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United Stated Supreme Court Issues a New Standard for Employer Liability for Retaliation: If an Employer's Retaliatory Actions Could Dissuade a Reasonable Worker from Making or Supporting a Charge of Discrimination Then the Employer Will Be Liable

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. ____ (2006)
Appeal from the Sixth Circuit Court of Appeals
Decided June 22, 2006

In an effort to keep our municipal clients apprised of new case law we have summarized a recent United States Supreme Court decision that can have a direct and immediate effect in the workplace. This decision changes and relaxes the definition of what is considered a retaliatory action by an employer.

Background

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against any individual based on that individual's race, color, religion, sex or national origin. Another section of the Civil Rights Act forbids an employer from retaliating against an employee or job applicant if that individual opposed any practice made unlawful by Title VII or made a charge, testified, assisted, or participated in a Title VII proceeding or investigation. (**CAUTION**: An employer can be liable for retaliation even if the underlying complaint of discrimination is without merit. Many an employer has paid dearly on charges of retaliation while at the same time obtaining a defense verdict on the discrimination cause of action).

A key element in establishing a case of discrimination or retaliation requires that the victim suffer an "adverse employment action." Until now, in New York State, the definition of an adverse employment action for discrimination and retaliation was the same; however, the United Sates Supreme Court in the *Burlington* case has now lessened the standard for a retaliation claim.

Discussion

The federal courts in New York State have defined an adverse employment action as a materially adverse change in working conditions that must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ··· unique to a particular situation." *Galabya v. New York City Bd. of Educ*. 202 F.3d 636, 640 (2d Cir. 2000).

In a recent case before the Second Circuit, *Fairbrother v. Morrison*, 412 F.3d 39 (2d Cir.2005), decided before *Burlington*, a woman complained that she was retaliated against by her employer. She alleged that she was removed from a unit in the hospital and re-assigned as a floater, received unsatisfactory evaluations and her worker's compensation claim was held back though eventually paid. According to the Second Circuit, this was not considered retaliation as it did not rise to the level of an adverse employment action as per the definition at the time. Had this Second Circuit case been decided after *Burlington*, the court, however, might have reached a different conclusion.

U.S. Supreme Court Decision

In *Burlington*, Sheila White was hired as a track worker by Burlington Railway and was the only woman working on tracks in the Maintenance of Way Department. She was hired because of her past experience in working with forklifts and assigned to work on a forklift. After a few months with the company, White's supervisor made sexually disparaging remarks to her in front of her male colleagues. White lodged a complaint and, after an internal investigation, her supervisor was suspended for ten days.

Shortly thereafter, White was removed from her forklift duties and assigned to standard track laborer tasks. Unlike the forklift assignment, the new work involved lifting objects by hand. White claimed that her

reassignment was in retaliation for reporting her supervisor. A few days after she filed this complaint, White was in a minor dispute with her immediate supervisor and was suspended for 37 days without pay for being insubordinate. However, an internal investigation disclosed that White was not insubordinate and she was returned to her position and given back-pay to make up for the suspension.

White filed a federal lawsuit alleging that Burlington retaliated against her by (1) changing her job responsibilities and (2) suspending her without pay for 37 days. Under the Second Circuit definition in the *Galabya* and *Fairbrother* cases, this would most likely not be considered an adverse employment action, and therefore, White could not have established a primae facie case.

The New Standard

In finding White's employer liable for retaliation, the Supreme Court held that the standards for an adverse employment action in discrimination and retaliation are different. To be adverse in a retaliation case, all that is required is 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." In other words, an adverse employment action in retaliation can fall well short of the standard required for discrimination.

In time, as more retaliation cases go before the Second Circuit, the Second Circuit will further define and illustrate what action(s) could, as a matter of law, be considered significant enough to dissuade a reasonable worker from making or supporting a charge of discrimination and thus give employers some guidelines to obey. Until then, we should be guided by the words of the Supreme Court. Effective enforcement of anti-discrimination laws can only be expected if employees feel free to approach their employers without fear of any reprisals. This can include reprisals by employers that go beyond the workplace. If an employer does something that would dissuade a reasonable employer from reporting discrimination, that would be considered retaliation. The workplace should be a location where the respect of the dignity of all workers is encouraged. This cannot be accomplished if reporting discrimination is punished.

Examples of facts that the Court cited which could be actionable are:

- A minor scheduling change to an employee with childcare problems;
- A refusal by a supervisor to invite an employee to a weekly training lunch;
- Changing White's assignment (from the forklift) to something physically more difficult, even though salary, benefits, and title were not affected; and
- Withholding White's pay for 37 days. (Even though White was eventually paid, holding back that amount of money could cause hardships for the worker outsider of the workplace [this is similar to what the Second Circuit had previously ruled was not an adverse employment action]).

Summary

Obviously, the best practice is to refrain from retaliating against an employee for making or being involved in a claim of discrimination. If you are planning on transferring or making any changes to an employee who has made a complaint of, or was a witness to, discrimination, ask: if threatened with that change, would it make a reasonable person reluctant to report discrimination. If so, the court could consider such an act adverse for the purposes of retaliation.

Often situations in the workplace are not so cut-and-dry. There are times when an employer faces a complaint after taking legitimate action against a poor or ineffective worker. The new standard does not mean that an employee who files a complaint can now do whatever he or she wants in the workplace with impunity. However, taking action against an employee who makes a complaint has become a potential mine field.

Now, more than ever, municipal employers should consult with counsel immediately upon receiving a complaint of discrimination either through their local government, the State Division of Human Rights or the U.S. Equal Employment Opportunity Commission. Upon receiving your complaint, we will ensure that your rights as an employer are protected and will zealously defend you in any federal employment actions.