

# BRIEFING

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Labor & Employment  
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## Anti-Discrimination in Employment: Retaliation Gets Personal

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### The *Burlington* decision

The United States Supreme Court has substantially lowered an important barrier to proving a retaliation claim under Title VII of the Civil Rights Act of 1964, as amended (Title VII), the model for most anti-discrimination in employment statutes. Prior to this decision, employees in the Second Circuit had to show that they suffered a "material adverse employment action" ("An adverse employment action is a 'materially adverse change in the terms and conditions of employment.'" *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 85 (2d Cir. 2001) (quoting *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)), abrogated on other grounds, *13 Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).) to establish a retaliation claim. But in *Burlington Northern & Santa Fe Railway Co. v. White (Burlington)* (126 S.Ct. 2405; 165 L.Ed.2d 345; 2006 U.S. LEXIS 4895 (June 22, 2006).), the Supreme Court, in a

virtually unanimous opinion (one justice concurring separately), broadened the class of adverse actions, reduced the severity of injury required, and defined injury in terms of the circumstances and expectations of the particular claimant.

In August 2006, the United States Court of Appeals for the Second Circuit followed *Burlington* in *Kessler v. Westchester Co. Dept.*

*of Social Services and Westchester County (Kessler)* (2006 U.S. App. LEXIS 21530 (August 23, 2006).).

Even before *Burlington*, retaliation claims were often considered difficult to defend and were becoming more frequent. Between 1992 and 2004, retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) doubled and now account for more than one-quarter of the EEOC's docket (*New York Times*, Linda Greenhouse, "Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace," June 23, 2006.).

Ms. White, the plaintiff in *Burlington*, began her employment as a track laborer.

Soon thereafter, a vacancy occurred and the railway's yardmaster assigned her to work as a fork lift operator. Later, she complained to Burlington officials about sexist remarks made by her immediate supervisor. Burlington suspended him for ten days and ordered him to take sexual harassment training. Management advised White of the suspension and also told her that she was being re-assigned to her former position and that the fork lift position was being given to a "more senior man." Later, White had an argument with her supervisor and was suspended without pay for 37 days. Even though she was ultimately reinstated with pay, she filed another EEOC retaliation charge.

Before *Burlington*, retaliation claims required employees to show they were subjected to a substantial adverse action related to their employment, for example, demotion, suspension, or termination. Speaking for all but one of the justices, Justice Bryer noted that, although the anti-discrimination sections of Title VII referred to employ-

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### BUSINESSES ARE STRONGLY ENCOURAGED

TO CONSULT WITH AN EXPERIENCED  
EMPLOYMENT DISCRIMINATION  
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ment-related actions, the retaliation section did not. In addition, an employee could be retaliated against “by taking actions not directly related to his employment or by causing him harm outside the workplace” (126 S. Ct. at 2409.). In other words, any form of injury, whether employment related or not, would do.

The Supreme Court held that an injury is material if it might well “dissuade a reasonable worker from making or supporting a charge of discrimination” (*Id.* at 2411 citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (DC Cir. 2006) (quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d, 658, 662 (7th Cir. 2005))). This would normally exclude “petty slights, minor annoyances, and simple lack of good manners,” since they are not likely to deter a reasonable employee from complaining to the EEOC (*Id.*).

Materiality or reasonableness must also be judged in terms of the characteristics of the particular employee and work situation:

“The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” *Oncale, supra*, at 81-82. A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. Cf., e.g., *Washington, supra*, at 662 (finding flex-time schedule critical to employee with disabled child)(126 S. Ct. at 2415 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998))).

“[J]udged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances’” (126 S. Ct. at 2416 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 at 81 (1998)))., the court easily held that Ms. White’s reassignment from fork lift to track labor duties was material. The track labor duties were more arduous and dirtier, required fewer qualifications, and were considered less desirable by her male co-workers. Similarly, the 37-day suspension without pay caused her family hardship at Christmas.

