



## Employment Practices Liability Risk Control ALERT: Are Managers Losing the Ability To Manage?"

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In today's work environment, a simple change of an employee's work assignment and duties can, under certain circumstances, subject an employer to liability. Specifically, when an employee has voiced an objection or engaged in what may be considered "protected activity" such as a complaining of discrimination, harassment or wrongdoing of the employer, a simple change in that person's work assignment or duties may be considered an adverse action and could be grounds for a suit. The mere threat of this type of risk can have a chilling effect on the ability to effectively manage staff and respond to changing business environments.

In the 2006 decision of Burlington Northern and Santa Fe Railroad Co. v. White, 126 S. Ct. 2405, the Supreme Court of the United States departed from years of established law and substantially broadened the circumstances under which an employee can successfully claim he or she was subjected to an "adverse action" and seek damages. Prior to the Burlington Northern decision, the various Circuit Courts employed differing standards ranging from the more stringent or "ultimate employment decision" standard that limited actionable retaliatory conduct to discreet acts, such as hiring, discharge, granting leave, promotion and compensation; to, at the other end of the spectrum, the least restrictive standard which had been adopted on the West Coast and which only required an Employee to establish "adverse treatment." This was interpreted to include anything which was reasonably likely to deter others from engaging in protected activity.

In Burlington Northern, the employee claimed she was retaliated against after she filed an internal sexual harassment complaint against her supervisor. Following an investigation of her complaint, the employer disciplined the supervisor and re-assigned the employee to another position but one that was within the same classification and which had the same pay and benefits. Nevertheless, the Plaintiff alleged that she suffered an adverse employment action since she perceived the new duties as less desirable. The case proceeded to trial and a jury agreed and awarded her damages. After a reversal in the appellate courts, and a ruling that the Employer's transfer of the employee to a different duty within the same classification and with the same salary, title and seniority was not an adverse employment action sufficient to sustain a Title VII retaliation claim, the Supreme Court granted certiorari to resolve the differences in how the Circuits were treating the "adverse action" requirement.

In rejecting arguments by the employer that the employee's pay and benefits did not change and thus a duty change was not an "adverse employment action", the Supreme Court recognized that all positions include some duties which are less desirable or more onerous than others, and based on that recognition, held that a transfer to another position or duties even within the same job description could constitute an adverse employment action. The Court concluded that the test to be used was whether the transfer might dissuade a reasonable worker from making or supporting a charge of discrimination.

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Since the Burlington Northern decision, the Third Circuit has addressed issues concerning what constitutes an adverse action in the context of employment retaliation claims and continues to carve out situations that stress the need for employers to be cautious in their actions. In March of 2007, the Third Circuit decided a retaliation claim and, relying on Burlington Northern, held that an employer's failure to select an employee for a career management program may be considered a "materially adverse" action and subject the employer to liability.<sup>2</sup> In that case, the failure to select the employee for the management program occurred after that employee complained of harassment by a manager at work. The Court opined that denial of participation in the program, which was perceived to be helpful toward career advancement, was sufficient to dissuade other employees from reporting claims of discrimination.

In another decision, the Court concluded that a "pattern of antagonism" that included the employer's skepticism of an employee's complaint and the employee's name being blacked off on a work schedule after that employee complained of harassment was sufficient under the Supreme Court's broad definition of "adverse action" to withstand summary judgment.

The Supreme Court's decision in Burlington Northern and subsequent court decisions should raise concern for employers. The subjective nature of the standard lends itself to manipulation and abuse. Now, any change of duties creates the possibility that retaliation will be claimed. With the Court's relaxed standard and expansion of actions that may subject an employer to liability, the need for careful review of employment decisions is crucial. Employers need to take a look at the big picture in employee management and consider the perception of a decision along with the reality.

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<sup>2</sup> Hare v. Potter, 2007 U.S. App. LEXIS 6731 (U.S. Court of Appeals, 3rd Cir. 3/21/2007)