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BNSF v. White: Early Returns

I covered the Supreme Court's June 22, 2006 ruling in *BNSF v. White* in the October 2006 issue of *TIP* and **Eric Dunleavy** wrote a superb follow-up article in the January 2007 issue. For present purposes, I will assume the reader is familiar with both articles. Eric stopped short of reviewing post-*BNSF* rulings. I will continue where Eric left off. I searched circuit court cases from June 22, 2006 through December 31, 2006 and will report the results of that search below.

Recapping *BNSF*, the Supreme Court assessed three standards for defining retaliatory acts as being materially adverse. The most restrictive standard, which I termed Ultimate Employment in my October 2006 article, requires illegal acts related to hiring, granting leave, discharge, promotion, or compensation. The middle standard, which I termed Adverse Employment, requires illegal acts relating to the terms and conditions of employment, but these acts need not constitute ultimate employment consequences.¹ The least restrictive standard, which I termed EEOC Deterrence, requires acts reasonably likely to deter a charging party (or others) from engaging in protected activity, regardless of whether they are illegal in an of themselves. There was little doubt that Ultimate Employment would lose. The problem is that the plaintiff in *BNSF* (Sheila White) alleged two actions (a transfer to a less prestigious job and a 37-day suspension without pay later rescinded with back pay) that satisfied EEOC Deterrence in the eyes of eight justices and Adverse Employment in the eyes of the ninth justice. That's great for Sheila White, but it leaves the rest of us wondering what the difference is between EEOC Deterrence and Adverse Employment.

There were two other issues addressed in the ruling. The first issue involved the *context* in which a retaliatory act occurs. For example, in *Washington v. Illinois Dept. of Revenue* [420 F. 3d 658, 662 (CA7 2005)], the 7th Circuit found that a shift change was materially adverse because the plaintiff faced a "unique vulnerability" (her prior flex-time schedule permitted her to care for her mentally retarded child, whereas the new schedule did not). The second issue involved *out-of-work* actions, as for example in *Berry v. Stevinson Chevrolet* [74 F. 3d 980 (CA10 1996)] where a false criminal charge was

¹ For example, hostile environment harassment is illegal under several statutes, but by itself does not rise to the level of an ultimate employment consequence unless it can be proven it is so severe that it leads to a constructive discharge (see for example *Pennsylvania State Police v. Suders* [542 US 129, (2004)]).

filed by an employer, and *Rochon v. Gonzales* [438 F. 3d 1211 (CADC 2006)] where no protection was afforded for the family of an FBI agent (which is standard operating procedure for the FBI). The eight justices that endorsed EEOC Deterrence also endorsed the circuit court ruling favoring the plaintiffs in each of these cases.

Search Criteria & Primary Ground Rules

Given my press deadline (February 1, 2007), I limited my search for citations from June 22, 2006 through December 31, 2006. There were 71 citations citing the Supreme Court’s ruling in *BNSF*. Seven citations were of six cases that survived summary judgment motions and went to trial. As depicted in Table 1,² there are two citations for one case on different dates (*Freitag v. Ayers*). These cases are interesting in their own right, but for present purposes, it is sufficient to note that the district court ruling was upheld in each case, four favoring plaintiffs and two favoring defendants.

Table 1
Jury Rulings Favoring Plaintiff

CA 1	<i>McDonough v. City of Quincy</i>	Lexis 15773	Jun 23	Jury Ruling - Plaintiff
CA 6	<i>Jordan v. City of Cleveland</i>	Lexis 16821	Jul 6	Jury Ruling - Plaintiff
CA 9	<i>Freitag v. Ayers</i>	Lexis 23383 Lexis 27285	Sep 13 Nov 3	Jury Ruling - Plaintiff
CA 10	<i>McInnis v. Fairfield</i>	Lexis 20740	Aug 14	Jury Ruling - Plaintiff
CA 7	<i>Szymanski v. County of Cook</i>	Lexis 28672	Nov 20	Jury Ruling - Defendant
CA 11	<i>White v. Potter</i>	Lexis 27539	Nov 7	Bench Ruling - Defendant

The remaining 64 citations represented 64 separate cases that were appeals of summary judgment for the defendant (SJD) at the district court level. In other words, they did not go to trial. Collectively, 49 SJDs were affirmed and 15 SJDs were reversed or vacated and remanded.³ Table 2 breaks down these rulings by the standard used by the respective circuit courts prior to the Supreme Court’s ruling in *BNSF*. Among the 15 nonaffirmations, 12 were reversals and 3 were vacate/remands.

² The citations in all tables are shorthand. For example, the technically correct citation for *McDonough v. City of Quincy* is 2006 U.S. App. LEXIS 15773. It should be noted that all or most of them can be found at WWW.findlaw.com. The date of the ruling is provided to facilitate Findlaw searches.

