



# Employment Discrimination and Retaliation Claims: A Legal Analysis of the Supreme Court Ruling in *Burlington Northern and Santa Fe Railway Co. v. White*

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## Summary

This report discusses *Burlington Northern and Santa Fe Railway Co. v. White*, a recent case in which the Supreme Court considered the scope of the retaliation provision under Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Specifically, the Court held that the retaliation provision, which bars employers from retaliating against employees who complain of discrimination, is not limited only to activity that affects the terms and conditions of employment, but rather covers a broader range of actions that would be materially adverse to a reasonable employee or job applicant. This new standard is significant because it clarifies the protection from retaliation that is available to employees who complain of discrimination and makes it easier for workers to sue for retaliation.

## **Contents**

Background .....	1
Title VII and Retaliation Claims .....	1
The Supreme Court’s Decision in <i>Burlington Northern</i> .....	2
Conclusion.....	4

## **Contacts**

Author Contact Information .....	4
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In June 2006, the Supreme Court issued its decision in *Burlington Northern and Santa Fe Railway Co. v. White*,<sup>1</sup> a case that involved questions about the scope of the retaliation provision under Title VII of the Civil Rights Act, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.<sup>2</sup> In a 9-0 decision with one justice concurring, the Court held that the statute's retaliation provision encompasses any employer action that "would have been materially adverse to a reasonable employee or job applicant."<sup>3</sup> This standard, which is much broader than a standard that would have confined the retaliation provision to actions that affect only the terms and conditions of employment, generally makes it easier to sue employers if they retaliate against workers who complain about discrimination. Under the Court's interpretation, employees must establish only that the employer's actions might dissuade a worker from making a charge of discrimination. This means that an employee may successfully sue an employer for retaliation even if the employer's action does not actually result in an adverse employment action, such as being fired or losing wages.

## Background

In 1997, Sheila White, the only woman working in her department at one of Burlington Northern's train yards, complained to company officials that her supervisor had repeatedly made sexist comments on the job. Although her supervisor was ordered to attend a sexual harassment training session, White was simultaneously reassigned to a less desirable job and later was suspended without pay. The company eventually reinstated White to her original position and awarded her backpay, but White sued, claiming that both the reassignment and suspension without pay constituted unlawful retaliation in violation of Title VII.<sup>4</sup>

At trial, a jury agreed with White's claims and awarded her compensatory damages. Initially, a panel of the Court of Appeals for the Sixth Circuit reversed the judgment,<sup>5</sup> but the full court, sitting en banc, vacated the panel's decision.<sup>6</sup> Although the Sixth Circuit ultimately upheld White's retaliation claims, the court, like other federal appellate courts to consider Title VII retaliation claims, differed over the standard to apply to such claims, and the Supreme Court granted review to settle this question.

## Title VII and Retaliation Claims

Under Title VII, it is unlawful for an employer to, among other things, "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>7</sup> In other words, Title VII's anti-discrimination provision protects an employee only from discrimination that is employment-related. In contrast, Title VII's

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<sup>1</sup> 126 S. Ct. 2405 (2006).

<sup>2</sup> 42 U.S.C. § 2000e-2(a).

<sup>3</sup> *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2408 (U.S. 2006).

<sup>4</sup> *Id.* at 2409-10

<sup>5</sup> *White v. Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443 (6<sup>th</sup> Cir. 2002).

<sup>6</sup> *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789 (6<sup>th</sup> Cir. 2004).

<sup>7</sup> 42 U.S.C. § 2000e-2(a).

retaliation provision prohibits an employer from discriminating against any employee or job applicant “because he has opposed any practice made an unlawful employment practice ... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under Title VII.<sup>8</sup> Since the enforcement of Title VII relies in part on the willingness of employees to report discrimination, this provision appears designed to prevent employers from undermining the anti-discrimination purpose at the heart of Title VII.<sup>9</sup>

These differences in statutory language led to disagreements among a number of courts about whether a retaliation claim, like a discrimination claim, must be based on an employment-related action, as well as about how harmful an employment action must be to constitute retaliation. For example, some appellate courts have required a close relationship between the retaliatory action and employment by applying the same standard to retaliation claims that they apply to discrimination claims, namely that the employer’s action must have an adverse effect on the terms and conditions of employment.<sup>10</sup> Other courts have applied an even stricter standard that recognizes retaliation only when an employer’s conduct relates to significant employment-related actions such as hiring, firing, or compensation.<sup>11</sup>

In contrast, other circuit courts have taken a more expansive view that applies a different standard to retaliation claims than is applied to regular discrimination charges. For example, several courts have required simply that employees demonstrate that the challenged action would have dissuaded a reasonable employee from making a complaint of discrimination.<sup>12</sup> The Supreme Court granted review to resolve this dispute among the lower courts.

