

Legal Update:

U.S. Supreme Court Defines Retaliatory Conduct



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[By Robert Coelho](#)

BEWARE OF RETALIATION

Yesterday, the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway v. White*, 364 F.3d. 789, limited employers' ability to transfer employees or change their job duties after a discrimination complaint has been made. The Court, interpreting Title VII of the Civil Rights Act of 1964, unanimously affirmed a jury verdict of retaliation in favor of a female forklift operator who was transferred to a less desirable job after she complained to her employer about sexual harassment. The Court found the employer retaliated against the employee by transferring her following the complaint and by suspending her without pay. Although the unpaid suspension was later paid, the Court still found the action retaliatory. This decision highlights the care employers must take when handling harassment and discrimination complaints, and most importantly, how to treat the employee following the complaint.

WHAT WOULD A "REASONABLE EMPLOYEE" THINK?

The Supreme Court held an employer's actions could be considered retaliatory if a "reasonable employee" would be dissuaded from filing a discrimination charge because of the actions. Although the law does not protect against "petty slights, minor annoyances, and simple lack of good manners," the Court ruled that ultimate employment actions (such as firing or demotion) are not required to establish illegal retaliation. Moreover, "context matters." For example, changing an employee's work schedule might not constitute retaliation for some, but would "matter enormously" to a young mother with school-age children. Failing to invite an employee to lunch may not be retaliation, but failing to invite the employee to a series of training lunches could be actionable because it could have the effect of deterring employee complaints. Since the context matters, trial courts will be left to determine whether employer actions could be considered intimidating by a reasonable

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employee based on the employment context.

THE FACTS OF THE BURLINGTON / WHITE CASE

Sheila White worked for Burlington Northern & Santa Fe Railway as a forklift operator, a desirable position. Some of her male co-workers resented her for taking the position, which they believed should have gone to a more senior male employee. White alleged she was subjected to numerous insults and harassment, including comments from her direct supervisor that a woman should not be working in the rail yard. She eventually complained about the comments and harassment, and her supervisor was suspended for 10 days. White contends that she also was punished by being transferred from her forklift job to track labor, a less desirable, more physically demanding job.

White filed a charge of harassment and retaliation with the Equal Employment Opportunity Commission, and was suspended for 37 days, allegedly for insubordination. When she filed a grievance with her union, the company reinstated her track labor job with back pay, but did not reinstate her to the forklift job. The Supreme Court found all the conduct retaliatory.

AVOIDING RETALIATION CLAIMS

Retaliation complaints are easy to make and difficult to defend. Employees may claim retaliation if they believe their initial complaint was not handled properly, or taken seriously. Similarly, employees may claim retaliation if they were put 'on leave' following a complaint; transferred, further harassed following an initial complaint, suddenly accused of being poor performers, or disciplined after their complaint for events that happened before they complained.

Employers can become so concerned about properly handling the initial complaint, they fail to consider the consequences of how the complaining employee is treated. The Supreme Court has emphasized the importance of carefully considering not only the handling of the initial discrimination or harassment complaint, but also avoiding actions that the complaining employee might consider retaliatory.

PRACTICAL TIPS TO IMPLEMENT NOW

1. Review policies and procedures. Make sure you have a strong policy prohibiting discrimination and harassment, including a comprehensive system for complaining about problems. Be sure your policy includes a strong prohibition against retaliation. Distribute the policy at least annually and conduct anti-discrimination, harassment, and retaliation training for all

employees.

2. Train managers. In addition to anti-discrimination and harassment training, be sure your managers are instructed on what may amount to a retaliatory act, how to recognize retaliation, and how to prevent it.

3. Avoid changing the complaining employee's job title, duties, or position. While there may be legitimate, business reasons for transferring, placing on leave, or changing a complaining employee's job duties, it is best to contact your legal advisor before doing so.

4. Be proactive and build in review. Meet with the employee to determine if he or she believes retaliatory conduct has occurred, and immediately follow up on any hint of retaliation. In addition, ask your legal counsel to review all decisions related to a discrimination or harassment complaint to insure there is no retaliatory conduct.

If you have any questions about retaliation actions and how to prevent them, please contact one of our lawyers in the Labor and Employment Group, or the lawyer with whom you commonly work at Hoge, Fenton, Jones & Appel.

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