BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE: HAS THE SUPREME COURT OPENED THE FLOODGATES FOR EMPLOYEE RETALIATION LAWSUITS?

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I. INTRODUCTION

Many federal laws and regulations prohibit employers from taking adverse or retaliatory action against employees who participate in protected activities or who oppose unlawful employment practices. Title VII of the Civil Rights Act of 1964,[1] the Immigration Reform and Control Act,[2] the Americans with Disabilities Act,[3] the Age Discrimination in Employment Act,[4] the Equal Pay Act,[5] Executive Order 11246,[6] the Rehabilitation Act,[7] the Vietnam Veterans' Readjustment Assistance Act,[8] and the Sarbanes-Oxley Act of 2002[9] are federal enactments that prohibit employers from retaliating against individuals who engage in activities protected under those laws, including filing charges and testifying, assisting, or participating in an investigation, proceeding, or hearing.[10]

Retaliation occurs when three things happen: 1) the employee engages in a protected activity, 2) the employer takes an *adverse employment action* against an employee, and 3) there is a connection between the adverse employment action and the protected activity.[11] Common examples of these adverse actions include discharge, demotion, denial of promotion, shift change, salary reduction, reduced work responsibilities, reassignment of position, and transfer to a less desirable job.[12] Title VII of the Civil Rights Act specifically forbids an employer from:

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[1] 42 U.S.C. § 2000e-2(a).
[2] 42 U.S.C. § 1981.
[3] 42 U.S.C. § 12101.
[4] 29 U.S.C. § 621.
[5] 29 U.S.C. § 206.
[6] 30 FR 12319 to 12395.
[7] 29 U.S.C. § 501 to 505.
[8] 38 U.S.C. § 4212.
[9] Sarbanes-Oxley Act P.L. 107-204 (2002).
[10] Wilfred J. Benoit, Jr., & James W. Negle, *Retaliation Claims.* EMPLOYER RELATIONS LAW JOURNAL, 29(3), 13-72 (Winter, 2003).
[11] Equal Employment Opportunity Commission (May 20, 1998), EEOC Compliance Manual, *available at* http://www.eeoc.gov/policy/docs/retal.html (last visited Dec. 4th, 2006).
[12] Alan L. Rupe, *The Life Cycle of the "Twofer,"* WORKPLACE MANAGEMENT, 83 (6)(2004), 16-17.

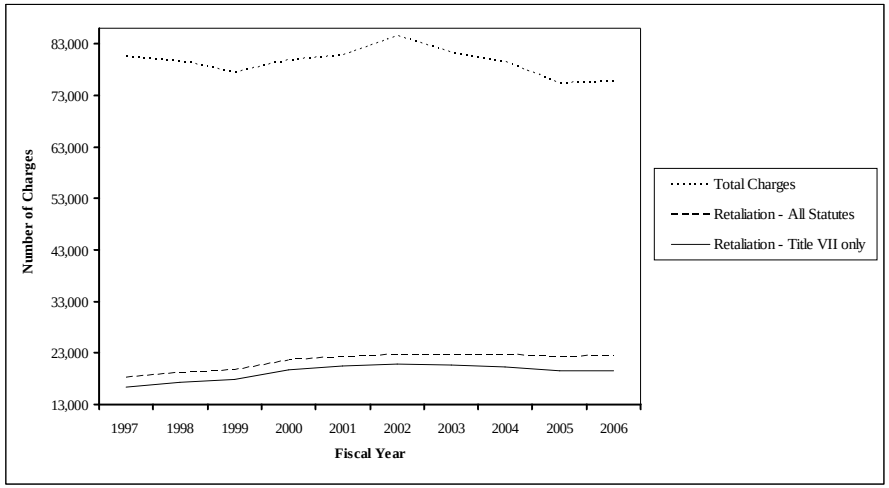
> Discriminat[ing] against an employee . . . because the individual opposes any practice made unlawful by Title VII or made a charge, testified, assisted, or participated in a proceeding or investigation, or hearing under this Act.[13]

It is clear that retaliation is a form of discrimination under Title VII and an employer is specifically prohibited from taking any action against an employee who makes a claim of an unlawful employment practice or participates in a proceeding covered under the act. Even though threats are not included in the listing of prohibited conduct, many courts have found that employers threatening employees with job-related sanctions constitute a form of retaliation,[14] and those threats will be treated as an additional violation.

