

June 23, 2006

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EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
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415.398.3500

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Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, DC 20037-1175
202.861.0900

Supreme Court Decision Results In Significant Change for Retaliation Cases

The June 22, 2006, decision of the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, written by Justice Breyer, who was joined by seven of his colleagues (with Justice Alito concurring in the result), will work a significant change in the advice given and the positions taken in retaliation cases, not just under employment laws such as Title VII, but in False Claims Act, environmental, and Sarbanes-Oxley cases—indeed, in any type of federal case in which a complainant is protected by an antiretaliation provision.

Sheila White complained of gender discrimination by her boss, who, she claimed, had made insulting and inappropriate remarks about the suitability of women working in a particular department of the defendant railroad. After she filed a complaint with the EEOC, White claimed that she was subject to retaliation by her boss, who had her reassigned to a lesser job and also placed her under surveillance.

White ultimately prevailed on all counts before the Sixth Circuit, and the Supreme Court took the case to resolve a split in the circuits as to what constituted actionable retaliation. The majority and better view was that “an adverse employment action” was one that worked a “materially adverse change in the terms and conditions” of employment, such as discharging, reducing pay, limiting leave, and failing to promote. The contrary view, urged by the EEOC but not by the Solicitor General, was that the “employer’s challenged action would have been material to a reasonable employee,” that is, that it would likely have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Looking to the unrestrictive wording of Title VII’s Section 704(a), eight justices held that the operative factor in retaliation was not limited to changing or affecting job conditions but instead encompassed actions that would deter a reasonable person from reporting misconduct in the first place.

This, of course, includes job-related matters, but also includes matters that have nothing to do with the workplace, including, for example, the kind of surveillance that the foreman had put in place. It also would

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include off-site conduct that might damage the plaintiff's reputation, as well as a host of actions limited only by the imaginations of plaintiffs and their attorneys.

In the end, it is now a tenet of federal law that a trier of fact in a Title VII case is not required to find that allegedly retaliatory actions (as opposed to underlying acts of alleged discrimination) caused any "materially adverse change in the terms or conditions of employment." Such actions need only be "materially adverse," i.e., of a nature that would dissuade a potential complainant from reporting a matter.

This creates immediate issues in employment cases, but note also that Section 704 has served as a model for other statutes that have nothing to do with employment discrimination, including the False Claims Act, SOX, and various environmental laws. The wording of the antiretaliation provisions of these statutes is such that the Supreme Court's holding in Burlington Northern is likely to apply elsewhere. The same will be true regarding at least some state antiretaliation laws that were previously interpreted under the materiality standard.

Since this decision is interpretive and thus does not describe a "new" legal standard, it is likely that the case will be given retroactive effect. In any event, the materiality debate is now over, and any conduct that could be held to deter a person from registering a complaint in the first instance now will be held to state a claim of actionable retaliation.

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If you have any questions regarding this significant Supreme Court decision or its impact on your workplace, please contact **Stuart Gerson** in EBG's **Washington, DC** office at (202) 861-4180 or SGerson@ebglaw.com.

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