

H.R. ALERT*

JULY 2006

Retaliation Under Title VII – The United States Supreme Court Upholds A Lesser Standard of Proof

The United States Supreme Court recently held in *Burlington Northern v. White*, 2006 WL 1698953 (U.S.), that the application of Title VII's retaliation provision does not confine the actions and harms it forbids solely to those that are related to employment or occur at the workplace. The Supreme Court further concluded that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. Accordingly, to

be actionable, an employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. This is potentially a devastating blow to employers and may open up the flood gates to litigation resulting from suspensions, transfers and other similar employment actions that were not previously considered sufficient for a claim of retaliation in accordance with prior Fifth Circuit jurisprudence.

Key Facts

In *Burlington Northern*, Sheila White ("White"), was the only woman in her department. She operated a forklift at the Tennessee yard of Burlington Northern & Santa Fe Railway Co. ("Burlington"). White complained of sexual harassment while working for Burlington and was subsequently removed from forklift duty to standard track laborer tasks, which was described as a more arduous and dirtier job. Her earlier position was considered a better job by male employees who purportedly resented White for occupying it.

In response to White's harassment complaint, her immediate supervisor was suspended for ten days and ordered to attend a sexual harassment training session. White had complained that she was repeatedly told by her immediate supervisor that women should not be working in the Maintenance of Way department. White also alleged that her supervisor made insulting and

inappropriate remarks in front of her male colleagues. When she was reassigned after making her harassment complaint, White filed another complaint, alleging that the reassignment was unlawful and in retaliation for her harassment complaint.

Sometime after being transferred and reassigned to standard track laborer tasks, White was charged with insubordination and suspended without pay for 37 days. Burlington later determined that White had not been guilty of insubordination, reinstated her, and awarded her back pay for the thirty-seven days she was suspended. White, thereafter, filed suit in federal court alleging that in changing her job responsibilities after she complained of harassment and in suspending her without pay for thirty-seven days, Burlington's actions amounted to unlawful retaliation under Title VII.

Procedural History

A jury awarded White compensatory damages in the amount of \$43,500, including \$3,250 in medical expenses for alleged emotional distress treatment. On appeal, the United States Sixth Circuit Court of Appeals affirmed. Burlington then sought review with the United States Supreme Court, which upheld the jury's finding of retaliation.

In affirming the jury's award, the Supreme Court made clear that the standard for retaliation is much less stringent than adverse job actions. An employee can now bring a retaliation claim for any employment decision that would dissuade a reasonable worker from making or supporting a charge of discrimination.

* H.R. ALERT is intended to provide late-breaking news in the employment arena.

\$1 Million Jury Award Upheld for Violation of the Family and Medical Leave Act

In *Lubke v. Arlington*, 2006 WL 1793268 (5th Cir), a city fire fighter, Kim Lubke (“Lubke”), sued the City of Arlington, Texas (“Arlington”) alleging that he was discharged in violation of the Family and Medical Leave Act (“FMLA”) as a result of missing work to care for his ill wife. Lubke was a twenty-two year veteran of Arlington’s fire department, and was a Battalion Chief in charge of eight fire stations and forty to fifty employees.

In preparation for the year 2000 (“Y2K”), Arlington’s critical departments, including the Fire Department, developed contingency plans in the event of widespread electronic problems. As a result, Arlington required all Fire Department employees to report to a designated Battalion Chief by dawn each day before reporting to duty. During the pendency of the Y2K plan, fire department employees were not allowed to call the unmanned answering machines (“call boxes”) to report unscheduled leave. Additionally, Arlington restricted its normal, more informal sick leave policies, and instead required a doctors’ written substantiation of any absence.

Lubke was scheduled to work from December 31, 1999 through January 1, 2000. On December 30, 1999, at 8:11 p.m., Lubke telephoned a call box and left a message stating that he would not be working during the Y2K weekend because he needed to stay home with his sick wife, who was also employed by the City of Arlington.

The Lubkes both returned to work on January 3, 2000 and submitted identical documentation. Lubke’s

documentation was rejected while his wife’s was approved. Lubke *repeatedly* requested information on what type of documentation would be sufficient and never received a response. On April 14, 2000, Lubke was terminated for dereliction of duty, unauthorized absence, and insubordination. Lubke then submitted additional documentation substantiating his wife’s serious health condition. The chief of the fire department acknowledged that the letters provided adequate medical documentation and substantiation, but he considered them untimely and Lubke’s discharge was upheld by the City of Arlington.

At trial, Arlington asserted that Lubke’s leave was not protected by the FMLA because Lubke failed to provide timely and adequate medical certification required to support his claimed leave. The jury rejected this claim and found Arlington had violated FMLA and awarded Lubke over one million in damages. Specifically, the judgment awarded Lubke damages for lost wages and benefits (\$395,394), liquidated damages (\$330,000), attorneys fees (\$305,292), and court cost (\$9,576).

On appeal, the Fifth Court affirmed the jury verdict. The Court pointed out that FMLA regulations provide that “if an employer fails to provide [FMLA] notice . . . the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.” Accordingly, Arlington’s failure to provide Lubke notice of exactly what certification was needed, prevented Arlington from taking employment action against Lubke for failure to timely provide adequate certification.

The Department of Labor Holds That Restaurants Cannot Deduct for Uniform Cleaning

The United States Department of Labor (“DOL”) recently issued a Wage and Hour Opinion Letter, FLSA 2006-21, 6/9/06, prohibiting restaurant owners from deducting uniform laundering costs from wait staff pay. The opinion letter stated that “no portion of an employee’s tips may be kicked back to the employer to cover the cost of uniform laundering,” and “even if the tips actually received exceed the maximum tip credit the employer needs to claim toward payment of the minimum wage, these excess tips are not deemed to be wages for purposes of the FLSA.”

The DOL further stated “A policy that employees must wear clean uniforms while on duty and the assurance that servers will always appear in clean, freshly pressed uniform tops, primarily is a convenience and benefit to the employer. As such, the cost of the laundering and pressing of the garment is a cost of doing business that may not be imposed on the employees if doing so would reduce their wages below minimum wage.”

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Your comments, questions, and suggestions are encouraged.

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