



Arthur Gutman  
Florida Institute of Technology

***Burlington Northern Santa Fe (BNSF) v. White:***  
**More Than Meets The Eye**

One of my favorite hobbies is reading reactions of labor attorneys to Supreme Court rulings. My favorite site for this purpose is ELIN (Employment Law Information Network<sup>1</sup>). Though ELIN attorneys generally favor defendants, they usually provide a variety of viewpoints. Not this time. On June 22, 2006 the Supreme Court unanimously supported Sheila White's claims of retaliation in *BNSF v. White*. Over the next few weeks, there were roughly two dozen citations in ELIN on how the Supreme Court "widened," "broadened," or "expanded" protections for employees against retaliation. Clearly, the ELIN attorneys were surprised by the ruling. So was I. However, the surprise was not that Sheila White won but the reasons why.

**Facts of the Case**

The facts in *BNSF v. White* are not that complicated. Sheila White was hired by Marvin Brown as a track laborer in the department of Maintenance of Way in the Memphis, Tennessee yard of BNSF. She was the first female in an all-male workforce. Although White was hired to perform relatively "dirty" work (e.g., removing and replacing track components, cutting brush, clearing litter, etc.), Brown was particularly impressed that White could operate a forklift. One day, a forklift operator vacated his position and Brown reassigned White to forklift operation. There was no change in grade or pay, but clearly, forklift operation is the cleaner job, requires more skill, and is more prestigious than ordinary track labor work. Subsequently, White was insulted and humiliated in front of her colleagues by Bill Joiner, her supervisor. White complained to Brown and Joiner was suspended for 10 days. That could have ended it, but Brown reassigned White back to track labor work based on complaints by male co-workers that forklift operation should go to a more "senior man." In addition, sometime later, White was suspended without pay for insubordination after an incident involving Percy Sharkey, a foreman. White appealed the suspension via the BNSF internal grievance procedure and the BNSF investigator concluded the suspension was an "overreaction," and White was given back pay for 37 days of missed work.

---

<sup>1</sup> The link for ELIN is [www.elinonet.com](http://www.elinonet.com). Registration is required, but membership is free. Members receive daily updates on employment law cases and issues.

White, who had previously filed a retaliation claim for reassignment to track labor work, added a second retaliation claim based on the suspension.

### Background Information

I previewed *BNSF v. White* in the July 2006 issue of *TIP*. I suggested Sheila White would win. My traveling partner (**Don Zink**) and I did a similar thing at SIOP.<sup>2</sup> After the ruling, I got e-mails congratulating me on my “foresight.” Thanks, but no thanks. I don’t think anyone familiar with the issues in the case expected BNSF to win. I think the Supreme Court chose a case with relatively plain facts to resolve conflicts among the circuit courts on three different standards for deciding retaliation claims. The Supreme Court did a similar thing in *Robinson v. Shell Oil* (1997), a landmark ruling credited with opening the floodgates for retaliation claims.

White was a likely loser under one of these standards, which I will call Ultimate Employment. Nobody I know expected this standard to prevail (and it did not). On the other hand, for reasons described below, White was a likely winner under either of the other two standards, but one of these contenders, which I will call Adverse Employment, was the betting favorite and the other contender, which I will call EEOC Deterrence, was the underdog. When the news media reported on the Supreme Court’s ruling, they focused on the fact that Sheila White won on all nine scorecards. However, the more important vote for purposes of legal precedent was that eight justices, led by Breyer, voted for the underdog (EEOC Deterrence) and only one justice (Alito) voted for the betting favorite (Adverse Employment).

My focus in the July 2006 column was on Alito’s support of Anna Jensen in *Jensen v. Potter* (2006) as a predictor of his likely vote favoring Sheila White in *BNSF v. White*. Anna Jensen complained she was sexually harassed by Carl Waters, and Waters was terminated. Jensen was then reassigned to Waters’ prior work station where she was harassed for 19 months by fellow coworkers who disagreed with the termination. The district court judge dismissed Jensen’s complaint in a summary judgment, ruling that coworker harassment is not a valid basis for a retaliation claim. Other courts had rendered similar rulings under Ultimate Employment, but Judge Alito favored Adverse Employment and overturned the summary judgment on this basis. Alito rendered this ruling on January 31, 2006, the day he was sworn in as a Supreme Court justice.

I didn’t cover the three standards in the July column because retaliation was only one issue in a broader range of issues across Alito’s 15-year tenure as a 3rd Circuit Court judge. Nevertheless, I thought Adverse Employment would prevail. There were several reasons to believe it was the betting favorite. At trial, a jury awarded Sheila White \$43,500 based on Adverse Employment, and this award was ultimately upheld by an en banc panel of 13

---

<sup>2</sup> This was a SIOP preconference workshop entitled “Employment Law: That Was the Year That Was—And Might Be Next” on May 4, 2006, in Dallas, TX.

judges at the 6th Circuit Court. In addition, Solicitor General Clement wrote an amicus brief on behalf the Bush Administration supporting Sheila White (not BNSF) on the basis of Adverse Employment. If that wasn't enough, a quick search suggests that Adverse Employment was used in more retaliation cases and in more circuit courts than its two competitors combined, including of course, Alito's 3rd Circuit Court ruling in *Jensen v. Potter*.

By my count, there are only two legal issues that cut across the panorama of workplace laws: disparate treatment and retaliation.<sup>3</sup> Moreover, retaliation claims had already doubled between 1992 and 2003 (see Zink & Gutman, 2005), in no small part due to *Robinson v. Shell Oil*. Furthermore, as Don Zink showed in our SIOP workshop, after adding year 2004, there seems to be a more recent pattern in which retaliation claims are increasing even though discrimination claims based on race, gender, religion, national origin, age, and disability are starting to decrease. Of course, we will need a few more years to determine if this latter trend holds.

