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EMPLOYEE RETALIATION CLAIMS UNDER THE SUPREME COURT'S *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE* DECISION: IMPORTANT IMPLICATIONS FOR EMPLOYERS

by DAVID P. TWOMEY*

I. INTRODUCTION

Not only does Title VII of the Civil Rights Act of 1964 forbid employment discrimination against any individual based on the individual’s “race, color, religion, sex or national origin,” as set forth in Section 703(a) of the Act, but a separate section of the Act, Section 704, makes it unlawful for an employer “to discriminate against” an employee or job application because the individual “opposed any practice” made unlawful by Title VII or “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation. Because federal circuit courts of appeals had reached different conclusions about the scope of Section 704—the so-called anti-retaliation provision of the Civil Rights Act—and the appropriate legal standard to be applied as well as the level of seriousness the harm must rise to in order to be actionable retaliation, the U.S. Supreme Court was called upon to resolve these splits in the circuits in its *Burlington Northern & Santa Fe Railway Co. v. White*

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The article presents the factual background of the case; the Court's reasoning and resolution of the "reach" of the Act's anti-retaliation provision; the Court's standard for actionable retaliation; and the application of the actionable retaliation standard to the Burlington Northern case. The article concludes with an evaluation of the impact the decision will have on Title VII jurisprudence and recommendations for employers.

II. FACTUAL BACKGROUND

Shelia White was hired by the Burlington Northern & Santa Fe Railway as a "track laborer" at the Carrier's Tennessee Yard. She was the only woman working in the track department. Soon after she was hired she was given the job of forklift operator, as opposed to the ordinary track laborer tasks, which involve track and switch maintenance work, cutting brush and clearing litter from the right-of-way. Three months after being hired she complained to company officials that her foreman treated her differently than male employees, and twice made inappropriate remarks to her. The foreman was suspended without pay for ten days and ordered to attend sexual harassment training. Also at that time the Roadmaster, a company supervisor who investigated the matter, reassigned the forklift duties to the former operator who was "senior" to White, and assigned White to track laborer duties. He explained that the reassignment reflected co-worker complaints that in fairness "a more senior man" should have the "less arduous and cleaner job." Six months into her employment White refused to ride in a truck as directed by a different foreman, and she was suspended for insubordination. A grievance was filed on her behalf by her union; and some thirty seven days later she was reinstated by the railroad with full backpay and the discipline was removed from her record. White filed a complaint with the EEOC claiming the reassignment to track laborer duties was unlawful gender discrimination and retaliation for her complaint about her treatment by the foreman. The 37 day suspension led to an additional retaliation charge. A jury

4 Burlington N., 126 S. Ct. at 2409.
5 Id.
6 Id.
7 Id.
8 Id. For more factual development on this incident see White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 793 (6th Cir. 2004) (en banc) [hereinafter White II], and White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443, 448 (6th Cir. 2002) [hereinafter White I].
9 Burlington N., 126 S. Ct. at 2409.
10 Id. at 2410.
rejected her gender discrimination claim and awarded her compensatory damages of $43,500, including $3250 in medical expenses on the retaliation claims. BNSF appealed contending that Ms. White was hired as a track laborer and it was not retaliatory to assign her to do the work she was hired to do. And, it asserted that the suspension of 37 days was corrected and she was made whole for her loss. A divided Sixth Circuit Court of Appeals panel reversed the judgment. The full Court of Appeals vacated the panel’s decision and voted to uphold the District Court’s judgment in White’s favor, but differed as to the proper standard to apply.

III. THE “REACH” OF THE ANTI-RETALIATION PROVISION

Because the Courts of Appeals had reached different conclusions about the scope of the Section 704 anti-retaliation provision, particularly the reach of the phrase “discriminate against” as used in that section, the Supreme Court was required to resolve the issue of whether Section 704 confines actionable retaliation only to activity that affects the terms and conditions of employment in the workplace itself as opposed to harm caused both in the workplace and outside the workplace. Further, the Court was required to determine the appropriate standard as to how harmful must the adverse actions be to fall within the scope of Section 704. The Third, Fourth and Sixth Circuits required a plaintiff to show an “adverse employment action,” applying the same standard for retaliation that is applied to a substantive discrimination offense under Section 703(a). The District of Columbia Circuit and the Seventh Circuits applied a broad view requiring a plaintiff to show that the “employer’s challenged action would have been material to a reasonable employee” and would likely have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Burlington Northern argued that the Sixth Circuit majority in its disposition of the Burlington Northern case was correct to require a link between the challenged retaliatory action and the terms, conditions, or status of employment as set forth in Title VII’s core anti-discrimination

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11 Id.
12 White I, 310 F.3d 443.
13 White II, 364 F.3d 789.
14 Burlington N., 126 S. Ct. at 2408.
15 Id.
16 Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3rd Cir. 1997); Von Gunten v. State of Maryland, 243 F.3d 858, 866 (4th Cir. 2001); White II, 364 F.3d at 795.
provision, Section 703(a). In its analysis, the Court focused on the language of the Act itself underscoring key terms, as follows:

Section 703(a)
It shall be an unlawful employment practice for an employer—

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.” § 2000e-2(a) (emphasis added).

Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” § 2000e-3(a) (emphasis added).

The Court refused to conclude that the different words used by Congress in Section 703(a) and Section 704 should be read to mean the same thing, as asserted by Burlington Northern and the Sixth Circuit majority. The underscored words in Section 703(a) limit the scope of that provision to the workplace. No such limitations appear in Section 704, the anti-retaliation provision. The Court pointed out that the anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. And the anti-retaliation provision seeks to secure the anti-discrimination provision's objective by preventing an employer from interfering through retaliation with an employee's efforts to secure or advance enforcement of the Act’s basic guarantees. Since an employer can effectively retaliate against an employee by taking actions not directly related to his employment, or causing harm outside the
workplace, the court concluded that Title VII’s anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harms.\textsuperscript{24}

IV. THE STANDARD FOR ACTIONABLE RETALIATION

Focusing on the employer’s challenged retaliatory act, and not the underlying conduct that forms the basis of the Title VII complaint, the Supreme Court set forth a standard to resolve the differing language used by the circuit courts to describe the level of seriousness to which the harm must rise before it becomes actionable retaliation. The Court concluded that a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, “which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”\textsuperscript{25} The Court stated that by focusing on the materiality of the challenged action and the perspective of a reasonable person, it believes that this standard will screen out trivial conduct while capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.\textsuperscript{26}

V. APPLICATION OF THE BURLINGTON NORTHERN V. WHITE STANDARD

The jury found that two of BNSF’s actions amounted to retaliation: the reassignment of White from forklift duty to standard track laborer tasks and the 37-day suspension without pay. The Court reviewed each action under its anti-retaliation standard.

\textsuperscript{24} See Rochon v. Gonzales, 438 F.3d at 1213 (concerning employer-FBI retaliation against employee in “the form of the FBI’s refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife”); Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996) (finding actionable retaliation claim as to employer who filed false criminal charges against a former employee who complained about discrimination). The \textit{Burlington Northern} Court did not have to address the issue of the “reach” of Section 704 beyond the workplace, to harm caused outside the workplace, as the employer actions at issue taken against Ms. White were both workplace-related actions. Rather than wait for a case involving an outside-the-workplace employer action, the Court took the opportunity to settle the issue and policy questions regarding Sections 703(a) and 704 as a foundation for its settling the standard for actionable retaliation claims under Section 704.

\textsuperscript{25} \textit{Burlington N.}, 126 S. Ct. at 2415 (quoting Rochon, 436 F.3d at 1219; Washington, 420 F.3d at 662) (citing with approval the formulation set forth by the Seventh and District of Columbia Circuits).

\textsuperscript{26} \textit{Burlington N.}, 126 S. Ct. at 2416.
A. The Reassignment of Duties.

Burlington Northern argues that a reassignment of duties cannot constitute retaliatory discrimination where both the former and present duties fall within the same job designation.\textsuperscript{27} The Court disagreed. While the reassignment of job duties is not automatically actionable, the Court stated whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.\textsuperscript{28} The Court quoted the following evidence of record the jury had before it:

...the jury had before it considerable evidence that the track laborer duties were "by all accounts more arduous and dirtier"; that the "forklift operator position required more qualifications, which is an indication of prestige"; and that "the forklift operator position was objectively considered a better job and the male employees resented White for occupying it."\textsuperscript{29}

The Court concluded that based on this record, a jury could reasonably conclude that the reassignment of White's responsibilities would have been materially adverse to a reasonable person.\textsuperscript{30}

B. The 37-Day Suspension

BNSF argues that the 37-day suspension without pay lacked statutory significance because the railroad ultimately reinstated White to service with full backpay. The Court did not find their argument to be convincing. The Court stated that a reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former.\textsuperscript{31} Thus an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.\textsuperscript{32} The Court determined that the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one.\textsuperscript{33}

\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 2417 (quoting White II, 364 F.3d at 803).
\textsuperscript{30} Burlington N., 126 S. Ct. at 2417.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 2418.
VI. IMPACT AND IMPLICATIONS OF THE BURLINGTON NORTHERN STANDARD

In the second sentence of his opening statement in the oral argument before the Supreme Court of the United States, counsel for Burlington Northern stated:

...As the Solicitor General’s brief and a couple of the other amici briefs point out, the number of—the number of these claims has increased by more than 100 percent over the course of the last decade, more than 30 percent of the EEOC’s docket is now made up of retaliation claims, and the cost of an average contested retaliation claim exceeds $130,000 per case....

