

WHAT CONSTITUTES REPRISAL PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT

As many of you may be aware, the Federal and State courts have been struggling with what constitutes an adverse employment action when evaluating Title VII reprisal cases. Some courts have been requiring strict tangible damages and others have broadened their definitions. In an attempt to better define this issue, the U.S. Supreme Court has now granted certiorari to *Burlington Northern and Sante Fe Railroad Company v. White*, a Title VII retaliation case where the very issue was what constituted an adverse employment action. The high court has limited its grant of certiorari to the petition's first question, "whether an employer may be held liable for retaliatory discrimination under Title VII for any "*materially adverse change*" in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held; for any adverse treatment that was "reasonable likely to deter" the plaintiff from engaging in protected activity (as the 9th Circuit held); or only for an "*ultimate* employment decision" (as two other courts of appeals hold).) *Burlington Northern*, (Dkt No 05-259).

To better describe the situation, you need to know the background facts. In this case the employee, Sheila White, was hired to operate a forklift and was the only female working in her department. At trial, her immediate supervisor admitted that he treated her differently because of her gender and that he didn't believe his department was an appropriate place for women to work. Additionally, another coworker admitted during trial that there was a general anti-woman animus among employees at the worksite. On top of this evidence there was uncontradicted evidence that White had no trouble performing her job. One supervisor was forced to admit that he never received a complaint about her performance. *White v. Burlington North*, 85 EPD Section 41,633.

After working for the company for several months, White complained to management about specific incidents of sexual harassment committed by her supervisor. The company conducted an investigation and suspended the supervisor for 10 days in addition to requiring the supervisor to attend a training session about sexual harassment. During the meeting between management and White to resolve her internal sexual harassment complaint, White was told by her male supervisor that she was being removed from her job, as forklift operator, and reassigned to a standard track laborer job because of her coworker's complaint. However, she was told that her pay and benefits would remain the same but her new job would be more arduous and dirtier than the prior forklift position.

At this time, White filed an EEOC sex bias charge. A short time after filing her EEOC charge she was suspended for 37 days without pay for alleged insubordination relevant to her new male supervisor. The Company did conduct an internal investigation regarding her 37 day unpaid

suspension after the fact and determined that White had not been insubordinate and should not have been suspended. As a result, the Company reinstated her with full back pay.

When the jury reviewed this evidence they returned a verdict in the employer's favor on the sex bias claim and in the employee's favor on the retaliation claim. The case was then appealed to the Sixth Circuit Court to define what constituted an adverse employment action. The Sixth Circuit affirmed in part and remanded in part the lower court proceedings. The Sixth Circuit did note that Plaintiffs are required to prove the existence of an "adverse employment action" to support any Title VII claim in order to prevent lawsuits based on trivial workplace dissatisfactions. However, the Sixth Circuit recognized that this particular case required the court to further define the meaning of "adverse employment action" for purposes of Title VII.

The Sixth Circuit examined its own decision history regarding defining adverse employment action and reaffirmed its definition held in *Kocsis v. Multi-Care Management, Inc.* (3 ADD Section 3-122). In *Kocsis* the Circuit Court held that a Plaintiff claiming employment discrimination must show that she suffered a materially adverse change in the terms of her employment and that a mere inconvenience, alteration of job responsibilities, or a bruised ego would not be enough to constitute an adverse employment action. The Court analyzed that reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims. However, the Court did not rule out the prospect that a reassignment without salary or work hour changes could be an adverse employment action if it constituted a demotion evidenced by a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indicators that might be unique to a particular situation.

The Sixth Circuit then reviewed the decision by the employer in the case of White to suspend her for 37 days without pay and concluded that the suspension itself was an adverse employment action even though it was reversed and she was reinstated with back pay. By accepting this definition, the Circuit Court joined the majority of other Circuit Courts and rejected the "ultimate employment decision" standard.

The Sixth Circuit also concluded that White's transfer was also an adverse employment action because her new job as track laborer was dirtier and more arduous than her prior forklift position. Further, the forklift position required more qualifications and had an indication of prestige within the company. The employer's own witnesses testified the employee's transfer occurred because male coworkers resented the employee because she had what was considered a better job. Ultimately, the Sixth Circuit upheld the decision that the Plaintiff had met her burden of establishing reprisal and establishing that she had been subjected to an adverse employment action. It will now be up to the debate of the United States Supreme Court as to whether or not they will support the decision of the Sixth Circuit or overturn it.

How is this case relevant to us? Well hopefully none of us will ever be put in the position of putting up witnesses that will blatantly admit gender discrimination or any other kind of discrimination in the workplace. Further, it would be a much better practice to investigate prior to a suspension of someone who had filed an EEOC charge against you than to suspend and then investigate. The Company in this case did many things wrong which gave the Plaintiff solid

proof of retaliation and a favorable jury verdict. It will be interesting to see what the United States Supreme Court does with this decision, but I caution everyone to broaden their definitions of what an adverse employment action is in the context of the day to day decisions that we make. Common sense and treating people with dignity goes a long way to avoid litigation.