

Supreme Court Clarifies Retaliation Standards: Burlington Northern v. White

Legal Alert
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Garvey Schubert Barer Legal Update, July 6, 2006.

On June 22nd, the United States Supreme Court made it much easier for employees to sue for retaliation after they have complained about sexual harassment or other types of discrimination. In *Burlington Northern v. White*, 548 U.S. ___, 2006 U.S. Lexis 4895 (2006), the Supreme Court grappled with what types of adverse action constitute "retaliation" against employees who either raised or supported discrimination claims. The railroad argued that before a retaliation claim could be successful, an employee should have to show a link between the alleged retaliation and the "terms and conditions of employment," such as a demotion or reduction in pay. The Court, however, took a much broader approach concluding that the actions that Title VII's anti retaliation provision forbids are not just confined to those that are related to employment or even those that occur in the workplace. Instead, an employee must only prove that the company did something that was harmful enough to dissuade a reasonable worker from making or supporting a charge of discrimination. While the Court explained that reporting discriminatory behavior would not protect an employee from "petty slights or minor annoyances," the decision makes it easier for employees to bring retaliation claims.

What this means for you:

Employers are likely to see more retaliation claims because the category of actions deemed harmful enough to be "retaliation" has become much broader and there will be renewed emphasis on these claims by Plaintiff's attorneys.

You should consider the following steps:

Ensure that your written policies are clear that retaliation is against company policy and that anyone who feels they have been subject to retaliation must contact Human Resources (HR) or an appropriate senior manager.

Make clear to managers that before any actions are taken that could be viewed as "harmful" to an employee who has made or supported a discrimination claim, someone in HR or senior management needs to review the decision. If you are uncertain about whether such an action could be considered retaliation, consult legal counsel.

Finally, explain to those who raise discrimination claims that the company has a non retaliation policy and that the employee should alert HR or senior management if they are concerned that they are being retaliated against. Then check in with the employee regularly over the next six

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months to ask how things are going. This way you can address concerns in a timely manner before they become the basis of a claim.