

## SUPREME COURT SETS BROAD RETALIATION TEST

KAFF Systems Summary.

*After she complained to Burlington Northern officials of gender discrimination, Sheila White, a forklift operator for Burlington Northern & Santa Fe Railway Co. was reassigned to a less desirable laborer position — albeit one with the same pay and benefits. She filed an Equal Employment Opportunity Commission complaint about the demotion; later, she was accused of insubordination toward a supervisor and suspended without pay. More than a month later, the company found she hadn't been insubordinate, reinstated her and awarded her back pay. White then sued Burlington Northern for retaliation under Title VII of the Civil Rights Act of 1964 that provides for retaliation claims if a worker complains of illegal discrimination and is then punished for making the complaint.*

*The issue of what exactly constitutes punishment sufficient to establish a retaliation claim had divided the federal appellate courts for years. Some held that an employee who complains of discrimination essentially had to be fired or demoted before he or she could successfully sue for retaliation. Other courts of appeals, however, held that any adverse employment action reasonably likely to deter an employee from asserting rights under Title VII is sufficient to support a cause of action. Applying a much broader test for retaliation than had previously existed in many federal judicial circuits, the U.S. Supreme Court ruled yesterday, June 22, 2006, that both Burlington Northern's suspension of White and the company's transfer of White to a less desirable job independently established an actionable retaliation claim.*

*In Burlington Northern, Justice Stephen G. Breyer wrote that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making or supporting a charge of discrimination can constitute actionable retaliation. Breyer acknowledged, however, that the broad, anti-retaliation language of Title VII is limited by the requirement that an employer's conduct must be "materially adverse" to the employee to rise to the level of actionable retaliation. His sweeping opinion clears up the confusion about what is required to create a claim for retaliation under Title VII, coming down clearly on the side of wronged workers. Many observers believe more retaliation claims will follow.*

Questions? Please call KAFF Systems at (440) 349.6624 or email to [HR@KAFFSystems.com](mailto:HR@KAFFSystems.com)

## **SUPREME COURT SETS BROAD RETALIATION TEST**

Employees Win Big; More Claims Expected

From ABA Journal eReport, June 23, 2006

BY MARTHA NEIL

Working as a forklift operator, Sheila White was the only woman in the Burlington Northern & Santa Fe Railway Co.'s maintenance department in the Memphis, Tenn., train yard in 1997.

After she complained to Burlington Northern officials of gender discrimination, she was reassigned to a less desirable laborer position—albeit one with the same pay and benefits. She filed an Equal Employment Opportunity Commission complaint about the demotion; later, she was accused of insubordination toward a supervisor and suspended without pay. More than a month later, the company found she hadn't been insubordinate, reinstated her and awarded her back pay.

White sued Burlington Northern for retaliation based in part on the transfer and the suspension. After a one-week jury trial, she won \$43,500 in damages plus medical expenses and attorney fees. But despite this courtroom victory, her journey through the nation's judicial system was only just beginning.

It ended Thursday in a resounding defeat for the railway and an important victory not only for White but also for employment discrimination plaintiffs nationwide.

Applying a much broader test for retaliation than had previously existed in many federal judicial circuits, the U.S. Supreme Court ruled that both Burlington Northern's suspension of White and the company's transfer of White to a less desirable job independently established an actionable retaliation claim.

[\*Burlington Northern & Santa Fe Railway Co. v. White\*](#), No. 05-259.

Until now, to prove a retaliation complaint, plaintiffs in certain circuits had to show not only job-related adverse conduct by the employer but an "ultimate employment decision" such as a firing.

In *Burlington Northern*, however, Justice Stephen G. Breyer wrote that neither element is necessarily required to create a claim for retaliation under Title VII of the Civil Rights Act of 1964. Justice Samuel A. Alito Jr. concurred in the otherwise unanimous opinion.

Rather, any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making or supporting a charge of discrimination can constitute actionable retaliation, Breyer wrote.

Title VII prohibits employers from discriminating against workers on the basis of certain characteristics, such as gender and race. The statute provides for retaliation claims if a worker complains of illegal discrimination and is then punished for making the complaint.

