

U.S. Supreme Court Relaxes Title VII Retaliation Standards

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The U.S. Supreme Court ruled yesterday that Burlington Northern Railroad unlawfully retaliated against a female employee after she complained of gender discrimination by transferring her to a more difficult job and suspending her without pay for 37 days, even though it reinstated her with full back pay.

The unanimous decision in the case of *Burlington Northern & Santa Fe Railway Co. v. White* expands the type of conduct that may be considered retaliatory beyond actions that directly relate to the employee's terms and conditions of employment. Under the new standard, unlawful discriminatory conduct now extends to materially adverse discriminatory actions, both inside and outside the workplace, that might dissuade a reasonable worker from making or supporting a discrimination charge.

Background

Plaintiff Sheila White worked as a forklift operator in Defendant Burlington's Tennessee Yard and was the only woman working in her department. About two months after she started, White complained that her supervisor repeatedly told her that women should not be working in his department and made other various insulting and inappropriate remarks regarding her gender. Although Defendant suspended the supervisor for 10 days after White complained, Defendant also removed White from her forklift operator position and reassigned her to perform less desirable, standard track laborer tasks.

Two weeks later, White filed an EEOC charge alleging gender discrimination and retaliation based on the reassignment. White subsequently filed a second EEOC charge claiming that Defendant placed her under surveillance and monitored her daily activities. A few days later, White and her supervisor got into a heated disagreement about which vehicle should transfer White between two locations. White was immediately suspended without pay for insubordination. White appealed her suspension and Defendant eventually reinstated her with 37 days backpay. Based on her suspension, White filed a third charge with the EEOC.

After exhausting her administrative remedies, White filed suit in federal court alleging Defendant's action of reassigning her to the track laborer position and suspending her for 37 days without pay constituted unlawful retaliation under Title VII. A jury agreed on both counts and awarded White \$46,750 in damages. On appeal, a divided Sixth Circuit Court of Appeals panel reversed the judgment, but the full Court of Appeals vacated the panel's decision. The *en banc* Court unanimously affirmed the District Court's judgment.

The Supreme Court's Decision

Although all Circuits acknowledged that the phrase "discriminate against" in Title VII's anti-retaliation provision referred to distinctions or differences in treatment, different Circuits reached different conclusions about whether the challenged action must be employment related and how harmful the action must be to constitute retaliation. Some Circuits required a close nexus between the retaliatory action and the employment, other Circuits limited the conduct to ultimate employment decisions, such as hiring and firing, and still others simply required that the action would have been material to a reasonable employee. Recognizing this split, the Supreme Court concluded:

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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 ... the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant ... 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

The Court cautioned, however, that an "employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." According to the Court, "the significance of any given act of retaliation will often depend upon the particular circumstances."

Applying these standards to White's complaint, the Court affirmed the jury's conclusion that Defendant's actions were retaliatory and materially adverse. In so holding, the Court rejected Defendant's argument that White's reassignment was not materially adverse because it was within the same job classification. The Court concluded that "almost every job category involves some responsibilities that are less desirable than others."

The Court also rejected Defendant's suggestion that White's 37 day suspension without pay was not materially adverse because she received full backpay. According to the Court, "an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay." "A reasonable employee facing a choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former."

Lesson for Employers

Under the new standard, employers must carefully consider any personnel actions that will affect an employee who previously complained of discrimination, even if the decision does not affect the employee's wages or benefits. Although an employee must still establish a link between the personnel action and the discrimination complaint, the type of conduct that will be considered materially adverse is now greatly expanded and is not limited to workplace conduct.