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Employers Beware: Retaliation Standard Eased

In its unanimous decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[1] issued on June 22, 2006, the U.S. Supreme Court made it significantly easier for plaintiffs to show they suffered retaliation after complaining about discrimination.

The Supreme Court ruled that a female forklift operator was retaliated against when her employer reassigned her to more-demanding job duties and then suspended her following her complaints of sex discrimination. In doing so, the Court clarified significant conflicts among various courts of appeals and set a standard that eases the showing necessary for a retaliation claim.

The Facts of 'White'

The company hired Ms. White as a track laborer. Ultimately, she was assigned to be a forklift operator but continued to perform some of the track laborer's duties. In September 1997, Ms. White complained to company officials that her immediate supervisor stated that women should not be working in her department. After investigation, the company suspended the supervisor for 10 days and required him to attend training. Subsequently, the company removed Ms. White from the forklift operator position and assigned her the less-desirable track laborer tasks. A company official stated that the reassignment reflected coworkers' comments that it was only fair for a man to perform the cleaner work of a forklift operator. Though Ms. White's compensation and benefits remained the same, the new position was more laborious than the forklift position. Ms. White filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination and retaliation by means of the reassignment to the more-laborious position.

Approximately eight weeks later, Ms. White filed a second charge with the EEOC alleging that the company had placed her under surveillance and was checking on her daily activities. One week later, after a minor act of alleged insubordination involving transportation to a work site, Ms. White was informed that she was suspended. Ms. White's suspension occurred seven days after she filed her second EEOC charge and three days after the charge was mailed to the company. While the male employee involved in the incident was not disciplined, despite acknowledgement that he directly disobeyed a supervisor's order, Ms. White was suspended without pay effective immediately. She timely filed a grievance with her union pursuant to the company's policy, and also filed another EEOC charge alleging retaliation.

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Following a 37-day suspension without pay, the hearing officer found that Ms. White had not been insubordinate and that she should not have been suspended. She was reinstated to her position with full back pay on Jan. 16, 1998.

Subsequently, Ms. White filed suit in federal court claiming that the company's actions in reassigning her duties and suspending her constituted unlawful retaliation under Title VII. A jury found in her favor. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court judgment, although the judges differed as to the applicable legal standard.

In 'White,' the Supreme Court adopted the view that the retaliation provision covers employer actions that are harmful to the point of dissuading a reasonable employee from asserting discrimination.

What Is Retaliation?

In order to ensure that the rights established by Title VII of the Civil Rights Act and similar employment laws are not rendered futile, employees who protest unlawful employment discrimination are protected against retaliation by their employers. Title VII provides in relevant part that: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants…because he has opposed any practice made an unlawful employment practice by this [title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title]."[2]

The protection against retaliation extends to those who file a charge or participate in an investigation by the EEOC or in another formal proceeding. In addition, protection is extended to those who oppose an illegal employment practice. However, in this regard, a plaintiff need not establish that the conduct she opposed was in fact a violation of federal law, but rather, only that she had a "good faith, reasonable belief" that the underlying employment practice was unlawful.[3]

Thus, even though it may turn out that the plaintiff cannot prove that the underlying activity itself was discriminatory, she may still have a viable claim for retaliation if the employer takes an adverse employment action against her.

Because the damages available to plaintiffs who establish a claim of retaliation are equivalent to those for proving actual discrimination (back pay, compensatory and punitive damages, and attorney's fees), it is advisable for employers and their counsel to understand retaliation claims particularly in light of the Supreme Court's decision in *White*. There is little that is more frustrating in the employment law field than finding that your client has a slam-dunk defense to a discrimination claim but may be liable for retaliation because it changed the plaintiff's schedule immediately following her filing an EEOC charge.

Adverse Employment Action

• ***What Is an Adverse Employment Action?*** Examples of adverse employment actions taken as a result of opposition to an alleged illegal employment practice include discharge, demotion, suspension, schedule changes, and job reassignment. However, do all of these actually qualify as the requisite adverse employment action that a

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plaintiff must prove to succeed on a retaliation claim? Until the Supreme Court's decision in *White*, the answer to that question depended on which circuit court of appeals had jurisdiction over your case.

In *White*, the Sixth Circuit held that job reassignment and a 37-day suspension without pay constituted an adverse employment action (despite the fact that the plaintiff ultimately was reinstated with back pay). In so holding, the standard applied by the Sixth Circuit was that a plaintiff claiming retaliation must show an adverse employment action defined as a "materially adverse change in the terms and conditions" of employment.[4] The Sixth Circuit relied upon its existing standard that "reassignments without salary or work-hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims."[5] However, the court noted that reassignment without salary or work hour changes, may be an adverse employment action if it constitutes a demotion evidenced by "a less-distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."[6]

The U.S. Court of Appeals for the Fourth Circuit applied a similar standard to the Sixth Circuit and has held that an adverse employment action need not involve an ultimate employment decision such as hiring, firing, or refusal to promote. "Retaliatory harassment" also can constitute adverse employment action.[7]

According to the Fourth Circuit, what is necessary in all retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected "the terms, conditions, or benefits" of the plaintiff's employment.

