

WHAT THE HECK HAPPENED!?!

An Employment Law Update

Scott Warrick, JD, MLHR, SPHR

Human Resource Consulting, Employment Law & Training Services

(614) 367-0842: Office (614) 738-8317: Cell

www.scottwarrick.com

I. RETALIATION

In White v. Burlington Northern & Santa Fe Railway Co., 321 F3d 1203 (6th Cir. 2004); 548 U.S. 53 (2006), Shiela White applied for a job as a forklift operator with Burlington Northern & Santa Fe Railway Company in its Maintenance of Way Department in Memphis, Tennessee. Burlington hired White for the job. White was the only female forklift operator in this department.

After a few months on the job, White filed a complaint of sexual harassment against her supervisor, Bill Joiner. The company investigated and determined that Joiner had in fact sexually harassed White. Joiner was suspended without pay for 10 days and was required to go to sexual and illegal harassment training.

However, as a result of its investigation, Burlington discovered that there were a great many complaints about White working in the forklift position. The forklift position was much cleaner and physically less demanding than the other jobs in the department. Other employees complained that a less senior person should not have been given this job.

As a result, Burlington removed White from the forklift position. White was replaced by a more senior male employee. Burlington did not change White's pay or benefits when she was transferred. However, White's new job was much dirtier and much more physically demanding than that of a forklift operator.

White filed a charge of retaliation with the Equal Employment Opportunity Commission. Afterwards, White filed this charge with the EEOC, she got into a dispute with her supervisor, and she was suspended without pay for the offense of insubordination, pending Burlington's investigation.

After Burlington investigated White's suspension for insubordination, management determined that White had not been insubordinate. Burlington therefore reinstated White with back pay, which equaled 37 days.

White then filed suit against Burlington for retaliation under Title VII. The court held for White.

In reaching its decision, the Sixth Circuit Court of Appeals (which covers Ohio, Kentucky, Tennessee and Michigan) reasoned that in order to support a claim for retaliation under Title VII, the plaintiff must establish:

1. That she engaged in activity protected by Title VII;
2. That she was the subject of an **adverse employment action**; and
3. That there exists a **causal link** between her protected activity and the adverse action of her employer.

The Sixth Circuit then defined an “**adverse employment action**” as being a “**materially adverse change in the terms and conditions of [plaintiff's] employment.**” As a result, employment actions that are merely **de minimis** are not actionable under Title VII.

The Sixth Circuit Court of Appeals reasoned that:

“If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure.”

The Sixth Circuit further stated that “**while additional tensions**” might arise if an employee files a charge or complaint with the employer, “**such predictable tension is not the type of adverse employment action prohibited by Title VII's retaliation clause.**”

The Sixth Circuit Court of Appeals has therefore adopted the following definition for “**adverse employment action**” for retaliation cases, based largely upon the United States Supreme Court’s decision in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998):

“[a] tangible employment action constitutes a **significant change** in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

An “adverse employment action” does not protect trivial employment actions, such as those that cause a “mere inconvenience” or a “bruised ego.” Likewise, “reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims.” A reassignment without salary or work hour changes, however, **may be** an adverse employment action **if it constitutes a demotion** evidenced by “a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”

In this case, however, even though White’s pay and benefits were not changed, she was transferred to a job that was harder, dirtier and had less prestige. Ever since White started working at Burlington there was great resentment amongst the other workers that she

received the forklift position. It was only **after** White filed her sexual harassment complaint that Burlington took action and removed White from the forklift position.

Also, suspending White without pay for 37 days was no small matter. It is clear that White was suspended because she was seen as a “trouble-maker” for filing a charge with the EEOC. Even though Burlington later recognized the error and reinstated White with back pay, the harm had been done. White had to sit at home for over one month without pay and wondering whether or not she would still have a job.

Therefore, the court held that Burlington had in fact retaliated against White for filing a sexual harassment complaint and a charge of illegal discrimination with the EEOC.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This case gives employers some very good language in trying to understand exactly what constitutes an “adverse employment action” and therefore retaliation under Title VII. Human resources should act as a consultant and review all employment actions taken against employees in order to make sure no such illegal retaliation is occurring.

II. SIXTH CIRCUIT: RETALIATION BY COWORKERS IS ACTIONABLE

NOTE:

The language and harassing acts in the following Hawkins case are extremely disturbing. I left this language in this handout since it demonstrates a tremendous change in 6th Circuit law. If you are bothered by truly horrendous language and harassing acts, please skip this case and move on to the next. However, if you do read the case, you will better understand why the court expanded Title VII Retaliation Law the way it did.

