A new world for retaliation claims

High court shifts balance of power in the workplace.

Marcia Coyle / Staff reporter
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Washington-In granting broad protection to workers claiming retaliation for bringing job discrimination claims, the U.S. Supreme Court last week shifted the balance of power in the workplace when someone has such a claim not just under Title VII of the Civil Rights Act of 1964, the nation's major job bias law, but under a host of civil rights and whistleblower statutes, said employment litigators and scholars.

"This decision is a real rebuke to the circuits that had been narrowing the kind of protections they would provide employees and is a clear statement to employers that none of this behavior is going to be tolerated," said labor-side counsel Debra S. Katz, partner in Washington's Katz, Marshall & Banks.

"I'm sure all of us in the plaintiffs' bar are going to be using some of the wonderful language in the decision in statutory whistleblower cases and cases under laws with similar anti-retaliation provisions," she added.

"I think this is going to have a very far-reaching effect, beyond Title VII."

The implications of the high court's June 22 ruling in *Burlington Northern & Santa Fe Railway v. White*, No. 05-259, are "enormous," agreed management-side counsel Daniel Westman, partner in the McLean, Va., office of Morrison & Foerster.

"The quantum of adverse action necessary to be actionable comes up under every state and federal whistleblower statute and there are dozens and dozens of them," said Westman, author of *Whistleblowing: The Law of Retaliatory Discharge*, 2d ed. (BNA Books 2004).

"The same issue comes up in Sarbanes-Oxley which protects against financial fraud. This opinion will be extremely influential."

The high court took BNSF Railway Co.'s appeal of a ruling by the 6th U.S. Circuit Court of Appeals to resolve a split among the circuits over the proper standard for judging an employer's liability under the anti-retaliation provision in Title VII, which prohibits discrimination in the terms and conditions of employment on the basis of race, color, religion, sex and national origin.

Section 704 of Title VII, the so-called anti-retaliation provision, makes it illegal for an employer to discriminate against an employee because he or she complained about discrimination or testified, assisted or participated in a Title

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The lower courts essentially had been using three different standards to judge whether an adverse employment action was taken in retaliation against an employee.

Ultimate employment decision: Generally viewed as the most employer-friendly standard, it held that only final employment decisions, such as firing, failing to hire and failing to promote, are adverse employment actions. A majority of circuits rejected this test, but it was used by the 5th Circuit.

Materially adverse change: This standard held that the employee must have suffered a materially adverse change in the terms and conditions of employment, not necessarily an ultimate employment decision.

Reasonably likely to deter: This standard, adopted by the Equal Employment Opportunity Commission (EEOC), was considered the most worker-friendly test. It held that an adverse employment action is any action that would be "reasonably likely to deter employees from engaging in protected conduct."

The high court appeal by BNSF (which shortened its name from Burlington Northern & Santa Fe in 2005) stemmed from a jury verdict and 6th Circuit ruling in favor of Sheila White, who filed retaliation claims on two separate incidents: her transfer from her job as forklift operator in the railroad's Memphis, Tenn., yard to track laborer-at same pay and benefits-after she complained to company officials about harassing and discriminating treatment by her co-workers and supervisor, and her suspension without pay for 37 days for alleged insubordination, shortly after filing an EEOC charge. A grievance committee held that the insubordination charge was unfounded, and she later received full back pay for the suspension.

After receiving a notice to sue from the EEOC, White filed a Title VII suit in federal court and won her retaliation claims and $43,500 in compensatory damages, plus $54,295 in attorney fees. An en banc 6th Circuit upheld the verdict, holding that the job reassignment and the 37-day suspension were materially adverse changes in the terms and conditions of her employment.

Settling the standard

Last week, a unanimous high court, led by Justice Stephen G. Breyer, did more than settle the standard for judging employer liability for retaliatory discrimination.

First, Breyer wrote, the anti-retaliation provision is not confined to employer actions and harms that occur only in the workplace. Title VII's substantive anti-discrimination provision is explicitly limited to discrimination "with respect to [a person's] compensation, terms, conditions, or privileges of employment," said Breyer, quoting the language in that provision. But there is no such limiting language in the anti-retaliation provision, he said, indicating Congress intended no such limit.

"An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace," wrote Breyer, rejecting arguments to the contrary by BNSF and the Bush administration.

Second, the anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or job applicant, he said.