Implicit in such an opening remark was a warning to the Court that a broad anti-retaliation standard would add significant burdens to employers and the federal courts. In fact Title VII charges alleging retaliation have been relatively constant since FY 2000, with 19,753 charges filed in that period, with a high of 20,615 in FY 2003 and a decline to 19,429 in FY 2005 and 19,560 in FY 2006. The Court was not persuaded by employer assertions that a broad anti-retaliation standard would open floodgates to retaliation claims. Rather, in order to protect the goal of achieving equal opportunity in employment in our society, the Court focused instead on implementing a standard—“materially adverse” from the perspective of a “reasonable worker”—that would screen out trivial conduct while effectively capturing those acts.
that are likely to dissuade employees from complaining or assisting in complaints about discrimination.  

VII. CONCLUSIONS AND RECOMMENDATIONS

Employers must be aware that the *Burlington Northern* decision extends the reach of Section 704 protections beyond the workplace and employment related retaliatory acts and harms, widening the range of employer conduct subject to the Act. The standard, involving questions of "materiality" of the employer action and how the action would influence a "reasonable worker," will result in an increase in litigation involving issues of fact for juries to resolve as opposed to the resolution through the summary judgment process as was appropriate in some retaliation cases. The time-consuming pre-trial procedures for building cases for jury trials and the trials themselves will add significant costs to employers and employees, with the employers responsible for their attorneys' fees, damages and attorneys' fees for the employees should the employees be successful in their litigation. Accordingly employers must develop and implement effective anti-retaliation policies and procedures for its supervisors and employees. With the wide notoriety of the *Burlington Northern* decision, employers should expect to have to deal with an increase in the number of claims of alleged retaliation.

Employers should develop and implement an anti-retaliation preventative action plan. It should:

- Post as part of its anti-discrimination and harassment policies a broad anti-retaliation policy that will be strictly enforced! 
- Establish ongoing educational programs for all levels of supervision to ensure that managers understand actions that may be construed as retaliation and the possible consequences to the employer of retaliatory litigation. The plan should set forth the disciplinary consequences to company officials found responsible for retaliatory actions.
- Make certain that complainants of race, color, religion, sex, national origin, age and disability know that there will be no retaliation for filing a complaint, and each individual who may be interviewed or who may testify regarding such a complaint shall also be informed of the company's no-retaliation policy.

38 *Burlington N.*, 126 S. Ct. at 2416.

39 As set forth in Section 704 of the Civil Rights Act, employees and applicants are protected from employer discrimination for opposing any practice made an unlawful employment practice by this subchapter—that is discrimination based on race, color, religion, sex or national origin. 42 U.S.C. section 2000e-3(a) (2006). The Age Discrimination in Employment Act also explicitly prohibits practices made unlawful by that act. 29 U.S.C. § 623(d) (2006). The EEOC's position is that claims may be filed for
Human Resource specialists should be assigned to scrutinize any employer action against an employee who has previously complained about discrimination. Supervisors proposing disciplinary or "other" actions against a complainant must be able to demonstrate to the HR specialist that legitimate nondiscriminatory reasons exist for the proposed employer actions. As examples from the Burlington Northern case, when the roadmaster (company supervisor) concluded that Ms. White's foreman was in violation of the company's sexual harassment policy and should be disciplined and be required to attend a sexual harassment training session, the concurrent timing of his reassigning the victim to less desirable duties would have signaled a clear anti-retaliation violation to a Human Resources specialist, which proposed action would have been overruled by the specialist and litigation avoided. So also when the track foreman and the roadmaster agreed to suspend Ms. White for insubordination without pay believing that she had refused a direct order to ride with another foreman, mandatory consultation with a Human Resources specialist could have initially resulted in an immediate suspension "with pay" and an expedited investigation by the employer to ascertain the true facts of the incident, rather than a thirty seven day period without a paycheck, which was a materially adverse action, even though the employer ultimately determined the discipline was not warranted and she eventually received full backpay and benefits and the discipline was removed from her record.


40 Burlington N., 126 S. Ct. at 2409.
41 See White II, 364 F.3d at 793; White I, 310 F.3d at 448.