



Retaliation Claims Expected To Increase

U.S. Supreme Court Creates New Broad Test for Defining Retaliation in *White v. Burlington Northern & Sante Fe Railway Co.*

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The Supreme Court upheld a jury's award of damages for retaliation where a female worker, after lodging a sex-discrimination complaint with her employer, (1) was transferred without reduction in pay and within her existing job description to less desirable duties, and (2) was suspended for insubordination related to another incident but was returned to work by the employer after investigation, with full back pay.

According to the Supreme Court, retaliation comes in all forms, and can be actionable even if it does not include hiring, firing, promotion or permanent loss of pay.

What is the new test?

Any action that is materially adverse to an employee who has complained of discrimination and that would dissuade a reasonable worker in the employee's position from making or supporting a charge of discrimination can constitute actionable retaliation. The actionable conduct is not confined to that which is related to employment or occurs or causes harm in the workplace.

How does the new test change the workplace?

In many circuits, including the 8th Circuit of which Minnesota is a part, the test had been that in order to prove retaliation, the employee must show job-related adverse conduct by the employer and that it is an ultimate employment decision, i.e., acts such as hiring, granting leave, discharging, promoting and compensating. Under the old test, it was less likely that a transfer without reduction in pay, failure to invite to certain lunches or meetings, changes in schedule, changes in duties or similar actions, not accompanied by economic harm to the employee, would constitute actionable retaliation. Now, depending on the circumstances of the case, those and other actions could constitute actionable retaliation.

What are some examples?

An employer changes an employee's job duties, but the duties are contained in the employee's existing job description. Where the new duties are dirtier, harder, less prestigious, and perceived by other employees as being worse, the change constitutes actionable retaliation, even though there is no reduction in pay and the new duties are within the same job description as the former duties.

An employee is suspended for over 30 days without pay while a claim against her of misconduct is investigated. Upon conclusion of the investigation, the employer, on its own volition, returns the employee to work and pays full back pay. The suspension constitutes actionable retaliation because a reasonable employee would find a month without a paycheck to be a “serious hardship.”

A change in schedule, e.g., from flexible scheduling to fixed-hour scheduling, may not matter to some employees, but “may matter enormously to a young mother with school age children,” and in that circumstance constitutes actionable retaliation.

A refusal to invite to lunch is usually trivial, but exclusion from a weekly training lunch might well deter a reasonable employee from complaining and therefore constitute actionable retaliation.

What steps should an employer take?

Management and supervisor training should include a strong component on discrimination, harassment and retaliation.

Discrimination and harassment policies should be reviewed and updated to clarify the definition of retaliation and to ensure that it is absolutely prohibited.

Performance reviews should be conducted at least annually, and should be written, honest and objective.

Discipline and other employment actions, and the basis for them, should be well-documented.

Where action is taken that affects an employee’s job, such as a change of hours, transfer or change in lines of authority, the business purpose for the action should be documented.

If any employment action concerning an employee who has complained of discrimination, or who has been a witness in a discrimination investigation, is contemplated, an objective third party, such as an HR professional or attorney, should review the proposed action and surrounding facts.

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