

Court Broadens Employees' Rights

In-House News:

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By Amy E. Wong

In a 9-0 decision on June 22, the Supreme Court significantly strengthened legal protection for employees who suffer workplace discrimination and harassment.

The Court decision in *Burlington Northern & Santa Fe Railway Company v. White* upheld Title VII of the Civil Rights Act of 1964, which expressly forbids discrimination and prohibits employers from retaliating against employees who allege discrimination.

The case revolves around Sheila White, Burlington's forklift operator and sole woman in her department, and her sexual harassment complaint. White told company officials that her immediate supervisor made sexist remarks about how women did not belong at the railroad tracks.

Her immediate supervisor was suspended for 10 days, and White was reassigned from forklift duty to standard track laborer tasks.

White turned to the Equal Employment Opportunity Commission (EEOC), filing a complaint of unlawful gender discrimination and employer retaliation for her original complaint.

After a spat with another supervisor, White was suspended without pay for insubordination, but then was reinstated with 37 days of back pay after she filed a grievance through her union.

Shortly after her suspension, White filed action in the federal court, suing and winning a case against Burlington on grounds of unlawful retaliation under Title VII.

Because Title VII's ambiguously defines retaliation, the case raised a hailstorm of uncertainty for employers, employees, and federal appeals courts.

To address this pertinent concern, the Court honed down on and differentiated between Title VII's clauses regarding discrimination and anti-retaliation.

In the *Opinion of the Court*, Justice Stephen G. Breyer concluded that, "The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status."

"The anti-retaliation provision seeks to secure that primary 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."

In short, "The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct."

In the *Burlington* case, Burlington did not discriminate against White based her

race, religion, or sex. Instead, the company took on a series of retaliatory actions after White's complaints of sexual harassment, demotion, and suspension.

What, then, qualifies as retaliation?

In its appeal to the Supreme Court, Burlington contended that its actions did not meet the definitional characteristics of retaliation.

The Bush Administration sided with Burlington, defining retaliation as actions that affect an employee's "compensation, terms, conditions, or privileges of employment."

Previously, winning a retaliation case was a rarity, unless the retaliation resulted in dismissal. The jury and the Sixth Circuit Court, however, defined demotion and suspension as retaliatory acts in the *Burlington v. White* case.

Justice Breyer asserted, "We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant."

Breyer continued, "In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

Ross Runkel, blogger at the *Employment Law Blog*, speculated that, depending on the circumstances, retaliation may be defined as changed job duties, temporary suspension, schedule change, or something as minimal as a refusal

to invite to company lunch meeting.

New Justice Samuel A. Alito Jr., who agreed with the Bush Administration's more limited definition of retaliation, wrote a separate opinion that criticized the Court for espousing a "new and unclear standard" that would cause more confusion.

One thing is clear: this broad definition of what constitutes retaliation proves to be, as many would claim, employee-friendly.

Daniel P. Westman, a lawyer at Morrison & Foerster who represents employers in discrimination cases told the *Washington Post*, "Justice Breyer's standard opens the door to claims based on actions that before today companies would not have suspected were actionable. Companies will have to be much more careful as to how they manage employees who are covered by Title VII."

Gillian Thomas, a lawyer for a women's rights group called Legal Momentum, told the *Los Angeles Times* that the decision "is an emphatic statement that employees should be able to raise a good faith complaint of discrimination without fear or retaliation from their employers."

This far-reaching legislation is expected to affect many attorneys who represent employers. Between 1992 and 2005, the number of retaliation claims more than doubled from 10,499 to 19,429 according to the Equal Employment Opportunity Commission, a staggering increase that comprises more than a quarter of its caseload.

Now, lawyers are more likely to take on more cases for alleged victims of

retaliation, which will consequently bolster the need of lawyers and defensive management practices in companies across the nation.

Ross Runkel concluded most aptly in *Employment Law Blog*, "Litigation over how the Court's new standard will apply will keep employee and employment lawyers (as well as the courts that hear these claims) busy for some time to come."