II. INCIDENTS OF RETALIATION

The data set forth in Figure 1, compiled from the Equal Employment Opportunity Commission (EEOC), provide information on the total number of charges filed with the EEOC for a ten-year period, the total number of retaliation charges filed under all statutes, and the number of charges filed with respect to only Title VII.[15] These figures show that in the last several years retaliation claims represented approximately 30% of the total charges filed with the EEOC and that approximately 87% of the retaliation charges involved violations of Title VII.[16] Thus, the following discussion will address primarily claims under Title VII.

Figure 1. Charge Statistics for a Ten-Year Period.[17]



It is believed more retaliation claims are successful in court because employers are perceived by judges and juries as imposing unfavorable working conditions on employees even when

[13] 42 U.S.C. § 2000e-2(a) (2004, June).
[14] See McKnight v. General Motors Corp., 908 F.2d 104, 111 (7th Cir. 1990) (retaliation or its threat is a common method of deterrence), cert. denied, 499 U.S. 919 (1991); Garcia v. Lawn, 805 F.2d 1400, 1401-02 (9th Cir. 1986) (threatened transfer to undesirable location); Atkinson v. Oliver T. Carr Co., 40 FEP Cases (BNA) 1041, 1043-44 (D.D.C. 1986) (threat to press criminal complaint).
[15] *See* The U.S. Equal Employment Commission, Charge Statistics FY 1997 Through FY 2006, *available at* http://www.eeoc.gov/stats/charges.html (last visited November 25, 2006).
[16] See Appendix A.
[17] The number of total charges reflects the number of individual charge filings.

discrimination claims are without merit.[18] Many questions have been raised about what constitutes retaliatory conduct. Is the transfer of an employee to a lower rated job, the denial of a salary increase or a promotion, or the assignment of an unrealistic task an instance of employer retaliation after a discrimination complaint has been filed or a settlement obtained? Does an employer's belligerent attitude toward an employee constitute retaliatory conduct? Does the employer's uncommunicative behavior toward the employee constitute retaliatory conduct? The U.S. Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*[19] (hereinafter referred to as *White*) has provided a great deal of needed guidance in answering these questions. It is anticipated that the decision may also cause an increase in the number of employee retaliation claims because *White* expands the factual circumstances under which employees may recover damages for retaliatory conduct of their employers. Thus, a closer examination of *White* is warranted.

III. *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE*

Prior to the *White* decision in April 2006, many lower courts applied a narrow and varied interpretation of retaliatory conduct, looking for obvious factual situations such as termination, demotion, or being passed over for a job. These conflicting interpretations of the anti-retaliation provision of Title VII by the various federal courts of appeals prompted the Supreme Court to answer the following two questions:

> Does the [anti-retaliation] provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse action be to fall within its scope?[20]

The decision in *White* answers these questions and appears to allow workers to file retaliation suits even when an employment action does not diminish their pay, hours, or benefits or cause them to suffer a monetary loss of any kind. In *White*, a unanimous Supreme Court broadened the definition of retaliation to include all but *trivial* actions that are materially adverse to a reasonable employee, such as transfers or suspensions that do not result in a loss of pay, benefits, or privileges. This new standard for retaliatory conduct makes avoidance of retaliation claims more difficult for employers because the types of conduct for which employer actions can be construed as retaliatory have been broadened.

