

**THIRD CIRCUIT REINSTATES TITLE VII RETALIATION LAWSUIT BY WHITE
POLICE OFFICERS WHO COMPLAINED OF DISCRIMINATION AGAINST
AFRICAN-AMERICAN EMPLOYEES**

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In Moore v. City of Philadelphia, 2006 WL 2492256 (3d Cir. Aug. 30, 2006), the Third Circuit Court of Appeals reversed a decision granting summary judgment in favor of the employer. The plaintiffs were three white police officers who had worked in the “7-squad” of Philadelphia’s 25th district and had complained of discrimination against African-American officers. Each had reported to management complaints communicated by black officers and some of their own observations of discriminatory conduct. In their lawsuit, plaintiffs alleged varying types of retaliation, such as not receiving the same lunch breaks and “less desirable work assignments.”

Although the Third Circuit did not break new ground with its decision, the Court reaffirmed several fundamental concepts that deserve emphasis when assessing the viability of a retaliation claim under Title VII. To establish a Title VII retaliation claim, the employee must show that “(1) he/she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against him/her; and (3) there was a causal connection between his/her participation in the protected activity and the adverse employment action.”

Protected Activity. The anti-retaliation provision contained in Title VII has two components. The “participation clause” protects employees who participate in Title VII proceedings. The “opposition clause,” which protects those who oppose any form of discrimination made unlawful by Title VII, is broader because it encompasses verbal or other informal methods of indicating an objection to alleged discrimination. The plaintiffs in this case engaged primarily in this type of “opposition” when they voiced complaints to management.

Adverse Employment Action. In June 2006, the Supreme Court effectively overruled the Third Circuit’s standard for determining whether an employee claiming retaliation was subject to “adverse employment action.” In Burlington N. & Sante Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006), the Supreme Court distinguished retaliation claims from those brought for other types of discrimination (e.g. race or gender). In White, the Court held that the definition of “adverse employment action” was broader when evaluating a retaliation claim and requires only “that a reasonable employee would have found the actions taken “materially adverse” because they “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Prior to the White decision, the Third Circuit had required a retaliation plaintiff to establish that his/her terms, conditions or privileges of employment had been altered. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997).

Causal Connection. The Third Circuit also reaffirmed that a causal connection need only exist between the protected activity and the adverse action. It is not necessary that the adverse action be based on race, religion, sex, or national origin for the plaintiff to prevail on a retaliation claim. Instead, “Title VII’s whistle-blower protection is not limited to those who blow the whistle on their own mistreatment or on the mistreatment of their own race, sex, or other protected class.” For this reason, the Third Circuit rejected the District Court’s finding that the plaintiffs’ race (white) presented a “threshold problem” for their retaliation claims since the anti-retaliation provision simply requires a showing that that they objected to what was reasonably perceived as discrimination and suffered “materially adverse actions” because of these complaints.

Conclusion. The import of the Third Circuit’s opinion is twofold. First, Title VII retaliation claims are more difficult to defend than other types of Title VII claims because, in part, a less demanding definition of “adverse employment action” applies. Public employers should remain cognizant of timing that might look suspicious and should continue to focus on the strength of its legitimate, non-retaliatory reasons supporting the employment decision. Second, employers must be wary of retaliation in any form. Proactive steps should be taken to ensure that those complaining of discrimination in the workplace are not treated differently and employers should encourage reports of perceived retaliation to be brought forward through internal mechanisms.