Employer Tips As EEOC Urges Return To Low Retaliation Bar

By **Denise Giraudo and Maryam Gueye** (February 9, 2023)

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Almost 17 years have passed since the U.S. Supreme Court's landmark 2006 decision in Burlington Northern & Santa Fe Railway Co. v. White, which sought to clarify the anti-retaliation provision of Title VII of the Civil Rights Act.[1]

Under Title VII's anti-retaliation provision, an employer is prohibited from discriminating against an employee or job applicant because that individual opposed a practice made unlawful by Title VII or because that individual made a charge, testified, assisted or participated in a Title VII proceeding or investigation.[2]

In Burlington Northern, the Supreme Court liberally interpreted this provision to prohibit "employer actions that would have been materially adverse to a reasonable employee or job applicant."[3]

The court specified that materially adverse actions were not limited to those that affect the terms and conditions of employment or occur at the workplace, but added that the actions must be harmful enough to "dissuade a reasonable worker from making or supporting a charge of discrimination."[4]

Nonetheless, years after the Burlington Northern decision, courts are still interpreting the retaliation standard in myriad ways.

In an attempt to achieve uniformity in lieu of the varying interpretations of the retaliation standard, this past year the U.S. Equal Employment Opportunity Commission has been pressuring courts to more closely adhere to the Burlington Northern standard of prohibiting any action that could dissuade a reasonable worker from making or supporting a charge of discrimination.

Still, despite this pressure from the EEOC, there remains no clear standard within the courts.

Current Unsettled Landscape

The ambiguous nature of the Burlington Northern decision has lead lower courts to variously interpret what may constitute a materially adverse employer action.

More serious examples of actions taken by employers that various courts have deemed retaliatory include denial of promotions, refusal to hire, denial of job benefits, demotion, suspension and discharge,[5] work-related threats,[6] warnings and reprimands,[7] negative or lowered evaluations,[8] and transfers to less prestigious or desirable work or work locations,[9] among others.

However, with varying fact patterns, courts are left with great discretion to determine what types of conduct are materially adverse. Indeed, in similar fact patterns, the analysis under Burlington Northern resulted in two different results.

For example, in Geleta v. Gray,[10] a U.S. Court of Appeals for the District of Columbia Circuit case in 2011, the plaintiff filed a claim alleging retaliation under Title VII after he was transferred to a new position after he participated in the investigation of a colleague's complaint of racial discrimination.

During the investigation, the plaintiff submitted a written statement supporting his colleague's claim that she had been racially discriminated against. Shortly thereafter, the plaintiff was transferred to a new position that he claimed had significantly less important responsibilities, despite receiving a substantial pay raise. The court concluded that the plaintiff's complete loss of supervisory responsibilities constituted material adversity.[11]

On the other hand, in applying Burlington Northern to another Title VII retaliation case in Higbie v. Kerry,[12] the U.S. Court of Appeals for the Fifth Circuit ruled in 2015 that an employer moving an employee's desk and modifying his role were not materially adverse actions because, previously, the employee had only an intermittent supervisory role.

The U.S. Court of Appeals for the Sixth Circuit, though, seems to require more egregious actions to rise to the level of material adversity.[13] In Szeinbach v. Ohio State University,[14] the Sixth Circuit held in 2012 that retaliatory accusations of misconduct in a plaintiff's academic research, made in emails to a journal editor and professors at other universities, could be materially adverse.

Similar to the Szeinbach court, the U.S. Court of Appeals for the First Circuit has found that comments to third parties are materially adverse. In 2007, in Dixon v. International Brotherhood of Police Officers,[15] the First Circuit held that comments by a union president on a television program regarding the plaintiff being unfit for her job and implying she would pay a price for her discrimination claim constituted retaliation.

Contrarily, in December 2021 in Stratton v. Bentley University,[16] the U.S. District Court for the District of Massachusetts held that the plaintiff's performance reviews, the alleged reprimands she received and a performance improvement plan she was put on did not "constitute a materially adverse action in the absence of evidence that such events carried tangible, negative consequences."

In 2009 the U.S. Court of Appeals for the Ninth Circuit, in Hellman v. Weisberg,[17] held that a chief judge's actions against a judicial assistant, consisting of social ostracism, reprimand and threat of termination, allegedly made after the assistant participated in an investigation of co-worker's discrimination claim, did not rise to adverse action because they did not interfere with her job duties or cause a material change in the terms of her employment.