A. FACTS OF THE WHITE CASE

The plaintiff, Sheila White, was hired for the position of Track Laborer in the Maintenance of Way Department by the Burlington Northern & Santa Fe Railway Company (hereinafter referred to as Burlington Northern). The Track Laborer job description defined numerous responsibilities and duties, including operating a forklift, replacing railway track components, and clearing brush and litter from the tracks. White's principal task at the time she was hired in June 1997 was to operate a forklift. In September 1997, White complained to Burlington Northern management that her immediate supervisor had made several insulting and inappropriate sex-related comments to her in front of her male co-workers. The company conducted an internal investigation, suspended the supervisor for ten days, and sent the supervisor to a sexual harassment training session.

At the same time that White was informed by Burlington Northern management of the disciplinary action imposed against her supervisor, she was told that she was being reassigned from the task of operating a forklift to other more strenuous and less desirable duties such as cleaning

[18] Rupe, s*upra* note 12, at 16-17.
[19] Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (June 23, 2006).
[20] *Id.*

brush and litter from the railway. White's job title remained Track Laborer and her wages and benefits were not affected by this task reassignment.

In October, White filed a complaint with the EEOC in which she alleged that her reassignment constituted unlawful sex discrimination and retaliation for having complained about her supervisor. In December, she filed a second retaliation claim based on her contention that she had been placed under surveillance and was being monitored by the company. A few days after the second charge was filed, White and her immediate supervisor were involved in a disagreement about which truck should carry her from one location to another, and the supervisor complained that White had been insubordinate. She was then suspended without pay. White pursued grievance procedures as provided within the company policies. The grievance process resulted in a finding that she had not been insubordinate and the company reinstated White to her position and gave her back pay for the thirty-seven days that she was suspended. White filed an additional retaliation claim based on the suspension.

After going through the appropriate administrative procedures and exhausting all administrative remedies, White brought an action in Federal Court in which she maintained that the company's actions in changing her job responsibilities and the suspension without pay for thirty-seven days both constituted unlawful retaliation in violation of Title VII. A jury found in her favor on both claims and awarded her $43,500 in compensatory damages, including $3,250 in medical expenses. The District Court denied Burlington Northern's post-trial motion for judgment as a matter of law.

The company appealed the Trial Court's decision to the Sixth Circuit Court of Appeals. Initially, a divided panel of the Sixth Circuit reversed the judgment and found in Burlington's favor. However, the full Court of Appeals vacated the panel's decision and affirmed the District Court's judgment in favor of the plaintiff. All of the members of the full court en banc agreed with a decision to uphold the District Court judgment; however, they disagreed as to the appropriate standard to apply.

The Supreme Court granted Burlington Northern's writ of certiorari to resolve the disagreements among the various courts of appeals on the standard to be applied to the Civil Rights Act's anti-retaliation provision. The principal argument advanced by Burlington Northern was that neither White's reassignment nor her thirty-seven-day suspension affected the terms or conditions of employment and therefore did not constitute retaliatory action prohibited under Title VII. Burlington Northern argued that the reassignment to different tasks was within the Track Laborer position job description and did not constitute retaliatory conduct because the reassignment did not affect White's job title, wages, or benefits. Burlington Northern also argued that the thirty-seven-day suspension did not constitute retaliatory conduct because White followed grievance procedures contained in the union contract and was eventually reinstated with full back pay. Burlington Northern's legal position was in accordance with the existing precedent of the majority of lower federal court decisions which was that retaliation and any claim for damages "requires a link between the challenged retaliatory action and [the] . . . status of employment."[21]

The Supreme Court recognized that different circuit courts of appeals had created different standards regarding whether a challenged action must be employment-related and how harmful such an action must be in order to constitute retaliation under Title VII.[22] Some circuit courts had held that a challenged action must result in an adverse effect on the terms, conditions, and benefits of employment.[23] Other circuit courts have adopted a more restrictive approach, holding that actionable retaliatory conduct is limited to "ultimate employment decisions"[24] such as hiring, granting leave, discharging, promoting, and compensating employees. Still other circuit courts had adopted a less restrictive approach, holding that a plaintiff must only show that the challenged

