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## Ruling Paves Way for More Employee Retaliation

The U.S. Supreme Court recently issued an important decision for all employers in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), expanding the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964.

Title VII, which makes it unlawful to discriminate in hiring, firing and other terms and conditions of employment based on an individual's race, color, religion, sex or national origin, also prohibits retaliatory action against an employee or applicant because he has "opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C.A. § 2000e-3(a). Until recently, the federal courts have applied different standards for determining whether a retaliatory action must be employment- or workplace-related, as well as what impact that action must have on the employee in order to constitute retaliation. The Third Circuit Courts of Appeals, which embraces Pennsylvania, utilized a stringent standard that required a plaintiff alleging retaliation to prove a "materially adverse change in terms or conditions of employment."

### The Case

In *Burlington Northern*, plaintiff White worked as a railroad track laborer, a job that involved many heavy, undesirable tasks but also included operating a forklift. Initially, White primarily operated a forklift, although she occasionally performed other duties. After White complained that her supervisor had made harassing and inappropriate comments, the company performed an internal investigation and disciplined the supervisor. White soon was relieved of all forklift duties and assigned to perform only more physical tasks. White then filed a retaliation charge with the Equal Employment Opportunity Commission, and a short while later she was suspended without pay for insubordination. Another company investigation exonerated White of the insubordination charge and she was reinstated with back pay. White filed a lawsuit in federal court that included a claim of retaliation, and a jury found in her favor. The Sixth Circuit Court of Appeals reversed. The Supreme Court granted certiorari, an order to review the judgment, to resolve two issues: (1) does Title VII's anti-retaliation provision confine actionable retaliation to activity that affects the terms and conditions of employment; and (2) how harmful must the adverse actions be to constitute retaliation?

### The Decision

Specifically rejecting the Third Circuit's standard and emphasizing that Title VII's anti-retaliation provision should be interpreted broadly, the Supreme Court held that a plaintiff need only show that "a reasonable employee would have found the challenged

action materially adverse," which means it "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." The inquiry whether a particular employment action is "materially adverse . . . depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." The Court noted that the adversity must be material in order to distinguish significant from trivial harms, petty slights and minor annoyances, and that the standard is objective (that is, how a reasonable employee would react). The Court also held that retaliation claims are "not limited to discriminatory actions that affect terms and conditions of employment," but may extend to employer actions unrelated to employment or that cause the employee harm outside the workplace.

### Long-Term Fallout

*Burlington Northern* paves the way for more retaliation claims. The new test for material adversity, although judged by a reasonable employee standard, still will involve subjectivity. For example, failing to invite an employee to lunch in most instances may not dissuade a reasonable employee from engaging in protected activity, but may be actionable if the employee is thereby excluded from an opportunity for professional advancement. Furthermore, employer actions that may support a retaliation claim no longer must result in firing, demotion, immediate and direct loss of pay or other tangible employment-related action, but now may include less direct or tangible harm such as delayed promotion, changes in work assignments, a change in schedule or office location, a poor job reference, pursuing criminal charges or filing a counterclaim.

Once in litigation, the new standards are likely to result in broader discovery requests, as plaintiff's attorneys probe differences between jobs, job assignments and social opportunities. Summary judgment may become more difficult to obtain because of the fact-intensive analysis necessary to the materially adverse inquiry and the Supreme Court's caution that context is important.

Finally, although *Burlington Northern* dealt with the anti-retaliation provisions of Title VII, the relaxed standards adopted by the Supreme Court are likely to guide the interpretation of other employment discrimination statutes whose anti-retaliation provisions are not materially different, such as the Age Discrimination in Employment Act and the Americans With Disabilities Act. \*

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