

Retaliation After *Burlington Northern*, Have Employers' Worst Fears Come True? Employment Law Strategist, May 2007

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The Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), resolved a split in the Circuits when it held that a so-called ultimate employment decision is not necessary to establish a retaliation claim. Instead, the Court held that any act that might dissuade a reasonable employee from making or supporting a claim of discrimination can create employer liability for retaliation under Title VII of the Civil Rights Act of 1964. After the decision, many commentators have expressed concern that the new standard will open the floodgates for a wave of new retaliation lawsuits, but what has *Burlington Northern* really changed, and what does the new framework mean for employers?

SIGNIFICANT, NOT TRIVIAL HARMS PROTECTED

While it is clear that *Burlington Northern* expanded the scope of "adverse actions" that can give rise to a retaliation claim, the Supreme Court also set certain limits, which have been repeatedly cited by the lower courts following the decision. First, the Court held that the law was not intended to protect employees from all changes at work, but only from action "that produces an injury or harm." Thus, the challenged action must be "materially adverse," a requirement the Court emphasized would separate "significant from trivial harms." The Court further noted that the anti-retaliation protection is not intended to immunize an employee who reports discriminatory behavior from "those petty slights or minor annoyances" that often occur in the workplace.

Courts following the *Burlington Northern* decision have seized upon the limiting language to dismiss retaliation claims that fail to establish "significant" harm by the plaintiff. For example, in *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14 (1st Cir. 2006), the plaintiff (a disabled teacher who previously filed a claim under the Americans with Disabilities Act) alleged that her employer retaliated against her by failing to provide a private bathroom for her. The school district had already begun construction of the bathroom, but it was not completed on time. The First Circuit affirmed summary judgment for the employer, holding that, while the delay in satisfying the plaintiff's accommodation requests may have caused her "inconvenience," there was no showing that it caused her "actual harm."

Similarly, in *Morgan v. Masterfoods USA, Inc.*, 2006 WL 3331780 (S.D. Ohio Nov. 14, 2006), the court held that: 1) a threat to "write-up" the plaintiff for poor attendance; 2) a formal investigation into an incident in which a machine on which the plaintiff was working "jammed"; 3) a comment by the plaintiff's manager that plaintiff was a "disgruntled employee" and that, if it were up to him, plaintiff would "be fired"; and 4) plaintiff's receipt of a lower performance evaluation, were insufficient to constitute materially adverse actions. (In some courts, a combination of actions such as these has been deemed to support a claim for a retaliatory hostile work environment. See, e.g., *Moore v. City of Philadelphia*, 461 F.3d 331 (3d Cir. 2006) (transfers, negative performance evaluations and alleged threats to "make [plaintiff's] life a living nightmare" created genuine issue of material fact on retaliation claim.)) The court found that most of the incidents were nothing more than "petty slights" and, although the plaintiff may have found them "troubling," they did not cause him any harm. With respect to the low performance evaluation, the plaintiff offered no evidence that it caused him any harm, such as by affecting his eligibility for a raise or promotion. If such evidence were introduced, however, it may well have changed the outcome. See, e.g., *Johnson v. Harvey*, 2006 WL 3791854, at *4-5 (E.D. Ark. Dec. 21, 2006) ("A reasonable employee could be deterred from participating in an EEO investigation if as a result, he suffers the penalty of being ranked artificially low when he seeks a job promotion.")

CONTEXT MATTERS

The Supreme Court also recognized in *Burlington Northern* that the standard for judging harm is an objective one. In other words, plaintiff's subjective feelings will not carry the day. Rather, the court or ultimately a jury must decide whether a reasonable employee in the plaintiff's position would have considered the challenged action "materially adverse." As the Court put it, "context matters."

A number of post-*Burlington* decisions have analyzed this requirement in the context of a shift change. In *Thomas v. Potter*, 202 Fed. Appx. 118 (7th Cir. 2006), the court held that the employer's decision to change the plaintiff-postal worker's shift schedule was not a "materially adverse" act, as the plaintiff failed to demonstrate "that he had a unique vulnerability that the Postal Service knew about and sought to exploit ..." The court therefore concluded that even if the plaintiff viewed the shift change as "undesirable or inconvenient," it did not rise to the level of harm sufficient to "dissuade a reasonable worker from making or supporting a charge of discrimination."

