BURLINGTON NORTHERN & SANTA FE RAILWAY CO. v. WHITE

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On June 22, 2006, the United States Supreme Court broadened the purview of the anti-retaliation provision of Title VII[1] when it held that the provision prohibits employer actions that would be considered materially adverse by a reasonable employee, regardless of whether such actions occurred at the workplace or were related to employment.[2] In so holding, the Supreme Court did three things worthy of comment. First, the Court expunged the confusion caused by disparate and incompatible treatments of the anti-retaliation provision by the circuit courts. Second, by subjecting all employer action to review, the Court reassured employees that by pursuing or assisting the pursuit of a discrimination claim the employees need not endure, without recourse, dissuasive actions of their employer that are marginally work-related. Third, by instituting a coherent materially adverse standard, the Court assuaged a common fear of employers that workplace conduct chronologically proximate to a claim of discrimination is kindling for an anti-retaliation claim.

I. BACKGROUND

A dispute between Burlington Northern & Santa Fe Railway Company, the petitioner, and Sheila White, the respondent, afforded the Supreme Court the opportunity to articulate its most recent interpretation of Title VII. That dispute commenced in the summer of 1997 when Burlington Northern hired White as a track laborer in its Maintenance and Way department.[3] As a track laborer, White's job duties included removing and replacing track components, transporting track material, cutting brush, and clearing litter and

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1. Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3 (2000).

2. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006). Justice Alito concurred in the judgment but not the reasoning of the Court.

3. *Id.*

cargo spillage.[4] However, soon after being hired, White was told that she would be operating a forklift instead.[5]

In September of 1997, White complained to Burlington Northern officials that her immediate supervisor, Bill Joiner, had not only frequently commented to her that women should not be working in the Maintenance and Way department, but that he also directed insulting and inappropriate remarks to her in front of her male co-workers.[6] After an internal investigation, Joiner was suspended for ten days and ordered to attend sexual-harassment training, and White was told to discontinue her operation of the forklift and to resume the standard track laborer job duties.[7] White was informed that the impetus for her reassignment was co-worker complaints that a "more senior man" should have the "less arduous and cleaner job" of forklift operator.[8] The change in White's job duties did not alter her pay or benefits.[9]

In October of 1997, White filed a retaliation charge with the Equal Employment Opportunity Commission (EEOC) claiming that her reassignment constituted an unlawful retaliation for her September complaint about Joiner.[10] Despite filing the charge, White continued working for Burlington Northern until December of 1997 when, after a disagreement with her immediate supervisor, White was suspended without pay for allegedly being insubordinate.[11] Subsequent internal grievance procedures concluded that White had not been insubordinate, and she was consequently reinstated and awarded backpay for the thirty-seven days she was suspended.[12] White filed an additional retaliation charge for her suspension.[13]

After exhausting her administrative remedies under the EEOC, White filed suit against Burlington Northern in the United States District Court for the Western District of Tennessee claiming that Burlington Northern, in changing her job responsibilities and

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* (quoting White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 792 (6th Cir. 2004)).
9. *White,* 364 F.3d at 793.
10. *Burlington N.,* 126 S. Ct. at 2409.
11. *Id.*
12. *Id.*
13. *Id.*

suspending her for thirty-seven days, had unlawfully retaliated against her in violation of Title VII.[14] The jury returned a verdict in favor of White on her retaliation claim.[15] A divided Sixth Circuit panel reversed the judgment.[16]

II. SIXTH CIRCUIT INTERPRETATION OF THE ANTI-RETALIATION PROVISION

The Sixth Circuit reheard the case en banc and agreed with the District Court that there was sufficient evidence for the jury to find that the thirty-seven-day unpaid suspension, as well as the transfer to a more arduous and dirtier job, constituted unlawful retaliation.[17] However, indicative of the disagreement between the other circuit courts, the majority and minority construed the phrase "discriminate against" in Title VII's anti-retaliation provision differently.[18]

Title VII does not define "discriminate against,"[19] thus obliging courts to breathe life into the phrase before it can be applied to the facts.[20] Consequently, the various circuit courts have reached different conclusions regarding both whether an employer action challenged under the provision must be employment or workplace related, and how harmful or injurious an employer action must be to constitute retaliation.[21]

An eight-judge majority of the en banc Sixth Circuit held that in order to "prevent lawsuits based upon trivial workplace dissatisfactions," a plaintiff must prove the existence of an adverse employment action in an anti-retaliation claim.[22] According to the majority, an adverse employment action is a "materially adverse

