



# JONES DAY COMMENTARY

## SUPREME COURT TO ADDRESS SCOPE OF KEY ANTI-DISCRIMINATION LAW

The Supreme Court granted *certiorari* recently in *Burlington Northern Santa Fe Railway Co. v. White*, a case expected to decide what constitutes employer liability under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from retaliating against employees who complain of workplace discrimination on the basis of race, color, religion, sex, or national origin. The United States Court of Appeals for the Sixth Circuit held that Burlington Northern Santa Fe Railway Co. unlawfully retaliated against Sheila White by making “materially adverse” changes to White’s terms of employment after she complained about sexual harassment—specifically, by transferring her to a more strenuous job and by temporarily suspending her without pay while investigating an unrelated act of insubordination.

Eight other federal courts of appeals, like the Sixth Circuit, define retaliation as a “materially adverse” change in terms of employment because of an employee’s complaint about discrimination. Three federal appellate courts disagree: The Fifth Circuit and

the Eighth Circuit have suggested that only “ultimate employment decisions,” such as firing or demoting employees who complain of discrimination, constitute unlawful retaliation. By contrast, the Ninth Circuit has held that Title VII prohibits any retaliatory action by an employer that is “reasonably likely to deter” employees from complaining about discrimination. The Supreme Court granted *certiorari* in *Burlington Northern* to resolve this three-way dispute over what constitutes unlawful retaliation under Title VII.

### THE FACTS OF *BURLINGTON NORTHERN*

In 1997, Sheila White became a forklift operator at Burlington Northern’s Memphis train yard, where she was the only woman in her department. Soon after she began working at Burlington Northern, she complained of sexual harassment by her boss, who was suspended as a result. A few days later, the company informed White that other employees complained that she had been given the forklift job over male employees with

more seniority. Thereafter, White was reassigned to perform track laborer duties, a position that had the same pay and benefits but involved “dirtier” and more strenuous work.

White filed complaints with the Equal Employment Opportunity Commission alleging sex discrimination and retaliation based on her reassignment. A week later, she was accused of insubordination in an unrelated incident and was immediately suspended without pay. After 37 days, a company investigation found that she had not been insubordinate, and she was reinstated with back pay. White sued Burlington Northern under Title VII and was awarded \$43,500 in damages for her retaliation claims (stemming from the reassignment and the temporary suspension without pay) and \$55,000 in attorney’s fees.

On appeal, two of the three Sixth Circuit judges who initially heard the case agreed with Burlington Northern that White’s reassignment and temporary suspension did not constitute unlawful retaliation because these actions were not “ultimate employment decisions.” But the Sixth Circuit, sitting *en banc*, reheard the case and reinstated White’s award. A majority of the *en banc* court (eight judges) defined retaliation as a “materially adverse change” in the terms of employment and found that both White’s reassignment and her temporary suspension satisfied this standard. Five judges agreed that Burlington Northern retaliated unlawfully against White, but they would have defined retaliation as any employer action that is “reasonably likely to deter” employees from complaining about job discrimination.

## THE LOWER COURTS’ DIVERGENT STANDARDS FOR DEFINING UNLAWFUL RETALIATION

While Title VII makes it unlawful for an employer “to discriminate against” an employee because that employee complains of workplace discrimination or other unlawful employment practices, the statute does not expressly define the sorts of actions by employers that amount to unlawful retaliation. Courts have concluded that Congress could not have intended for them to construe the statute literally and hold employers liable for what the Sixth Circuit called “trivial workplace dissatisfactions” that happen to follow complaints of workplace discrimination. As a result, every court of appeals has required plaintiffs to show something more substantial—

a “tangible” or “adverse employment action”—to support a Title VII retaliation claim. But courts have disagreed about just what constitutes such an adverse action.

The approach favored by Burlington Northern, and supported by language in the opinions of the Fifth and Eighth Circuits, makes employers liable only for “ultimate employment decisions” taken in retaliation for an employee’s complaints about discrimination—actions such as discharging, demoting, or reducing the pay of an employee. These courts stress that Title VII was not intended to allow employees to sue over petty complaints stemming from every action “by employers that arguably might have some tangential effect on ultimate employment decisions.” *See, e.g., Mattern v. Eastman Kodak Co.* (5th Cir. 1997). The original Sixth Circuit panel found that White’s temporary suspension was not an “ultimate employment decision” because it was only the first step, not the final one, in a process that could have led to her termination. Similarly, it found that White’s reassignment was merely a routine lateral transfer with the same pay and benefits, not an ultimate employment decision that affected the core terms of her employment. Courts applying the “ultimate employment decision” standard have also rejected Title VII retaliation claims brought by employees who alleged that they were subjected to retaliatory hostility from supervisors or other employees, threatened with being fired, or required to move to a position with the same title and salary in another town. *See Montandon v. Farmland Indus., Inc.* (8th Cir. 1997); *Manning v. Metropolitan Life Ins. Co., Inc.* (8th Cir. 1997); *Mattern v. Eastman Kodak Co.* (5th Cir. 1997).

