

Supreme Court Defines What Constitutes Retaliation under Title VII

Today, the United States Supreme Court decided *Burlington Northern and Santa Fe Railway Co. v. White*, holding that the scope of Title VII's anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and covers any employer action that would have been materially adverse to a reasonable employee or applicant. This case arose after Sheila White, the only woman working in her department at the Burlington's Tennessee Yard, complained that her immediate supervisor repeatedly told her that women should not be working in her department. The company disciplined White's supervisor, but it also removed White from her forklift position and assigned her to perform standard track laborer tasks, a more arduous and dirtier duty. White filed several EEOC charges, alleging that Burlington retaliated against her by removing her from forklift duty and by aggressively scrutinizing her work. Soon thereafter, White was suspended without pay for insubordination. Burlington, however, later found that White had not been insubordinate, reinstated her, and awarded her back pay for the 37 days she was suspended. White then sued her employer, asserting that Burlington's actions—(1) changing her job responsibilities and (2) suspending her for 37 days without pay—amounted to unlawful retaliation in violation of Title VII. The Supreme Court agreed.

Title VII's anti-retaliation provision forbids employer actions that "discriminate against" an employee (or job applicant) because he has "opposed" a practice that Title VII forbids or has asserted his Title VII rights. The various federal circuit courts have disagreed about whether an employer's actions must be employment or workplace related to constitute a retaliatory action under Title VII. The Supreme Court settled the dispute by reasoning that to adequately achieve Title VII's anti-retaliation goal, of providing employees unfettered access to Title VII's rights and remedies, an employer may not retaliate in any manner inside or outside the workplace. Therefore, even actions that may not affect the terms and conditions of a plaintiff's employment may be considered retaliatory under this broad definition, such as providing bad references after an employee's termination, blackballing an employee, shunning an employee, requiring early payment of a loan, etc.

Also important for employers, the Supreme Court adopted an objective standard to determine what conduct constitutes a retaliatory action. It held that Title VII's anti-retaliation provision covers only "materially adverse" employer actions. The Court defined "materially adverse" as conduct that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court used "material adversity" to distinguish significant versus trivial harms. It also relied on the "reasonable employee" standard, rather than looking at a specific plaintiff's subjective feelings. Based on these standards, the Court found that a reassignment to less desirable duties and

a 37-day suspension without pay could be considered retaliatory acts by a reasonable employee, aimed to dissuade a worker from making a complaint of discrimination.

While we can agree to disagree about who is a “reasonable employee,” the Court sent a very strong message to employers that they must prohibit all actions toward an employee that are likely to deter them from complaining to the EEOC, the courts, and their employers about discrimination in the workplace—including actions that are not employment related.

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