You have been warned.

In this case, you will see it all: Emotional children, workplace violence, incompetent management, retreating coworkers, a destructive union and more. As a result of Anheuser-Busch’s inability to run its workplace and protect its employees, we have new law in the Sixth Circuit: Retaliation by coworkers is now actionable.

In Hawkins, et. al. v. Anheuser-Busch, No. 07-3235 (6th Circuit February 19, 2008) Diana Chiandet, an employee at the Anheuser-Busch’s plant in Columbus, Ohio, reported sexually harassing behavior from one of her co-workers, Bill Robinson, while working on Production Line 75. Chiandet complained to brewery management in July of 1993 that she had received three harassing and threatening anonymous notes. The first note stated:

“Are you looking for a real good hot time with a real hard body man? [I]f so I’m your man. Call my line to nite [sic] for some read [sic] hot sex talk. 1-800-334-1256. I’ll be waiting.”

The second note read:

“Hi - Are you lonely and looking for a real hot time? [I]f so I’m the man for you. If you want something Hot and Hard call me at 1-800-335-666. They call me Mr. Big Daddy.”

The final note stated:

“What’s up sexy. So are you ready for something nice and hard because I think it’s about time we got together so we can have a good time all nite [sic] long. I no [sic] you like it *long and* Hard. And I have tools to do that all nite [sic] thing. P.S. Don’t worry I will make real good to you. I no [sic] what you like *PAIN*.”

On August 4, 1993, shortly after reporting these notes to management, Chiandet told her supervisor that her car had been “sideswiped” at work.

The brewery concluded that the notes were “inappropriate, lewd, suggestive and threatening,” and launched an investigation into the incident. A handwriting expert promptly determined that Robinson was the author of the notes. Although Robinson originally denied writing them, he later admitted to being the author after he was confronted with evidence from the handwriting expert. This caused Anheuser-Busch to terminate Robinson’s employment in early September of 1993. Robinson pursued a union-backed grievance.

Under the collective bargaining agreement at the brewery, management may terminate employees only for “just cause.” Employees who wish to challenge a disciplinary action taken against them can file a grievance. Grievances are first heard by a department head, then by a human resources manager, and finally by a Multi-Plant Grievance Committee. The Grievance Committee is composed of two company representatives, two union representatives, and a mutually agreed-upon arbitrator. Following Robinson’s appeal, the Grievance Committee reinstated him after a six-month suspension.

Jackie Cunningham was hired by Anheuser-Busch in May of 1996. In 1999, Cunningham began working with Robinson on line 75. Cunningham became concerned about Robinson’s conduct after she saw him near her residence and believed that he was following her. She alleged that, shortly after she saw Robinson near her home, he began to harass her at work.

Specifically:

- Cunningham said that during a training session in 1999, Robinson sang a rap song to her with the lyrics: “Baby, won’t you back that thing up,” and then held money in his hand and said: “Is that what it’s gonna take?”

- Robinson also tried to put his hand on her shoulder, but she moved away.
- Robinson then said to her: “I will suck your p#@@y but you got to suck my d@#k.”
- Robinson later caressed her back and she responded by screaming at him: “Don’t touch me.”
- Robinson told Cunningham to come over to his vehicle at work and, when she refused, he chased her around and tried to grab her as she ran away.
- Robinson asked Cunningham: “Why don’t you just suck my d@#k?”
- Robinson told Cunningham that he was getting rid of his girlfriend, and asked her: “Why don’t you just make up your mind?” while trying “to feel on her.” Cunningham also said that she could not remember every instance of harassing behavior, but that Robinson would harass her “on and off” and would “push on and on.”

She allegedly complained to her supervisor, Eric Steinberg, “a few times” about Robinson’s behavior and contacted the plant operations manager Richard Sambecki to request a transfer. Cunningham also asserted that she told her supervisors that life was “unbearable” working with Robinson since he was “really trying to make [her] job difficult.”

She also talked with her union steward, Leslie Schoenian, about Robinson’s behavior. Schoenian advised Cunningham of the things that Robinson “was capable of” and suggested that the best solution would be to simply move to another brewery line.

Shortly thereafter, Cunningham told Schoenian that she wanted to move lines, and Schoenian discussed the matter with management. The brewery then transferred Cunningham to a new line. Even after the transfer, however, Cunningham alleged that she felt harassed by Robinson’s friends and said that “stuff still followed [her]” to her new position.

