

SUPREME COURT ENHANCES PROTECTION AGAINST RETALIATION

In a unanimous decision, the Supreme Court recently provided employees who complain of discrimination or harassment with greater protection from retaliation.

The decision establishes a broader definition of retaliation and an employee-friendly legal standard. The Court held that the standard for evaluating a retaliation claim is whether the action against the employee “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

The decision interprets Title VII of the Civil Rights Act of 1964. Title VII forbids retaliation against an employee or job applicant who has “made a charge, testified, assisted, or participated in: a Title VII proceeding or investigation.”

However, federal appellate courts have struggled with the scope of Title VII’s anti-retaliation provision and what it means to retaliate against an employee. Many federal appellate courts set a strict standard making retaliation cases difficult to win. This decision lowers the standard and will likely result in a continuing increase in retaliation claims and more cases that get to the jury.

The broad interpretation by the Court was necessary, according to Justice Stephen G. Breyer, to effectuate the purpose of the statute: “Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act’s primary objective depends.”

Complaining Employee Removed From Duties

The case involved Sheila White, a forklift operator and the only woman in her department at Burlington, Northern, & Santa Fe Railway Co. (Burlington). In 1997, White complained to Burlington that her supervisor had made insulting and inappropriate remarks to her and repeatedly told her that women should not be working in his department. Burlington conducted an internal investigation and suspended the supervisor for ten (10) days.

White was told about the discipline. At the same time, she was told that she was being removed from forklift duty and assigned to perform only standard track laborer tasks. She was told that the reassignment reflected co-worker’s complaints that “a more senior man” should have the forklift operator position.

White filed an EEOC charge for gender discrimination based on her reassignment. A couple of months later she filed a second retaliation charge claiming she had been subject to increased surveillance and monitoring of her daily activities. A few days later, a work disagreement between White and her immediate supervisor resulted in her indefinite suspension for insubordination.

She filed an internal grievance that vindicated her and gave her back pay. However, White filed an additional EEOC charge based on the suspension.

Jury Awarded Damages; Burlington Appealed

White sued Burlington for retaliation based in part on the transfer and the suspension. After a one-week jury trial, she won \$43,500 in damages plus medical expenses and attorney fees.

On appeal, the confusion over the correct standard to apply in retaliation cases became apparent. A divided three-judge panel initially reversed the judgment against Burlington on the retaliation claims. However, the *en banc* court subsequently upheld the judgment for White, but disagreed on the correct standard to apply.

Two Questions Before The Court

The Supreme Court granted review and recognized the split between the circuits on the standards. The court addressed two fundamental questions: (1) Does Title VII's protection against retaliation only apply to actions that are related to employment or occur at the workplace?; and (2) How harmful must the action be to constitute retaliation?

Court Holds No Link to Employment or Workplace Required

As for the first question, this case lowered the retaliation standard by holding that the anti-retaliation provision of Title VII is not confined to those actions that are related to employment or occur at the workplace. The Court held that limiting the protections to only work or employment related actions would defeat the purpose of the anti-retaliation provision.

For example, the Court cited a case where an employee filed a false criminal charge against an employee who had complained about discrimination.

Actions Must Be Materially Adverse

As for the second question, the Court recognized that numerous federal courts have held that the employee must show that there was an "adverse employment action" that materially affected the terms and conditions of employment – such as a firing or cut in wages. Departing from this strict standard, the Ninth Circuit measures retaliation by any employer action that is "reasonably likely to deter" an employee from complaining about discrimination. This standard is the most protective of workers.

Resolving this split, the Court held that the employee must show that the employer's action was "materially adverse to a reasonable employee or

applicant.” In adopting this standard, the Court emphasized that “[i]t is important to separate significant from trivial harms, ”contrasting“ employer interference with ‘unfettered access to Title VII’s remedial mechanisms, ”which is actionable, with “the ordinary tribulations of the workplace,” which generally are not. Petty slights and minor annoyances are to be excluded.

Reasonable Employee Standard

The Court adopted an objective standard that requires a retaliation plaintiff to show that the challenged action “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The focus is on the materiality of the employer’s actions and “the perspective of a reasonable person in the plaintiff’s position.”

The Court noted that the significance of any act of retaliation might depend upon the particular circumstances. The opinion reflected the view that anti-retaliation law must be flexible enough to account for a diverse workplace.

For instance, a shift change might not matter to some employees, but “may matter enormously to a young mother with school age children.”

Even something seemingly trivial like refusing to invite an employee to lunch could be retaliation, according to Breyer, if it is “a weekly training lunch that contributes significantly to the employee’s professional advancement.”

In the *Burlington* case, the employee was suspended for thirty-seven (37) days and then reinstated with back pay. The Court held that a reasonable employee would find a month without a paycheck to be a serious hardship. Further, an indefinite suspension could well act as a deterrent to the filing of a discrimination claim, even if the suspended employee eventually receives back pay. Moreover, there was considerable evidence that the transfer was to a position that was more arduous and dirtier, and that the forklift position was considered a better job.

Effect on California Employers

While more favorable to employees in the rest of the nation, the standard adopted by the Supreme Court is actually less favorable to employees than the standard that had been used by the Ninth Circuit. The Ninth Circuit had the most employee-friendly standard of any of the circuits. Thus, in some aspects, this case actually provides greater protection to California employers.

Regardless, retaliation claims are likely to continue to rise. Retaliation claims under Title VII nearly doubled between 1992 and 2005 according to the EEOC and account for about 25% of the EEOC’s caseload.