³ A reversal is a prejudicial message that means the district court got it wrong. In comparison, to simply vacate and remand means only to start over and review under the new standard without prejudice.

Table 2
Distribution of SJD Appeals

Ultimate Employment Courts	CA5 CA8	8 Rulings: 5 Affirmations (62.5%)
Adverse Employment Courts	CA7 CA9 CADC	14 Rulings: 11 Affirmations (78.6%)
EEOC Deterrence Courts	Remaining 7 Circuits	42 Rulings: 33 Affirmations (78.6%)
All Courts	12 Circuits	64 Rulings: 49 Affirmations (76.6%)

Because there were so many SJD appeals, primary ground rules were established such that (a) the 12 reversals are treated as being more important than the 3 vacate/remands and (b) the affirmations that illuminate conceptual differences among the Ultimate Employment, Adverse Employment, and EEOC Deterrence standards are treated as more important than those that shed no light on this issue.

Secondary Ground Rules

There are four additional rules to note. First, although *BNSF v. White* was a Title VII case (covering race, religion, sex, and national origin), it applies broadly to other EEO classes (age and disability), to EEO claims via constitutional amendments, to non-EEO statutes such as the Family Medical Leave Act (FMLA), and to constitutional claims on non-EEO issues (e.g., First Amendment claims of retaliation after use of freedom of speech). For present purposes, less emphasis is placed on the source of the original claim in favor of the facts in the retaliation claim.

Second, the source claim is irrelevant in most cases to the ruling in the retaliation claim. For example, in *Easterling v. Concordia*, the ruling was SJD on both the original charge (sex discrimination) and retaliation at the district court level. The 5th Circuit then affirmed SJD on the source claim but reversed SJD on the retaliation claim. For present purposes, the ultimate disposition of the source claim is deemphasized.

Third, in any retaliation claim, plaintiffs must satisfy three elements (or prongs) in order to prevail:

- Prong 1: Documentation of participation or opposition
- Prong 2: A materially adverse action
- Prong 3: A causal connection between Prongs 1 and 2

The Supreme Court's ruling in *BNSF v. White* focused entirely on the definition of *materially adverse*. Critically, even if the circuit court credits the plaintiff on Prong 2, the plaintiff must still prove a causal connection (Prong 3)

in order to prevail. For present purposes, the emphasis is on cases where Prong 2 was addressed, regardless of the disposition on Prong 3.

Fourth, retaliation claims follow standard disparate treatment rules and may use the *direct* or *indirect* method to establish causality (Prong 3). The difference between these two methods is illustrated by the 7th Circuit Court in *Phelan v. Cook County*. The direct method is illustrated as follows:

Under the first method, a plaintiff can defeat summary judgment by “present[ing] direct evidence...that he engaged in protected activity...and as a result suffered the adverse employment action of which he complains.” ... “If [the evidence] is contradicted, the case must be tried unless the defendant presents un rebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had no retaliatory motive.” In the absence of an admission of retaliatory motive by the defendant, a plaintiff can succeed under this first method, referred to as the “*direct method*,” by presenting sufficient circumstantial evidence such that a jury could infer retaliation.

It is important to note the distinction between direct/indirect *method* as compared to direct/indirect *evidence*. The direct method may use either direct evidence (e.g., e-mails, eyewitnesses) or indirect (or circumstantial) evidence (e.g., that similarly situated employees were treated differently).⁴ The critical point is *when* the evidence is presented. If the plaintiff leads with either form of evidence in the prima facie phase, the defendant is forced to rebut that evidence directly. If the district court judge believes that insufficient evidence has been presented, or the evidence presented is successfully rebutted by the defendant, then SJD is granted.

The indirect method for retaliation claims is illustrated by 7th Circuit Court in *Phelan v. Cook County* as follows:

The second method described as the “indirect method,” “requires the plaintiff to show that after filing the charge only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action.”

For example, if a plaintiff claims termination in retaliation for filing an EEOC claim of sex discrimination, and does not offer any direct or indirect evidence in the prima facie phase, the defendant may simply articulate or verbalize (without having to prove) a nondiscriminatory reason for the termination, forcing the plaintiff to prove the stated reason for termination is a pretext for discrimination. This is known as the *McDonnell-Burdine* scenario.⁵ If the district court judge deems that a reasonable jury cannot infer retaliation based on pretext, then SJD is granted.

⁴ See for example *Desert Palace v. Costa* [539 US 90 (2003)], where the plaintiff lead with indirect evidence and forced the plaintiff to rebut that evidence.

⁵ See for example *McDonnell Douglas v. Green* [411 US 792 (1973)] where the plaintiff provided no direct or indirect evidence of discrimination in the prima facie phase and was forced to come up with direct or indirect evidence discrediting the defendant’s articulation in the pretext phase.