[21] *Burlington Northern*, 126 S. Ct. at 2410.
[22] *Id.*
[23] *Id.*
[24] Bond, Schoeneck & King (2006, June). U.S. Supreme Court Expands the Scope of Retaliation Claims Under Title VII of the Civil Rights Act of 1964, *available at* http://www.bsk.com/archives/infomemo.dbm?StoryID=714 (last visited December 4, 2006).

action would likely have dissuaded a reasonable worker from making or supporting a complaint of discrimination.[25]

B. The Decision

Title VII's anti-retaliation provision, contained in subsection 704(a), is as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[26]

In the holding, the Supreme Court determined that the goal of the anti-retaliation provisions in Title VII is to protect individual employees from harm or retaliation when their conduct is under the claim of Title VII. The Court ruled that employer conduct in or out of the workplace can be considered retaliatory if it is materially adverse within the context of an individual worker so as to discourage a reasonable employee from filing a claim, regardless of the validity of the initial complaint.[27] From this holding there are four separate and distinct concepts that make up the overall claim of retaliation: 1) retaliation in or out of the workplace, 2) material adversity and context of employment, 3) a reasonable employee standard, and 4) validity of initial complaint. The Supreme Court, in concurring with the Sixth Circuit Court of Appeals, found that two of Burlington's actions amounted to retaliation: specifically the reassignment of White from forklift duty to standard Track Laborer tasks and the imposition of the thirty-seven-day suspension without pay.

1. Retaliation in or out of the Workplace

After reviewing the anti-retaliatory provisions of a number of other federal statutes, the Court concluded that the purpose of such clauses was to prevent harm to individuals based upon their conduct under color of statute and thus retaliatory conduct of the employer was *not* limited to just employment-related matters. The Supreme Court noted a case in which the FBI retaliated against an employee by refusing, in violation of FBI policy, to investigate death threats made by a prisoner against the employee.[28] In another case, an employer filed false criminal charges involving criminal theft and forgery against a former employee who had complained about discrimination.[29]

The Court reasoned that limiting retaliation claims to just employment-related actions would not meet the purposes of the anti-retaliation provisions and would not cover the situation presented in *White*. The Court stated:

> The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards . . . that have treated the anti-retaliatory provisions as forbidding the same conduct prohibited by the anti-discrimination provisions and have limited actionable retaliation to the so called "ultimate employment decisions."[30]

[25] *Burlington Northern*, 126 S. Ct. at 2409.
[26] 42 U.S.C. § 2000-3(a).
[27] *Burlington Northern*, 126 S. Ct. at 2413.
[28] Russello v. United States, 464 U.S. 16 (1993).
[29] Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996).
[30] *Burlington Northern*, 126 S. Ct. at 2413.

Therefore, anti-retaliation provisions apply to employment-related situations that harm employees in the workplace as well as employer conduct outside the workplace that would likely hinder employees from engaging in protected activities. The Court concluded "that the anti-retaliation provision [of Title VII] does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace."[31] The Court emphasized that enforcement of Title VII was dependent on the cooperation of employees willing to file complaints and also to serve as witnesses to unlawful conduct. The statute could not and would not be enforced without employees who felt comfortable in voicing their concerns. Thus, interpretation of the anti-retaliation provisions of Title VII to provide broad protection helped ensure the success of the act in combating unlawful discrimination.

2. Materiality and Context

In affirming the ruling of the Sixth Circuit, the justices said that the term *material adversity* was noteworthy in evaluating retaliation claims "because we believe it is important to separate significant from trivial harms."[32] While employees who report discriminatory behavior cannot necessarily be "immunize[d] from petty slights or minor annoyances that often take place at work and that all employees experience,"[33] they should be protected from the more serious harms when discrimination is reported. The Court phrased the standard in general terms because a given act of retaliation would often depend upon a specific factual scenario; thus, the facts and context of each case are important. The Court specifically cited and quoted from the *Oncale v. Sundowner* decision, "[T]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[34] "An act that would be immaterial in some situations is material in others."[35] A schedule change might not be important to some employees, but to a parent with young children in school, such a change might be significant. Likewise, a supervisor's refusal to invite an employee to lunch would normally not be unlawful retaliation; however, if the lunch involved a training session that would affect professional development, then unlawful retaliation might be present. Depending upon the circumstances, retaliation might be found in an unfavorable annual evaluation, an unwelcome schedule change or job transfer, or other action not considered an "ultimate employment decision."[36] The Supreme Court indicated that any significant negative action by an employer toward a complaining employee, in or out of the workplace, could be retaliation if it would deter or discourage an employee from filing protected claims.

