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Supreme Court provides broad interpretation of Title VII's prohibition against retaliation

By John D. Canoni

A unanimous Supreme Court has made it easier for some individuals to establish Title VII retaliation claims, *Burlington Northern v. White*, 2006 U.S. LEXIS 4895 (June 22, 2006). At the same time, other employees will find it more difficult to prevail on such claims.

In this case, the Court agreed with the Sixth Circuit's en banc ruling below that Ms. White, the only woman working in the railroad's Tennessee maintenance department, was improperly retaliated against after she complained about sexual harassment. The Court's ruling confirmed a jury award of \$43,500 in compensatory damages in Ms. White's favor.

The Supreme Court adopts a uniform national standard for Title VII retaliation cases replacing widely-divergent standards applied by various circuit courts. The Court chose a middle ground between extreme views. It first rejects the extremely low threshold adopted by the Ninth Circuit, the EEOC, and the Sixth Circuit's concurring judges. That fairly minimal standard permitted retaliation claims whenever individuals suffered any adverse treatment because of a retaliatory motive that was reasonably likely to deter the charging party or others from engaging in protected activity. The Court also rejects the extremely high threshold adopted by the Fifth and Eighth Circuits. That demanding standard dismissed any retaliation claim not based on an "ultimate employment decision," such as hiring, firing, promotion, or pay.

The Court chose the middle ground adopted by the Seventh and District of Columbia Circuits as the new nationwide Title VII retaliation standard. Henceforth, employer actions are retaliatory (1) if they "would have been materially adverse to a reasonable employee or job applicant" and (2) "they could well dissuade a reasonable worker from making or supporting a charge of discrimination." A key phrase here is "materially adverse" as that is intended to filter out claims of "trivial harms," a concern repeatedly expressed by the Justices during oral argument. Another key phrase is "reasonable worker" as that is intended to make the legal standard less subjective. Particular employees may strongly believe they are victims of retaliation, but they should lose unless that belief is objectively reasonable.



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The Sixth Circuit en banc majority similarly chose the now-uniform “materially adverse” standard. However, the majority then added the further limitation that the materially adverse change must be “in the terms and conditions of employment.” The majority was thereby joining other circuit courts, including the Third and the Fourth, that apply the same standard to both Title VII discrimination and retaliation cases.

The Supreme Court, again unanimously and rejecting the Solicitor General’s contrary position, held that the scope of Title VII’s retaliation provision must be broader than Title VII’s discrimination provision. Discrimination claims are actionable under Title VII only if they relate to terms, conditions, or privileges of employment. That additional language does not appear in Title VII’s retaliation provision. The Court held Congress purposely chose different language to also prohibit retaliatory employer actions not directly related to an individual’s employment or that cause harm to an individual outside the workplace. The Supreme Court, thereby, adopted the rationale of several lower courts that retaliatory conduct by employers violates Title VII regardless of its form or location, e.g., *Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1971) (employer cancelled a major public symposium in the employee’s honor); *Gore v. Trustees of Deerfield Academy*, 2005 U.S. Dist. LEXIS 14996 (D. Mass. 2005) (school denied admission to employee’s daughter).

The retaliation rules have now changed dramatically. For example, the Ninth Circuit must now follow a heightened standard, whereas the Fifth and Eighth Circuits must now apply a less rigorous standard. All circuits will recognize that the Supreme Court has promulgated a fact-intensive standard. This will generally make summary judgment more difficult to achieve for employers and ultimate access to jury trials easier to achieve for employees. Lawyers for employees are certain to quote Justice Breyer’s telling observation that “context matters” because whether a given act of retaliation is materially adverse “will often depend upon the particular circumstances.”

The Court offers only employee-friendly examples. First, it affirms the Sixth Circuit en banc ruling that Ms. White’s reassignment to the more arduous and dirtier forklift operator’s job, and her 37-day suspension without pay, following her sexual harassment complaints were both materially adverse and retaliatory. The forklift job was with the same pay and benefits and even within the same job classification and Ms. White was fully reimbursed for her 37-day suspension.

Justice Breyer offers two additional examples to demonstrate how “context matters.” A simple schedule change could be materially adverse for a young mother with school-age children. A simple refusal by a supervisor to invite a subordinate to lunch could become materially adverse if the lunch were a weekly training lunch that advances the subordinate’s career. In short, there can be circumstances transforming otherwise-trivial employer actions into materially adverse retaliation. Summary judgment motions will be less likely to succeed if those special circumstances are present.

It seems certain that retaliation claims will now increase. Courts understandably want to protect claimants as well as those individuals who assist claimants in filing discrimination claims. Thus a valid retaliation claim exists even where the underlying discrimination complaint that allegedly led to the employer’s retaliatory action is made in good faith but is without merit. The judicial desire to protect against retaliation will also likely extend the

Court's broad reading of Title VII's retaliation section in later cases to retaliation sections under the ADA, ADEA, FMLA, Sarbanes-Oxley, and other laws.

Retaliation claims were flourishing even before this Supreme Court decision. Annual Title VII retaliation claim filings increased from 15,342 (17.5% of all charges) in 1995 to 19,429 (25.8% of all charges) in 2005. Annual retaliation claim filings under all laws administered by the EEOC constituted 29.5% of all charges filed in 2005, twice as many as 1992.

Employers should be forewarned. Training programs for supervisors aimed at understanding and preventing retaliatory actions are absolutely necessary. Companies particularly need to review carefully any personnel or other action taken concerning a complaining individual in the weeks and months following her/his complaint. The complaining employee is not entitled to preferential treatment or relaxation of normal workplace rules (as many employees may think), but the "danger zone" following an employee complaint of discrimination is a perilous period for employers and their human resources departments.

For more information on this issue or other employment law matters, please contact John Canoni (at 212-940-3169 or jcanoni@nixonpeabody.com) or your Nixon Peabody attorney.

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