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## GENERAL COUNSEL NOTE

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March 2008

Over 40 years ago, Congress took significant steps to address discrimination in the employment context by enacting Title VII of the Civil Rights Act of 1964. Title VII forbids employment discrimination based upon a person's race, religion, sex, or national origin. While all employees may not know the details of the law, most in the Vanderbilt University community appreciate the importance of preventing discrimination in the workplace<sup>1</sup>. A lesser known aspect of Title VII is that it prohibits an employer from retaliating against any of its employees who have filed or alleged a charge of discrimination, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing brought under Title VII. It is the retaliation aspect of Title VII that is at the forefront of discussion in employment circles as of late and is the subject of this General Counsel Memo.

As a result of Title VII and the litigation that followed its enactment, employers have taken significant steps to identify and address discrimination in the workplace setting. However, the statistics collected over the past decade indicate that employees feel that employers who may not be discriminating against them on account of their race, religion, sex, or national origin are still retaliating against them if they exercise their right to raise allegations of discrimination in the workplace. In 1992, 10,499 Title VII-related retaliation claims were filed with the Equal Employment Opportunity Commission ("EEOC"), the federal agency that investigates allegations of Title VII-related unlawful discrimination. That number accounted for only 14.5% of the total charges filed with the EEOC that year. Contrast that with statistics for the fiscal year ending 2007, when over 23,371 such retaliation claims were filed. Thus, in just 15 years, we have moved to a scenario where 28.3%, or 1 of every 4, of the charges filed with the EEOC includes a claim that the employee believes that he/she has been retaliated against for raising a claim of discrimination or participating in some way in a Title VII matter.<sup>2</sup> The current statistics from the Vanderbilt Opportunity Development Center ("ODC"), the department at the University responsible for investigating charges of discrimination, to compiling statistics, mirror this trend. In 2007, over 23% of the formal charges filed with the ODC were retaliation-related.

This increase in retaliation claims coupled with a split of opinion by the federal courts across the country as to what standard to apply when deciding whether an employer's conduct is enough to constitute unlawful retaliation, laid the groundwork for the United States Supreme Court to hear the appeal of a Tennessee case with retaliation at its crux. In *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006), the Supreme Court addressed the essential question:

What type of action must an employer take against an employee and what degree of harm must that action cause to an employee to constitute unlawful retaliation?

In the *White* case, the Plaintiff, Shelia White, was the only female working in the Burlington Northern ("BN") rail yard in Tennessee. When she was originally hired, she was assigned to operate a forklift. Two months after she was hired, Ms. White complained to BN officials about sex-based comments made by her supervisor. The supervisor was disciplined and ultimately suspended for 10 days for his conduct.

Even though BN addressed Ms. White's claim by conducting an investigation and taking timely and appropriate action against her supervisor, they also removed her from her position of forklift operator and reassigned her to work as a track laborer. While her original job description included the track laborer duties, a track laborer was not as "prestigious" a position as, and was a much "dirtier" job than, that of a forklift operator. This reassignment of duties did not take place until after she reported her supervisor's sex-based comments to BN officials. BN claimed the reassignment was the result of more senior employees complaining because they had not been given the forklift operator's position. However, the evidence presented at the trial did not support BN's claim.

Subsequent to her reassignment, Ms. White filed a claim with the EEOC alleging that such reassignment was gender-based discrimination and in retaliation for her complaining to BN officials. Later she filed a second EEOC charge alleging other workplace harassment. Within a few days after BN received the second EEOC charge, it suspended Ms. White without pay claiming she had been insubordinate to a supervisor. The insubordination charge stemmed from Ms. White's alleged failure to follow an instruction to ride in a certain truck from one work location to another. Ms. White internally grieved the insubordination charge and she was exonerated and reinstated with back pay for her 37-day suspension.

Ms. White filed a lawsuit in federal court against BN claiming that the reassignment of job duties and suspension were all in retaliation for her original discrimination claim. At trial, a jury found in Ms. White's favor with regard to the retaliation claim, even though she had been reinstated and granted back pay. It is important to note that the original claim of gender discrimination was dismissed in BN's favor because once it had been notified of the gender-based discrimination, BN took prompt and appropriate action by investigating the complaint and disciplining the supervisor and cured the situation. It is how BN treated or mistreated Ms. White after she raised her claim that resulted in the

jury's finding that BN retaliated against Ms. White for exercising her right to file a complaint. On appeal the court concluded that it was reasonable for the jury to find that it was not mere coincidence that BN suspended her shortly after filing her second EEOC charge and that BN took that action to teach her and subsequent employees to keep their mouths shut.

