Supreme Court expands scope of Title VII retaliation claims
By Ricki E. Roer

Retaliation claims have always been some of the most difficult employment claims for employers to handle, particularly where the employee making the claim remains actively employed. The United States Supreme Court’s recent decision in the Burlington Northern & Santa Fe Railway Co. v. White case just enlarged the scope of these claims.

In a rare unanimous decision the United States Supreme Court has definitively ruled that the scope of Title VII’s retaliation provisions is broader than the scope of Title VII’s anti-discrimination provisions. The Burlington decision clarifies that any harm individual employees experience because they opposed discriminatory practices is potentially a basis for a retaliation claim, including actions not directly related to their employment or actions taken that harm employees outside of the workplace.

A broad reading of the scope of the anti-retaliation provisions is required to fulfill the “primary purpose” of the legislation, which is “unfettered access to statutory remedial mechanisms.” The Burlington Court confirmed that Title VII provides “broader protection for victims of retaliation than those whom Title VII primarily seeks to protect, namely victims of race-based, ethnic-based, religion-based, or gender-based discrimination.”

Rejecting prior Circuits holdings that an employee was required to establish a tangible employment action or an ultimate employment decision to state a retaliation claim, the Burlington Court set a new standard for actions falling under the scope of the Title VII’s anti-retaliation provisions. “A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

The Court specifically stated that a “material adversity” is required because “it is important to separate significant from trivial harms. Title VII . . . does not set forth a general civility code for the American workplace . . . normally petty slights, minor annoyances, and simple lack of good manners will not create” the basis for a retaliation claim.

In the Burlington case, the employee, Sheila White, claimed a job assignment which was undisputedly within the job description of her position, and a 37-day suspension for which she received full back pay and benefits, qualified as potentially retaliatory acts. The Court agreed. Ms. White was the only woman in her department. She was hired as a track laborer and soon thereafter was assigned to primarily operate as a forklift driver. A few months after she was hired in 1997, Ms. White complained of sexual harassment by her immediate supervisor. Ms. White’s complaint was investigated, and it was determined that her immediate supervisor had acted inappropriately and the supervisor was suspended for 10 days and ordered to attend sexual harassment prevention training.

At the time Ms. White was told about the actions taken regarding her complaint, she was also told that her primary duties would now be standard track laborer duties. Ms. White was told that this transfer was being made because other employees complained that White was given the forklift job over more senior employees. Although standard track laborer duties were part of her job description, these standard duties were more physically demanding and dirty. Approximately six months later, Ms. White was suspended for insubordination. Ms. White’s pay was withheld for 37 days. She was eventually found not to have been insubordinate and was given back pay.

The Burlington Court held that both of these actions qualify as potential bases for a retaliation claim: being forced to live without pay for over a month, even if the plaintiff is made whole, and reassignments. The Court noted that while a reassignment of job duties is not automatically actionable, whether a particular reassignment is a retaliatory act needs to be judged upon the facts of the particular case and judged from the perspective of a reasonable person in the plaintiff’s position.

The Burlington case, both by the expansion of the scope of retaliation claims and by setting a new standard for their assessment, adds several important new dimensions to the defense of these claims. The attorneys of Wilson Elser’s National Employment Group can assist you with addressing these new aspects of retaliation claims.