"In the present context that means the employer's actions must be harmful to the point that they would well dissuade a reasonable worker from making or supporting a charge of discrimination," he wrote, saying that this standard prevails in the 7th and District of Columbia circuits.

Material adversity, he explained, will separate significant from trivial harms. And, the reactions of a "reasonable" employee, he said, provide an objective, judicially administrable standard for judging harm.

Breyer added, "Context matters" because the significance of any given act of retaliation will often depend upon the particular circumstances.

"A supervisor's refusal to invite an employee to lunch is normally trivial, a non-actionable petty slight," he said.

"But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination," Breyer said.

The high court decision is a "sea change" in the law in the 5th Circuit, where it was permissible for an employer to retaliate in almost any manner except actually firing the employee, said civil rights scholar Eric Schnapper of the University of Washington School of Law, who assisted White's counsel, Donald A. Donati of the Donati Law Firm in Memphis.

"There have been about 250 decisions applying this ultimate employment action standard," he said. "And the court's decision is a

substantial change in most of the rest of the country."

There are about 80 federal statutes with anti-retaliation provisions, and half of those use language similar to Title VII, he said, adding. "My assumption is this decision will control all of them."

Some of those statutes include the Americans With Disabilities Act, the Equal Pay Act and the Age Discrimination in Employment Act, said employment law scholar Charles Craver of George Washington University Law School.

Schnapper said there are not many cases alleging employer retaliation outside of the workplace, but when those cases are brought, they often involve bad job references. Katz of Washington's Katz, Marshall & Banks, said they also involve so-called SLAPP suits-strategic lawsuit against public participation-by employers against employees.

"My hope is this will be a wakeup call to employers about the need to have really clear policies on retaliation and to monitor what happens to employees after they complain of discrimination," said Schnapper.

For retaliatory actions taken outside of the workplace, the employee still has to show an agency relationship to the employer, said Craver, that they were done by a supervisor, manager or co-worker and the employer knew or tolerated it.

Craver said: "If I were an employer's lawyer, I would actually be happy in a sense. I want to be able to tell my employers, 'Don't do anything to punish someone who has filed a discrimination charge or opposed a practice.' It's easier to have a bright-line rule that tells an employer, 'Don't do anything to change current employment conditions when someone files a charge unless you can show it's part of normal employment procedure.'"

Not-so-bright line

But the bright-line rule is not so bright, according to some management attorneys who predict more litigation because of the new standard.

Employers would have preferred a standard tied to an employer having taken an adverse employment action of some sort, such as a firing or demotion, said management attorney Joel W. Rice, of counsel to Atlanta-based Fisher & Phillips' Chicago office.

The high court's decision is a sort of "double whammy," he said, because it favors employees and broadens the range of claims that can be brought by reaching actions outside of the workplace.

"Retaliation claims are statistically a burgeoning area," said Rice. "In many cases, it is the most troublesome claim for employers to defend against because every action you take after a person has complained is put under a microscope and now the scope of actions potentially problematic has been expanded."

A disgruntled employee, for example, could say his manager threatened or yelled at him in a closed-door meeting, said Rice, and unlike under the objective adverse employment action, the new standard could draw the employer into a lengthy, costly factual dispute about something that happened behind closed doors.

"Almost any comment by a supervisor or manager of a negative nature of any kind could be construed as dissuading a reasonable person from filing a discrimination charge," he said.

Morrison & Foerster's Westman said that the decision implicitly sends a very strong message that retaliation is bad and that will be influential in any court.

"I'm very concerned about the decision in the Sarbanes-Oxley context," he said. "It will be a lot easier for Sarbanes-Oxley whistleblowers to make out cases and that is very troublesome."

For example, he said, in the post-Sarbanes-Oxley era, many accounting firms are going beyond the requirement to have CEOs and chief financial officers sign off on financials and are pushing down into the accounting organizations.

"An accounting manager may say, "I'm not going to certify the accuracy because it's far beyond my scope of control.' If a client calls and asks me what to do with this manager, I'm going to be very careful and say anything you do that could be an adverse employment action could be actionable. It makes it difficult for managers to manage honestly," he said.

The only "silver lining" for employers under the new standard is that trivial actions won't be retaliatory, said Allan H. Weitzman of New York-based Proskauer Rose's Boca Raton, Fla., office

"So we'll be fighting over what's trivial and what's not."