This morning, the U.S. Supreme Court issued its highly anticipated decision in
*Burlington Northern & Santa Fe Railway Company v. White* (No. 05-259). The case
was brought by a female railroad worker who claimed that she was suspended
without pay and reassigned to another position in retaliation for complaining about
unlawful harassment. The key question before the high court was what constitutes
an “adverse employment action” under the anti-retaliation provision of Title VII of
the Civil Rights Act of 1964.

In upholding the jury’s verdict in favor of the employee, the Court first held that the
anti-retaliation provision “does not confine the actions and harms it forbids to those
that are related to employment or occur at the workplace.” In reaching this
conclusion, the Justices referred to the D.C. Circuit opinion involving an FBI agent
who claimed that he was not warned when the FBI learned about threats to his life
from an inmate. According to the Court, “[a] provision limited to employment-
related actions would not deter the many forms that effective retaliation can take.”
Thus, the Court rejected the standard applied by the Courts of Appeals that limited
actionable retaliation to so-called “ultimate employment decisions.”

The high court then turned to what it deemed to be the proper standard for
evaluating retaliation claims under Title VII. Agreeing with the Seventh and District
of Columbia Circuits, the Justices wrote: “In our view, a plaintiff must show that a
reasonable employee would have found the challenged action materially adverse,
‘which in this context means it well might have dissuaded a reasonable worker from
making or supporting a charge of discrimination.’”

The Court made three important explanatory points:

1. It is important to distinguish “significant from trivial” harms;
2. It used the phrase “reasonable employee” to make clear that the standard is an
   objective, rather than subjective one; and
3. It defined the standard in general terms because the decision as to whether it is
   an adverse action must be decided in context.

Applying its new standard, the Court unanimously held that both a 37-day unpaid
suspension, even though it was later converted to paid, and an assignment to a more
physically arduous position were adverse actions and thus form the basis for a
retaliation action. As a result, the judgment of the Court of Appeals was affirmed.
According to Michael Fox, a shareholder in Ogletree Deakins’ Austin office: “This decision is not a terribly unexpected result. This will undoubtedly be referred to as a pro-employee decision—which it is—but employers can take heart in the explanatory comments, particularly that the test is objective. Similar to determining whether conduct meets the severe and pervasive standard for sexual harassment, whether an action is sufficiently adverse for retaliation may often be decided by the court. What it certainly means, however, is there will exist a period of time until the courts, at least in 10 circuits, sort through their new standard.”

This ruling, and the practical impact for employers, will be discussed in more detail in the next issue of The Employment Law Authority, Ogletree Deakins’ bimonthly newsletter. For a copy of the decision, click here. Should you have any questions about this ruling or other employment law related issues, please contact the Ogletree Deakins attorney with whom you normally work or the Client Services Department at 866-287-2578 or via e-mail at clientservices@ogletreedeakins.com.

Note: This article was published in the June 22, 2006 issue of the National Authority.