

## Employers should brace for spike in retaliation claims

By Allen Smith



In recent years, most employment law from the Supreme Court has been "moderately favorable for employers," but a June 22 ruling that an employer was liable for damages for retaliation is "about as employee-friendly as it could be," according to Joel Rice, a management attorney with Fisher & Phillips in Chicago. He said he was surprised by the court's unanimous ruling, telling *HR News* that "it certainly will encourage a greater number of disgruntled employees to consider retaliation claims."

The ruling is "guaranteed to generate more litigation," agreed Ann Reesman, general counsel for the Equal Employment Advisory Council. She described the court's standard for determining whether employer conduct is unlawful retaliation "a legal fiction." The reality for employers in the wake of the ruling should be more training for managers to be "very careful and deliberate when making employment decisions," Reesman remarked in an interview.

The case that rose all the way to the Supreme Court involved Sheila White, who was the only female forklift operator at the Tennessee Yard of Burlington Northern & Santa Fe Railway Co.

When she was hired, she started work as a track laborer, removing and replacing track components, transporting track material, cutting brush and clearing litter and cargo spillage from the right of way. But soon after she started, a co-worker who had previously operated the forklift left, and operating the forklift became her main responsibility.

White said her supervisor repeatedly told her women should not be working in the maintenance-of-way department and allegedly made insulting and inappropriate remarks to her in front of male colleagues. Burlington suspended the supervisor for 10 days and ordered him to attend sexual harassment training. However, White was removed from forklift duty and assigned to perform only standard track laborer tasks. In reassigning her, the roadmaster said that in light of co-worker complaints a "more senior man" should have the "less arduous and cleaner job" of forklift operator.

White sued for sex discrimination under Title VII, alleging retaliation. After her claim was filed, a new immediate supervisor disagreed with her about which truck should transport White from one location to another. The supervisor claimed she was insubordinate and suspended her. She invoked the internal grievance procedures, which led to a conclusion that she had not been insubordinate and an award of back pay for the 37 days she was suspended. White filed an additional retaliation charge as a result of the suspension.

A jury found in White's favor on the retaliation claim and awarded \$43,500 in compensatory damages and \$3,250 in medical expenses, and the 6th Circuit ultimately affirmed.

### **Bar is set low**

On appeal, the Supreme Court affirmed. The company and the solicitor general argued that there should be a link between the challenged retaliatory action and the terms, conditions or status of employment for there to be unlawful retaliation.

But the court adopted a lower standard, determining that Title VII's prohibition on retaliation provides broad protection beyond actions directly related to employment if the actions would dissuade a reasonable worker from bringing a discrimination charge. This standard is consistent with rulings in the 7th Circuit and the D.C. Circuit as well as Equal Employment Opportunity Commission guidance.

Applying this standard, the Supreme Court concluded that Burlington retaliated against White unlawfully. The court rejected Burlington's argument that a reassignment of duties could not be retaliation when the former and present duties fell within the same job description. "We do not see why that is so," the court stated. "Almost every job category involves some responsibilities and duties that are less desirable than others."

In addition, the court rejected Burlington's argument that the suspension was not retaliatory when the company ultimately reinstated her with back pay. The court observed that White and her family had to live for 37 days without income, referring to her testimony that the suspension resulted in "the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. ... I got very depressed." So, the jury's determination that the suspension was materially adverse was reasonable, the court ruled.

"Context matters," the court stated. "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." And in another hypothetical, it noted that "a supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination" (**Burlington Northern & Santa Fe Railway Co. v. White, No. 05-259 (2006)**).

Reesman said she was "surprised by what a low threshold" the court set for unlawful retaliation. But employers can't react by treating anyone who claims discrimination with kid gloves, she said, because "you can't run a business that way."

Instead, employers should provide "booster training for managers and supervisors" that focuses on "making good, job-related job decisions and documenting it," she said.

Rice reflected that "the lesson is that retaliation claims are probably a bigger concern than the original discrimination claim itself." As a result, managers need to "tread very carefully" in response to discrimination claims, look into them, and satisfy the employee that the claim is taken seriously, "plus be careful with its actions with the employee and make sure they are based on sound business reasons.

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