

Supreme Court Broadens Basis for Retaliation Claim

One of the most popular kinds of discrimination claims finding their way into the courts today is that alleging retaliation. The laws (such as, for example, Title VII of the Civil Rights Act of 1964) that prohibit employment discrimination based on race, color, religion, sex, national origin, age, and disability also prohibit an employer from retaliating against a worker who complains about such discrimination. Increasingly, employees who sue an employer for discrimination will add a second claim for retaliation. Though it sounds strange, an employer can be found to have committed retaliation and ordered to pay the employee damages, even though the employee's main discrimination claim is not successful in court.

One issue that has prompted considerable debate involves the question of what an employer must do to be guilty of retaliation. One position, which has been adopted by several federal circuit courts of appeal, is that the employer's action must rise to the level of having some adverse effect on an employee's compensation, terms, and/or conditions of employment. Other appellate courts have taken a more restrictive view, holding that only an "ultimate employment" decision by an employer - that is, one involving a hiring, firing, promotion, etc. - can constitute retaliation. Anything short of discharging an employee or denying him/her a promotion, for example, would not be considered retaliatory action under this view. Still other courts have focused on whether the employer's action would tend to discourage an employee from making or supporting a complaint of discrimination.

The Supreme Court recently resolved this variation in standards by approving the latter view mentioned above. A plaintiff, to bring a retaliation charge, must only show that a reasonable worker would find the employer's allegedly unfavorable treatment "materially adverse," which the Court said means that it would be likely to dissuade the worker from complaining about discrimination or assisting another worker with a discrimination complaint. *Burlington Northern and Santa Fe Railway Co. v. White*, No. 05-259 (U.S. Jun. 22, 2006). The Court emphasized that this was an objective standard. The question is not whether the employee actually, perhaps because of unusual sensitivities, was deterred by the employer's action but whether a "reasonable" employee would be deterred. The Court further noted that the particular facts of a given situation must always be considered, giving as an example the fact that a work schedule change, while not "materially adverse" to many workers, might be so to a "reasonable" female employee with school-aged children.

This ruling is "employee" friendly. It broadens considerably the kind of adverse treatment of an employee, who has raised or is supporting a discrimination complaint, that will qualify as employer "retaliation." For that reason, the *Burlington* case is expected to increase the already rising tide of retaliation complaints faced by employers.