



## **LABOR AND EMPLOYMENT ALERT**

### **SUPREME COURT GRANTS BROADER PROTECTION TO EMPLOYEES CLAIMING RETALIATION IN THE WORKPLACE**

**July 2006**

In a recent opinion, the United States Supreme Court enhanced the protection provided to employees who claim that they have been retaliated against for complaining about workplace discrimination. In *Burlington Northern & Santa Fe Railway Co. v. White*, 2006 U.S. LEXIS 4895 (Jun. 22, 2006) (“*Burlington Northern*”), the Supreme Court held that retaliation claims under Title VII of the Civil Rights Act of 1964 (“Title VII”) may be based upon any “materially adverse” employment action that “might have dissuaded a reasonable worker” from complaining about discrimination, regardless of whether the action results in a loss of compensation or benefits, a demotion or a termination. This holding overturns a narrower standard for retaliation claims that had been adopted by a number of federal appellate courts and thereby substantially increases the potential for retaliation claims in those jurisdictions.

At issue in *Burlington Northern* was whether the respondent, Sheila White, had been subjected to unlawful retaliation during her employment as a track laborer with Burlington Northern. Ms. White, who was the only female employee in her department, had been assigned to operate a forklift, until she complained to management that her immediate supervisor was harassing her by repeatedly telling her that women should not be working in their department. On the same date that Ms. White was informed that her immediate supervisor was being disciplined for the harassment, she was advised that she was being removed from forklift duty and was being assigned to perform less desirable track laborer tasks. Within days after *Burlington* was notified that Ms. White had filed an EEOC charge alleging that her reassignment of duties constituted retaliation, Burlington suspended Ms. White without pay for allegedly being insubordinate to her supervisor. Through the use of an internal grievance procedure, that suspension was later reversed and Ms. White was reinstated

with back pay. Ms. White thereafter brought an action in federal district court, alleging that Burlington had retaliated against her in violation of Title VII through both the change in her job duties and her suspension. The jury verdict in Ms. White’s favor was ultimately upheld by the United States Court of Appeals for the Sixth Circuit.

Because the appellate courts had adopted divergent standards in evaluating retaliation claims, the Supreme Court granted certiorari in the case. Whereas some appellate courts had adopted a restrictive approach, requiring that the allegedly retaliatory conduct result in a materially adverse change in the employee’s terms or conditions of employment (the approach taken by the Third, Fourth and Sixth Circuits) or involve “an ultimate employment decision” such as hiring, leave, discharge, promotion or compensation (the approach taken by the Fifth and Eighth Circuits), other appellate courts had adopted a broader approach. For example, the Ninth Circuit had held that an act is retaliatory if it “is reasonably likely to deter the charging party or others from engaging in protected activity.” The Seventh and the District of Columbia Circuits, in turn, had concluded that an act may be retaliatory if it “would have been material to a reasonable employee” and would likely have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”

In adopting the formulation set forth by the Seventh and District of Columbia Circuits, the Supreme Court rejected the notion that there must be a link between the alleged retaliatory conduct and the affected employee’s terms and conditions of employment. Recognizing that employers can retaliate against employees through conduct occurring outside of the workplace, the Court concluded that Congress’ goal of protecting employees from retaliation would not be met if Title VII’s anti-retaliation provision only prohibited conduct directly

related to the individual's employment in the workplace. The Court also concluded that, for retaliation claims to be actionable, they must be based upon conduct that a "reasonable employee would have found . . . materially adverse," which within certain contexts means that the conduct might well have "dissuaded a reasonable worker from making or supporting a charge of discrimination." Although noting that this standard would not be met through a showing of "petty slights" or "minor annoyances," the Court maintained that the significance of any given act of retaliation "will often depend upon the particular circumstances," which may include "a constellation of surrounding circumstances, expectations, and relationships that are not fully captured by a simple recitation of the words used or the physical acts performed." In other words, as the Supreme Court specifically noted, for the purposes of this standard, "[c]ontext matters." Accordingly, conduct that would not be retaliatory to most employees may nevertheless support a retaliation claim based upon the particular employee's individual circumstances. In an example offered by the Court in its opinion, a "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."

As Justice Alito noted in a concurring opinion, the standard adopted by the Court will impose a myriad of individualized considerations into the review of each retaliation claim. In determining whether a particular act "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," a court or jury will need to determine whether the act might well dissuade a reasonable worker who shares at least some individual characteristics with the actual victim. Noting that the Court's illustration of the young mother introduces at least three individual characteristics into the analysis (age, gender and family responsibilities), Justice Alito pondered as to "[h]ow many more individual characteristics a court or jury may or must consider."

Because of the context-sensitive and claimant-specific nature of the new standard, it seems likely that the new standard will result in a significant increase in retaliation claims, which already are raised in nearly one third of all EEOC charges. Accordingly, in order to avoid claims of retaliation, employers need to be particularly sensitive as to how they treat employees who have complained of employment discrimination.

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If you wish to obtain further information regarding these matters, please contact either the Gallop, Johnson & Neuman attorney who normally provides or manages your legal services or an attorney in the Firm's Labor and Employment Department. Department attorneys include:

Bradley G. Kafka, Chair  
Jon A. Bierman  
Stuart I. Cohen  
Chad A. Horner

Craig J. Hoefler  
Robert S. Seigel  
Stephen W. Skrainka  
Mark W. Weisman

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