14. In re Burlington N. & Santa Fe Ry. Co., 162 F. Supp. 2d 699 (W.D. Tenn. 2001).
15. *Id.*
16. *Burlington N.,* 126 S. Ct. at 2410.
17. *White,* 364 F.3d at 803.
18. *Id.*
19. In relevant part, Title VII's anti-retaliation provision provides only that:
> It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a) (2000) (emphasis added).
20. *See White,* 364 F.3d at 795.
21. *Burlington N.,* 126 S. Ct. at 2410.
22. *White,* 364 F.3d at 795.

change in the terms and conditions of [the employee's] employment."[23] Contained within that definition of adverse employment action were two requisite directives for the resolution of anti-retaliation claims in the Sixth Circuit.[24] First, only changes in "terms and conditions of employment" would be scrutinized by the court.[25] Second, to be actionable, those changes must be "materially adverse" to the employee.[26]

The Sixth Circuit's definition of adverse employment action was narrower than some and broader than other definitions proffered by the various circuit courts. For example, the Fifth and Eighth Circuits held that only "ultimate employment decisions"—acts such as hiring, granting leave, discharging, promoting, and compensating—would be subject to review.[27] On the other hand, the Ninth Circuit held that as long as the employer's action was "reasonably likely to deter" employees from engaging in activity protected by the provision, that action would be prohibited.[28]

Although a six-judge minority of the en banc Sixth Circuit agreed with the majority's rejection of the "untenable" ultimate employment action doctrine of the Fifth and Eighth Circuits,[29] it disagreed as to what constituted a sufficiently adverse employment action to invoke Title VII's anti-retaliatory provision.[30] The minority espoused utilizing the "reasonably likely to deter" standard adopted by the Ninth Circuit,[31] contending that such a standard was more consistent with the statutory language of Title VII and Supreme Court precedent.[32]

Thus, the holding of the en banc Sixth Circuit highlighted both the disagreement between and within the circuit courts as to the correct interpretation of the anti-retaliation provision. And as the holding occupied the vanguard in a long series of disparate and incompatible circuit court constructions of the anti-retaliation provision, the en

23. Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999).
24. *See White,* 364 F.3d at 795.
25. *Id.*
26. *Id.*
27. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); *see* Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).
28. Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000).
29. *White,* 364 F.3d at 808.
30. *Id.*
31. *Id.* at 809.
32. *Id.*

banc Sixth Circuit's decision sufficiently captured the Supreme Court's attention to warrant a grant of certiorari.

III. SUPREME COURT INTERPRETATION OF THE ANTI-RETALIATION PROVISION

The Supreme Court granted certiorari to decide whether Title VII's anti-retaliation provision "forbids only those employer actions and resulting harms that are related to employment or the workplace," and to determine "how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope."[33] The Court ultimately held that the anti-retaliation provision forbids those employer actions that would be considered materially adverse by a reasonable employee or job applicant, regardless of whether such actions occurred at the workplace or were related to employment.[34]

A. Inside and Outside the Workplace

The Court's opinion, authored by Justice Breyer, expanded the scope of the anti-retaliation provision beyond that of the anti-discrimination provision by first severing the link between the two provisions,[35] a link that was integral to the Sixth Circuit holding that in order for an employer to violate Title VII's anti-retaliation provision it must effect a materially adverse change in the "terms and conditions" of the employee's employment.[36] Contradicting the Sixth Circuit's approach, the Court instructed that the anti-retaliation provision not be read *in pari materia* with the anti-discrimination provision.[37]

In relevant part, Title VII's anti-discrimination provision provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to *hire* or to *discharge* any individual, or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment,* because of such individual's race, color, religion or national origin.[38]

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33. *Burlington N.,* 126 S. Ct. at 2409.
34. *Id.*
35. *Id.*
36. *White,* 364 F.3d at 795.
37. *Burlington N.,* 126 S. Ct. at 2410.
38. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).

