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### The Supreme Court Expands Employee Protection Against Retaliation

A recent decision of the United States Supreme Court is being heralded as a significant victory for employees asserting claims of retaliation. In *Burlington Northern & Santa Fe Railway Company vs. White*, the Court expanded the scope of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 to cover any employer action that a reasonable employee would find to be materially adverse. In particular, the Court explained that an adverse action need not result in a change to the employee's terms and conditions of employment to constitute retaliation.

In *White*, the plaintiff, Sheila White, worked as a track laborer for Burlington Northern and was assigned to operate a forklift as her primary responsibility. White was the only woman in the Maintenance of Way Department, and within a few months of being hired, she complained to the company that she was being subjected to gender discrimination by her immediate supervisor. While the company disciplined the supervisor in response to her complaint, it also removed White from her job as a forklift operator and assigned her to a more arduous task within the same job classification, at the same rate of pay and with the same benefits. A few days later, White and another supervisor had a disagreement, and the company suspended White without pay for insubordination. However, after White invoked the company's internal grievance procedure, Burlington Northern concluded that she had not been insubordinate and reinstated her to her former position with complete back pay.

Nonetheless, White sued her employer for gender discrimination and retaliation. The jury found against her on the claim of discrimination, but found that the company had retaliated against her. Although Burlington Northern argued that it had taken corrective action in response to her grievance and reinstated her with back pay, the jury awarded White \$43,500 in compensatory damages, including \$3,250 in medical expenses, incurred during her suspension. The Court of Appeals for the Sixth Circuit affirmed the jury's verdict.

The Supreme Court agreed to hear the case in order to resolve whether a challenged action has to be employment- or workplace-related to be actionable, and how harmful that action must be to constitute retaliation. In *White*, the Court concluded that for an action to constitute retaliation, it must cause the employee "materially adverse harm that might dissuade a reasonable employee from making or supporting a charge of discrimination." In establishing this new test, the Court

explained that Congress intended for the protection against retaliation to be broader than the protection against discrimination and did not intend to limit the anti-retaliation provision only to actions concerning the employment relationship or the workplace. By way of example, the Court cited to an appeals court decision finding an employer's filing of false criminal charges against an employee to constitute retaliation.

Applying this new standard to the facts of *White*, the Court affirmed the jury's verdict, because a reassignment of job duties can constitute retaliation. Although her new job duties fell within her job description as a track laborer and she continued to receive the same pay and benefits, the Court noted that White presented evidence that the job of operating the forklift was considered a better and less arduous assignment. The Court also held that the suspension constituted retaliation. While Burlington Northern argued that White had received reinstatement and full back pay, the Court affirmed the jury's award of compensatory damages because White and her family had to live for 37 days without income, and many reasonable employees would find a month without pay a serious hardship. As support for this conclusion, the Court noted that White had obtained medical treatment for the physical and emotional hardship caused by her suspension.

The Court's decision in *White* means that an employer can be found to have engaged in retaliation even if the employee's terms and conditions of employment are unchanged. This could include conduct away from the workplace. Recognizing the broad effect of its decision, the Court clarified that trivial harms, petty slights or minor annoyances that often take place at work are not the kinds of incident that would constitute retaliation. It emphasized, however, that courts must consider the entire context of the alleged retaliatory action and must apply an objective, reasonable person standard. By way of example, the Court stated that a supervisor's refusal to invite an employee to lunch is normally a non-actionable petty slight, but explained that excluding an employee from a weekly training lunch that contributed significantly to the employee's professional advancement might be enough to constitute retaliation.

The bottom line for employers is that a myriad of conduct may now constitute retaliation. The employee need not have been fired, disciplined, demoted or suffered a loss of pay or benefits. In the future, employers need to be even more cautious when dealing with employees who have filed claims of discrimination, whether internally or externally. As the Court's decision explains, even a petty slight, when viewed in context, could be deemed unlawful retaliation.

**This Bulletin was prepared by Sheila O'Leary of Foley Hoag LLP's Labor & Employment Law Department. If you would like additional information on this topic, please contact Ms. O'Leary (soleary@foleyhoag.com or 617-832-3044), or contact your attorney at Foley Hoag LLP. For "Alerts and Updates" on other topics, please visit the "Newsstand" link on our website at <http://www.foleyhoag.com/>.**

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