

**SUPREME COURT INVITES MORE RETALIATION LAWSUITS BY EMPLOYEES**

By Sean Driscoll

Some actions taken against an employee after he or she has complained of discrimination may constitute unlawful retaliation. Some may not. How can you tell the difference? On June 22, 2006, the US Supreme Court set the standard for determining which actions constitute unlawful retaliation. Unfortunately, the Court's decision in *Burlington Northern & Santa Fe Railway v. White* sets a low bar that invites a greater number of retaliation claims.

**Case Background**

In 1997, Shelia White began working as the only female forklift operator in Burlington Northern's Tennessee yard. In September of 1997, she complained that her supervisor had commented that women should not be working in the yard, and that he had made inappropriate remarks to her in front of male colleagues. After an investigation, the company suspended the supervisor for 10 days and ordered him to attend a sexual harassment training. The company also relieved White of her forklift duties and reassigned her to perform the more demanding duties of a standard track laborer, although these duties were still within the same job category. White filed a complaint with the Equal Employment Opportunity Commission regarding the challenge.

Shortly after the company received her EEOC complaint, White and her new supervisor had a disagreement about what truck she should ride in to transport her from one location to another. The supervisor reported that White was insubordinate, and Burlington suspended her without pay. Burlington later concluded that White had not been insubordinate and awarded her backpay for 37 days that she was suspended.

White sued for discrimination and retaliation, claiming that (1) the change in job duties, and (2) suspension without pay, amounted to illegal retaliation. Although the jury found in favor of Burlington on the gender discrimination claims, it found for White on the retaliation claims.

Burlington appealed all the way to the US Supreme Court, arguing that White could not prevail on the retaliation claim because she had not proven that she suffered any actual damages. Her new duties were in the same job category, and she had been repaid all money lost because of the suspension.

**The Supreme Court Sides with White**

The Supreme Court found for White. Unlike a typical discrimination claim, the Court held that White did not have to prove any change in the terms and conditions of her employment to prevail on the retaliation claim. An action constitutes unlawful retaliation of a reasonable employee would find the challenged action materially adverse, which in this context means the action is the sort that might dissuade a reasonable worker from making or supporting a claim of discrimination. The Court held that a change in job duties or a suspension without pay, even if later repaid, were the sorts of actions that might dissuade a reasonable worker from making a discrimination claim.

The Court also found that the retaliatory action in question need not even be employment related, and non-employment actions might dissuade some employees from making or supporting

a claim of discrimination. For example, while failing to invite an employee to lunch is usually trivial and nonactionable, if attendance at the lunch might contribute to the employee's professional advancement then the non-invitation could be deemed retaliatory.

### **What Does This Mean for Your Business?**

*White* is an employee friendly case that, unfortunately, invites more retaliation lawsuits. The *White* test for retaliation is so fact-specific that an action that might constitute retaliation in one workplace, might not in another. Indeed, the same action in the same work place may be retaliatory with respect to one employee, but not another. According to the Court, "context matters." "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." What this means in litigation is that courts will be more reluctant to dismiss retaliation claims on motions, allowing more of them to go to juries.

Employers must be even more vigilant about avoiding retaliation claims after *White*. Before taking any potentially adverse action against an employee who has made a claim of discrimination or exercised other employment law rights (e.g., filing a workers compensation claim, taking FMLA leave, etc.), employers must thoroughly analyze how the potential action will be perceived by the employee. If it's the sort of action that could possibly dissuade an employee from making or supporting a claim of discrimination, then either don't do it or be sure that the decision is truly job-related and thoroughly documented. Because *White* demands second-guessing in litigation, a lack of solid, documents evidence greatly increases the likelihood that the claim will make it to a jury.

Finally, *White* highlights the role of supervisors, as they are usually the front line in preventing of causing retaliation claims. Supervisors must be trained in how critical it is to avoid such claims, as well as how to work with employees who have filed discrimination claim. These need not be treated with kid gloves necessarily, but every action after the complaint that could possibly be seen as retaliatory must be clearly job-related and justified in writing before it is taken.

For further assistance on this or any other employment issue, contact Randy Sutton or Sean Driscoll at SAALFELD GRIGGS PC.