The Court noted that the italicized words—*hire, discharge,* and *compensation, terms, conditions, or privileges of employment*—do not appear in the anti-retaliation provision, which is significant because those words restrict the scope of the anti-discrimination provision to only those actions that either "affect employment or alter the conditions of the workplace."[39] In light of the Court's established presumption that "Congress acts intentionally and purposely in the disparate inclusion or exclusion [it exhibits],"[40] the Court observed that there is reason to believe that Congress intended the differences in scope that the language intimates.[41] The Court attested that this belief is strengthened by a clear difference in purpose between the provisions: the anti-discrimination provision "seeks to prevent injury to individuals based on who they are," and the anti-retaliation provision "seeks to prevent harms to individuals based on what they do."[42] In other words, "purpose reinforces what language already indicates."[43]

The Court analyzed this difference in purpose and concluded that although the objective of the anti-discrimination provision could be achieved without prohibiting anything other than employment-related discrimination, the objective of the anti-retaliation provision could not be.[44]

The Court recognized that employer retaliation against an employee can be just as effective outside the workplace as inside it.[45] To illustrate this recognition, the opinion pointed to *Rochon v. Gonzales*, wherein the FBI retaliated against an employee by refusing to investigate death threats made against that employee and his wife by a federal prisoner.[46] The chilling effect such an action would have on further complaints is clear. And as enforcement of Title VII depends upon the willingness of employees to file complaints and act as witnesses, the Court concluded that "[i]nterpreting the anti-retaliation provision to provide broad protection . . . helps assure the cooperation upon which accomplishment of the Act's primary

39. *Burlington N.,* 126 S. Ct. at 2411–12.
40. *Id.* at 2412 (citing Russello v. United States, 464 U.S. 16, 23 (1983)).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* (citing Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006)).

objective depends."[47] Consequently, the anti-retaliation provision is not tied to any specific type of employer act; instead, it encompasses all employer acts.[48]

B. Actionable Injury or Harm

Regardless of the scope of the anti-retaliation provision, which subjects all employer conduct to scrutiny, only those employer actions that produce an injury or harm are prohibited.[49] The Court, in accord with the Seventh and District of Columbia Circuits, asserted that for the alleged harm or injury to be actionable a plaintiff must show a reasonable employee would have found the employer's conduct materially adverse.[50] For conduct to be considered materially adverse, the plaintiff must show that it "well might have" dissuaded a reasonable employee from making or supporting a charge of discrimination.[51] The Court explained that it used the phrase "materially adverse" because it wanted to clearly separate the actionable significant harms from the non-actionable trivial harms.[52] The Court argued that such a separation is important because the role of the anti-retaliation provision is to deter employers from hampering an employee's "unfettered access" to Title VII's remedies,[53] and one can assume that trivial harms—"petty slights, minor annoyances, and simple lack of good manners"—will not hamper an employee's access to such remedies.[54] To assume otherwise would allow employees to inoculate themselves from those "petty slights or minor annoyances" that are an inevitable part of every work environment and that all employees endure.[55]

In its attempt to instruct future courts as to how to apply this standard, the Court stressed that the materially adverse standard is "tied to the challenged retaliatory act,"[56] but not the underlying conduct forming the basis of the Title VII complaint.[57] The Court also

47. *Id.* at 2414.
48. *Id.* at 2412.
49. *Id.* at 2414.
50. *Id.* at 2415.
51. *Id.* (quoting *Rochon,* 438 F.3d. at 1219).
52. *Id.*
53. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
54. *Id.*
55. *Id.*
56. *Id.* at 2416.
57. *Id.*

explained that the materially adverse standard is phrased in general terms because "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."[58] Put more concisely, context matters.[59] To illustrate the Court's point, the opinion offered the following example: Altering an employee's work schedule may be insignificant to most workers, but such a change may be quite significant to a young mother with school-age children.[60] Thus, the Court provides not only a clear standard, but also direction and illustration to aid its application.

In applying its materially adverse standard to the facts at issue in this case, the Court supplies a concise look at how this standard is to be utilized. The Court ultimately concluded that there was sufficient evidentiary basis to support the jury's verdict on White's retaliation claim.[61] With regard to Burlington Northern reassigning White the job duties of a track laborer after it had assigned her the less arduous and cleaner duties of forklift operator, the Court noted that a jury could conclude that the reassignment to a more arduous and dirtier job with less prestige would have been materially adverse to a reasonable employee.[62] With regard to the thirty-seven-day suspension, the Court reasoned that "an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay."[63] The Court explained that White's receipt of backpay did not cure the fact that both White and her family had to subsist for thirty-seven days without income, "not knowing whether or when White would return to work."[64] Consequently, the Court found that the jury reasonably concluded that White's payless suspension was materially adverse.[65]

58. *Id.* at 2415 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).
59. *Id.*
60. *Id.*
61. *Id.* at 2416.
62. *Id.* at 2417.
63. *Id.*
64. *Id.*
65. *Id.*

C. Prohibited Action in the Wake of the Burlington Northern Case

Employees have been greatly benefited by the Court's holding because all employer action is now subject to review in all circuits, regardless of whether such action occurs at the workplace or is related to employment. And although it is unlikely that employers will attempt to dissuade employees via actions that have absolutely no relationship to the workplace or employment, it is less unlikely that they will attempt to do so via actions that are marginally work related. Thus, this holding specifically benefits employees by reassuring them that in pursuing or assisting the pursuit of a discrimination claim an employee need not endure, without recourse, the marginally work-related but nevertheless dissuasive actions of his or her employer.