Although I did not keep an exact running count, in the general run of cases I examined, plaintiffs with strong direct or indirect evidence that come out swinging in the prima facie phase stood a better chance of prevailing than plaintiffs who relied on disproving articulations by the defendants in the pretext phase of *McDonnell-Burdine* scenarios. For present purposes, the distinctions between methods and evidence are deemphasized. These distinctions are critical, however, for readers who intend to study retaliation rulings to determine how Prong 3 claims are evaluated.

Ultimate Employment Courts

Table 3 depicts cases decided in the courts that previously used the Ultimate Employment standard. Because this is the most restrictive of the three standards, these are the cases most vulnerable to reversals of SJD based solely on Prong 2. There were three reversals of SJD and five affirmations. Seven of the eight cases were from the 5th Circuit and only one was from the 8th Circuit. To assist the reader, the ground rules discussed above will be relaxed for these cases and then heightened for the remaining 56 cases evaluated by the prior Adverse Employment and EEOC Deterrence courts.

Table 3

Ultimate Employment Courts (CA5 & CA8)

CA 5	<i>Easterling v. Concordia</i>	Lexis 19053 Jul 28	SJD Reversed—Prong 2
CA 5	<i>Pryor v. Wolfe</i>	Lexis 21467 Aug 22	SJD Reversed—Prong 2
CA 5	<i>Despres v. San Antonio</i>	Lexis 31000 Dec 15	SJD Reversed—Prong 2
CA 8	<i>Lewis v. St. Cloud University</i>	Lexis 26983 Oct 31	SJD Affirmed—Prong 3
CA 5	<i>Kebiro v. Wal Mart</i>	Lexis 20635 Aug 10	SJD Affirmed—Prong 3
CA 5	<i>Peace v. Harvey</i>	Lexis 26784 Oct 26	SJD Affirmed—Prongs 2 & 3
CA 5	<i>McCoullough v. Kirkum</i>	Lexis 31335 Dec 20	SJD Affirmed—Prongs 2 & 3
CA 5	<i>McClaurin v. Jackson Fire Dept.</i>	Lexis 31274 Dec 19	SJD Affirmed—All Three (?)

Each of the three reversals directly challenged the Ultimate Employment standard. Sue Ann Easterling was denied promotion to head coach of a female basketball team in favor of a male and filed a Title VII sex discrimination claim. As previously noted, the 5th Circuit affirmed on discrimination and reversed on retaliation. Easterling documented 10 specific ways in which she was mistreated after she filed the sex discrimination claim (e.g., assignment to offices ten miles apart, an inferior office with bad odor, working outdoors for the first time in her 12-year employment history, and others). None of these were Ultimate Employment actions. However, the 5th Circuit concluded that these actions satisfied the new EEOC Deterrence standard (dissuading a reasonable person from challenging discrimination), and that there was a causal connection between her sex discrimination claim and the subsequent actions taken against her.

The other two reversals had a similar theme. Henderson Pryor filed a race claim after disputing with his employer that a leave of absence should be classified as paid sick leave rather than unremunerated time under the FMLA. Michael Despres filed a reverse-discrimination race claim, after which he was subjected to (among other things) special overtime rules. Pryor documented that his compensation was delayed compared to other similarly situated employees (who were paid during the same interval) and Despres documented that other similarly situated employees (who did not complain of discrimination) were not subject to these special overtime rules.

Among the five affirmations of SJD, two were decided on Prong 3 alone. Richard Lewis sued for age discrimination after he recovered from a heart attack and felt he was being pressured to retire. He was later terminated. John Kebiro sued Wal-Mart under several statutes for failure to promote. He subsequently applied for other promotions, each of which was denied. Thus, both plaintiffs challenged Ultimate Employment decisions (termination and promotion), meaning they satisfied the lesser EEOC Deterrence standard. However both plaintiffs failed to prove causation. In *Lewis*, the 8th Circuit ruled there was too long an interval between the source and retaliation claims (11 months), and that the defendant had legitimate reasons for which similarly situated employees would merit termination. In *Kebiro*, Wal-Mart documented two key requirements for promotion (supervisory experience or exceptional past performance). Kebiro not only failed to satisfy either requirement; he was not even aware of them.

Two affirmations of SJD were decided on Prongs 2 and 3. Glenda Peace filed an EEOC complaint and claimed she subsequently suffered retaliation because she received a formal note on leave approval procedures from the Deputy Chief of Staff, she had no designated seat at a ceremony for a retiring general, she lost her designated parking place, was assigned tasks she “subjectively” perceived as menial, and was yelled at three days before her retirement date. The 5th Circuit Court affirmed that these were “trivial harms” and that causality was not established between those harms and her EEOC complaint. Similarly, Lecia McCoullough (and two other women) filed sexual harassment charges for which the police department took prompt, corrective actions. She claimed she was subsequently relocated to a new desk, was insulted by other employees, and was transferred to a different division (which she had previously requested). As in Peace, the 5th Circuit viewed these as trivial harms and saw no causality between these harms and the sexual harassment complaint.

