

# eLABORate

June 23, 2006

## United States Supreme Court Makes It Easier for Employees to Bring Retaliation Claims

In what could be the most significant employment law decision in years, a unanimous Supreme Court has made it easier for employees to bring retaliation claims against their employers. *Burlington Northern v. White*. The decision may prove to be a nightmare for employers when making personnel decisions or disciplining employees who have previously claimed workplace discrimination. The ruling marks the first time the high court has spelled out how significant retaliation must be to serve as the basis for a federal lawsuit, and could open a new floodgate of litigation.

The case involved Sheila White, the only female forklift operator working for Burlington Northern Railroad in Memphis, Tennessee. Shortly after she was hired in 1997, White complained about sexual harassment and discrimination by a foreman. The foreman was immediately disciplined by the company. Ten days later she was removed from her forklift job and given more demanding track laborer duties, such as clearing brush, repairing damaged track, and clearing litter and cargo spillage from the right-of-way. White filed an EEOC charge concerning the reassignment and filed a second EEOC charge later in the year. Subsequently, White was suspended without pay for 37 days for insubordination. White was later reinstated and given backpay for the 37 days she was suspended. She then filed a third EEOC charge, claiming unlawful retaliation for having filed the charges. White filed a retaliation lawsuit in federal court and a jury awarded her approximately \$47,000 in damages, a

decision that was affirmed by the United States Court of Appeals for the Sixth Circuit. The Supreme Court agreed to hear the appeal to resolve a conflict in the Circuit Courts as to the proper standard to use in determining what constitutes actionable retaliation. Burlington Northern argued that the ban on retaliation should apply only to “ultimate employment decisions” such as a demotion or firing.

In its ruling, the Supreme Court stated that Title VII’s anti-retaliation provisions are much broader than the statute’s anti-discrimination provisions, and should be interpreted to afford employees more protection. Writing for the Court, Justice Breyer said workers could sue for retaliation over “materially adverse” employer actions. “That means that the 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.” The Court made clear that Title VII’s anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. The Court held that the transfer of White to the more arduous track laborer duties and the subsequent 37 day suspension were such that they would dissuade an employee from making a claim of discrimination, even though she was eventually reinstated and received her lost wages.

The Court stressed that its new “reasonable person” standard is “judicially administrable” and

*continued on page two*

*continued from page one*

“avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.” However, the concern among employers is that in actual practice, the new standard will routinely create a “jury question” that will rule out the likelihood of pre-trial dismissal. This is because the Court says whether an employer’s conduct will be viewed as actionable retaliation depends on the context of each particular situation. For example, according to the Court:

A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.

Prior to the decision, employers had feared that such a relaxed standard would result in any workplace decision that an employee disagreed with being labeled retaliation. The Supreme Court Opinion attempted to address such concerns by noting the importance of separating “material adversity” from “trivial harms.” The Court reiterated earlier decisions stating that Title VII does not create “a general civility code for the American workplace” and 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.”

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