Supreme Court Makes It Easier to Prove Retaliation in Discrimination Claims

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Human resources managers should be aware that a recent United States Supreme Court decision expanded the kinds of actions taken by employers that could be considered retaliatory under Title VII. According to the decision in *Burlington Northern and Santa Fe Railway Co. v. White*, 2006 U.S. LEXIS 4895, Title VII's anti-retaliatory provision covers any actions by an employer, including non-workplace related acts, that are "materially adverse" to a "reasonable employee" or job applicant.

Background
Sheila White, the only female employee in the Maintenance of Way department, worked first as a track laborer and then was moved to forklift operator – a cleaner, less arduous and more prestigious position. After White complained to Burlington officials that her immediate supervisor made insulting and inappropriate remarks about how women should not be working in the department, she was removed from her forklift duties and reassigned back to the less desirable job of track laborer.

White filed a claim with the EEOC asserting the reassignment was made in retaliation for her earlier complaint against her supervisor. A few days later, Burlington suspended White without pay for insubordination after a disagreement she had with her new immediate supervisor. The company later found that White's conduct was not insubordination and White was reinstated to her position and awarded 37 days of backpay.

Thereafter, White filed another retaliation claim with the EEOC, stating that her suspension was in retaliation for filing her first complaint and for exercising her rights under Title VII. After exhausting her administrative remedies, White filed suit in federal court under Title VII claiming that Burlington retaliated against her by: (1) changing her job assignment after complaining about her supervisor; and (2) suspending her without pay for insubordination.

The Supreme Court held Burlington retaliated against White. The Court ruled that the purpose of the anti-retaliation provision is to protect an employee's unimpeded right to make a claim of discrimination. The anti-retaliation provision of Title VII does not limit an employer's unlawful conduct to actions related to "hir[ing]", "discharge" or "compensation, terms, conditions, or privileges of employment" as it does in the discrimination provision. The Court interpreted the anti-retaliation provision to include a broader range of employer conduct, including non-workplace acts.

The New Standard Defined
Under Title VII, the anti-retaliation provision forbids an employer from discriminating against an employee or job applicant because the employee "opposed any practice" that is unlawful under Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. The anti-retaliation provision protects an employee only from retaliation that produces injury or harm.

The Court's new standard requires an employee to show that a "reasonable person" would have found the challenged action "materially adverse." Conduct by the employer that is merely annoying or is simply a lack of good manners will not be considered materially adverse – the employer's conduct must rise to a level where it might have dissuaded a reasonable worker from coming forward with or continuing a claim of discrimination.

While the Court stated that the "reasonable employee" standard is an objective standard, it held the context of the situation matters. As such, an employer's action taken against one employee may be considered immaterial, but the same action taken against another employee may be material. The Court offered the following example: a change in work schedule may be immaterial to most employees, however to a single mother who relies on the stability of her schedule, the change may be perceived as material and therefore potentially retaliatory. In applying the reasonable person and materially adverse standards, focus is placed only on the conduct the employer took that is the subject of the retaliation claim, not the employer's conduct in the underlying discrimination action. An employer may not unlawfully discriminate against an employee, but then may unlawfully retaliate against the same employee for bringing the claim.

Application of the New Standard to White
In Burlington, the Supreme Court held that White's job reassignment was not automatically retaliation. However, since White's reassignment to the position of track laborer required fewer skills, was more difficult, and was perceived to be a less prestigious position, a reasonable person could believe the reassignment was materially adverse. Further, the court held that White's suspension, even though she was later reinstated with backpay, caused a serious economic hardship on her and her family and a reasonable person would find that the suspension was given to deter her from advancing her discrimination claim.

Discussion
This case should remind human resources professionals and front-line managers that they need to be keenly aware of actions they take against employees, especially after claims of discrimination have been alleged, in order to avoid liability under Title VII for retaliation. While the reasonable person standard is said to be objective, it certainly appears that the subjective considerations muddy the analysis and could allow for more frequent findings of employer retaliation.

Even though an employer need not fear that courts will consider trivial conduct "materially adverse", it must be aware that if such conduct appears to dissuade a person from coming forward with or supporting a claim of discrimination the employer may be liable for retaliation.

We offer the following suggestions in light of this decision:

1. **Be consistent in workplace decisions.** By doing so, you can demonstrate that actions taken against a complaining employee were no different than actions taken against other employees.
2. **Be sensitive to unique circumstances.** If the situation presents unique circumstances, consider those facts before taking action to avoid any perception that the action was retaliatory in nature.
3. **Document the reasons why you are taking action inconsistent with your personnel policies and procedures.**

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