Lastly, Willie McClaurin sued on behalf of union members who openly challenged modifications in promotional testing procedures as being contrary to an agreement between the union and the fire department. He claimed union members were then treated differently than non-union members on the day of promotional testing and sued via the 14th Amendment claiming retaliation for use of freedom of speech. This case is isolated from the others in Table 2 because the district court ruled SJD on all three prongs. However, the 5th Cir-

cuit assumed Prong 1 was satisfied and affirmed SJD on grounds that changes and/or irregularities in testing procedures do not constitute an Adverse Employment action and that there was no causal connection between these changes/irregularities and how union and non-union members were treated.

In summary, the three reversals of SJD were based on *BNSF v. White*, whereas the five affirmations of SJD were not. However, three of the affirmations (*Peace*, *McCoullough*, and *McClaurin*) illustrate what prior Ultimate Employment courts view as trivial harms that do not satisfy EEOC Deterrence.

EEOC Deterrence Courts

Moving to the other extreme, EEOC Deterrence, Table 4 depicts 14 cases, 12 from the 7th Circuit, two from the DC Circuit, and none from the 9th Circuit (recall the only 9th Circuit rulings involved a single jury trial case). Collectively, there are three reversals and 11 affirmations of SJD. These cases are displayed as four distinct subgroups.

Table 4

EEOC Deterrence Courts (CA7, CA9 & CADC)

CA 7	<i>Phelan v. Cook County</i>	Lexis 23692	Sep 18	SJD Reversed—Prong 2
CA DC	<i>Velikonja v. Gonzales</i>	Lexis 25675	Oct 17	SJD Reversed—Prong 2
CA 7	<i>Burnett v. LFW</i>	Lexis 31746	Dec 26	SJD Reversed—Prong 3
CA 7	<i>Treadwell v. Illinois</i>	Lexis 18789	Jul 27	SJD Affirmed—Prong 3
CA 7	<i>Tomanovich v. Indianapolis</i>	Lexis 20247	Aug 8	SJD Affirmed—Prong 3
CA 7	<i>Yindee v. CCH</i>	Lexis 20576	Aug 11	SJD Affirmed—Prong 3
CA 7	<i>Cassimy v. Rockford Bd. of Ed.</i>	Lexis 22566	Sep 5	SJD Affirmed—Prong 3
CA 7	<i>Anders v. Waste Management</i>	Lexis 23184	Sep 12	SJD Affirmed—Prong 3
CA 7	<i>Burks v. Wisconsin DOT</i>	Lexis 24576	Sep 29	SJD Affirmed—Prong 3
CA 7	<i>Mohammed v. Racine Sch. Dist.</i>	Lexis 27402	Nov 1	SJD Affirmed—Prong 3
CA 7	<i>Nair v. Nicholson</i>	Lexis 24725	Oct 2	SJD Affirmed—Weak Period
CA DC	<i>Ramey v. Pepco</i>	Lexis 31151	Dec 18	SJD Affirmed—Prong 1
CA 7	<i>Thomas v. Potter</i>	Lexis 25508	Oct 11	SJD Affirmed—Prong 2
CA 7	<i>Jordan v. Chertoff</i>	Lexis 30903	Dec 14	SJD Affirmed—Prong 2

The first subgroup contains the three reversals of SJD. Two of them (*Phelan* and *Velikonja*) were reversed based on Prong 2. On the other hand, David Burnett easily satisfied Prong 2 (he was terminated), and the reversal was based on Prong 3. Therefore, applying the aforementioned ground rules, *Phelan* and *Velikonja* are more relevant to the present discussion than *Burnett*.

Phelan is interesting because of its similarity to the facts in *BNSF v. White*. Recall that Sheila White received a 37-day suspension without pay

and was later vindicated (with backpay) after an internal investigation. Similarly, Laura Phelan was terminated and later vindicated (with backpay). Therefore, the 7th Circuit reversed SJD for the same reasons offered by the Supreme Court in *BNSF v. White*. In fact, the 7th Circuit found that the actions against Laura Phelan were more egregious than against Sheila White because Phelan was out of work for nearly four months.

Velikonja is interesting because the alleged retaliatory act was somewhat subtle. Maria Velikonja was accused of falsifying time sheets. This prompted an investigation by the Office of Professional Responsibility (OPR). Velikonja challenged the falsification charges via Title VII, after which, she was referred for a second OPR investigation. She claimed the second investigation was in retaliation for the Title VII claim and that the harm was that she could not apply for promotions while this investigation was ongoing. The district court ruled that an official investigation is not an adverse employment action even under EEOC Deterrence. The 7th Circuit ruled that “a reasonable jury could find that the prospect of such an investigation could dissuade a reasonable employee from making or supporting a charge of discrimination.”