In agreeing to hear the *White* case, the U.S. Supreme Court focused on whether the reassignment and Ms. White's subsequent suspension for alleged insubordination constituted unlawful retaliation and were the very types of conduct that Title VII's anti-retaliation provisions were enacted to address. BN argued that retaliation claims must be narrowly tailored and only look at employer conduct that adversely affects an individual's compensation, terms, conditions, or privileges of employment. Essentially what BN argued was that an employee only has a claim for retaliation if they were demoted or fired. After hearing the case, the Supreme Court rejected BN's argument and held that in a case that alleges retaliation, the plaintiff must only show that:

[A] reasonable employee would have found the challenged action */the reassignment and suspension/* materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Under this standard, employees may be allowed to bring retaliation claims based on subtle reprisals, such as being put on a different shift, being excluded from work-related training, or being harassed outside the workplace. In some cases, reassignment of duties could potentially constitute retaliation within the scope of Title VII, even though it was unaccompanied by any demotion, pay cut, or change in job title.

While the Court's opinion might appear to have opened the floodgates to every potential retaliation claim, it is important to note that the holding states that an action by an employer must be "materially adverse" to the "reasonable employee." As the Court stated, "trivial harm" will not rise to the level of retaliation.

Even though the Supreme Court has once again set forth the standard that must be applied by all federal courts, it will be many more years and many more court cases before a clear picture emerges as to what a "materially adverse action" is in the mind of a "reasonable employee." Until the courts wade through these definitions, what are managers and supervisors to do? They must continue to be alert to conduct in the workplace that could be viewed as discriminatory and be diligent in addressing such conduct. They must also take steps to make sure no employee is inadvertently retaliated against if he or she brings an issue to the employer's attention.

Many times, an initial claim of discrimination is subtly brought to a supervisor's or manager's attention over lunch, in the break area or even in a non-work setting. The employee may even say, "I do not want you to do anything about this." Too many times supervisors and managers downplay the complaint and do not forward it to the appropriate superior or Employee Relations representative or the Vanderbilt ODC. If anything, let this article serve as a wake-up call to take all claims seriously. Oftentimes, it is the failure to take the initial discrimination claim seriously and follow Vanderbilt's policies regarding reporting such matters that sets the stage for a retaliation claim. In light of the Supreme Court's decision in *White*, all supervisors and managers need to adopt a proactive approach to preventing retaliation claims.

So, how does a supervisor or manager take proactive steps? Once an employee makes a supervisor aware of a possible discrimination issue, that knowledge is imputed to the employer. Therefore, even if an employee asks a supervisor not to act on a matter, the supervisor must address the issue by contacting his or her supervisor, Employee Relations or the ODC. It should be every employer's goal that its employees feel comfortable taking to management any concerns they have regarding discrimination or retaliation and, at Vanderbilt, to Employee Relations or the ODC. To adequately protect themselves from retaliation claims, the employer must be able to show that an adverse employment action was not connected to a charge or claim filed by the employee. Examples of actions employers, managers, and supervisors can take to reduce potential retaliation claims include the following:<sup>3</sup>

1. Train supervisors and managers to properly address and document complaints of potential discriminatory, harassing, or retaliatory activity, and to inform management, Employee Relations or the ODC of both formal and informal complaints in accordance with internal policy and practice. Currently, the ODC addresses retaliation in its Alphabet Soup training for supervisory personnel.
2. Consider informal and formal complaints of retaliation with the same seriousness and deliberation that you would complaints of sexual or other harassment or discrimination. Conduct investigations, and handle such complaints as appropriate under internal policies and procedures. Provide guidance as appropriate to supervisors and managers about how to deal with day-to-day employment matters with the employee after the complaint is made.

3. Address performance issues as they arise. Employees who have been counseled regarding performance issues *prior* to making complaints are less likely to link performance-related actions (demotion, transfer, termination) to those prior complaints.

The takeaway from the *Burlington Northern v. White* case and the EEOC's own statistics is that retaliation claims are on the rise. Only through sufficient supervisor and management education and proactively addressing concerns of employees can Vanderbilt ensure that it is effectively preventing potential retaliation claims and exposure. Additional guidance is always available from the ODC, Employee Relations, or the Office of the General Counsel.

**This Note is for informational and educational purposes only.  
It states general propositions and is not intended to  
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the Office of the General Counsel.**

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<sup>1</sup> While Title VII applies only to race, religion, sex, and national origin, other laws address other forms of discrimination, such as the Age Discrimination in Employment Act addresses age discrimination and the Americans with Disabilities Act addresses disability discrimination. Many aspects of this General Counsel's Memo also apply to those laws and the forms of discrimination that those laws address.

<sup>2</sup> Charge Statistics from the U.S. Equal Employment Opportunity Commission Fiscal Year 1992 through 2007, <http://www.eeoc.gov/stats/charges.html> (last modified Feb.. 26, 2008)

<sup>3</sup> Teresa M. Thompson, 'The United States Supreme Court Defines Retaliation and Expands Employee Rights,' Fredrickson & Bryson, PA, September 2006, [www.fredlaw.com/articles/employment/empl\\_0609\\_tmt.html](http://www.fredlaw.com/articles/employment/empl_0609_tmt.html).