THE NATIONAL
LAW JOURNAL
WWW.NLJ.COM THE WEEKLY NEWSPAPER FOR THE LEGAL PROFESSION MONDAY, AUGUST 14, 2006 ALM

EMPLOYMENT LAW

Retaliation Reinvigorated

By Michael Starr

ALL THINGS OLD are new again. Retaliation against employees who protest perceived invidious discrimination has been illegal since employment discrimination itself was first banned more than 40 years ago. Yet the U.S. Supreme Court's recent decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), has placed some new wine in some old bottles, expanding the anti-retaliation provisions of federal employment discrimination law to the widest scope previously adopted by any court.

Retaliation is a large part of employment discrimination law, and it is growing. In the early 1990s, some 15.3% of all illegal discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) alleged retaliation. By 2005, that had almost doubled to 29.5%. That is worth a moment's reflection: Forty years after invidious discrimination in employment was outlawed, almost one in three EEOC complaints allege retaliation for protesting that illegality, either in addition to some underlying discrimination or independent of it.

Since retaliation is so easy to allege and so hard to defend, many courts had looked for ways to limit retaliation claims so that federal courts would not be forced to be the arbiter of every petty employment dispute that arose after someone had complained of discrimination in employment. While the Supreme Court in *Burlington Northern* acknowledged that employees who report what they perceive to be illegal discrimination cannot be "immunize[d]...from those petty slights or minor annoyances that often take place at work and that all employees experience," id. at 2416, its actual interpretation of the relevant statutory language was quite sweeping.

'Burlington Northern' expands anti-retaliation provisions to the widest scope previously adopted by any court.

Retaliation language has always been in the act

In its operative language, Title VII of the Civil Rights Act of 1964 bans discrimination on the basis of race, religion, sex and national origin. But § 704(a) of Title VII, 42 U.S.C. 2000e-3(a)—which has been part of the act since its inception—also prohibits "discrimination" against any individual who has "opposed" any practice that Title VII forbids.

Avoiding retaliation against those who object to perceived discriminatory conduct is so central to anti-discrimination law that it can be illegal even when not expressly prohibited. That was the gist of the Supreme Court's decision last term in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), sustaining a retaliation claim pursuant to Title IX of the Education Amendment of 1972, 20 U.S.C. 1581 et seq., even though Title IX contains no analog to § 704 of Title VII. The high court sustained the claim for retaliation in large part because affording legal protection to those who raise their voices to oppose invidious discrimination was "integral" to the effective enforcement of Title IX's substantive rights.

The Supreme Court, again, in *Burlington Northern*, emphasized the importance of safeguarding employees from retaliation. The substantive provision of Title VII, the court said, "seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious or gender-based status." 126 S. Ct. at 2412. In contrast, the anti-retaliation provision "seeks to secure that primary objective" by prohibiting an employer from harming those employees who "advance enforcement of [Title VII's] basic guarantees" by objecting to invidious discrimination in their own workplaces, whether directed against others or themselves. Id.

The facts of *Burlington Northern* fit a familiar pattern. The plaintiff, Sheila White, was the only woman working in the track maintenance department of

Michael Starr *is a partner in the labor and employment group of Hogan & Hartson, resident in New York. He can be reached at mstarr@hhlaw.com.*

the railroad and had objected to "insulting and inappropriate remarks" made to her by her immediate supervisor. The railroad took prompt corrective action, suspending the supervisor for 10 days and making him attend sexual-harassment training. However, in the conversation informing her of the company's corrective action, White was also told that she would be reassigned from her job of driving the forklift truck to other standard track-laborer tasks, which were by all accounts more arduous and dirtier, involving, literally, much heavy lifting. White claimed retaliation. Thus, while the underlying allegation of discrimination led to no employer liability (because the alleged harassment had been promptly cured), the employer faced exposure for how it responded to the complaining employee.

