

## U.S. SUPREME COURT EXPANDS ANTI-RETALIATION PROVISION OF TITLE VII

Employers have long understood that Title VII of the Civil Rights Act of 1964 prohibits retaliation against an employee for opposing a practice that is unlawful under Title VII or for participating in a Title VII proceeding. Most courts, however, had limited this prohibition to retaliatory conduct that involved an ultimate employment decision (such as a termination) or constituted a materially adverse change in the terms and conditions of employment.

On June 22, 2006, the U.S. Supreme Court removed any such limitation in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006). In a unanimous opinion, the Court held that the anti-retaliatory provision of Title VII is not limited to harms that are related to employment or occur at the workplace. Instead, Title VII prohibits any materially adverse treatment of an employee, on or off the job, that the employee reasonably perceives is related to a prior complaint.

In short, the Court expanded the circumstances under which an employee may bring a retaliation claim against an employer, making it easier for an employee to take a retaliation claim to trial.

### Anti-Retaliation Provision Includes Non-Workplace Damages

Sheila White was hired by Burlington Northern & Santa Fe Railway Co. to work as a track laborer in the Maintenance of Way department at the company's Tennessee yard. Shortly afterward, White took on primary responsibility as a forklift operator, though she maintained some of the general track laborer duties. A few months later, she complained to Burlington of alleged sexual harassment by her immediate supervisor and her co-workers. Her immediate supervisor was disciplined, but White was removed from forklift duties and reassigned to the standard track laborer tasks.

White filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that the reassignment was unlawful discrimination and retaliation for her complaint to Burlington. Subsequently, she was suspended without pay for 37 days for insubordination. She then followed the company's internal grievance procedure, and it was determined that she had not been insubordinate. Burlington reinstated White and awarded her back pay for the period she had been suspended. She then filed another retaliation complaint with the EEOC, after which she received her notice of right to sue.

White subsequently filed a Title VII retaliation lawsuit against the company, claiming that Burlington's changing her job responsibilities and suspending her amounted to unlawful retaliation. A jury ultimately awarded her \$43,500 in punitive damages, and the Sixth Circuit Court of Appeals upheld the award. The U.S. Supreme Court affirmed, finding that while Burlington's prior corrective action in the form of reinstatement and back pay resulted in the employee being "made whole" from a workplace perspective, White had non-workplace damages, including emotional distress from her unpaid 37-day suspension during the Christmas holidays.

The Court determined that Title VII's anti-retaliation provision is not limited to actions or harms "related to employment" or that occur "at the workplace." Specifically, the Court noted that confining the anti-retaliation provision to "employment-related actions would not deter the many forms that effective retaliation can take." Accordingly, narrowly limiting the anti-retaliation provision would not adequately "assure the cooperation upon which the accomplishment of Title VII's primary objective depends."

### **Court Adopts Objective Standard for Determining Damages**

The Court acknowledged that the anti-retaliation provision does not protect employees and applicants against all retaliation, but only from retaliation that produces an injury or harm that would have been "materially adverse to a reasonable employee or applicant." To establish that the level of harm is "materially adverse," a plaintiff must show that the alleged retaliatory act or practice "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

Under this test, context matters – including the constellation of surrounding circumstances, expectations, and relationships. For example, "[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." Accordingly, on this issue, the Court's opinion provides general guidelines, but no bright-line standards. These guidelines, by necessity, will require courts to review adverse actions on a case-by-case basis; this ultimately means that a court's ruling in any given case will be difficult to predict.

### **Impact for Employers**

In clarifying that Title VII's anti-retaliation provision is not confined to workplace harms, the Court has significantly expanded the scope of potential retaliation claims. Moreover, the Court's reliance on a "reasonable employee" standard may make it more difficult for employers to get retaliation claims dismissed prior to trial.

This decision emphasizes the importance for employers of ensuring they have sufficient procedures in place to prevent retaliation against employees who complain of discrimination. An employer considering taking disciplinary action against an employee after the employee has complained of discrimination should evaluate the proposed discipline carefully to be certain it is consistent with the employer's policies and past practices with similarly situated employees.

**NORTH CAROLINA ALERT—STATE RAISES MINIMUM WAGE**

Beginning Jan. 1, 2007, employers in North Carolina will be required to pay their employees a minimum wage of at least \$6.15 per hour, an increase of \$1 over the current federally mandated minimum wage of \$5.15 per hour. According to Gov. Mike Easley, the increase was necessary to “help many North Carolinians cope with the rising costs of transportation, housing, healthcare and other basic needs.” There are a number of bills pending before the U.S. Congress to raise the federal minimum wage. If any passes, North Carolina employers will be required to pay whichever minimum wage is higher.

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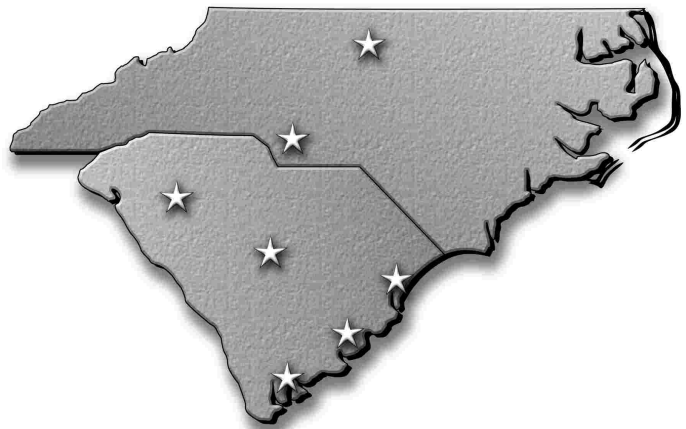
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