Applied to the *White* case, the Supreme Court believed that the employer's actions were materially adverse. Although both the former and present job duties fell within the same job description, there was considerable evidence that the Track Laborer duties were dirtier and more strenuous, while the forklift operator position required more qualifications, was more prestigious, and was objectively considered a better job. Thus, the plaintiff's reassignment could be viewed as materially adverse. Likewise, the Court considered the suspension without pay to be materially adverse even though the plaintiff was reinstated with back pay. The Court noted that White and her family were deprived of this income for thirty-seven days with no knowledge as to when or if she would ever receive it. The Court believed that a deprivation of this income caused White significant mental distress.

[31] *Id.*
[32] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1992).
[33] *Burlington Northern*, 126 S. Ct. at 2414.
[34] 523 U.S. at 80.
[35] Washington v. Illinois Dept of Revenue, 420 F. 3d, 658, 661 (CA7 2005).
[36] *Burlington Northern*, 126 S. Ct. at 2411.

3. Reasonable Employee Standard

A "reasonable employee"[37] facing the choice of a job with a paycheck or a discrimination complaint might well choose the former. Therefore, the company's actions in suspending the plaintiff without pay could have a chilling or limiting effect on individuals' willingness to file complaints and/or serve as witnesses to unlawful conduct related to enforcement of Title VII. The Court used the word *reasonable* to describe an employee because its belief is that such a standard for evaluating harm would interject objectivity in each individual case and would be judicially easier to administer. This standard eliminates any objections based upon uncertainties or discrepancies in application. The Court specifically noted:

> We refer to reactions of a reasonable employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.[38]

4. Valid or Invalid Complaints

Finally, some anti-retaliation laws protect employees from negative consequences for complaining about discrimination, whether or not the complaint is meritorious.[39] The most noteworthy effect of the *White* decision is that the Court established a separate and distinct cause of action under Title VII if any retaliatory action is taken after the filing of a discrimination complaint or the acting as a witness to an unlawful activity. Such subsequent conduct is to be reviewed apart from the merits of the original unlawful discrimination complaint. The Court held that significance of a retaliation claim does not require a reviewing court or jury to consider "the nature of the discrimination that led to the filing of the charge."[40] "Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint."[41] This essentially means that the employee's original complaint does not need to be valid for the employee to prevail on the issue of retaliation and that retaliation claims can survive the original discrimination complaint. For an employer, the employee's participatory conduct remains protected even if the employee is ultimately wrong on the merits of the initial discrimination claim, and this may be true even when the contents of that underlying charge are motivated by malicious intent or defamatory statements that are totally false.[42]

IV. Aftermath of *Burlington Northern & Santa Fe Railway Co. v. White*

The Supreme Court's decision in *White* has significant implications for business organizations as well as managers and supervisory employees. As a practical matter, employers can expect to see an upsurge in the number of retaliation lawsuits.[43] The court's adoption of a broad, general standard for retaliation means that an employer can be liable for conduct—