Remarkably, Justice Alito concluded that this benefit runs counter to Title VII because it "implies that the persons whom Title VII is principally designed to protect—victims of discrimination based on race, color, sex, national origin, or religion—receive less protection than victims of retaliation."[66] But this conclusion fails to note that the anti-retaliation provision protects victims of discrimination, whether it does so directly or indirectly. Thus, the fact that its scope is broader than that of the anti-discrimination provision actually affords victims of discrimination more protection, not less.[67] For example, the anti-retaliation provision prohibits an employer from retaliating against an employee for opposing a practice made unlawful by Title VII,[68] which directly protects a victim of discrimination.[69] The provision also prohibits an employer from retaliating against an employee who is testifying, assisting, or participating in an investigation, proceeding, or hearing under Title VII,[70] which indirectly protects a victim of discrimination because it is a victim's investigation, proceeding, or hearing that the employee, now protected from retaliation, is undeterred from assisting or participating in.[71]

By expanding the scope of the anti-retaliation provision beyond that of the anti-discrimination provision, the Court benefited employees by providing broader Title VII protection than they would

66. *Id*. at 2419 (Alito, J., concurring in judgment).
67. *See* 42 U.S.C. § 2000e-3(a) (2000).
68. *Burlington N.,* 126 S. Ct. at 2419 (Alito, J., concurring in judgment).
69. *Id.*
70. *Id.*
71. *Id.*

have had if the reach of the provisions remained equal. Nevertheless, this enlargement of the anti-retaliation provision's scope is unlikely to be perceived as a benefit by employers because it exacerbates a common fear that any workplace conduct chronologically proximate to a claim of discrimination is kindling for an anti-retaliation claim. Now, *any* employer conduct that attends a claim of discrimination is capable of stoking the fire of prosecution. Of course, due to the Court's institution of a materially adverse standard, such acts must still meet a specific deterrence threshold: only employer acts that "well might . . . dissuade[]" a reasonable employee from making or supporting a charge of discrimination are actionable. Consequently, the use of a materially adverse standard should diminish employer apprehension that once an employee makes a charge of discrimination he must be handled with a velvet glove.

Nonetheless, Justice Alito's various disagreements with the majority's materially adverse standard portend what will likely be other concerns of employers attempting to use this standard to guide their conduct in a post-*Burlington Northern* employment context. Justice Alito asserted that the majority's standard is concerned with retaliation that well might dissuade an employee from making or supporting a charge of discrimination, and therefore the type of discrimination, more specifically its severity, must be taken into account.[72] Because employees who have endured severe discrimination may not be easily dissuaded from complaining and vise versa, "the majority's interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation."[73]

Fortunately, in addressing Justice Alito's arguments one can not only assuage these anticipated concerns, but also provide even more guidance as to what employer actions are now prohibited under the anti-retaliation provision. Justice Alito's analysis ignores the clear statements of the majority opinion to the contrary. As the majority pointed out, "the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint."[74] More specifically, the majority expressly addressed

72. *Id.* at 2420.
73. *Id.* at 2420–21.
74. *Id.* at 2416 (majority opinion)

Alito's criticism when it asserted that "this standard does *not* require the reviewing court or jury to consider 'the nature of the discrimination that led to the filing of the charge.'"[75]

This assertion is corroborated by the majority's choice of language in communicating its materially adverse standard. The challenged action must dissuade a reasonable worker from making or supporting "*a* charge of discrimination."[76] Note that the majority did not use the definite article "the" before the noun phrase "charge of discrimination," which would have clearly pointed at the specific charge of discrimination alleged by the plaintiff. Instead, the majority used the indefinite article "a." An indefinite article "points to nonspecific objects, things, or persons that are not distinguished from the other members of a class."[77] Consequently, the definition of the indefinite article "a," at the very least, intimates that the majority expects one to envision a generic charge of discrimination when determining whether the plaintiff well might have been dissuaded by the alleged retaliatory act. Thus, when applying the standard, an employer must simply consider whether the retaliation might well deter a reasonable employee from complaining about discrimination in general, not the specific discrimination alleged by the employee.[78]