## **The Supreme Court’s Decision in *Burlington Northern***

Ultimately, the Supreme Court agreed with lower courts that had taken a more expansive view of the application of the retaliation provision, holding that the provision encompasses “employer actions that would have been materially adverse to a reasonable employee or job applicant.”<sup>13</sup> The Court relied on both the language and the purpose of the statute to reach this result.

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<sup>8</sup> *Id.* § 2000e-3(a).

<sup>9</sup> The Equal Employment Opportunity Commission received over 22,000 claims of retaliation in FY2004, a figure that has roughly doubled since 1992. See U.S. Equal Employment Opportunity Commission, *Retaliation* (July 19, 2005), <http://www.eeoc.gov/types/retaliation.html>; Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, NY Times, June 23, 2006, at A1.

<sup>10</sup> See, e.g., *White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789 (6<sup>th</sup> Cir. 2004); *Gunten v. Maryland*, 243 F.3d 858 (4<sup>th</sup> Cir. 2001); *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3<sup>d</sup> Cir. 1997).

<sup>11</sup> See, e.g., *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5<sup>th</sup> Cir. 1997); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686 (8<sup>th</sup> Cir. 1997).

<sup>12</sup> See, e.g., *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7<sup>th</sup> Cir. 2005); *Ray v. Henderson*, 217 F.3d 1234, 1242 (9<sup>th</sup> Cir. 2000); *Rochon v. Gonzales*, 438 F.3d 1211, 1217 (D.C. Cir. 2006).

<sup>13</sup> *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2408 (U.S. 2006).

In analyzing the statutory language, the Court noted that the language of Title VII's anti-discrimination provision differs from the language of the retaliation provision "in important ways."<sup>14</sup> Under the anti-discrimination provision, the statutory language limits the scope of the provision to actions that affect the terms and conditions of employment, but "[n]o such limiting words appear in the anti-retaliation provision."<sup>15</sup> As the Court noted, "We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"<sup>16</sup>

Additionally, the Court examined the purposes behind the anti-discrimination and retaliation provisions. According to the Court, the anti-discrimination provision reflects the primary purpose of Title VII, which is to prevent discrimination against certain individuals. The retaliation provision, on the other hand, is designed to ensure that the statute's primary purpose is carried out by preventing an employer from retaliating against employees who report discrimination.<sup>17</sup>

Relying on this difference in purpose, the Court reasoned that Congress did not need to prohibit anything more than employment-related conduct in order to achieve the statute's primary purpose of preventing discrimination. However, the Court noted that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace."<sup>18</sup> As examples, the Court cited a case in which the FBI retaliated against an employee by refusing to investigate death threats made against the agent and his family, as well as a case in which an employer retaliated by filing false criminal charges against a former employee who had complained of discrimination.<sup>19</sup> Therefore, the Court reasoned that the purpose behind the retaliation provision would not be served unless the provision encompassed a broader range of conduct than the anti-discrimination provision, noting that "[a] provision limited to employment-related actions would not deter the many forms that effective retaliation can take."<sup>20</sup>

Given these differences in both the language and purpose of the statute, the Court ultimately held that the retaliation provision is not limited to employer actions that affect the terms and conditions of employment. Instead, the Court established a standard that requires an employee to demonstrate that a reasonable employee would have found the challenged action to be materially adverse. Noting that Title VII's retaliation provision does not protect an employee from the "petty slights or minor annoyances" of the workplace,<sup>21</sup> the Court stated that a challenged action must be significant enough to dissuade the average worker from making or supporting a charge of discrimination. The Court also emphasized that the context matters when determining whether an employer's action rises to the level of retaliation. For example, "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."<sup>22</sup>

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<sup>14</sup> *Id.* at 2411.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2412 (quoting *Russello v. United States*, 464 U.S. 16, 23 (U.S. 1983)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2415.

<sup>22</sup> *Id.*

Applying the broader retaliation standard to White's claim, the Court upheld the original jury verdict in her favor.<sup>23</sup> Although Burlington Northern eventually reversed its decision to reassign White and suspend her without pay, the company's actions were deemed sufficiently harmful to dissuade an employee from reporting discrimination. In a concurring opinion, Justice Alito disagreed with the majority's standard for retaliation claims. Instead, Justice Alito favored a narrower interpretation that would have limited retaliation claims to conduct that affects the terms and conditions of employment, although he would have upheld White's retaliation claim under this standard.<sup>24</sup>

## Conclusion

Although the *Burlington Northern* case involved retaliation against an employee who made charges of sex discrimination, the decision applies more widely to employees who claim retaliation for reporting any kind of discrimination prohibited by Title VII. In addition, because the Court's decision in *Burlington Northern* means that a broader range of employer actions may constitute unlawful retaliation, it should become easier for employees to file retaliation claims. Therefore, the number of Title VII retaliation claims filed with the Equal Employment Opportunity Commission or in federal court may be expected to increase in the future.

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<sup>23</sup> *Id.* at 2416.

<sup>24</sup> *Id.* at 2421.

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