

# Labor Law Bulletin

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Labor and employment law trends  
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July 28, 2006

## U.S. Supreme Court Clarifies Scope of Employer Retaliation Under Title VII

The U.S. Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259 (June 22, 2006), holds that any adverse employment action that would dissuade a reasonable worker from pursuing a charge of discrimination is sufficient to state a claim of retaliation under Title VII. This is the standard used by the U.S. Court of Appeals for the Seventh Circuit (covering Illinois, Wisconsin and Indiana), but is broader than the test applied by other appellate courts. The Supreme Court also reaffirmed that illegal retaliatory action against an employee can occur outside the workplace.

In *Burlington*, the Court held that White's reassignment to less desirable job duties was actionable, even though the duties were within her job description. The Court also found that a 37-day unpaid disciplinary suspension, although later rescinded with full back pay, was an actionable adverse employment action because the suspension occurred over the Christmas holiday, during which she and her family had no income and she did not know whether or when she might return to work.

Whether retaliation is actionable will depend on the particular circumstances of the case. The same employer conduct might be deemed prohibited retaliation as to one employee but not as to another. As Justice Breyer explained, a change in work schedule "may make little difference to many workers, but may matter enormously to a young mother with school age children" and reasonably dissuade the latter from pursuing a charge of discrimination.

*Burlington* should change little for employers in the Seventh Circuit, which already applies the standard adopted by the Court. However, the case clearly opens the door for employees to claim that any employment action they consider adverse, even one that does not have any economic impact amounts to illegal retaliation under Title VII (and likely, other employment discrimination laws).

Avoiding retaliation claims by employees who bring internal or external discrimination complaints has always been a nettlesome problem. *Burlington* re-affirms the need for employers to ensure that any arguably adverse action taken against such an employee is and can be shown to be unrelated to the employee's protected conduct. Company policies should include a strongly worded statement that retaliation for reporting discrimination or harassment, or for participating in an investigation, will not be tolerated and should be reported immediately. When a complaint of discrimination or harassment is made, employers should reiterate this policy to all involved and monitor the situation carefully thereafter.

If you have questions about the *Burlington* decision or retaliation issues generally, please call Bruce Alper, (312/609-7890), Alison Maki (312/609-7720) or any other Vedder Price attorney with whom you have worked.

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