The Second Circuit standard is similar to that of the Fourth and Sixth circuits. The Second Circuit defines an adverse employment action to be a "materially adverse change in the terms and conditions of employment."[8] Examples of materially adverse changes include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation."[9]

The U.S. Courts of Appeals for the Fifth Circuit and the Eighth Circuit have adopted a more-restrictive approach. The Fifth Circuit standard was that an adverse action would be limited to "ultimate employment decisions" such as hiring, granting leave, discharging, promoting, and compensating. A visit to plaintiff's home by two supervisors after she had gone home ill, a reprimand for not being at her assigned work station, and a "final warning" were held not to be adverse employment actions constituting retaliation.[10]

The U.S. Courts of Appeals for the Seventh Circuit and the District of Columbia Circuit supported another standard. Those courts said that a plaintiff must show that the employer's action would have been "material to a reasonable employee," which meant that it would likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[11] Nevertheless, the Seventh Circuit held that the plaintiff could make out a claim of retaliation where she was assigned to a new supervisor and her hours changed while acknowledging that these actions might not be materially adverse for a "normal employee" or "99 percent of the staff."[12]

The New Standard

In *White*, the Supreme Court adopted the view held by the Seventh and District of Columbia circuits that the retaliation provision covers those employer actions "that a reasonable employee would have found the challenged action materially adverse…."[13] Stated another way, the Court noted that the actions must be harmful to the point of dissuading an employee from asserting a complaint of discrimination.

In 'White,' the Supreme Court adopted the view held by the Seventh and District of Columbia circuits that the retaliation provision covers those employer actions that a reasonable employee would have found the challenged action materially adverse.

The Supreme Court made a point of stressing that actions must be "materially" adverse, in order "to separate significant from trivial harms."[14] The Court further noted 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."[15]

The Court rejected the employer's contention that job reassignment could not as a matter of law constitute an adverse employment action where the reassigned duties were within the original job description. The Court noted that "common sense" suggests that an effective way to deter one from asserting discrimination claims is to assign them more arduous duties.

The Court did caution that not every job reassignment will result in a retaliation claim and that each case will be determined by its specific facts judged from the perspective of a "reasonable person" in plaintiff's position considering all the circumstances.[16] According to the Court, a schedule change might not bother all workers, but it could be significant to a young mother with school age children.

In ruling in Ms. White's favor, the Supreme Court discounted the fact that she received full back pay for the suspension period stating, "Many reasonable employees would find a month without a paycheck to be a serious hardship" and "an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay."[17]

Where Do We Go From Here?

There is no question that the standard announced by the Supreme Court makes it easier for a plaintiff to establish a claim of retaliation. Although the Court set an objective analysis by measuring the effect of an employer's actions on a "reasonable" employee and requiring that the actions be materially adverse, the thrust of the standard requires case-by-case assessment. While stating that its "objective standard is judicially administrable" because it "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feeling," the Court also states that "context matters."[18]

Has the Court truly set an objective standard that can be applicable in all cases? It does not seem so. Indeed, how is the typical employer supposed to know whether a woman whose shift has been changed has school-age children?

The lesson to heed from *White* is that employers must not only focus on training supervisors on ways to avoid discrimination, but equally on providing direction and guidance to its supervisors on how to treat workers who complain of discrimination.

This is especially so because an employee may assert a valid retaliation claim even though the underlying claim of discrimination that led to the complaint is without merit. Intuitively, supervisors are likely to assume that a baseless discrimination claim equals a baseless retaliation claims. Such is not the case. Employers beware.

1. 548 US__, Slip Op. (June 22, 2006).
2. 42 USC §2000e-3(a).
3. *Reed v. A.W. Lawrence & Co.*, 95 F3d 1170 (2d Cir. 1996).
4. 364 F3d 789 (6th Cir. 2004).
5. Id. at 797.
6. Id.
7. *Von Gunten v. Maryland*, 243 F3d 858 (4th Cir. 2001).
8. *Schiano v. Quality Payroll Systems, Inc.*, 445 F3d 597 (2d Cir. 2006).
9. Id. at 609.
10. *Mattern v. Eastman Kodak*, 104 F3d 702 (5th Cir. (1997); see also *Manning v. Metropolitan Life Ins. Co.*, 127 F3d 686, 692 (8th Cir. 1997).
11. *Washington v. Illinois Dept. of Revenue*, 420 F3d 658 (7th Cir. 2005); see also *Rochon v. Gonzales*, 438 F3d 1211 (D.C. Cir. 2006).
12. 420 F3d at 662.
13. Slip Op. at 13.
14. Slip Op. at 13.
15. Id.
16. Slip Op. at 16.
17. Slip Op. at 18.
18. Slip Op. at 14.