



United States Supreme Court Opens the Door to More Retaliation Lawsuits

As most of you know, state and federal laws make it unlawful for an employer to retaliate against an employee for having complained about workplace discrimination or harassment or other protected conduct. In our Breakfast Briefings and News Alerts we have repeatedly discussed the dangers of labeling and treating such an employee as "not a team player" or engaging in other action that could be construed as retaliation. Last week, the U.S. Supreme Court issued a decision (*Burlington Northern v. White*) which now makes it easier for an employee to prove that he or she has been the victim of unlawful retaliation. Here's what you should know:

Employee was hired for a laborer position, in substantial part, because of her experience as a forklift operator. She was the only woman who worked in the department. She was assigned to forklift duties as soon as she started work. But her supervisor (who did not participate in the hiring decision) soon told her that women don't belong on laborer teams. She complained to the company, which promptly disciplined the supervisor, but a short time later Employee was removed from her forklift assignment and directed to perform other less desirable tasks that fell within the laborer job description. She filed a claim with the EEOC, and a few weeks later was placed in a month-long unpaid disciplinary suspension after an incident of alleged insubordination. The company later concluded she had not been insubordinate and it reinstated her with full backpay.

Employee sued and a jury decided the employer's actions constituted unlawful retaliation. Employer appealed, claiming (1) it should not be unlawful for an employer to move an employee from one assignment (forklift) to another assignment (non-forklift) when all of the assignments are legitimately within the employee's job description; and (2) employer should not have been held liable for the unpaid suspension when its own internal processes had adequately addressed the situation by reinstating her with full backpay.

The U.S. Supreme Court rejected both of the employer's assertions:

First, the Court stated that the test of whether an employer's conduct constitutes unlawful retaliation is simple: Would the action reasonably be expected to deter employees from making discrimination complaints? If the answer is YES, the employer's action is retaliatory. Here, the reassignment to non-forklift duties was clearly in response to Employee's complaint, it was a less favorable assignment, it could reasonably be expected to deter employee or others from making such complaints in the future and, therefore, it was unlawful retaliation.

Second, the Court said the employer's remedial action (in correcting the unpaid suspension) did not undo the fact that the initial suspension had been a consequence of her EEOC complaint and, therefore, a form of unlawful retaliation. The Court then went further and ruled that an employer engages in unlawful retaliation even when its action does not have any affect within the workplace. In other words, if the employer does something that could embarrass or negatively impact the employee only outside the workplace, it can still be held liable for unlawful retaliation if that act could reasonably be expected to deter the employee or others from bringing good faith complaints about unlawful workplace discrimination.

The Court noted that context was an important factor in determining whether conduct was retaliatory. For instance:

- A schedule change in an employee's work schedule may not make a difference to one employee, but may be a significant matter to another employee who is a young parent with school age children. Such action may dissuade that employee from making a discrimination complaint
- A supervisor's refusal to invite an employee to lunch might be trivial to one employee, but excluding an employee from a weekly training lunch that contributes to the employee's advancement may constitute retaliation because such conduct may deter others from complaining of discrimination

The message for in-house counsel, human resources managers, and all senior managers is clear: Make sure there are solid mechanisms in place that prevent any immediate supervisor from acting on his or her impulse to retaliate against someone for having made a complaint about alleged workplace harassment or discrimination. These mechanisms should include written anti-retaliation policies and training for managers and supervisors.

Please call on any one of us for additional guidance regarding these issues.

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