Cherri Hill began working at the brewery in August of 1999. In January of 2000, she started working with Robinson. She alleged that Robinson began harassing her in November of 2000. In her deposition, Hill recounted numerous instances of touching—stating that Robinson touched her arms, rubbed her shoulders, and walked up close behind her—and that he regularly made “lewd and explicit” comments. When Hill asked Robinson to stop, he said that he knew she “liked it” and that he “wanted to have sex” with her. Hill stated that Robinson would walk close to her, touch her on the backside, and that on one occasion he rubbed against her with “his private area” and grabbed her around the waist. Hill also said that on three or four occasions Robinson

told her “she had big breasts” and a “big butt.” On another occasion, Robinson told her “he wanted to fuck” her and said, “I bet you have some good pussy and I know that you would like this. You should let me take you away from your boyfriend.” In addition to recalling these specific incidents, Hill testified that Robinson made lewd and sexual comments “all the time.”

Hill told a coworker in November of 2000 that Robinson was bothering her. She also contacted Schoenian, her union steward, to complain about Robinson’s conduct. Hill then asked her supervisor, Don Schlarman, if she could transfer lines after telling him that Robinson “had been touching her and talking dirty to her.” Donald Manley, the brewery’s human resources manager, was informed of Hill’s complaint and ordered Cortlin Davidson, a human resources investigator and assistant manager, to look into Hill’s allegations.

Davidson began his investigation by interviewing Hill. During the interview, Hill enumerated the ways in which Robinson had harassed her and informed Davidson that Robinson had also harassed Cunningham. Davidson’s notes from his interview with Hill recount that Hill complained that Robinson had been grabbing her, rubbing up against her, making suggestive sexual remarks, and that “every time” they were together Robinson was doing something inappropriate “like winking, blowing kisses, touching her or grabbing her.”

On December 9, 2000, a few weeks after Hill reported the allegations of harassment, but before the brewery had finished its investigation, someone set Hill’s car on fire while it was parked at her home. Although Hill believed that Robinson was responsible for the fire, no arrests related to the fire were made. Hill informed the fire investigators about her suspicions and reported the incident to both Davidson and Schlarman. Davidson did not investigate the incident, and instead told Hill that if she did not have any proof of Robinson’s involvement, she should not make allegations against him. Schlarman told Hill that she could be sued for slander for accusing Robinson. Nothing in the record suggests that the brewery took any steps to investigate Hill’s allegation that Robinson set fire to her car. At some point during December of 2000, however, the brewery transferred Hill to a different line.

Davidson interviewed Robinson as part of his investigation into Hill’s original allegations of harassment. When Robinson was informed of Hill’s complaint, he denied harassing her. Robinson was apparently never asked about the fire.

At the end of his report, Davidson concluded: “Based on the interviews conducted, I believe that Bill Robinson did behave in a sexually inappropriate manner with both Cherri Hill and Jackie Cunningham.” Despite the report’s conclusion, the brewery did not discipline Robinson. The investigation was closed, and Hill received a letter informing her that Anheuser-Busch had been unable to substantiate her allegations of harassment, that corporate policy prohibited retaliation for raising such concerns, and that she could contact management if she had any questions. Nothing in the record indicates whether the brewery spoke with Robinson at the close of the investigation,

and there is no evidence showing that a letter was ever sent to him.

Following the close of its investigation into Hill's allegations in December of 2000, Anheuser-Busch corporate headquarters received an anonymous letter criticizing the investigation into Hill's allegations and stating that "fellow employees on the line are intimidated from telling the truth because they are well aware of what [Robinson] is capable." The letter alleged that the brewery had botched the investigation by failing to interview everyone on the line who knew about the harassment and that employees were "afraid to get involved" in the investigation because "bad things" happened to women who made accusations against Robinson.

This letter recounted specific allegations of violence against women at the brewery, noting that Hill's car had been set on fire shortly after she accused Robinson of sexual harassment, that Robinson had threatened to "kill that Bitch" (meaning Hill) if he lost his job, and that all four tires of another employee's car were slashed after a woman threatened to report that Robinson had harassed her. The letter also stated that Robinson bragged in the cafeteria that he had slashed the tires to "repay the woman for telling on him," and that it was "this type of retribution" that "keeps people from speaking out" against Robinson. Finally, the letter concluded by stating: "I have no vendetta against Bill Robinson. My only hope is that the truth be told and Cherri Hill might be seen as an example of what to do when they've been sexually harassed." It was signed, "a concerned employee."