"This is a big victory for employees," says Michael P. Maslanka of Dallas, who represents employers. While he says *Burlington Northern* may be a "hard pill to swallow now" for employers, he believes that, "in an odd way, it really is a victory for corporate America, because you want people to blow the whistle when things are wrong."

He also believes the decision is likely to boost the number of retaliation claims being brought.

The case also implicitly sends a message that most retaliation cases need to be decided by juries, at trial, rather than by federal judges on defense motions, says Matt Ghio, a St. Louis employment lawyer who represents plaintiffs.

"The court seems to be saying that federal judges should not be creating barriers to having a jury hear their case," Ghio says.

The issue of what exactly constitutes punishment sufficient to establish a retaliation claim had divided the federal appellate courts for years. Some held that an employee who complains of discrimination essentially has to be fired or demoted before he or she can successfully sue for retaliation. Other courts of appeals, however, said any adverse employment action reasonably likely to deter an employee from asserting rights under Title VII is sufficient to support a cause of action.

In White's case, even the judges of the Cincinnati-based 6th U.S. Circuit Court of Appeals disagreed. A divided three-judge panel initially reversed the judgment against Burlington Northern on the retaliation claims. *White v. Burlington Northern*, 310 F.3d 443 (2002). And then, when the en banc court subsequently upheld the judgment for the plaintiff, there was disagreement about the correct standard to apply. *Burlington Northern v. White*, 364 F.3d 789 (2004).

Breyer's sweeping opinion clears up this confusion, coming down clearly on the side of wronged workers.

The court's conclusion was required under the plain language of Title VII because its anti-retaliation provision is broader than its anti-discrimination provision, Breyer wrote.

That is because Congress apparently intended the difference and recognized that "an employer can effectively retaliate against an employee by taking actions

not directly related to his employment or by causing him harm *outside* the workplace," he explained.

Thus, "the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the courts of appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called 'ultimate employment decisions.' "

The broad, anti-retaliation language of Title VII, however, is limited by the requirement that conduct must be materially adverse to rise to the level of actionable retaliation, Breyer continued.

"It is important to separate significant from trivial harms," he wrote, contrasting "employer interference with 'unfettered access' to Title VII's remedial mechanisms," which is actionable, with "the ordinary tribulations of the workplace," which generally are not. His list of ordinary tribulations included personality conflicts and snubbing, and "sporadic" abusive language, gender-related jokes and teasing.

What exactly constitutes retaliatory conduct will depend on the circumstances of the particular case, he continued.

"By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position," Breyer explained, "we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination."

Applying this standard to White's case, the Supreme Court found that "reassignment of job duties is not automatically actionable."

At the same time, though, an employer cannot avoid legal scrutiny by claiming, as Burlington Northern did, that there was no retaliation because the plaintiff's duties, before and after reassignment, fell within the same job description. Here, because evidence showed the job to which White was reassigned was considered harder, dirtier and less prestigious, a jury could reasonably find that the reassignment was retaliatory, the opinion stated.

The jury also had a reasonable basis for finding that the railway company's 37-day suspension of White—initially without pay, although she was later reimbursed—after she complained was retaliatory, the court said, writing: "Many reasonable employees would find a month without a paycheck to be a serious hardship."

Memphis lawyer Donald A. Donati represented the plaintiff in the case. Carter G. Phillips of Washington, D.C., represented the railway. Neither returned phone messages Thursday.

In a concurring opinion, Justice Alito found the majority's test for actionable retaliation "unclear" and said its interpretation of Title VII "has no grounding in the statutory language."

Alito favored reading Title VII's anti-retaliation provision in conjunction with its anti-discrimination provision so that both bar discrimination with respect to compensation, terms, conditions or privileges of employment. The courts of appeals that have agreed with this reading of the statute require a materially adverse employment action, he said.

Nonetheless, Alito concurred in the majority result. Both White's transfer to less desirable job duties and her suspension without pay, he wrote, constitute retaliation under the "materially adverse employment action test" rejected by the majority.