The second subgroup includes seven cases (*Treadwell* through *Mohammed*) requiring limited discussion because all were decided solely on Prong 3 (failure to prove causality). The alleged retaliatory acts in these cases were termination, suspension, salary reduction, and a reclassification that did not involve a reduction in pay but was a reduction in title.

Nair and *Ramey* are grouped together because both are extremely weak cases. Sukumari Nair brought charges that were so weak that the 7th Circuit admonished her lawyer for unprofessional conduct. Ramey illustrates a failure of the Prong 1 test. Benjamin Ramey filed a union grievance for mistreatment followed by a 13th Amendment retaliation claim based on race. However, the union grievance lacked a racial component. As a result he could not prove he was engaged in a “statutorily protected activity.”

Lastly, *Thomas* and *Jordan* are grouped together because both were affirmed on Prong 2. Pamela Jordan reappealed after her prior appeal to the 7th Circuit was struck down. She argued that the 7th Circuit failed to consider her *out-of-work* claim in the first appeal. Although the Supreme Court did endorse out-of-work claims in *BNSF*, Jordan failed in her second appeal because she could not cite any out-of-work actions. Michael Thomas alleged that a shift change was retaliatory based on *context*, another issue endorsed by the Supreme Court in *BNSF*. However, the 7th Circuit ruled he failed to prove he faced a “unique vulnerability” as, for example, in *Washington v. Illinois Dept. of Revenue*, where the plaintiff was caring for a mentally retarded child.

In summary, applying the ground rules, only 4 of 14 cases merit discussion in light of *BNSF v. White*. As expected (because EEOC Deterrence was previously used in these courts), these four cases do not reflect conceptual changes in light of *BNSF v. White*. Two reversals invoking Prong 2 were cor-

rections of district court rulings that misunderstood EEOC Deterrence prior to the Supreme Court's ruling and two affirmations invoking Prong 2 reflect appropriate conceptions of the out-of-work and context issues as articulated by the Supreme Court.

Adverse Employment Courts—Part 1

The remaining 42 cases are spread among seven circuit courts that previously used the Adverse Employment standard. SJD was vacated and remanded in 3 cases, reversed in 6 cases, and affirmed in 33 cases. Because of the volume of cases among these courts, the vacate/remands and reversals are presented in Table 5 immediately below (Part 1) and the affirmations are presented in a separate section (Part 2) in Tables 6 through 9 further below.

Table 5 has two subgroups. The first subgroup depicts three vacate/remands and one reversal and the second grouping depicts the remaining five reversals. In the vacate/remand cases, the 1st Circuit (*DeJesus*), 6th Circuit (*Baugham*), and 11th Circuit (*Clemons*) ordered reconsideration of SJD rulings in light *BNSF V. White*, but without opining on the facts in these cases. Therefore, they shed no light on how these courts interpreted Prong 2. *Campbell* is of little interest for present purposes because it was decided solely on Prong 3 (the employer conceded Robert Campbell suffered adverse actions, but he had no proof of causality). However, the remaining five cases involve Prong 2 rulings.

Table 5

Adverse Employment Courts—Reversals and Vacate/Remands (CA1 CA2 CA3 CA4 CA6 CA10 CA11)

CA 1	<i>De Jesus v. Potter</i>	Lexis 31839	Dec 27	Vacated–Remanded
CA 6	<i>Baugham v. Battered Women</i>	Lexis 31722	Dec 20	Vacated–Remanded
CA 11	<i>Clemons v. Alabama HR</i>	Lexis 26209	Oct 23	Vacated–Remanded
CA 6	<i>Campbell v. Univ. of Akron</i>	Lexis 25876	Oct 17	SJD Reverse–Prong 3
CA 2	<i>Kessler v. Westchester</i>	Lexis 21530	Aug 23	SJD Reversed–Prong 2
CA 6	<i>Randolph v. Ohio</i>	Lexis 17473	Jul 13	SJD Reversed– Prongs 2 & 3
CA 11	<i>Taylor v. Roche</i>	Lexis 23380	Sep 12	SJD Reversed–Prongs 2 & 3
CA 10	<i>Mickelson v. NY Life</i>	Lexis 21944	Aug 28	SJD Reversed– Prongs 2 & 3
CA 3	<i>Moore v. Philadelphia</i>	Lexis 22317	Aug 30	SJD Reversed–Prong 2

Two of these cases (*Kessler* and *Randolph*) have facts analogous to *BNSF v. White*. In the first case, Richard Kessler was transferred to another office after filing an age discrimination claim. There was no change in job classification or salary. However, by his report, he no longer performed broad discretionary or managerial functions, nobody reported to him, and he performed

work normally assigned to lower level personnel. In other words, as did Sheila White, Richard Kessler alleged that he now had a less prestigious job. This claim failed at the district court level under Adverse Employment because it did not constitute a change in the terms and conditions of employment. However, the 2nd Circuit reversed under EEOC Deterrence, ruling that a “rational factfinder could permissibly infer that a reasonable employee” in Kessler’s position “could well be dissuaded from making a charge of discrimination.”