[37] Rochon v. Gonzales, 438 F. 3d 1211, 1219 (2006).
[38] *Burlington Northern*, 126 S. Ct. at 2414.
[39] Equal Employment Opportunity Commission (May 20, 1998), EEOC Compliance Manual, *available at* http://www.eeoc.gov/policy/docs/retal.html (last visited November 25, 2006).
[40] *Burlington Northern*, 126 S. Ct. at 2402.
[41] *Id.* at 2411.
[42] *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969) (noting that Congress has evidenced a protective legislative intent, with the balance being "struck in favor of the employee in order to afford him the enunciated protection from an invidious discrimination, by protecting his right to file charges").
[43] Eli M. Kantor (2006), *Employers Beware—U.S. Supreme Court Opens Floodgates for Employee Retaliation Lawsuits, available at* http://www.goarticles.com/cgi-bin/showa.cgi?C=225933 (last visited November 25, 2006).

workplace-related or not—that would be regarded as a materially adverse action to a reasonable employee and that might have the effect of deterring or dissuading individuals from filing a Title VII charge or from participating in an investigation.

The new standard essentially broadens the number of factors that supervisory personnel must consider, while not providing the specifics employers may desire. As one court recognized, "[T]he law does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit."[44] Nevertheless, it appears that certain types of job-related employer conduct have been found to support claims of retaliatory conduct. The following are examples of conduct that have been adjudicated as a basis for retaliation claims, to wit:[45]

- Bringing an employee in for questioning after learning they made a claim of discrimination
- Denying promotion
- Transferring an employee to another location or position
- Changing an employee's actual job duties, even if the duties are still in the employee's original job description
- Increasing "monitoring" of an employee's performance or activities
- Filing criminal charges against the employee
- Giving poor references for the employee, including telling prospective employers that the employee filed a claim for discrimination
- Changing an employee's schedule when change materially affects the employee
- Excluding an employee from meetings or training lunches
- Not granting leave, paid or unpaid
- Denying a pay increase
- Suspending without pay
- Denying previously approved paid time off
- Allowing co-worker retaliation or hostility, if severe, and if condoned by the employer
- Filing a lawsuit against the employee or a counterclaim in a lawsuit brought by the employee

As the retaliatory conduct above indicates, it is reasonable to conclude that almost any management decision might be interpreted as retaliation against a specific employee if that employee has made any complaint or claim under Title VII or may appear as a witness to any Title VII proceedings. Furthermore, it is irrelevant whether such a complaint has any merit. It is the making of a claim or complaint under color of Title VII that triggers the anti-retaliatory provisions of the act. Management and business must proceed cautiously and with great care with an employee's subsequent work treatment if that employee has engaged in statutorily protected conduct. A simple decision such as who to put on a committee or give an assignment may be affected. Employers should be mindful that excluding the complaining employee could lead to a retaliation claim, even though the employee may not be the best choice for that committee or assignment for reasons that have nothing to do with retaliation. Indeed, the employer's fear of being accused of retaliatory conduct may lead to the complaining employee actually receiving *more favorable treatment* than would be received had a complaint not been made.

Hypothetically, some employees will misuse the decision, knowing the dilemma their employer faces should they file a complaint or claim under Title VII. Some employees may make discrimination-based claims when their jobs are in jeopardy to be able to claim retaliation if their employment is terminated or they receive disciplinary action.

[44] Knox v. State of Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).
[45] Mary P. Birk, *Walking on Eggshells—Avoiding Retaliation Claims When an Employee Who Files a Discrimination Complaint Does Not Leave*, 32 Employee Relations Law Journal, 10-13. (2006).

V. CONCLUSION

Justice Byers in the majority opinion makes two very clear and distinct statements pertaining to the anti-retaliatory provision of Title VII:

> [T]he anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.[46]
>
> The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm . . . 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.[47]

The *White* decision redefines the breadth and application of the retaliation provision of Title VII of The Civil Rights Act of 1964 (as amended) and removes the conflicts between the various courts of appeals. In cases in which employees are involved as complainants or witnesses, any adverse conduct by the employer will be judged by the *reasonable employee* standard. The standard requires that the Trier of Facts determine whether or not a reasonable employee would be dissuaded from pursuing a remedy under Title VII or being a witness to such a proceeding in light of the employer's subsequent conduct. If a *reasonable employee* would be dissuaded, the conduct is a form of retaliation and a violation of the anti-retaliatory provision. If a reasonable employee would not be dissuaded then it is not a violation.