There was ample reason to conclude that no retaliation had occurred. The person who made the reassignment—"roadmaster" Marvin Brown—had, in fact, hired White only months earlier and given her the forklift operator duty when it became available. He explained his reassignment decision as being based on workplace equity, as male co-workers had complained that "in fairness," the preferred forklift operator assignment should have gone to the " 'senior man.' " On the other hand, Brown had selected White for the forklift job initially, notwithstanding her lack of seniority, and the timing of the reassignment was suspicious, as if to "teach her a lesson" for having protested her supervisor's putatively inappropriate comments. In any event, the jury must have concluded that retaliation, not workplace fairness, motivated the reassignment, as it found for White. That issue, though, was not before the court, which addressed only whether the reassignment (and White's subsequent suspension for purported insubordination) was the kind of employer conduct that could fall within the reach of Title VII's anti-retaliation provision.

Many circuits, though not all, had adopted interpretations of § 704 that were quite clearly intended to cabin its reach. Some insisted on a linkage between the retaliatory conduct and the individual's employment by arguing that illegal retaliation could arise only from a materially adverse change in the terms and conditions of employment. Others had gone further, limiting actionable retaliation only to "ultimate employment actions," like discharge, denial of promotion or reduction in pay. These judicial interpretations have all been swept aside by *Burlington Northern*, which holds unequivocally that Title VII's "anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Id. at 2412-13.

Attempting to limit its holding, the court said that not all retaliation is proscribed by § 704, but only "retaliation that produces injury or harm." Id. at 2415. Apparently, what the court intended was to protect employees only from "materially adverse" employer actions, but not "petty slights or minor annoyances" that might sometimes result from complaints of discrimination. This standard, the court said, was "objective" and "judicially administrable," because only the "reactions of a reasonable employee" had to be considered in "judging" the materiality of the purported harm.

This admirably "objective" standard is, however, qualified by subjective factors because, as the court put, "[c]ontext matters." Id. Thus, in an example cited by the court, while a supervisor, miffed at being charged with discrimination, does not engage in actionable retaliation by declining to take her accuser to lunch, a statutory violation might arise from excluding an employee from a weekly training lunch that significantly contributes to professional advancement. The court did not go on to explain, however, whether the potential contribution to professional advancement was, in such an instance, to be measured by an objective standard or from the employee's subjective point of view.

Subjective factors will keep coming to the fore

Most likely the court intended some kind of objective standard by insisting that materiality be judged from "the perspective of a reasonable person in the plaintiff's position." It will nonetheless be a rare juror who could keep the plaintiff's subjective concerns separate from what is likely to affect "any" reasonable person "in the plaintiff's position."

Further shades of subjectivity are added by the court's linkage of materiality to the tendency of an adverse action to deter a "reasonable" employee from protesting discrimination. Not to quibble, but the court articulates this factor in two significantly different ways. In one, the court says that materiality means that the challenged action "well might have dissuaded a reasonable worker" from objecting. In the other, the court says the standard will capture those allegedly retaliatory acts that "are likely to dissuade" employees. That formulation suggests that the probability of a deterrent effect on a reasonable employee—not just a significant possibility, as in the first—is needed before the employer's action is harmful or injurious enough to constitute actionable retaliation. Is there any doubt about which of these two formulations will be cited by plaintiffs' counsel and which by defense counsel?

Though employers will welcome the court's insistence that Title VII's anti-retaliation provision does not make actionable "trivial harms," its definition of material (as opposed to trivial) adversity is so contextualized and amorphous that it will be difficult to distinguish what it leaves in from what it excludes. As a result, summary judgment for the employer on retaliation claims will be even harder to achieve than it was before. Another consequence of the court's broad view of actionable harm is that future retaliation cases will turn more than ever on the issue of causation: Was the materially adverse employer action actually motivated by hostility to the person who objected to what he perceived to be discriminatory conduct for his having done so? As the facts of *Burlington Northern* itself show, this is often an intensely litigated issue that requires some subtle inferences to be made about people's motives from conduct that is amenable to widely diverse interpretations. Unless lower courts develop some limiting principles as to this issue of causation, almost every claim of illegal retaliation may well be headed to trial. NLJ