In the second case, Donna Randolph filed an EEOC claim alleging harassment by inmates in an all-male maximum-security youth facility. She was later placed on administrative leave and was ultimately terminated. As happened to Sheila White, Randolph was later reinstated (but with only 70% backpay). The district court ruled that the reinstatement and backpay were sufficient to foil the retaliation claim under Adverse Employment, but the 6th Circuit, which had ruled in *BNSF v. White*, ruled that “in this case as in ... [*BNSF v. White*] ... the termination and concomitant loss of income constitutes a materially adverse action under Title VII, notwithstanding Randolph’s later reinstatement with backpay.”

The third case (*Taylor*) relates to the *context* in which an otherwise legal shift change satisfies EEOC Deterrence. It is a complicated case involving multiple counts of discrimination. For present purposes, it is sufficient to know that Howard Taylor requested a shift from day work to night work and was denied by a supervisor who allegedly told him he should have thought about the consequences before filing a discrimination claim (thereby satisfying Prong 3). More importantly for present purposes, Taylor alleged that he was working in a tense situation, needed night work to take his children to school in the morning, and was denied the shift change for over a year. The 11th Circuit ruled that a “reasonable person” could consider these actions a “change in the terms and conditions of employment.” Obviously, if it is reasonable to consider such actions changes in the terms and conditions of employment, they are also sufficient to dissuade a reasonable person from charging discrimination.

The fourth case is also complicated. For present purposes, it is sufficient to know that Jennifer Mickelson filed a pay discrimination claim, and then, unrelated to that claim, took FMLA leave time related to depression and panic attacks. At her doctor’s advice, she requested early return to part-time work prior to exhausting her FMLA leave time but was denied. She did not file an FMLA discrimination claim. She ultimately exhausted her FMLA leave time, was not sufficiently recovered to return to work, and was terminated for not returning to work. The district court ruled she could not claim retaliation for refusal of part-time work because she made no claim of violation of FMLA. However, because the employee handbook permitted intermittent leave on FMLA, the 10th Circuit reversed on grounds that refusal of her part-time work request caused her to exhaust her FMLA time, to lose salary and benefits, and ultimately, to be terminated.

Lastly, *Moore* is potentially what Eric Dunleavy termed a “smoking gun” case in his January 2007 article. After opposing what they perceived as racial harassment against Black police officers, Myrna Moore (and other White officers) claimed harassment by fellow White officers. The district court rejected the retaliation claim based on Adverse Employment because the alleged retaliatory harassment was “not severe and pervasive enough to create a hostile work environment” (the standard in hostile environment harassment cases). However, the 3rd Circuit reversed based on EEOC Deterrence, ruling that they were victims of “materially adverse actions” because they “reasonably perceived” the actions against them violated Title VII.

In summary, it is not clear that any of the first four reversals of SJD distinguish between Adverse Employment and EEOC Deterrence based on the Supreme Court’s ruling in *BNSF*. Two of the cases (*Kessler & Randolph*) involved allegations that satisfied both standards in a closely divided en banc ruling by the 6th Circuit in *BNSF v. White* before that case went to the Supreme Court. The third case (*Taylor*) involved an issue (*context*) that was previously endorsed by both an Adverse Employment court (*Berry v. Stevinson Chevrolet*) and an EEOC Deterrence court (*Rochon v. Gonzalez*). The fourth case (*Mickelson*) involved a mistake by a district court that could have occurred in any other district court. However, the last case (*Moore*) contained a retaliatory harassment claim that was clearly insufficient to satisfy Adverse Employment prior to the Supreme Court’s ruling in *BNSF* (because it does *not* constitute hostile harassment under Title VII) that was sufficient to satisfy EEOC Deterrence after the Supreme Court’s ruling (because the actions may be “perceived” as violating Title VII, and therefore deter reasonable people from claiming discrimination).

Adverse Employment Courts—Part 2

The remaining 33 rulings are affirmations of SJD distributed among the seven Adverse Employment courts. There were 22 rulings in which affirmations were based *entirely* on Prong 3 (failure to prove causation). Most of these cases involved alleged retaliatory acts that were clear-cut examples of *material harm* under any of the three standards (e.g., termination, demotion, and failure to promote). Some of these cases (particularly in the 11th Circuit) involved what could have been interpreted as trivial complaints, but the circuit court declined to rule on Prong 2 because Prong 3 was not satisfied (and it was deemed unnecessary to rule on Prong 2). That leaves 11 affirmations where alleged acts of retaliation *were* deemed trivial. Most of these cases also involved failure to prove causality. However, for present purposes, only the triviality determinations merit discussion.