Justice Alito also questioned the majority's conception of the reasonable employee.[79] One illustration provided by the majority involved a change in the work schedule of a young mother with school-age children.[80] The majority contended that such an act may not disturb many employees, but may greatly disturb such a mother.[81] Justice Alito asserted that this illustration proves that the majority's test does not concern the reasonable employee, but rather "a reasonable worker who shares at least some individual characteristics with the actual victim."[82] Justice Alito further asserted that the majority's illustration introduced three individual characteristics (age, gender, and family responsibilities), and he expressed concern that "[h]ow many more individual characteristics a court or jury must

75. *Id.* at 2415 (quoting Alito, J., concurring in the judgment).
76. *Id.* (emphasis added).
77. CHICAGO MANUAL OF STYLE 166 (15th ed. 2003).
78. *See Burlington N.*, 126 S. Ct. at 2416.
79. *Id.* at 2421.
80. *See id.*
81. *Id.*
82. *Id.*

consider is unclear."[83] But Justice Alito appears to incorrectly equate context with individual characteristics.

The majority placed the reasonable person in the employee's context; it did not give the reasonable person the employee's characteristics.[84] The difference between the two approaches is best conveyed by the majority's illustration of the young mother with school-age children. In considering the "constellation of surrounding circumstances, expectations, and relationships"[85] revolving around a young mother with school-age children, jurors, judges, and prudent employers would be expected to place the reasonable person in a situation where he is an employee burdened with the expectations and circumstances that would typically accompany having to care for children.[86] For example, a reasonable person who is required to work and, at the very least, is also expected to share in the responsibility of feeding, picking up, and supervising children will likely be more affected, and thus dissuaded, by a change in a work schedule than an employee unhindered by such responsibilities.

Justice Alito's final critique of the majority's standard is that "well might dissuade" is a "loose and unfamiliar causation standard,"[87] and "in an area of the law in which standards of causation are already complex, the introduction of this new and unclear standard is unwelcome."[88] The three-word combination "well might dissuade" is arguably unfamiliar. Nevertheless, the majority provides enough information and explanation to provide sufficient, if not clear, guidance for the standard's interpretation and application.

The language in the opinion, which was lifted verbatim from *Rochon*, places "well" directly before the word "might," indicating that "well" modifies "might."[89] Although there are many definitions of the word "well," the majority's application of its causation standard to the facts shows that "well" is intended to augment "might" in a way that conveys a greater degree of likelihood than "might" would alone.[90] More specifically, when applying its causation standard to the

83. *Id.*
84. *Id.* at 2415 (majority opinion).
85. *Id.*
86. *See id.*
87. *Id.* at 2421 (Alito, J., concurring in judgment).
88. *Id.*
89. *Id.* at 2415 (majority opinion).
90. *Id.* at 2417.

facts, the majority determined that "an indefinite suspension without pay *could well* act as a deterrent."[91] In substituting "could" for "might," the majority imparted that it considers "might well have" as synonymous with "could well have."[92] The word "well" directly preceded by "could" conveys that "well" means "easily" or "readily."[93] Thus, by way of diction deduction, it becomes apparent that the majority considers actionable conduct to be conduct that "easily" or "readily" could dissuade a reasonable employee from filing or supporting a charge of discrimination. This interpretation of the majority's standard equates with the majority's imposition of a materially adverse standard in order to preclude an employee from inoculating himself or herself from those "petty slights or minor annoyances" that are an inevitable part of every work environment and that all employees endure.[94] Certainly, "petty slights and minor annoyances" would not "easily" or "readily" dissuade an employee from filing or supporting a charge of discrimination.

IV. CONCLUSION

The Court's most recent interpretation of the anti-retaliation provision is the bearing point for employers, employees, and courts sailing upon the provision's waters. It replaces the disparate and incompatible direction previously proffered by the circuit courts. It also expands the navigable waters to all employer acts, thus reassuring employees that by pursuing or assisting the pursuit of a discrimination claim an employee need not endure those dissuasive actions of his or her employer that are marginally work-related. And by instituting a coherent materially adverse standard, the Court has allowed employers to remove the velvet glove, grasp the helm of their business without timidity, and treat employees in that zone of proximity following a discrimination claim as justly and fairly as they would any other, and no better.

91. *Id.* (emphasis added).
92. *Id.*
93. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1421 (11th ed. 2003).
94. *Burlington N.*, 126 S. Ct. at 2417.