In August 2006, the Second Circuit followed *Burlington* in *Kessler v.*

*Westchester Co. Dept. of Social Services and Westchester County* (2006 U.S. App. LEXIS 21530 (August 23, 2006)). Kessler argued that he suffered an adverse action when he was transferred to a position one level below his. The Second Circuit agreed because it was reasonable to believe that an employee confronted with such a reassignment might well be dissuaded from filing a discrimination charge. In the new position, Kessler lost his former broad managerial functions, had no subordinates, and performed work normally performed by lower-level personnel.

The federal appellate court loosened another element of retaliation, that the employer must know of the protected activity. The employer argued there was no retaliation because the decision to transfer Kessler was made by a manager who was unaware of Kessler’s discrimination complaints. But the court, quoting its earlier decision in *Gordon v. New York City Board of Education* (232 F.3d 111, 116 (2d Cir. 2000).), stated, “Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity,” which was present because the employer made submissions in opposition to Kessler’s complaints.

## Some implications of *Burlington*

Employers can expect *Burlington* to produce a substantial increase in the number of retaliation claims. The Supreme Court’s opinion greatly expands the form of injury recognized in retaliation cases (any form, employment related or not, is sufficient), reduces the seriousness of the injury required (enough to dissuade a reasonable person from filing or supporting a discrimination complaint), and defines seriousness or reasonableness in terms of the characteristics of the particular employee and work situation. Each of these factors makes it easier to maintain a retaliation claim.

The court’s own example of what is material is instructive: “A schedule change ... may make little difference to many workers, but matter enormously to a young mother with school-age children” (126 S. Ct. at 2415.). But how does an employer know the employee’s particular or personal “circumstances” (e.g., a young mother with school-

age children) or her “expectations” about whether a normal work change will “matter” to her or not? Nor does the example exclude “many workers,” since men as well as women have all kinds of non-work obligations that “matter” to them, whether it is caring for children or other relatives, working second jobs, or meeting other obligations. Many of the ordinary prerogatives of employers, such as changing work assignments, hours, tasks, reporting relationships, days off, and other aspects of work could be “material” when viewed from such a personal perspective.

Employers can also expect the cost of defending a retaliation claim to increase substantially. In addition to allowing more claims, *Burlington* sets a standard that is quite vague and risky (e.g., what would reasonably deter someone in the plaintiff’s particular circumstances from making or supporting a discrimination claim). How vague standards apply to facts is decided by a jury verdict after a trial, which can be far more costly than what otherwise might be just a summary proceeding.

## Some steps employers can take to reduce retaliation claims

There are a number of steps an employer can take to help avoid or reduce the costs of retaliation claims allowed by *Burlington*:

### Carefully investigate claims and document the facts

When a retaliation or discrimination claim surfaces, it should be carefully investigated and documented. The object is to carefully collect and preserve evidence when memories are fresh and accurate. This information can be critical for evaluating claims, reaching early resolutions, establishing legal deadlines, and disproving claims in legal proceedings.

### Establish a policy against retaliation

Adopt an anti-retaliation policy. It should be part of a broader anti-discrimination policy and procedure that allows employees to complain about discrimination, the basis for a retaliation claim. This can help identify problems and claims at an early stage and may allow them

to be corrected or settled amicably or inexpensively. A claimant’s failure to use a well-publicized complaint system may be a defense to certain discrimination claims and might at least be persuasive to the fact finder in a retaliation claim.

### Train supervisors

When Kessler filed his discrimination complaint, a high-level manager “questioned his loyalty ‘as a result of filing the NYSDHR complaint.’” The Second Circuit held this provided proof that retaliation caused the adverse action. Clearly, therefore, supervisors need to be trained not to make negative comments or display anger or other forms of disapproval after an employee files a complaint.

