

in this issue:

JUNE 2006

U.S. Supreme Court clarifies that a Title VII retaliatory "adverse action" need not be related to the employee's terms and conditions of employment, but instead can occur when adverse conduct would discourage a "reasonable employee" from making a discrimination complaint.

Supreme Court Broadens Employee Protection Against Unlawful Retaliation

By Gregory B. Reilly

On June 22, 2006, the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259 (June 22, 2006), defined what constitutes an "adverse action" sufficient for an employee to successfully assert a Title VII retaliation claim. The Supreme Court had not previously addressed this issue. The Court held that a retaliatory "adverse action" need not be related to the employee's terms and conditions of employment. It further held that illegal retaliation occurs whenever the adverse conduct or harm would have the effect of discouraging a "reasonable employee" from making a discrimination complaint.

The Court's decision is likely to have a profound impact on employers because, for many jurisdictions, the Court's ruling expands existing employee protections from retaliation. The decision also requires courts to carefully consider the context of the alleged retaliation. In other words, the Supreme Court's holding does not establish any "bright line" rule for determining whether an employer's actions constitute illegal retaliation. Instead, this determination will require a case-by-case analysis.

The Employer Made a Mistake and Tried to Fix It

The female plaintiff in *Burlington Northern* worked as the only female in the maintenance department of the company's railroad yard. She complained that her

male supervisor sexually harassed her and, as a result, the employer suspended the supervisor. Following the supervisor's suspension, the company assigned plaintiff more physically demanding work. She then filed an EEOC complaint. Later, she was suspended without pay for 37 days for insubordination. After she contested the suspension at a company hearing, the railroad reinstated her and granted her backpay for the 37 days of her suspension. Nonetheless, plaintiff filed a Title VII retaliation lawsuit against the company. A jury awarded plaintiff \$43,500 in punitive damages on her retaliation claim. The Sixth Circuit Court of Appeals upheld the jury's award ruling that plaintiff's suspension without pay constituted an adverse employment action even though the railroad later reinstated and compensated her with backpay.

Supreme Court Considers Whether the Employer's Actions Are Sufficient to Constitute Retaliation

In the case before it, the employer's prior corrective action in the form of reinstatement and backpay resulted in the employee being "made whole" from a workplace perspective. The employee, however, had nonworkplace damages (e.g., emotional distress from her unpaid 37 day suspension during the Christmas holidays). Thus, the Supreme Court first considered whether Title VII's retaliation

provision protects only employees who suffer an adverse action related to their terms and conditions of employment. In so doing, the Court examined the various standards used by federal appellate courts across the country.

Two lower appellate courts (the Fifth and Eighth Circuits) previously held that cognizable retaliatory action must involve some “ultimate” employment decision, such as a failure to hire or a termination. Other lower courts (the Third, Fourth and Sixth Circuits) had held that the challenged retaliatory action must result in an adverse effect on the terms, conditions or benefits of employment. The Supreme Court rejected these approaches, finding that Title VII’s prohibitions against retaliation are broader. The Court explained that, as a practical matter, not all adverse actions are necessarily employment-related. The Court noted, as an example, that an employer might file false criminal claims against an employee in retaliation for her making a discrimination complaint. The Court ruled that the “scope of the [Title VII] anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”

Having reached this conclusion, the Court then addressed the question of “how harmful must the adverse actions be to fall within the scope” of Title VII’s retaliation prohibition. On this issue, the Court’s opinion provides some general guidelines, but no “bright line” standards. The Court ruled that only significant, rather than “trivial” harm, is sufficient. The Court also ruled that in judging whether the harm is significant, the courts should use an objective standard by examining whether a “reasonable employee” would view the retaliatory harm as significant. In making this determination, the Court noted that the context of the alleged retaliatory action must be considered. These general guidelines, by necessity, require courts to

review adverse actions on a case-by-case basis, which means that a court’s ruling in any given case will be more difficult to predict. Applying this standard to the case before it, the Court unanimously found that the plaintiff’s 37-day suspension (even though later compensated) and assignment to more physically demanding job tasks were sufficiently harmful such that they might have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” As such, the Supreme Court affirmed the Sixth Circuit’s ruling in favor of the employee.

Conclusion

By clarifying that Title VII’s anti-retaliation provision is not confined to workplace harms, *Burlington Northern* has dramatically expanded the scope of potential retaliation claims. For example, employers faced with an employee’s discrimination complaint should be extremely cautious in making counterclaims or initiating legal action against the employee because such actions could be viewed as retaliatory adverse actions even though they are not employment-related. Likewise, the Court’s reliance on a “reasonable employee” standard may make it more difficult for employers to successfully dismiss retaliation claims prior to trial. Confronted with a fact-based, context driven analysis it is possible, if not probable, that many lower courts will order retaliation claims to a jury trial. As Justice Alito wrote in his concurring opinion, the Court has introduced a “new and unclear” standard to an area that was “already complex.”

Gregory B. Reilly is a shareholder in Littler’s New York office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Reilly at greilly@littler.com.
