

## **U.S. SUPREME COURT BROADENS EMPLOYER LIABILITY IN TITLE VII RETALIATION CASES**

By: David W. Adams and  
Steven M. Parrish

Breaking its trend of issuing favorable rulings to employers, the United States Supreme Court recently expanded employer liability for retaliation claims brought under Title VII of the Civil Rights Act of 1964. In *Burlington Northern & Santa Fe Ry. Co. v. White*, No. 05-259 (June 22, 2006), the Court adopted an extremely broad interpretation of Title VII's anti-retaliation provision. This new standard will undoubtedly result in an increase of Title VII retaliation claims.

Title VII is the federal law preventing discrimination and harassment of employees on the basis of race, color, gender, national origin and religion. Title VII also has anti-retaliation provision that is designed to protect employees who file, make or participate in employment discrimination complaints. Prior to the Supreme Court's ruling in White, employees in Florida, and in many other jurisdictions, could only assert retaliation claims in situations where they suffered "tangible adverse employment action", such as an employment termination, a demotion, or a loss/reduction in wages. This prior retaliation standard benefited employers because it set forth a straightforward "bright line" on the types of events that could give rise to a retaliation claim. Short of termination, demotion or other action causing financial loss to the employee, the employer did not have to worry about claims related to employment actions like verbal/written warnings or schedule changes.

However, the Supreme Court's new standard now eliminates the requirement of "tangible adverse employment action" for a viable retaliation claim, and consequently, blurs the line on what types of events can give rise to a retaliation claim. According to the Supreme Court, retaliation is now any action by an employer that might dissuade a reasonable employee from making or participating in a discrimination complaint. The Court also ruled that retaliatory action may include acts that are "not directly related to employment." Although the Court stated that the "standard for judging harm must be objective," the new standard maintains an entirely subjective flavor. In this regard, the Court stressed that "context matters" in examining an employer's actions and set forth as an example of retaliation "a schedule change in an employee's work schedule" that "makes little difference to many workers," but matters enormously to a young mother with school age children.

The likely effect of the Court's decision will be an increase retaliation claims that will be more difficult for employers to defend. Employers will need to be more careful in disciplining or terminating employees because each employee's personal idiosyncratic circumstances will be relevant to the determination of whether the employer's actions were reasonable. Employers wishing to limit their legal risk of retaliation claims will have more difficulty managing employees who complain of discrimination as any corrective action taken against complaining employees could result in a retaliation claim.

Moreover, the Court's decision could result in employers being forced to defend even innocuous actions and words that do not result in obvious harm to the employee.

**How should employer's reduce this increased legal risk?** Employers should re-examine their policies designed to prevent retaliation against employees who complain about equal employment opportunity issues. Effective steps usually involve having and communicating a policy against retaliation. Employers should also train managers and supervisors on the policy. Investigations of discrimination complaints should include instructions to employees to report any alleged retaliation following the lodging of an employment discrimination complaint. Moreover, employers must carefully assess and document employment decisions, especially if they follow a prior charge of discrimination.

*David W. Adams is a Partner in the Firm's Tampa office and is Chair of the Labor and Employment Practice Group. He is also a member of the Intellectual Property Practice Group. He was admitted to the Florida Bar in 1991. Steven M. Parrish is a Partner in the West Palm Beach office and a member of the Firm's Employment Practice Group. He can be reached at (561) 366-5439 and [sparrish@broadandcassel.com](mailto:sparrish@broadandcassel.com).*