

New Employee-Friendly Retaliation Standards: The Road Ahead for Employers

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Introduction

The U.S. Supreme Court has expanded the rights of employees

- The Court's holding
 - An employee can bring a Title VII retaliation claim based on retaliatory actions taken by an employer that do not directly impact the terms and conditions of an employee's employment, provided such actions are materially adverse to the employee.

- *Burlington Northern & Santa Fe Railway Co. v. White*, 2006 U.S. Lexis 4895 (June 22, 2006)



Introduction

The U.S. Supreme Court has expanded the rights of employees

- The new standard of analysis
 - An employee need not show that the alleged retaliatory conduct impacted his/her “compensation, terms, conditions, or privileges of employment”;
 - Rather, the employee need only show that a “reasonable person” would have been dissuaded from exercising his/her Title VII rights as a result of the employer’s actions, even if such actions are unrelated to the workplace.



Introduction

- The result
 - Possible increase in the already growing number of retaliation claims
 - Increased uncertainty for employers
 - Easier burden for plaintiff to establish basic elements of a Title VII claim



Background of the Case

- The facts
 - Only female employee
 - Complained about supervisor's insulting, inappropriate remarks
 - Supervisor was disciplined and employee was reassigned
 - No change in pay or benefits, but new assignment is less prestigious and the job is dirtier
 - EEOC complaint: assignment retaliatory
 - Disagreement with another supervisor resulted in employee's suspension without pay
 - Grievance procedures--employee reinstated with full backpay
 - EEOC complaint: suspension retaliatory



What the Court Considered

- One issue identified by the Court for review
 - What is the appropriate standard for determining what constitutes an adverse employment action in a retaliation case?
 - “materially adverse change in the terms of employment”;
 - adverse treatment “reasonably likely to deter”; or
 - only treatment that results in an “ultimate employment decision”.



What the Court Considered

- The Court also addressed a second issue
 - Does Title VII's anti-retaliation provision prohibit only those employer actions that are related to an employee's employment or workplace?



“Material Adversity” Required

- Title VII does not protect an individual from all forms of retaliation.
- The challenged action must be one that an objectively reasonable employee would have found “materially adverse.”



“Material Adversity”

- In other words, the employer’s actions must be “likely to dissuade employees from complaining or assisting in complaints about discrimination.”



“Reasonable Person”

- “Reasonable Person” standard applies to determining material adversity
 - In determining whether the employee has suffered “material adversity,” the harm must be judged based on how an objective, “reasonable” employee would respond to the employer’s challenged action.
 - The significance of any given act of retaliation will often depend on the particular circumstances; context matters.



The New Standard

- Put more simply
 - An employer cannot escape liability by engaging in retaliatory conduct that does not directly impact an employee's terms or conditions of employment but nevertheless is just as effective at discouraging an employee from exercising the employee's Title VII rights.



Applying the New Standard

- White's reassignment was "materially adverse"
 - The reassigned job was more arduous and dirtier.
 - The previous job was viewed as more prestigious.
- The suspension was an adverse action
 - Although given backpay, White and her family had to live for 37 days without income, a fact many reasonable employees would find to be a serious hardship, and according to White's testimony, caused her emotional distress.



Impact

- The result
 - Resolution of a Title VII retaliation claim will require a far more fact-specific review to determine whether the employer's action dissuaded the employee from exercising the employee's Title VII rights.
 - Courts will have little guidance to go by in their initial efforts to apply this new standard, in turn:
 - Creating uncertainty for employers with respect to what constitutes "retaliatory" conduct
 - Increasing a plaintiff's chances of surviving summary judgment, taking their case to a jury, and getting punitive damages
 - Expanding the decision beyond Title VII
 - As for pending cases, the Court merely clarified the law.



The New Standard

Examples

- Refusal to investigate death threats
- Criminal charges filed against former employee
- Shift changes
- Negative job references to prospective employers
- A negative performance evaluation (even in the absence of any loss of job or tangible job status), a supervisor forcing the employee out, and an employee not being permitted to telecommute like other employees
- Job transfers that disrupt an employee's life
- An employment rating that might result in loss of potential bonus



Going Forward

What are an employer's obligations under Title VII?

