arduous and cleaner job” of forklift operator. White filed a charge alleging gender discrimination and retaliation in response to her complaint about her supervisor. After her claim was filed, her new immediate supervisor had a separate disagreement with her about which truck should transport White from one location to another. The supervisor claimed she was insubordinate and suspended her. She invoked the company’s internal grievance procedures, which process concluded that she had not been insubordinate, and she was awarded back pay for the 37 days she was suspended. White then filed an additional retaliation charge as a result of the suspension. A jury found in White’s favor on the

retaliation claim and awarded \$43,500 in compensatory damages, including \$3,250 for medical expenses. Burlington Northern appealed the circuit court's decision affirming this award.

The key question before the Supreme Court was what constitutes an "adverse employment action" under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. The company argued that there should be a link between the challenged retaliatory action and the terms or conditions of employment for there to be unlawful retaliation. In upholding the jury's verdict in favor of the employee, the Court adopted a lower standard, determining that the anti-retaliation provision provides broad protection beyond actions directly related to employment if the actions would discourage a reasonable worker from bringing a discrimination charge. In essence, the Court decided that retaliation need not be job-related or affect an "ultimate employment decision" to be unlawful.

Thus, the Court rejected the standard applied by various appellate courts that limited actionable retaliation to so-called "ultimate employment decisions" and resolved what had been conflicting approaches among the circuit courts when defining what constitutes unlawful retaliation under Title VII. In determining what it deemed to be the proper standard for evaluating retaliation claims under Title VII, the Justices wrote: "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Although the anti-retaliation provision does not protect employees from "petty slights, minor annoyances, and simple lack of good manners," the Court said it does protect employees when the action is found to be "materially adverse".

In explaining this standard, the Court made three important points:

1. it emphasized the importance of distinguishing between significant and trivial harms
2. it used the phrase "reasonable employee" to make clear that the standard is an objective, rather than subjective one
3. it defined the standard in general terms because the decision as to whether it is an adverse action must be decided in context.

"Context matters," the Court stated. "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." In another hypothetical, the Court noted that "a supervisor's refusal to invite an employee to lunch is normally trivial... but to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination."

Applying its new standard, the Court unanimously held that Burlington Northern unlawfully retaliated against White by giving her a 37-day unpaid suspension (even though it was later converted to a paid suspension) and an assignment to a more physically arduous position. The Court rejected Burlington Northern's argument that a reassignment of duties could not be retaliation if the former and present duties fell

within the same job description, stating “almost any job category involves some responsibilities and duties that are less desirable than others.” The Court also rejected Burlington Northern’s argument that the suspension was not retaliatory since the company ultimately reinstated White with back pay, observing that White and her family had to live for 37 days without income, and referring to her testimony that the suspension resulted in the “worst Christmas I had out of my life.”

Why is this decision significant? The Court’s clarification of Title VII’s anti-retaliation provision has significantly expanded the potential scope and number of potential retaliation claims. The Court’s emphasis on context in assessing these claims also suggests that more of these lawsuits will likely be resolved at trial before a jury, rather than at the summary judgment stage of litigation before a judge. The Court’s decision therefore reinforces the necessity of carefully analyzing what might be characterized as adverse actions when dealing with employees who have asserted claims of discrimination under Title VII.

In recent years, most employment-related decisions from the Supreme Court have been moderately favorable for employers. This decision will undoubtedly encourage a greater number of disgruntled employees to consider retaliation claims. In response to this ruling, we recommend that employers adopt and disseminate a strong anti-retaliation policy and provide training for managers and supervisors that focuses on making good, job-related decisions and documenting them.

As a result of this ruling, retaliation claims may well be a bigger concern than the original discrimination claim itself. It is therefore imperative that employees be informed about the process for reporting alleged discrimination, that claims of discrimination be investigated thoroughly, and that management demonstrate to the employee that the claim is being taken seriously. All subsequent actions taken with regard to that employee must be based on sound business reasons. It is important to investigate allegations of retaliation and take prompt corrective action if retaliation occurs. In light of the stakes involved, we recommend that legal counsel be consulted to determine the potential ramifications of any proposed actions.

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