

# LABOR AND EMPLOYMENT PRACTICE GROUP

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## TITLE VII RETALIATION CLAIMS: *BURLINGTON NORTHERN V. WHITE*

Title VII retaliation claims have nearly doubled over the past decade, and currently make up about one quarter of all Title VII claims filed with the EEOC. The U.S. Supreme Court's June 22, 2006, decision in *Burlington Northern and Santa Fe Railway Company v. Sheila White* is likely to result in a further increase in these claims by making it easier for plaintiffs to prove they have been victims of illegal employer retaliation.

### BURLINGTON V. WHITE

In *Burlington*, Sheila White was the only woman in a forklift operator department at Burlington Northern's Memphis train yard. After White complained to Burlington officials about her supervisor's repeated discriminatory and harassing remarks, Burlington suspended the supervisor and reassigned White to standard track laborer tasks—a less prestigious and more arduous assignment than her forklift operator assignment. White filed a charge with the EEOC, claiming that the reassignment of her duties constituted gender discrimination and retaliation for having complained about her former supervisor. After White filed a second retaliation charge with the EEOC, Burlington suspended her without pay for 37 days for an alleged act of insubordination. White filed an internal grievance concerning the suspension, and after investigating the insubordination issue, Burlington determined that White had not been insubordinate, reinstated her, and awarded her backpay for the 37 days she had been suspended. White then filed an additional retaliation charge with the EEOC based on the suspension.

### TITLE VII ANTI-RETALIATION PROVISION

The anti-retaliation provision in Title VII prohibits employer actions that discriminate against employees

who have "made a charge, testified, assisted, or participated in" a Title VII "investigation, hearing, or proceeding." Before *Burlington*, courts disagreed about whether these prohibited actions include only workplace- and employment-related actions, and about just how harmful the act must be to be considered retaliatory. The Supreme Court has now established a standard for courts to follow in the future.

### NEW STANDARD FOR RETALIATION CLAIMS: "CONTEXT MATTERS"

First, the Court held that the anti-retaliation provision can apply to acts and harm that occur outside the workplace. This holding overrules the more restrictive "ultimate employment decision" standard that some jurisdictions, including the Eighth Circuit (which includes Missouri), had applied, which limited actionable retaliatory conduct to employer acts such as "hiring, granting leave, discharging, promoting, and compensating." In determining whether an act has risen to the level of being actionable retaliation, the Court held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse. . . ." The decision did not establish a precise definition of what constitutes material adversity. The Court held that the particular facts and surrounding circumstances of each case would determine whether an employer's action was materially adverse and, therefore, actionable. As Justice Breyer stated in the majority's opinion, "Context matters."

Using this standard, the Court majority affirmed the original jury verdict in favor of White. (The jury returned a verdict in favor of Burlington Northern on White's sex discrimination claim. However, the jury

returned a verdict in favor of White on her retaliation claim, awarding her \$43,500 in compensatory damages, including \$3,250 in medical expenses incurred for treatment White received for emotional distress. The jury found against White on her claim for punitive damages. The district court also awarded White attorney's fees in the amount of \$54,285, which represented 80% of White's total attorney's fees).

Although not all job duty reassignments are automatically actionable, the Court held that in White's case, the reassignment to a more strenuous and less desirable job would deter a reasonable employee from bringing discrimination charges. Also, the fact that White was reinstated and awarded backpay did not make up for the fact that she and her family had to go without her salary for 37 days.

## POTENTIAL IMPLICATIONS FOR EMPLOYERS

Because the *Burlington* decision establishes a fact-sensitive standard for evaluating retaliation claims, it is foreseeable that it will become increasingly more difficult for employers to obtain summary judgment and avoid jury trials on retaliation claims. Even when a plaintiff's claim appears to lack merit, the jury will likely be charged with making the factual determination of whether an employer's actions would be considered materially adverse to a reasonable employee. Therefore, the employer's cost of defending retaliation claims is likely to increase as more cases will either go to trial or settle.

Of course, there also is a concern that unscrupulous employees may use the anti-retaliation provision in an attempt to immune themselves from termination or other disciplinary measures, or from receiving less desirable work assignments. Simply making an accusation of discrimination or harassment could potentially serve as an easy shield for an employee from an employer's otherwise legitimate discipline and assignment decisions.

In addition, courts often look at how Title VII claims are analyzed when considering cases filed under other civil rights statutes, such as the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). The *Burlington* decision could, therefore, have more far-reaching effects on retaliation claims filed under these statutes, as well.

On the other hand, the new standard may decrease the likelihood of class actions forming over retaliation claims. The fact-sensitive standard should make it exceedingly difficult for plaintiffs to obtain class certification.

## PROCEED WITH CAUTION

Employers now must use even more caution when taking action against their employees. *Burlington* makes it more imperative than ever for employers to partner with legal counsel to establish proper anti-harassment, anti-discrimination, and anti-retaliation policies and to obtain legal counsel prior to disciplining an employee who has made claims of discrimination or harassment.

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