Additionally, for purposes of exposition, the 33 cases are distributed among four tables that depict the 1st, 2nd, 3rd and 4th Circuits (Table 6), the 6th Circuit (Table 7), the 10th Circuit (Table 8), and the 11th Circuit (Table 9). There

are two subgroups in each table representing cases decided entirely on Prong 3 (top subgroup) and cases involving Prong 2 determinations (bottom subgroup).

Ten of the affirmations of SJD were in the 1st, 2nd, 3rd, or 4th Circuits, and six of these rulings had Prong 2 implications. Actions that were deemed trivial in these six rulings included failure to improve a bathroom facility in timely fashion (*Carmona-Rivera*), denial of Professor Emeritus status because the added benefits are di minimis (*Zelnik*), denial of extended leave after an initial leave was granted (*Browne*), a single corrective performance review (*Morrison*), being screamed at on two occasions (*Hanani*), and a single racist remark (*Jordan*).

Table 6

Affirmations in CA1 CA2 CA3 CA4

CA 3	<i>Red v. Potter</i>	Lexis 28700	Nov 20	SJD Affirmed—Prong 3
CA 3	<i>Walsh v. Wal-Mart</i>	Lexis 24680	Oct 2	SJD Affirmed—Prong 3
CA 4	<i>Pascual v. Lowes Home Centers</i>	Lexis 19760	Aug 2	SJD Affirmed—Prong 3
CA 4	<i>Csicsman v. Sallada</i>	Lexis 30490	Dec 12	SJD Affirmed—Prong 3
CA 1	<i>Carmona-Rivera v. Puerto Rico</i>	Lexis 23257	Sep 12	SJD Affirmed—Prongs 2 & 3
CA 2	<i>Zelnik v. Fashion Tech</i>	Lexis 23424	Sep 14	SJD Affirmed—Prongs 2 & 3
CA 2	<i>Browne v. Queens College</i>	Lexis 27045	Oct 27	SJD Affirmed—Prongs 2 & 3
CA 3	<i>Morrison v. Carpenter Tech.</i>	Lexis 21448	Aug 22	SJD Affirmed—Prongs 2 & 3
CA 3	<i>Hanani v. New Jersey</i>	Lexis 27960	Nov 9	SJD Affirmed—Prongs 2 & 3
CA 4	<i>Jordan v. Alternative Resources</i>	Lexis 25569	Oct 13	SJD Affirmed—Prong 2

Table 7 depicts seven affirmations of SJD for the 6th Circuit in which two rulings had Prong 2 implications. Actions that were deemed trivial in these two cases included denial of a pay raise under conditions where a reasonable person would not expect to receive one (*Watson*) and the allegation of a failure to transfer to a more prestigious position that would have enhanced the plaintiff's career lacked evidence that the position was, indeed, more prestigious (*Freeman*).

Table 7

Affirmations in CA6

CA 6	<i>Martin v. General Electric</i>	Lexis 16810	Jul 3	SJD Affirmed—Prong 3
CA 6	<i>Cox v. Shelby Comm. College</i>	Lexis 19806	Aug 9	SJD Affirmed—Prong 3
CA 6	<i>Gentry v. Summit Healthcare</i>	Lexis 22779	Sep 5	SJD Affirmed—Prong 3
CA 6	<i>Kestner v. Stanton Group</i>	Lexis 25610	Oct 12	SJD Affirmed—Prong 3
CA 6	<i>Sosby v. Miller Brewing Co.</i>	Lexis 29194	Nov 22	SJD Affirmed—Prong 3
CA 6	<i>Watson v. City of Cleveland</i>	Lexis 23218	Sep 8	SJD Affirmed—Prong 2
CA 6	<i>Freeman v. Potter</i>	Lexis 25072	Oct 4	SJD Affirmed—Prongs 2 & 3

Table 8 depicts seven affirmations of SJD for the 10th Circuit in which two rulings had Prong 2 implications. Actions that were deemed trivial in these two cases included a shift change by the employer that was “reasonable” under the circumstances in which it was made (*McGowan*) and a single remark to the media that a plaintiff “cool her jets,” a failure to issue a decision on an internal affairs decision under circumstances deemed reasonable, and ordering officers to attend firearms training even though they were exonerated in a shooting incident (*Paloni*).