- The anti-retaliation provision of Title VII prohibits discrimination against an individual:
 - Because the individual has opposed any practice made an unlawful practice by Title VII; or
 - Because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.



Going Forward

- What should I do going forward?
 - Review and, if necessary, revise employment policies
 - Prepare job descriptions
 - Establish clear performance expectations
 - Perform regular evaluations
 - Document misconduct
 - Thoroughly investigate complaints
 - Provide additional training to the managers and supervisors
 - Exercise greater caution when dealing with employees who have exercised their Title VII rights



The Investigation

- How to do it right
 - Be aware of and follow established investigation procedures
 - Act promptly
 - Be objective and neutral and keep an open mind
 - Consistency and respect are key



The Investigation

- **Complainant Interview**

- For each act of alleged harassment/discrimination, determine when it occurred, what happened, where it occurred and who saw the incident
- Be thorough—every incident should be explored
- For each incident, determine witnesses and relevant documents
- Ask employee to provide a written statement (or sign interview notes)
- Ask about employee's expectations for investigation
- Explain investigation process
- Follow-up with an outline of each incident and solicit corrections/additions
- Clearly state that the employee will not experience retaliation



The Investigation

- **Interview all witnesses and potential witnesses**
 - Explain interview's purpose
 - Explain the importance of confidentiality
 - Explain that no retaliation can occur
 - Emphasize the importance of receiving accurate information
 - Explore each alleged incident with the witness
 - Explore the witness's impressions and thoughts about the work environment
 - Emphasize to witness that he/she should immediately report any instance of retaliation



The Investigation

- **Interview person accused of wrongdoing**
 - Explain the purpose of the investigation
 - Let the employee know what he/she has been charged with doing (allowing the accused to review a written summary of the incidents may be appropriate)
 - Let the employee know that no conclusions have been reached and that you want to hear his/her response before making any decisions



The Investigation

- **Interview person accused (cont.)**
 - Obtain the employee's version of what happened
 - Ask the employee about any documents that should be reviewed or additional people who should be interviewed
 - Let the employee know how the investigation will proceed and the anticipated time frame
 - Provide information about how investigation results will be communicated
 - **Emphasize NO RETALIATION**



The Investigation

- **Investigation administration**
 - Keep only one set of detailed, legible (typewritten) notes of everything you do during the course of the investigation
 - Keep detailed, legible notes of interviews; use quotes where possible (only if appropriate)
 - Include facts only; do not include impressions, opinions, conclusions, follow-up notes, etc.
 - Gather and review relevant documents and/or statistics
 - After reviewing relevant documents, information and interviews, reach a conclusion based on what has been learned (often in consultation with counsel)



The Investigation

- **Investigation administration (cont.)**
 - Determine appropriate response
 - Follow up with complaining employee
 - Communicate the importance of reporting further problems and/or retaliation
 - Follow up regularly to make sure that employee's situation has improved and that no further problems have developed (retaliation or harassment)



The Investigation

- **Investigation administration (cont.)**
 - **Communicate with accused employee**
 - **Talk with counsel before implementing a termination decision**
 - **Notify the managers involved and make sure that they closely monitor the situation**
 - **Stress importance of NO RETALIATION**



Investigation Pitfalls

- **Poor investigations can lead to defamation, wrongful termination, breach of contract, and retaliation claims**
- **Do not promise confidentiality**
- **Do not commiserate or socially sympathize with any party (if you have a side, find an impartial person to conduct the investigation)**
- **Do not reveal which side or person you believe**
- **Do not prejudge the situation or jump to conclusions**
- **Do not discuss the investigation or witness interviews with anyone who does not have a direct and important need to know the information**
- **Do not discuss your preliminary impressions or judgments**
- **Do not explore details unrelated to the claims you are investigating**



Training

- “Reasonable Person” standard
 - Perception
- Inference is enough
- Context matters (e.g., schedule change for working mothers)
- Work Related?
 - Standard applies inside and outside the workplace
 - Managers are managers 24/7



Training

- Others are protected (e.g., witnesses, investigators)
- Discrimination is not required to prove retaliation
- Manage performance fairly and consistently
- HR should audit how managers document performance



Training

- Managers need to know how to manage after a complaint is filed



Questions?



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