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United States Supreme Court Makes Retaliation Claims Easier to Prove in Most Circuits
Burlington Northern & Santa Fe Railway Co. v. White
(2006 U.S. LEXIS 4895, June 22, 2006)

The United States Supreme Court recently ruled that Burlington Northern & Santa Fe Railway's ("Burlington Railway") decision to transfer and suspend Sheila White, a forklift operator, following her sexual harassment report and EEOC charge, was actionable retaliation. White was the only woman in her department and she reported being told by her immediate supervisor that women should not be working in the department, as well as other insulting remarks. White's report resulted in an investigation and the suspension of her supervisor. Following her supervisor's suspension, White's position as a forklift driver was given to a more senior man and she was placed into a less desirable position.

Two weeks later, White filed an EEOC charge claiming gender discrimination and retaliation. She later filed a second EEOC charge for retaliation for being closely monitored by the same supervisor. White was thereafter suspended for 37 days for reported insubordination surrounding a truck delivery. An internal grievance process led to White's reinstatement with back pay. White filed a third retaliation charge following the suspension. After exhaustion of the EEOC administrative process, she filed suit claiming that Burlington Railway retaliated against her by placing her in a less desirable job and suspending her without pay for 37 days. The jury agreed and awarded damages. The jury award was upheld by the Sixth Circuit, en banc, but with differing views on the standard which applies in a retaliation case.¹

Generally, Title VII's anti-retaliation provision protects employees who oppose a practice prohibited by Title VII or participate in conduct protected by Title VII including filing a charge, testifying, assisting in an investigation proceeding or hearing.²

While the definition of retaliation is uniformly recognized, the Circuits have historically had differing interpretations of what is required to succeed on such a claim. For example, the Third, Fourth and Sixth Circuits apply the same standard to retaliation claims as other discrimination claims requiring the action to effect a term condition or benefit of employment.³ The Fifth and Eighth Circuits allow retaliation cases to proceed only when there is an ultimate employment decision involved including hiring, termination, leave, promotion or compensation.⁴ The Seventh and District of Columbia Circuits, on the other hand, require the employee to show that an employer's conduct would be material to the reasonable person.⁵ Finally, the Ninth Circuit, following EEOC guidance, requires only that the conduct be based on a retaliatory motive and be reasonably likely to deter the protected activity.⁶

¹ 364 F.3d at 789, 795-800 (6th Cir. 2004).

² 42 USC § 2000e-3(a).

³ *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Burlington Northern*, 364 F.3d at 795-800.

⁴ *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997)

⁵ *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006).

⁶ *Ray v. Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000).

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Relying on the specific language differences in the anti-retaliation provisions of Title VII, in comparison to the discrimination provisions of Title VII, the Supreme Court concluded the standard for retaliation cases should not be identical to the standard applied for other types of discrimination cases. Because the Court believed Congress made a distinction between the definition for discrimination and retaliation, the Supreme Court determined that employers can be liable for retaliation if an employee engages in protected activity and the employers' actions "interfere with an employee's efforts" to avoid discrimination. The standard adopted by the Court requires a plaintiff to prove that a reasonable employee would find the action materially adverse "which in this context means it might well have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (citations omitted.) Based on the ruling, the standard for determining harm is based on the objective, reasonable employee. Further, the concept of materiality, according to the Court, is important because not every harm to an employee is actionable. However, courts must consider the context of each particular situation. The Court gives the example of a change in work schedule not being significant to most employees but being significant to a mother of school age children.

Applying the standard announced by Justice Breyer, the Court upheld the jury's decision against Burlington Railway concluding that reassignment of Sheila White's job duties to a more difficult job and a 37-day suspension, even with back pay, following protected activity, constituted retaliation.

Overall, in the majority of Circuits, the Court's decision is a departure from existing precedent which would have required a plaintiff to more closely associate the retaliation with a tangible employment decision. Now, it appears that a plaintiff can prevail if a reasonable employee would find that the challenged action would have, in some significant manner, deterred the participation in protected activity.

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