Compare that with the U.S. District Court for the District of Idaho's 2012 decision in Gaub v. Professional Hospital Supply Inc.,[18] where the court found it materially adverse when a plaintiff's performance was subjected to intensified scrutiny after he made a complaint and when his co-workers became unresponsive to him, making his job harder.

Given these varying interpretations of Burlington Northern, the EEOC has recently turned its focus to ensuring there is a clear rule for what may constitute a materially adverse action.

In 2022, the EEOC submitted amicus briefs in a number of circuits, arguing that courts are not adhering to precedent set by Burlington Northern and are instead requiring stricter standards to show retaliation. In all of those cases, the EEOC argued that Burlington Northern's standard of prohibiting any action that could dissuade a reasonable worker from

making or supporting a charge of discrimination should always be applied.

Practical Implications for Employers

Based on the varying levels of conduct that can constitute a materially adverse action, it appears that in many circuits, employees have bigger hurdles to jump to establish a prima facie case of retaliation. However, employers should be aware that actions such as termination will always rise to the level of material adversity.

Moving forward, given the pressure from the EEOC for a bright-line rule, it would be prudent for employers to continue to ask themselves whether their actions would dissuade an employee from freely making a complaint about discrimination, and employers should think twice before taking any disciplinary actions against employees who have engaged in protected activity.

In doing so, employers must be cognizant of how they respond to employee behavior or complaints. Precautionary measures can include carefully reflecting on disciplinary measures, recognizing employee-protected activity, conducting thorough investigations, properly following up on complaints and accurately documenting employee issues.

Nonetheless, after all this time, without the Supreme Court providing a clear-cut standard by which employers can easily abide, lower courts will continue to create their own interpretations regarding which actions rise to the level of materially adverse action for purposes of establishing retaliation.

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[1] Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

[2] 42 U.S.C. § 2000e-3(a).

[3] Burlington Northern and Santa Fe R. Co. v. White, 548 U.S. 53 (2006).

[4] Id.

[5] Roberts v. Roadway Express Inc., 149 F.3d 1098, 1104 (10th Cir. 1998) (observing that suspensions and terminations were by their nature adverse).

[6] Planadeball v. Wyndham Vacation Resorts Inc., 793 F.3d 169 (1st Cir. 2015) (holding that a supervisor's multiple threats to fire the plaintiff were materially adverse and actionable as retaliation).

[7] Ridley v. Costco Wholesale Corp., 217 F. App'x 130, 135 (3rd Cir. 2007) (upholding a jury verdict finding that although demotion was not retaliatory, the post-demotion transfer to a warehouse, counseling notices for minor incidents and failure to investigate complaints

about these actions constituted unlawful retaliation).

[8] See, e.g., Walker v. Johnson, 798 F.3d 1085, 1095 (D.C. Cir. 2015) (holding that the denial of a deserved rise in performance rating could be actionable as retaliation).

[9] See, e.g., O'Neal v. City of Chi., 588 F.3d 406, 409-10 (7th Cir. 2009) (holding that alleged repetitive reassignments negatively affecting plaintiff's eligibility to be promoted from sergeant to lieutenant on the police force constituted materially adverse action).

[10] Geleta v. Gray, 645 F.3d 408 (D.C. Cir. 2011).

[11] Geleta v. Gray, 645 F.3d 408, 412 (D.C. Cir. 2011) (holding that the plaintiff's job transfer to a nonsupervisory role with less programmatic responsibilities could constitute a materially adverse employment action).

[12] Higbie v. Kerry, 605 F. App'x 304, (5th Cir. 2015).

[13] Freeman v. Potter, 200 F. App'x 439, 442 (6th Cir. 2006) ("A de minimis employment action is not materially adverse and, thus, not actionable.") (citation omitted).

[14] Szeinbach v. Ohio State Univ., 493 F. App'x 690 (6th Cir. 2012).

[15] Dixon v. Int'l Bhd. of Police Officers, 504 F.3d 73 (1st Cir. 2007).

[16] Stratton v. Bentley Univ., No. 19-CV-11499-DJC, 2021 WL 6098974 (D. Mass. Dec. 23, 2021).

[17] Hellman v. Weisberg, 360 F. App'x 776 (9th Cir. 2009).

[18] Gaub v. Pro. Hosp. Supply Inc., 845 F. Supp. 2d 1118 (D. Idaho 2012).