Although management at the brewery where Robinson worked was informed about the allegations of fear and retaliation contained in the letter, the brewery did not reopen the investigation, warn Hill about Robinson's threats, ask any employees if they felt threatened by Robinson, or create a confidential means for reporting allegations of harassment. Robinson continued to work on line 75.

Across the next few years, Robinson continued to harass several female coworkers. Again and again, Anheuser-Busch would simply transfer the victim to another position and move another female employee into her place. In order to intimidate anyone who complained, Robinson would key their cars, threaten them, assault them and slash their tires. Even the supervisors knew that Robinson was dangerous and had regularly harassed and retaliated against women.

On June 2, 2003, Robinson was terminated. Robinson's termination became final on July 21, 2003 after a grievance was filed by the union. Robinson later shot his girlfriend and then killed himself.

Amanda Grace-Hawkins, one of Robinson's victims, along of several other of his victims, filed suit in the Franklin County Common Pleas Court against Anheuser-Busch in June of 2005.

The district court granted summary judgment in favor of Anheuser-Busch. The employees appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit held that in order to be actionable, **the harassment must consist of more than words that simply have sexual content or connotations.** Instead, the workplace must be permeated with “discriminatory intimidation, ridicule or insult” sufficiently severe or pervasive to alter the conditions of employment. **A non-exhaustive list of factors for the court to consider include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”**

This court had also previously held that harassment involving an “element of physical invasion” is more severe than harassing comments alone.

In this case, both Cunningham and Hill alleged that Robinson’s harassment was ongoing and continual. They recited comments significantly more graphic, personal, and sexually explicit than the comments made in other cases in which this court found there to be illegal sexual harassment. The witnesses in this case recounted acts of touching and unwelcome physical contact that established an element of physical invasion.

The court found that the plaintiffs had set forth enough facts to survive summary judgment that they had experienced harassing acts that were severe or pervasive. Therefore, the court held that it was not necessary to decide whether “off-premises” harassment can be considered as part of the severe or pervasive test under Title VII.

As for the retaliation claims set forth by the plaintiffs, the court held that Robinson’s alleged involvement in setting fire to Hill’s car, as well as other off-duty retaliatory acts he committed, could be considered in relation to Hill’s retaliation claim under the United States Supreme Court’s ruling in Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (holding that employers may be held liable for off-premises acts of retaliation under Title VII’s anti-retaliation provision).

In reaching its decision, the Sixth Circuit reasoned that when determining whether retaliatory acts committed outside the work area or directed towards others counts towards making a case of retaliation, the courts may consider such factors as the severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff.

The court then reasoned that more weight should be given to acts committed by a **serial harasser** if the plaintiff knows that the same individual committed offending acts in the past. If a serial harasser is left free to harass employees, then everyone gets the clear impression that this harassment is tolerated, which supports a plaintiff’s claim that the workplace is both objectively and subjectively hostile.

In order to hold an employer liable for the illegally harassing acts between co-workers, the employer must have known of the harassment or should have known. In

this case, the court held that management at Anheuser-Busch either knew or should have known that Robinson was sexually harassing its employees. It was common knowledge on this production line that Robinson was sexually harassing these women. Furthermore, several of these women reported this illegal conduct over a 10 year period.

Contrary to Anheuser-Busch's assertion, simply separating the harasser and his victim is insufficient to preclude liability. Instead, companies must take affirmative steps reasonably calculated to prevent and put an end to a pattern of harassment—such as personally counseling harassers, sending them letters emphasizing the company's policies and the seriousness of the allegations against them, training, and threatening harassers with serious discipline if future allegations are substantiated—are more likely to be deemed to have responded appropriately.

Other reasonable responses calculated to end harassment might include:

- (1) Formulating an “observation network” designed to monitor the harasser,
- (2) Checking in with the victim daily to ensure that she had not been further bothered by the harasser, and
- (3) If further complaints arise, meeting with the harasser the next day to give him written notice that this was his “one and only” warning, that further harassment would result in immediate termination, and that harassment “absolutely will not be tolerated.”

The court then noted that in this case, the brewery did not do *anything* other than take the most remedial steps by removing the victims from Robinson's production line ... and then putting someone else in their place.

In order to establish a prima facie case of retaliation under this court's Title VII case law, an employee must establish that:

- (1) He or she engaged in protected activity,
- (2) The employer knew of the exercise of the protected right,
- (3) An adverse employment action was subsequently taken against the employee, and
- (4) There was a causal connection between the protected activity and the adverse employment action.