The decision also allows the trier of facts to consider the effect the employer's adverse conduct may have on the employee beyond the terms and conditions of employment. Conduct of the employer which does not affect employment but may affect personal situations may also be considered retaliatory if such conduct might dissuade a reasonable employee from pursuing lawfully protected activity under Title VII.

Since 2000, there has been an ever-increasing number of complaints filed with the EEOC claiming retaliatory conduct on the part of the claimant's employer. Prior to *White* the conflicting precedents of the courts of appeals generally restricted valid claims to job-related conduct of the employer. The *White* decision now expands objectionable conduct beyond the job and into the employee's personal life. The number of retaliatory claims filed with the EEOC between 2000 and the decision rendered in *White* were based upon the legal concept that retaliation must be work- or employment-related. As shown in Figure 1, the number of claims of retaliatory conduct grew at a small but steady rate based upon prior legal precedents that were applied to the anti-retaliation provisions of Title VII. It is the opinion of the authors that the expansion of the anti-retaliation provision to non-workplace and/or non-employment related factual situations can only result in an increase in the anti-retaliation complaints filed with the EEOC. Presumably a majority of the claims filed with the EEOC were in accordance with the legal precedents then in force and the number of claims continued to increase yearly. The broadening or expansion of the interpretative precedents makes the anti-retaliation theory available in more factual situations, and thus more cases or complaints will be filed.

[46] *Burlington Northern*, 126 S. Ct. at 2413.
[47] *Id.* (emphasis added).

Appendix A
Charge Statistics
FY 1997 Through FY 2006

The number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the eight types of discrimination listed. The data are compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System —quarterly reconciled Data Summary Reports, and the national database.

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Total Charges	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768
Race	29,199	28,820	28,819	28,945	28,912	29,910	28,526	27,696	26,740	27,238
	36.2%	36.2%	37.3%	36.2%	35.8%	35.4%	35.1%	34.9%	35.5%	35.9%
Sex	24,728	24,454	23,907	25,194	25,140	25,536	24,362	24,249	23,094	23,247
	30.7%	30.7%	30.9%	31.5%	31.1%	30.2%	30.0%	30.5%	30.6%	30.7%
National Origin	6,712	6,778	7,108	7,792	8,025	9,046	8,450	8,361	8,035	8,327
	8.3%	8.5%	9.2%	9.8%	9.9%	10.7%	10.4%	10.5%	10.7%	11.0%
Religion	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466	2,340	2,541
	2.1%	2.2%	2.3%	2.4%	2.6%	3.0%	3.1%	3.1%	3.1%	3.4%
Retaliation —All Statutes	18,198	19,114	19,694	21,613	22,257	22,768	22,690	22,740	22,278	22,555
	22.6%	24.0%	25.4%	27.1%	27.5%	27.0%	27.9%	28.6%	29.5%	29.8%
Retaliation —Title VII only	16,394	17,246	17,883	19,753	20,407	20,814	20,615	20,240	19,429	19,560
	20.3%	21.7%	23.1%	24.7%	25.2%	24.6%	25.4%	25.5%	25.8%	25.8%
Age	15,785	15,191	14,141	16,008	17,405	19,921	19,124	17,837	16,585	13,569
	19.6%	19.1%	18.3%	20.0%	21.5%	23.6%	23.5%	22.5%	22.0%	17.9%
Disability	18,108	17,806	17,007	15,864	16,470	15,964	15,377	15,376	14,893	15,625
	22.4%	22.4%	22.0%	19.9%	20.4%	18.9%	18.9%	19.4%	19.7%	20.6%
Equal Pay Act	1,134	1,071	1,044	1,270	1,251	1,256	1,167	1,011	970	663
	1.4%	1.3%	1.3%	1.6%	1.5%	1.5%	1.4%	1.3%	1.3%	0.9

From: http://www.eeoc.gov/stats/charges.html