### Carefully document and monitor adverse actions and the non-discriminatory reasons for them

Adverse action should be viewed from the perspective of a judge or jury. Is the action deserved, proportional to the offense, and consistent with the action taken against other employees in similar situations? Different treatment of like offenses and inconsistent explanations about the reasons for an adverse action are two other major sources claimants use to show that an adverse action was due to retaliation and not the employer’s non-discriminatory reason. Thus, an adverse action needs to be supported by reliable facts, reflect sound judgment, and explained with one voice.

### Consider using expert, impartial, or independent decision makers

A broader perspective and legal expertise can be brought to adverse action decisions by assigning them to a trained, higher-level manager with access to the advice of legal counsel. The decisions can, by agreement, be given to a mediator to possibly avoid a judge or jury. They could even be made by tossing a coin. But if you choose this method, you should retain the coin. Someone will undoubtedly want to check it for bias.

### Temporal proximity

Claimants often rely on the temporal proximity between a protected activity and an adverse action to raise an inference that the action was due to retaliation. But the Supreme Court, in *Clark County School Dist. v.*

*Breeden*, held that “action taken (as here) 20 months later suggests, by itself, no causality at all.” The court added that other courts “uniformly hold that the temporal proximity must be ‘very close’ (*O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (CA10 2001)). See, e.g., *Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (CA10 1997) (three-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (CA7 1992) (four-month period insufficient)” (532 U.S. 268, 272-73 (2001)). Moreover, the Second Circuit has stated, “We have in the past held that a delay of three months was fatal to a showing of causation, *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86, and that a delay of eight months supported a showing of causation, *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir. 1980)(*Burkybile v. Bd. of Ed. of Hasting-On-Hudson Union Free School Dist.*, 411 F.3d 306 (2d Cir. 2005) cert. denied 126 S.Ct. 801, 163 L.Ed. 628 (2005)).” The Second Circuit continues to follow its earlier caution that they have “not drawn a bright line to define the outer limits” (*Gorman-Bakos v. Cornell Cooperative Extension*, 252 F.3d 545 (2d Cir. 2001).) of temporal proximity.

### Consider obtaining expert legal advice

Obtaining the advice of a knowledgeable legal expert is a key part of the strategy suggested by *Burlington* because the opinion establishes an ambiguous and highly risky standard of injury (in effect, what is not trivial when viewed from the claimant’s personal circumstances and expectations). Assessing this risk involves not just examining the factors involved in *Burlington* but also considering what legal defenses may be available to defeat a potential claim. To effectively take the preventive steps outlined above, employers should also consult an experienced employment discrimination attorney.

These are a few of the basic precautions suggested by the *Burlington* decision. But there may be other steps that can be taken to avoid or reduce the risk of costly retaliation claims. The focus needs to be on anticipating and avoiding claims by designing strategies that specifically deal with the new and difficult issues created by

*Burlington*.

The costs of obtaining legal advice prior to taking an

adverse action is modest especially compared to the costs that can result from a jury trial or other legal proceedings. Although only a small percentage of discrimination cases are resolved by a jury trial (Kevin M. Clermont and Stewart J. Schwab, “How Employment Discrimination Plaintiffs Fare in Federal Court,” *Journal of Empirical Legal Studies*, Volume 1, Issue 2, 429-458, July 2004.), the median national jury award for compensatory damages in 2002 in discrimination cases was \$232,322 (Jury Verdict Research, “Jury-Award Median in Employment Cases Up 14%; Age Discrimination Plaintiffs Win the Most Money” (News Release, September 2, 2003)). This excluded punitive damages, an award for plaintiff’s attorney’s fees (often available in discrimination cases), attorney fees for defending the action, expert witness fees, appeal expenses, lost time, and other costs. Of course, even defending a case that does not reach trial can be expensive. Adverse actions after *Burlington* pose greater risks and should be more carefully scrutinized. In short, retaliation has become more personal in its definition and its consequences.

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