

Burlington Northern & Santa Fe Railway Co. v. White<sup>1</sup>  
Decided by the United States Supreme Court  
June 22, 2006

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Employers can assign workers the job assignments they must perform as a condition of employment. However, when the context of the new assignment looks like an attempt to dissuade an employee from reporting discriminatory action, the reassignment may be unlawful retaliation. This unlawful retaliation occurred in the *Burlington Northern* case.

### What happened in this case?

Sheila White worked for Burlington Northern as a “track laborer.” Sheila was assigned forklift operations as part of her job. Several months after she started this job, her direct supervisor made inappropriate remarks about women operating forklifts. Her immediate supervisor was disciplined, but shortly after she complained about the remarks, Sheila was reassigned to other duties. She was told “in fairness, a more senior man should have the less arduous and cleaner job of forklift operator.” Sheila filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming the reassignment was gender discrimination and retaliation. After this complaint was served on her boss, she was charged with insubordination and suspended for 37 days without pay. Sheila filed a grievance, and as a result, the insubordination determination was reversed and Sheila received her back pay. Sheila filed another complaint with the EEOC seeking damages for her other losses, resulting in this appeal.

### What does the law say about retaliation for filing a discrimination claim?

Federal law prohibits discrimination in the workplace based on gender. (*See* [http://www.dflworkforjustice.com/practice\\_employment.html](http://www.dflworkforjustice.com/practice_employment.html) for more information about anti-discrimination laws and the workplace.) This same law prohibits employers from retaliating against employees that report discrimination. Previously, retaliation generally included a demotion or firing after an employee complained about discriminatory action and brought it to the attention of the employer. Sheila White was not fired or demoted. All of the duties she was asked to perform were part of her job description. She was suspended, but then reinstated and given back pay. The Supreme Court was asked to consider whether Sheila’s assignment to other duties by Burlington Northern could amount to retaliation.

The Supreme Court decided that when looking at retaliation issues, a court may look to actions beyond the harmful acts of firing or demoting someone. The policy behind this decision is that employers should not interfere with an employee’s right to enforce the employment anti-discrimination provisions of the Civil Rights Act. However, not every employer action results in

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<sup>1</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. , 2006 U.S. LEXIS 4895, No. 05-259 (Jun. 22, 2006).

a retaliation claim. The court may consider the act as retaliatory if “a reasonable employee would have found the challenged action materially adverse.”<sup>2</sup> A copy of this opinion is available at <http://www.supremecourtus.gov/opinions/05slipopinion.html>.) In other words, the court must look to the context of the action through the eyes of the “reasonable employee.”

In *Burlington Northern*, the Court found that there was sufficient evidence to support a finding that Burlington Northern had engaged in retaliatory actions against Shelia White. A reasonable employee might be dissuaded from filing a complaint if they thought they might be suspended without pay. In this case Sheila White was suspended without pay. Even though she was reinstated and given back pay, a whole month without pay could easily have a chilling effect on employees considering filing complaints against an employer.

The Supreme Court was unanimous in this decision. Justice Breyer, a President Clinton nominee, authored the opinion. All the justices agreed with the outcome. Justice Alito wrote separately to express his concern about the “reasonable employee” standard.<sup>3</sup> He raised several issues related to the practical challenges of implementing the new standard:

- 1) The standard would not protect the employees exposed to severe discrimination because it would take more to “dissuade” the reasonable employee from reporting the severe discriminatory action. Consequently, the retaliation standard affords greater protection to employees suffering from milder forms of discrimination. Justice Alito considered this outcome perverse to the intent of the statute.
- 2) The standard appears to require the “reasonable employee” to share at least one or more of the discrimination victim’s individual characteristics, e.g. age, gender & family responsibilities. Justice Alito raised concerns about this standard expanding to an unmanageable degree.
- 3) A new causation standard would create confusion. He referred to the court’s opinion where the standard for causation is “[w]hether an employer’s retaliatory act ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”<sup>4</sup>

## What does this mean for employees?

Context really does matter when you are considering filing a retaliation claim. The reasonable employee standard requires the court to look at the situation through objective eyes. This does not mean that everything that happens to you after you complain about discrimination is retaliation, but it does mean the court must consider whether the actions taken by your employer would dissuade the average employee in your circumstance from filing a discrimination complaint. If you have a situation at work where you think your boss is retaliating against you for complaining about discrimination, you may have a legal claim. Contact Deem & López Law Offices at (717) 892-3900, or fill in our contact sheet at <http://www.dflworkforjustice.com/contact.html>.

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<sup>2</sup> *Id.* Slip opinion at 13.

<sup>3</sup> *Id.* Concurring opinion at 5.

<sup>4</sup> *Id.* Concurring opinion at 7.

## What does this mean for employers?

Think carefully about the job reassignments you make after an employee files a discrimination claim. In the right context, even a job reassignment that is part of an employee's present job description may appear retaliatory if it has a chilling effect on reporting discrimination. Make sure your policies are up to date and your supervisors are well trained on how to respond to these sensitive complaints. Contact Deem & López Law Offices at (717) 892-3900 or fill in our contact sheet at <http://www.dflworkforjustice.com/contact.html>.

## What does this mean for attorneys and litigants considering an appeal?

Attorneys and litigants watched this case very carefully as it proceeded through the courts. The District Court found in favor of Sheila White. The 6<sup>th</sup> Circuit Court of Appeals initially reversed the District Court on the retaliation claims. The 6<sup>th</sup> Circuit heard the case *en banc*, vacated the prior 6<sup>th</sup> Circuit order and reinstated the District Court's verdict for Sheila White. Although the 6<sup>th</sup> Circuit ruled in Sheila White's favor, it could not determine the proper standard to apply in retaliation cases. Appellate advocacy, tenacity and creativity were essential. Successful appellate advocacy includes community organizing with various interest groups and developing a consistent legal theory with a clear public policy message. Interest groups filed at least four amicus briefs in this case, and many organizations signed onto these briefs. This level of legal advocacy and strategizing requires a team of attorneys that understand appellate advocacy. Contact Deem & López Law Offices at (717) 892-3900 or fill in our contact sheet at <http://www.dflworkforjustice.com/contact.html>.