

Labor Law Release

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The Supreme Court Makes Retaliation Claims Easier

Over the last few years, we have provided you with training to avoid claims of retaliation. In California, the standard has been that the retaliation must result in a substantial adverse change in the terms and conditions of the plaintiff's employment. Any change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1445.)

The United States Supreme Court recently addressed what level of action that is sufficient to constitute "adverse" action under federal law. (*Burlington Northern & Santa Fe Ry. v. White* 2006 LEXIS 4895.)

Sheila White was a forklift driver and the only woman in the company's maintenance department. After she complained to BSNF of gender discrimination, she was reassigned to a less desirable laborer position, although she retained her same pay and benefits.

White filed a complaint with the EEOC about the demotion. She was later accused by BSNF of insubordination and suspended without pay. More than a month later, the company found she hadn't been insubordinate, reinstated her and awarded her back pay.

White sued BSNF for retaliation based on the transfer and the suspension. The jury awarded her \$43,500 in damages plus medical expenses and attorneys' fees.

Applying a much broader test for retaliation than had previously existed in many federal circuits, the Supreme Court ruled that the company's decisions to transfer and to suspend Ms. White to a less desirable job established "adverse action" sufficient to sustain a claim of retaliation.

The court concluded that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making or supporting a charge of discrimination constitutes retaliation.

The Court attempted to limit the effect of its ruling by stating that the employer's conduct must be "materially" adverse to rise to the level of actionable retaliation. The Court made reference to the differences between "significant" harm and "trivial" harm or "ordinary tribulations" ruling that only the significant harms are actionable.

What constitutes a trivial harm or ordinary tribulation? The Court listed the following actions: Personality conflict; snubbing; sporadic abusive language; gender-related jokes; and teasing. In each case, the court will focus "on the materiality of the employer's action and the perspective of a reasonable person in the plaintiff's position." While the Court thinks this is an effective test, we believe that it will allow more employees to file suit. Moreover, many of these claims will result in trials and will not be dismissed on summary judgment. In essence, the Court's decision increases an employer's exposure and the cost of defending a lawsuit.

What impact does this have on business owners and human resources? This is a very serious ruling. Consider carefully before taking any action against an employee who has complained of harassment or who has participated in an administrative or civil proceeding. It will be necessary for employers to adequately document deficiencies in performance unrelated to complaints of discrimination and training managers on what constitutes actionable retaliation.

This article cannot substitute for legal or human resource advice in any particular situation. We encourage you to contact us if you have concerns or questions.

This is not intended as a complete analysis of the subject matter, or legal advice on any specific matter. Contact us if you have specific questions or need further assistance.