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The New Retaliation Standard

By: Louis P. DiLorenzo

On June 22, 2006, in *Burlington Northern & Santa Fe Railway Co. v. White* (Burlington Northern), a unanimous Supreme Court provided employees with a much broader protection against retaliation under Title VII. The expanded standard allows employees to state a claim of retaliation if they can prove that the employer's action had caused them to suffer a material adversity, meaning that the action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Court further broadened the retaliation provision's protection to include harmful actions conducted by an employer outside the workplace and not directly related to employment. However, the standard "for judging harm must be objective" and will not protect employees "from those petty slights or minor annoyances that often take place at work."

In the case, the plaintiff, Ms. White, a newly hired Track Laborer, complained that her supervisor had made inappropriate sexual comments in front of her male co-workers. Burlington Northern conducted an investigation, concluded her complaint was valid and disciplined the supervisor. At the same time, White was reassigned from the favored task of operating the forklift to more strenuous and less desirable job duties such as clearing brush and litter from the railway tracks. Two days after being reassigned, Ms. White filed a complaint with the EEOC alleging she had been given different job duties because of her sex and her prior complaint. About two months later, Ms. White was suspended without pay for 37 days after being accused of insubordination by her supervisor. After investigation, her charge of misconduct was dropped and she was reinstated with back pay. She amended the EEOC complaint to include her suspension. After a trial in Federal District Court, a jury found Burlington Northern had unlawfully retaliated against Ms. White by reassigning her and suspending her and awarded her compensatory damages. On appeal, the Sixth Circuit upheld the judgment of the District Court.

Under its newly expanded standard, the Supreme Court found Ms. White to be the victim of unlawful retaliation. The Supreme Court concluded that a reassignment to less desirable or more arduous job duties or suspending an employee without pay for a period of time constituted a materially adverse action that would tend to discourage a reasonable employee from making or supporting a claim of discrimination. In general, the Court explained that whether or not an action would dissuade a "reasonable" employee from complaining would depend on the circumstances in which it occurs. "Context matters," noted the Court. The Court supplied two examples: a schedule change might be immaterial to most workers but materially adverse to a mother with young children; being left out of a lunch invitation, is usually trivial, except if it is a training lunch that can contribute to professional advancement.

To minimize the risk of liability for retaliation, the employer should review policies and provide periodic training of supervisors and personnel to ensure it is well known that such retaliation against an employee for making or supporting a claim of discrimination will not be tolerated. During an investigation of an internal complaint of harassment or discrimination, the complainant should be encouraged to make the employer aware of any possible retaliatory conduct. As "context matters," to these claims, it is more important than ever for the employer to monitor and keep detailed records of the circumstances surrounding every employee complaint. Any disciplining of complainants should strictly follow company policies and be carefully considered.

Be careful out there!

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The MACNY Technology Council will be holding its first Council event of the year on "Wireless Network Design - Cost and design considerations"

October 3rd. This topic was selected in a survey of members and council participants as an important subject for this year.

Program Overview: With the growing popularity of wireless networking, everyone should be using it, right? Isn't wireless networking easy to install? There's no reason to consider a professional wireless design and installation firm, is there? Wireless should be a cheap alternative to expensive data wiring, shouldn't it? This discussion will examine wireless networking cost and design considerations. There is much more to WLAN installation in the Enterprise than most people realize, and wireless networking needs to be properly designed and provisioned when used as part of any firm's operational technology strategy. **Topics are:** What are the obvious costs of wireless networking? What are the not-so-obvious costs? Are there hidden costs or "gotchas" in having and using WLAN? and How to approach proper WLAN design

Speaker: Lee Badman is a Network Engineer, Wireless Project Lead, and Adjunct Instructor for Syracuse University. Lee is also a freelance writer for periodicals including Network Computing Magazine, Cabling Business Magazine, and the Syracuse Post Standard, and often writes about wireless networking products and the WLAN industry. **Meeting will be held at the MACNY offices. 8:30 a.m. Breakfast/9am -11:30 am. Program Free for IT Council Members, \$50.00 Non-Council Members. To register please visit macny.org/calendar.aspx**



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