Likewise, in *McGowan v. City of Eufala*, 472 F.3d 736 (10th Cir. 2006), the court held that the employer's denial of the plaintiff's request for a reassignment from the night shift to the day shift was not actionable. The court noted that the plaintiff "identified no specific rationale for the transfer other than an undefined subjective preference" and the two shifts did not differ in pay or benefits, nor was the night shift more arduous.

By contrast, in *Taylor v. Roche*, 196 Fed. Appx. 799 (11th Cir. 2006), the plaintiff filed a charge of discrimination against the employer with the Equal Employment Opportunity Commission (“EEOC”) and, thereafter, repeatedly and unsuccessfully sought transfer to the night shift. The plaintiff argued that the denial of the shift change request constituted a “materially adverse” employment action, and the court agreed. The court found significant that the plaintiff: “1) had experienced a tense work environment with a particular supervisor; 2) had requested a return to the shift he previously worked ... in order to take his children to school and avoid a tense environment; and 3) [had his] request ... denied for more than one year.”

These cases demonstrate that, where an employee challenges a shift assignment based solely on convenience or subjective preferences, it will generally not rise to the level of a “materially adverse” action. However, where the employee can demonstrate harm based on the circumstances, such as a schedule change for a mother with school-age children, see *Burlington Northern*, 126 S. Ct. at 2415, it may be sufficient to establish “significant,” rather than “trivial” harm.

RETALIATORY MOTIVE REQUIRED

Although the Supreme Court did not reach the issue in *Burlington Northern*, it is important to remember that a plaintiff alleging retaliation must still prove that the challenged action was motivated by an intention to retaliate against the plaintiff for engaging in protected activity.

The Eleventh Circuit recently affirmed judgment for the employer following a bench trial in *Dar Dar v. Associated Outdoor Club, Inc.*, 201 Fed. Appx. 718 (11th Cir. 2006), because the plaintiff could not connect the adverse action to a retaliatory motive. The plaintiff alleged that her employer retaliated by terminating her employment approximately six months after the plaintiff complained about sexual harassment. The court first noted that the length of time between the plaintiff’s complaints and her termination “weighs against a finding of causation.” Although the plaintiff offered testimony from a former manager that one of her supervisors felt that the plaintiff complained “too much” and that the supervisor was “looking to fire her,” the court was not persuaded by this testimony because the alleged statement occurred approximately one and a half years before the plaintiff was terminated. Other managers called by the employer testified that the employer subsequently received multiple complaints about the plaintiff for rude behavior toward customers and for refusing to serve a customer. The court concluded that the employer’s witnesses were credible and that the plaintiff failed ultimately to prove retaliatory intent.

COMMENTARY

According to the EEOC, retaliation claims are the fastest growing type of claims filed. *Burlington Northern* has certainly focused increased attention on the issue. Nevertheless, employers can still take several steps to avoid and, if necessary, defend themselves against retaliation claims.

- The first and perhaps most important step is to educate supervisors and managers about retaliation and encourage them to seek guidance from upper management or human resources where appropriate. Ideally, supervisors should receive annual training that addresses anti-retaliation requirements, including the new standards announced by the Supreme Court. Among other things, such training may enable an employer to avoid punitive damages when faced with a retaliation claim.
- Employers should ensure that their employee handbooks or policies contain a provision prohibiting all forms of retaliation against employees who complain about discrimination, harassment or other unlawful activity, or who file or participate in a charge or lawsuit against the company. Company policies should also provide clear mechanisms for employee complaints and investigations.
- It is also critical for supervisors to document properly the employer’s legitimate reasons for employment actions taken against all employees.
- Employers should investigate claims of retaliation promptly and thoroughly, counsel any accused parties that retaliation of any kind is prohibited, and advise the complaining employee to report any further acts of alleged retaliation promptly.
- In light of the expanded definition of “materially adverse” actions, managers, supervisors, human resources personnel and other decision-makers should be sensitive to the impact that all changes at work (e.g., shift changes, work assignments and transfers) may have on a particular employee. A careful employer need not feel paralyzed by the prospect of a retaliation claim. Although employers should be sensitive to the timing and defensibility of actions taken against employees who have engaged in protected activity, such employees do not get a free pass.

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