

Court Rejects 'Smoke and Mirrors' Argument to Limit Employee Rights

By Charlotte Fishman

Inspector Gregory: "Is there any point to which you would wish to draw my attention?"

Holmes: "To the curious incident of the dog in the night-time."

Inspector: "The dog did nothing in the night-time."

Holmes: "That was the curious incident."

Sir Arthur Conan Doyle, "Silver Blaze" (1893)

With all the ink that has been spilled in the wake of the 9-0 Supreme Court's *Burlington Northern v. White* decision, 2006 DJDAR 7866 (June 22), which clarified the standard for Title VII retaliation claims, it is remarkable that the language in the majority opinion likely to have the greatest impact on future employment discrimination claims appears to have escaped notice. As with the "curious incident" of the dog in the night-time, it's what the court didn't do that merits attention.

Most reports in both the popular and legal media inaccurately referred to the decision as an "expansion" of employee rights. Before the Supreme Court's decision, the lower federal courts were divided, some holding to a more restrictive standard than the one the court adopted, others to a more liberal one. When the Supreme Court settled the conflict over the scope of covered acts and how to distinguish between trivial and actionable retaliation, it rejected the most-restrictive interpretations: It agreed that retaliation claims are not limited in scope to workplace- or employment-related actions, and, with respect to the level of harm required, it adopted a flexible test to distinguish trivial from actionable conduct.

The Supreme Court announced a test that merges the "materiality" and "deterrence" standards, employing a common-sense approach that takes the totality of circumstances into account to determine whether the effect of the employer's action "might well dissuade a reasonable person in the plaintiff's position from making or supporting a charge of discrimination." The court explicitly disapproved decisions limiting retaliation to "ultimate employment actions" and rejected the idea of a "laundry list" approach, which would provide a safe harbor for "lesser" employment actions. No doubt this is a victory for employees. But an expansion of their rights? Only if you believe that they had very restrictive rights to begin with.

And that is where the deeper significance of the case lies. What the Supreme Court did not do is accept the invitation of Burlington Northern to impose a novel, highly restrictive test for actionable retaliation claims, based upon the dubious premise that the court already had adopted such a standard for discrimination claims.

Burlington Northern petitioned the court to take the case in order

to interpret the anti-retaliation provision of Title VII, and that is the basis upon which certiorari was granted. In fact, Burlington Northern had a larger, more insidious agenda. Its goal, as evidenced by the briefing and oral argument, was a radical restructuring of Title VII. Had it been successful, meaningful protection against both discrimination and retaliation would have been a thing of the past.

Under the guise of "harmonizing" the anti-retaliation provision (Section 704(a)) with pre-existing Supreme Court precedent interpreting the anti-discrimination provision (Section 703(a)), Burlington Northern argued that both required "tangible employment actions" causing a significant change in employment status.

Restricting discrimination claims to "tangible employment actions" (hiring, firing and acts with tangible economic consequences) is flatly inconsistent with the statutory purpose and ignores the historical context in which Title VII of the Civil Rights Act of 1964 was enacted. In response to the social concerns brought to public consciousness by the civil rights movement of the 1960s, Congress set an ambitious goal of assuring equal employment opportunity and eliminating discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Thus, the expansive language of Section 703(a), making it an unlawful employment practice to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," has been interpreted broadly, in accordance with congressional intent "to strike at the entire spectrum of disparate treatment ... in employment." *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986).

Unfortunately, over the years, hostility to Title VII among some in the federal judiciary has resulted in increasing receptivity to a more business-friendly regulatory perspective. Although the attitude that there is an acceptable quantum of discrimination (like an allowable level of mercury in fish or pollution in the air) is antithetical to the history and purpose of the Civil Rights Act of 1964, it has made headway, and Burlington Northern sought to capitalize on the trend.

Burlington Northern's goal was to raise the bar for both discrimination and retaliation claims, limiting Title VII's reach to "tangible employment actions." In a stunning display of hubris, Burlington Northern and the solicitor general attempted to convince the court that its own prior precedent, particularly *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), compelled this result. Fortunately, even the new conservative Supreme Court (with the exception of Alito) was not diverted by the smoke and mirrors, delivering what amounts to a judicial rebuke: "[W]e have

found no case in this Court that offers petitioner or the United States significant support. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), as petitioner notes, speaks of a Title VII requirement that violations involve 'tangible employment action' such as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' ... But Ellerth does so only to 'identify a class of [hostile work environment] cases in which an employer should be held vicariously liable

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(without an affirmative defense) for the acts of supervisors.' ... Ellerth did not discuss the scope of the general anti-discrimination provision ... (using 'concept of a tangible employment action [that] appears in numerous cases in the Courts of Appeals' only 'for resolution of the vicarious liability issue'). And Ellerth did not mention Title VII's anti-retaliation provision at all. At most, Ellerth sets forth a standard that petitioner and the solicitor general believe the anti-retaliation provision ought to contain. But it does not compel acceptance of their view."

This language first appears in the portion of the decision discussing the argument that retaliation cannot encompass a wider universe of claims than discrimination. The point is re-emphasized in the court's conclusion, which rejects both the general argument that Title VII's substantive provision and its anti-retaliation provision must prohibit the same conduct and the specific "ultimate employment decision" standard urged by the petitioner.

Rejecting the petitioner's argument that discrimination and retali-

ation must cover the same universe of acts, the court clarified that the scope of actions covered by the retaliation provision is broader than that covered by the discrimination provision. Determining that the core value of any retaliation statute is maintaining unfettered access to the statutory remedial mechanism, the court found no anomaly in including non-employment-related actions as potential retaliation claims.

Moving to the second question, the level of harm required to distinguish between trivial and actionable retaliation claims, the

court adopted a modified version of the Equal Employment Opportunity Commission's deterrence standard: "By focusing on the materiality of the challenged action and the perspective of a reasonable person in plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination."

In essence, the court set the dividing line between trivial and actionable retaliation claims at a relatively low level of harm. To be material, an adverse action need only be "likely to dissuade" — that is, significant enough to cause a reasonable employee to think twice about complaining in the future.

Ironically, there is a sense in which Burlington Northern's loss is likely to be a win for its wider policy goals. Burlington Northern and its supporters professed to be concerned about the increase in retaliation claims, and I predict that, as a result of this decision, there will be less retaliation and fewer retaliation claims. Now that the court has signaled it is serious about discrimination, employer efforts to secure compliance (which are key to preventing retaliation) also will become serious.

In addition, Burlington Northern

and its supporters were adamant that it is in the best interest of the business community to have a unitary standard for discrimination and retaliation claims. I predict that the court's common-sense, context-sensitive approach will create a push in that direction, since actions that satisfy the court's test for workplace-related retaliation surely also will meet the standard for actionable discrimination with respect to the "terms, conditions and privileges of employment."

But we will have to wait and see. For the moment, employees and their advocates are free to bask in the court's return to first principles (unfettered access to statutory remedial mechanisms) and common sense (context matters) as touchstones for the interpretation of Title VII and to maintain an attitude of cautious optimism that the Roberts court will stay the course in the face of future incursions.

Charlotte Fishman is an employment attorney and executive director of Pick Up the Pace, a nonprofit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace. She participated as amicus in support of respondent Sheila White in *Burlington Northern v. White*.

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