Table 8

Affirmations in CA10

CA 10	<i>Argo v. Blue Cross/Blue Shield</i>	Lexis 16687	Jul 3	SJD Affirmed—Prong 3
CA 10	<i>Scott v. Kempthorne</i>	Lexis 18209	Jul 17	SJD Affirmed—Prong 3
CA 10	<i>Haynes v. Level 3</i>	Lexis 20265	Aug 8	SJD Affirmed—Prong 3
CA 10	<i>Antonio v. Sygma</i>	Lexis 20996	Aug 16	SJD Affirmed—Prong 3
CA 10	<i>Metzler v. Federal Home Loan</i>	Lexis 24268	Sep 26	SJD Affirmed—Prong 3
CA 10	<i>McGowan v. City of Eufala</i>	Lexis 31277	Dec 19	SJD Affirmed— Prongs 2 & 3
CA 10	<i>Paloni v. Albuquerque Police</i>	Lexis 31895	Dec 27	SJD Affirmed—Prong 2

Lastly, Table 9 depicts nine affirmations of SJD for the 11th Circuit in which only one ruling had Prong 2 implications. As noted earlier, this court, more so than any of the other circuit courts, showed a propensity to ignore potential trivial complaints because of Prong 3 failures. In the only case with Prong 2 implications, Laura Beard, a woman, filed a wage discrimination claim and argued that subsequently her supervisor was less supportive of her than of her male colleagues.

Table 9

Affirmations in CA11

CA 11	<i>Austin v. City of Montgomery</i>	Lexis 18710	Aug 2	SJD Affirmed—Prong 3
CA 11	<i>Tran v. Boeing</i>	Lexis 19601	Aug 3	SJD Affirmed—Prong 3
CA 11	<i>Dar Dar v. Associated</i>	Lexis 26201	Oct 23	SJD Affirmed—Prong 3
CA 11	<i>James v. Alabama Dept. Revenue</i>	Lexis 27082	Oct 31	SJD Affirmed—Prong 3
CA 11	<i>Collins v. Univ. of Alabama</i>	Lexis 29989	Dec 6	SJD Affirmed—Prong 3
CA 11	<i>Wallace v. Georgia DOT</i>	Lexis 30924	Dec 13	SJD Affirmed—Prong 3
CA 11	<i>Delong v. Best Buy</i>	Lexis 30865	Dec 13	SJD Affirmed—Prong 3
CA 11	<i>Arnold v. Tuskegee Univ.</i>	Lexis 31476	Dec 19	SJD Affirmed—Prong 3
CA 11	<i>Beard v. 84 Lumber</i>	Lexis 25918	Oct 17	SJD Affirmed— Prongs 2 & 3

In summary, the affirmations of SJD in the Adverse Employment courts are less interesting than the reversals of SJD, particularly those reversals involving Prong 2 issues. Although, there are additional examples of “trivial

harms” based on Prong 2, there is nothing in these rulings to suggest that the very same actions would have been any or less trivial had these appeals been based on pre-*BNSF* rules.

Conclusions

It must be emphasized that these are *early returns*. We must continue to monitor cases to ensure they are representative of future returns. Furthermore, because my search was limited to post-*BNSF* circuit court cases, there are no indications of pre/post-*BNSF* changes in the district courts. I have done some pre/post-*BNSF* sampling of district court cases but that report will have to be made on another day. In addition, because I made no pre/post-*BNSF* comparisons among the circuit courts (something I am also working on), there are limitations to the conclusions from these early returns. Nevertheless, there are at least three issues worth monitoring in future cases.

First, there are three examples of SJDs made under Ultimate Employment rules that were reversed based entirely on the Supreme Court’s ruling in *BNSF* (the 5th *Easterling*, *Pryor*, and *Desperes*). Therefore, there may be additional cases in the pipeline that await reversal in the 5th and 8th Circuits based primarily, if not entirely, on Prong 2.

Second, the circuit courts appear to be on the same page in defining “trivial harms,” at least so far. This was never before an issue for the Ultimate Employment courts. These courts (CA5 & CA8) previously focused on actions relating to hiring, leave, discharge, promotion, and compensation, and therefore, “trivial harms” were less of an issue. Nevertheless, there is nothing, as yet, to distinguish their rulings of “triviality” from those rendered by the Adverse Employment and EEOC Deterrence courts. More importantly, there is nothing, as yet, to distinguish rulings of “triviality” between the Adverse Employment and EEOC Deterrence courts.

Third, although there were five reversals of SJD based on Prong 2 among the Adverse Employment courts, four of them were candidates for reversal prior to *BNSF* (*Kessler*, *Randolph*, *Taylor*, and *Mickelson*). However, one ruling that was clearly dead on arrival under Adverse Employment rules (*Moore v. Philadelphia*) was reversed in light of *BNSF*. The *Moore* case signals that hostile environment harassment claims that fail as primary (or source) claims of discrimination may succeed as retaliation claims. This is an issue that must be monitored.