However, since the U.S. Supreme Court's decision in Burlington Northern, under Title VII, the “adverse employment action” requirement in the retaliation context is not limited to an employer's actions that solely affect the terms, conditions or status of employment, or only those acts that occur at the workplace. The retaliation provision instead protects employees from conduct that would have “dissuaded a

reasonable worker from making or supporting a charge of discrimination.”

The Sixth Circuit held that an employer will be liable for the retaliatory acts of a coworker if:

- (1) The coworker’s retaliatory conduct is sufficiently severe so as to “dissuade a reasonable worker from making or supporting a charge of discrimination,”
- (2) Supervisors or members of management have actual or constructive knowledge of the coworker’s retaliatory behavior, and
- (3) Supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff’s complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.

The court then looked to determine if:

- (1) Robinson’s actions were sufficiently severe to dissuade a reasonable worker from making or supporting a charge of discrimination,
- (2) If Anheuser-Busch had knowledge of Robinson’s retaliatory actions, and
- (3) If management either condoned Robinson’s actions or failed to adequately respond to the allegations of retaliation.

There are, therefore, sufficient facts in the record upon which a jury could find that Anheuser-Busch’s failure to investigate the complaint of Robinson’s violent act of retaliation was both indifferent and unreasonable.

WHAT DOES THIS MEAN TO HUMAN RESOURCES

This case was a “Goat Rodeo” from the beginning.

First of all, union employees need to understand that they pay union dues for a reason:

For representation.

Therefore, when Robinson was committing all of these unspeakable acts, the union not only represents Robinson, but it also represents those women who are being harassed. It is absolutely vital that union members pursue their rights with the union, which means filing grievances against the harassers with the union. If the union fails to represent the union member, which includes the victims, they can file suit against the union.

Think of it this way: If you paid a lawyer \$50 a month to protect your interests, and the lawyer then failed to defend your interests, and actually defended the person who is harassing you, **WHAT WOULD YOU DO?**

This case typifies why so many companies are anti-union: The Teamsters did nothing to protect their good members and did *everything* to protect a “serial harasser” like Robinson ... even though the Teamsters knew Robinson was dangerous and a harasser.

Next, there are several members of management that should have been terminated. Robinson had been making threats in the workplace, he was stalking his coworkers at their homes and he had even admitted to setting fire to Hill’s car to his coworkers. What in the world was management waiting for?

In my “Preventing and Understanding Workplace Violence” class, we draft a definition of “workplace violence.” Understanding this definition is vital if you expect your employees to recognize it when it occurs. So, what is workplace violence?

“Any actual or threatened physical, verbal or nonverbal abuse occurring in or outside the work setting.”

Had this definition been followed, the employer would have addressed this situation MUCH earlier.



Scott Warrick, JD, MLHR, CEQC, SPHR
Scott Warrick's Consulting & Employment Law Services
(614) 367-0842 Office ♣ (614) 738-8317 Cell ♣ (614) 367-1044 FAX

www.scottwarrick.com

CEO Magazine's 2008 Human Resources "Superstar"

Nationally Certified Emotional Intelligence Counselor

2010, 2008, 2007, 2006 and 2003 SHRM National Diversity Conference Presenter

[Scott Trains Managers and Employees ON-SITE in over 40 topics](#)

Scott Warrick specializes in working with organizations to prevent employment law problems from happening while improving employee relations. Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go.

Scott travels the country presenting his revolutionary ["Emotional Intelligence, Tolerance & Diversity for White Guys ... And Other Human Beings: Understanding the Neurology of Intolerance."](#) This one of a kind **SKILL-BASED** program is the only **SKILL-BASED Emotional Intelligence/Tolerance/Diversity Program** in the country approved by HRCI-SHRM for **STRATEGIC** SPHR Credit because it creates an atmosphere of open communication so we are better able to resolve all kinds of conflicts in our organizations.

Scott's ["Do It Yourself HR Department & Legal Compliance CD"](#) is a favorite among Human Resource Professionals across the country to not only inform clients of the changes in Employment Law but to also bring their departments into compliance ... **AND KEEP THEM THERE!**

Scott's academic background and awards include:

- Capital University College of Law (Class Valedictorian (1st out of 233))
- Master of Labor & Human Resources and B.A. in Organizational Communication: The Ohio State University
- The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

Solving Employee Problems BEFORE They Happen!