

L a b o r & E m p l o y m e n t
A L E R T

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SUPREME COURT BROADENS DEFINITION OF RETALIATION

In *Burlington Northern & Santa Fe Railway Co. v. White*, the United States Supreme Court ruled that the test for determining whether a challenged action constitutes unlawful retaliation is whether a reasonable employee would have found such action to be a “materially adverse action.” The Court described this as an action that “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Under this objective test, the fact that a challenged action in fact did not dissuade an employee from asserting or pursuing a claim is irrelevant. What matters is whether there is evidence sufficient for a jury to conclude that the challenged action *might* dissuade a “reasonable employee” from asserting or pursuing a claim. This ruling is likely to prompt more frequent assertion of retaliation claims and to make it more difficult for employers to defend such claims and to manage employees who have asserted discrimination or harassment claims.

The plaintiff in *Burlington Northern* alleged that her employer committed two acts of retaliation against her for her prior complaints of gender discrimination: first, in removing her as a forklift

operator and reassigning her to laborer duties, and second, in suspending her without pay for insubordination. Over the employer’s protestation, the jury found that that both actions were retaliatory. The employer did not challenge the jury’s findings on motive to the Supreme Court. Rather, the employer argued that its actions were not harmful enough to the plaintiff to be actionable retaliation, as the reassignment did not cause any loss of pay or benefits, and the employer had restored all of the plaintiff’s lost wages from her suspension to resolve her internal grievance.

Rejecting both contentions, the Court found sufficient evidence to support the jury’s verdict that each challenged act was unlawful retaliation under the “materially adverse” standard that it adopted.

On the reassignment claim, the Court cited evidence that the laborer duties were more arduous and less desirable than her former duties. While not all reassignments are actionable, the Court said, a jury could reasonably conclude that a reassignment to harder and less desirable duties is

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materially adverse. The Court emphasized that “context matters”: what may be material to one employee may not be material to another. For example, “[a] schedule change . . . may make little difference to many workers, but may matter enormously to a young mother with school age children.”

On the suspension claim, the Court found the evidence of the emotional strain the plaintiff suffered from having no job or income for 37 days reasonably supported the jury’s conclusion that the suspension was materially adverse, despite her reinstatement with full back pay 37 days after the suspension began.

Conclusions. Although the Court opined that the newly adopted standard should “separate significant from trivial harms,” the decision will encourage employees to claim retaliation over changes an employer may not consider significant and will make it harder both to defend such claims and to manage employees who have complained of work-related discrimination or harassment.

Recommendation. Employers should proceed with even greater caution than before when disciplining an employee who has complained of discrimination or when taking any other action that might conceivably have an adverse effect on such an employee. Before taking action against a complainant, the employer (1) should be sure that the reasons for taking the action are legitimate, nondiscriminatory and provable, and (2) should consider whether a jury could decide that taking such action could dissuade a reasonable employee from making or pursuing a claim. *Burlington Northern* also provides an important lesson that while taking remedial action in response to an internal employee complaint of discrimination or harassment may limit liability, it will not necessarily eliminate liability.

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