The *en banc* Sixth Circuit concluded that the “ultimate employment decision” standard contravenes the purpose and language of Title VII. While recognizing that Title VII was not intended to authorize discrimination lawsuits based on “trivial employment actions,” the Sixth Circuit, joining eight other circuits, held that the statute prohibits *any* kind of *materially* adverse change to the terms of employment taken in retaliation for an employee’s complaint about discrimination—not just final or “ultimate” decisions by the employer. The Sixth Circuit concluded that White’s reassignment to the track laborer job was materially adverse because her new position was less prestigious, required fewer qualifications, and was objectively less desirable than her previous position as a forklift operator, even though her pay and benefits remained the same. The court also found that White’s temporary suspen-

sion without pay was materially adverse because it deprived her of the use of her wages for a time and caused her to suffer emotionally and to incur attorney's fees. Under this standard, other courts have found that severe or pervasive harassment, stripping of job duties and supervisory responsibility, and exclusion of employees from company meetings can all constitute "materially adverse" actions that violate Title VII if taken in retaliation for an employee's complaints about discrimination. See *Medina v. Income Support Div.* (10th Cir. 2005); *Simas v. First Citizens' Federal Credit Union* (1st Cir. 1999); *Johnson v. City of Fort Wayne, Ind.* (7th Cir. 1996).

Finally, five judges of the *en banc* Sixth Circuit concluded that the "materially adverse" standard fails to capture the full scope of retaliation prohibited by Title VII. They advocated the standard, adopted by the Ninth Circuit, that Title VII prohibits an employer from taking any retaliatory action that is "reasonably likely to deter" employees from complaining about discrimination, regardless of whether the employer's action affects the terms and conditions of the plaintiff's employment. The Sixth Circuit minority found support for its position by comparing Title VII's anti-discrimination and anti-retaliation provisions. Title VII's anti-discrimination provision prohibits discrimination on the basis of race, color, religion, sex, or national origin with respect to an employee's "compensation, terms, conditions, or privileges of employment." In contrast, the text of the anti-retaliation provision of the statute prohibits retaliatory discrimination unconditionally—without regard for whether the retaliation affects the employee's "compensation, terms, conditions, or privileges of employment." The Sixth Circuit minority found further support for its position in the EEOC's Compliance Manual on Retaliation, which adopts the "reasonably likely to deter" standard (albeit without the EEOC's following notice-and-comment rulemaking procedures), and in the policy objective of vigorously preventing retaliatory discrimination.

As a practical matter, the "materially adverse" and "reasonably likely to deter" standards lead to the same results in many cases, such as *White's*, where a "materially adverse" change to the terms of employment is also "reasonably likely to deter" an employee from complaining about discrimination. But because the latter standard holds employers liable for *any* conduct that is reasonably likely to deter an employee from engaging in protected activity, it may subject employers to liability for conduct that does not constitute a "materially

adverse" change *with respect to an employee's terms or conditions of employment*, such as giving a negative job reference to a departed employee. See, e.g., *Brooks v. City of San Mateo* (9th Cir. 2000).

## POSSIBLE IMPLICATIONS

This case is of great importance to all employers subject to Title VII's anti-retaliation provision. The Supreme Court's explanation of the standard governing unlawful retaliation has the potential to bring greater uniformity and clarity to the disarray among lower courts regarding the acts that create employer liability under Title VII. For example, the Court's opinion may have implications for whether employers can be held liable under Title VII's anti-retaliation provision for, among other things, a modification of duties within the same job; a temporary suspension and other nonfinal actions that are subsequently reversed; hostility by coworkers or supervisors; and other conduct that does not directly affect the core terms of a plaintiff's employment. In addition, the Supreme Court's opinion may affect the interpretation of anti-retaliation provisions in statutes like the False Claims and Major Fraud Acts, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act. A decision in this case is expected by July.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which may be found at [www.jonesday.com](http://www.jonesday.com).

### **Shay Dvoretzky**

1.202.879.3474

[sdvoretzky@jonesday.com](mailto:sdvoretzky@jonesday.com)

### **Thomas J. Davis**

1.202.879.3751

[tjdavis@jonesday.com](mailto:tjdavis@jonesday.com)

### **Alison B. Marshall**

1.202.879.7611

[abmarshall@jonesday.com](mailto:abmarshall@jonesday.com)

### **Thomas M. Beck**

1.202.879.3603

[tmbeck@jonesday.com](mailto:tmbeck@jonesday.com)

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