

THE INSIDE PERSPECTIVE

LABOR AND EMPLOYMENT LAW SOLUTIONS FOR EXECUTIVES AND HR PROFESSIONALS



SMITH MOORE LLP
ATTORNEYS AT LAW

June 2006

U.S. Supreme Court Speaks on Retaliation

Some employees, finding it difficult to prevail in direct discrimination cases in today's diverse workplaces, turn to retaliation claims as a way to protest treatment by their employers. How far does such protection extend? Does any differing treatment that the employee perceives as a "slight" constitute actionable retaliation?

In *Burlington v. White*, the Supreme Court addressed that question for Ms. White, a female forklift driver who reported a male co-worker for saying a woman should not be doing her job. Not long after her complaint, the company reassigned Ms. White to a more physically demanding job. The Supreme Court evaluated whether the reassignment was an adverse action over which Ms. White could sue or was simply a job change that did not give her a remedy in court.

According to the unanimous Court, retaliation under Title VII may cover actions by an employer that would be "materially adverse" to a "reasonable" employee or job applicant. If the actions are "harmful to the point that *they could well dissuade a reasonable worker* from making or supporting a charge of discrimination" they may constitute unlawful retaliation. The Court held that the reassignment of Ms. White, even though not unreasonable in a business sense, was "materially adverse" and sufficient to support a retaliation claim.

The Supreme Court's analysis has important implications, including the following:

- An employer may be held liable for retaliation if its treatment of the employee varies from the *status quo* even if it has not taken action, such as a demotion or decrease in pay, that would negatively affect an employee's income or rank within the organization.
- The standard, whether action is harmful enough that it "could well dissuade" an employee from reporting unlawful conduct, is vague, which means that outcomes in retaliation cases will be less predictable for a few years as courts determine the boundaries of the claim.
- More jury trials, and fewer dismissals by judges, will likely occur over the next few years because the key issue—what is harmful enough to dissuade a reasonable person—is the kind of factual inquiry that the court system generally entrusts to juries.

Following the *White* decision, retaliation claims may be more appealing to disgruntled employees. Employers must consider carefully any action that could be perceived as retaliation, particularly if a complaining employee is singled out for different treatment.

TIP

The United States Supreme Court has developed a standard for unlawful retaliation cases that may result in an increase in these claims. Consequently, the Court has given employers even more reason to use great care in making any employment decision that singles out an employee who has recently complained of an unlawful employment practice.



TIP Author - Denise Smith Cline
Smith Moore LLP
Labor and Employment Team

Labor and Employment Team Members

Allen Buckley	(404) 962.1042	Alex Maultsby	(336) 378.5331
Laura Deddish Burton	(336) 378.5566	Jerry Oliver	(919) 755.8710
Will Burton	(336) 378.5421	Patti Ramseur	(336) 378.5304
Denise Smith Cline	(919) 755.8734	Barbara Ruby	(336) 378.5294
Martin Erwin	(336) 378.5327	Beth Brooks Scherer	(919) 755.8790
Mike Kelly	(336) 378.5336	Ed Sharp	(336) 378.5259
Caroline Lock	(336) 378.5341	Julie Theall	(336) 378.5256
Travis Martin	(336) 378.5277	Jeri Whitfield	(336) 378.5270

To send individual email: firstname.lastname@smithmoorelaw.com

For additional information on this or any other labor and employment topic, please contact any member of the Labor and Employment Team.

The firm restricts its practice in the labor and employment area to the representation of management.



www.smithmoorelaw.com

ATLANTA

One Atlantic Center
Suite 3700
1201 West Peachtree Street
Atlanta GA 30309
404.962.1000
404.962.1200 {FAX}

GREENSBORO

300 N. Greene Street
Suite 1400
Greensboro NC 27401
336.378.5200
336.378.5400 {FAX}

RALEIGH

2800 Two Hannover
Square
Raleigh NC 27601
919.755.8700
919.755.8800 {FAX}

WILMINGTON

300 N. 3rd Street
Suite 301
Wilmington NC 28401
910.251.7001
910.251.7007 {FAX}

TIP is a publication of the Labor and Employment Practice Group of Smith Moore LLP.
The information in this TIP should not be interpreted as legal advice with respect to specific situations.