I think the fact that Sheila White won is alone sufficient to contribute to the increasing amount of retaliation claims, independently of why she won. However, there are related concerns because of why she won. Some SIOP members have told me that *BNSF v. White* will add to the list of actions plaintiffs will use to claim retaliation, including off-the-job incidents. Additional fears include an increase in retaliation claims on "trivial" issues, that plaintiff attorneys will encourage such complaints, and that such claims will more likely go to trial because district court judges will be hard pressed to "weed" them out in summary judgments. I have yet another concern. The main issue in *BNSF v. White* was "harmonizing" the relationship between nondiscrimination and retaliation provisions in Section 703(a) and 704 (a) in Title VII. My concern is that in addressing this issue, the Supreme Court opened a can of worms on a related issue: the definition of "adverse employment consequences" in retaliation claims and "tangible employment consequences" in sexual harassment claims.

The bottom line is there are several reasons to believe the Supreme Court has raised at least as many issues as it has resolved and that it will be forced to revisit these issues in less time than the 9 years between *Robinson v. Shell Oil* (1997) and *BNSF v. White* (2006). Let's take it an issue at a time.

### **Nondiscrimination and Retaliation Proscriptions in Title VII**

Title VII offers a trilogy of proscriptions based on race, color, religion, sex, and national origin (a sort of three-part harmony). These proscriptions apply to (a) terms and conditions of employment, (b) segregation and classification, and (c) retaliation. The first two parts are written into Section 703(a) of Title VII, which makes it illegal for an employer to:

---

<sup>3</sup> Anti-retaliation provisions apply in Title VII, age discrimination (ADEA), disability discrimination (ADA), constitutional claims, FLSA (Fair Labor Standards Act) and NLRA (National Labor Relations Act).

(1) [F]ail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment...or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.

The third part (the anti-retaliation provision) is written into Section 704(a) in Title VII, which makes it illegal for an employer to:

[D]iscriminate 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 (emphasis added by author).

Thus, the anti-retaliation provision contains both an *opposition clause* (for complaining about employer practices short making legal claims) and a *participation clause* (for making actual legal claims).

Prior to *BNSF v. White*, the only major issue in Section 704(a) addressed by the Supreme Court was the definition of *employee* in *Robinson v. Shell Oil*. Some courts had interpreted the phrase “employees or applicants” literally and denied application of Section 704(a) to former (terminated) employees, others did not. Charles Robinson sued for racial discrimination under 703(a) after Shell Oil terminated him. He then applied for another job and that employer requested a reference letter from Shell Oil. The reference letter was negative and Robinson lodged a 704(a) claim that it was written in retaliation for his 703(a) claim. Shell Oil argued the term “employee” covers only current employees and applicants. The Supreme Court rejected this argument and extended coverage of 704(a) to include former employees. The ruling was written by Justice Thomas. It was short, crisp, and unanimous, and unlike *BNSF v. White*, there were no separate concurrences with varying opinions.

### **The EEOC’s Deterrence Standard**

In the immediate aftermath of *Robinson v. Shell Oil*, the EEOC issued policy guidance on 704(a) in Section 8 of its compliance manual (Number 915.003; 5/20/98). This guidance superseded prior guidance in Section 614.7(f) in the 1991 compliance manual. The new version articulated three “essential elements” for a retaliation claim. Specifically, plaintiffs must prove (a) they engaged in opposition or participation; (b) they suffered an “adverse action”; and there was (c) a “causal connection” between the opposition or participation and the adverse action. The new version also articulated the EEOC Deterrence standard as its definition of *adverse action*. Accordingly:

The statutory retaliation clauses prohibit any adverse treatment that is based on a *retaliatory motive* and is *reasonably likely to deter* the charg-

ing party or others from engaging in protected activity. Of course, *petty slights and trivial annoyances are not actionable*, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged *regardless of the level of harm*.

Broadly construed, this definition applies to any action based on illegal motives that deters (or dissuades) a “reasonable person” from exercising the right to oppose or participate in accordance with 704(a), including actions that might occur away from the job. The EEOC also believes its position is sufficient to dispel “trivial annoyances” that do not rise to the level of deterrence. As we will witness below, this was a major point of disagreement between Breyer’s group and Alito in *BNSF v. White*. The part on “level of harm” implies the motive to discriminate is the basic violation and the degree of harm to the plaintiff relates to the monetary award for compensatory damages.

The EEOC acknowledged that some courts had used the other two standards, and that Adverse Employment is less restrictive than Ultimate Employment. Nevertheless, it rejected both standards in no uncertain terms. Accordingly:

Adverse Actions Need Not Qualify as “Ultimate Employment Actions” or Materially Affect the Terms or Conditions of Employment to Constitute Retaliation.

On the surface, there were solid reasons for betting against EEOC Deterrence in *BNSF v. White*. First, although federal courts often defer to EEOC regulations (accorded them the force and effect of law), such missives are authorized by Congress, whereas compliance manuals (and other forms of policy guidance) are generally written for employers and require no such authority. Second, EEOC Deterrence emerged full-blown in response to *Robinson v. Shell Oil*, even though the definition of “employee” was the major issue in that case. Third, the EEOC had used the term “adverse employment action” in its 1991 compliance manual, and in a number of retaliation cases it prosecuted or submitted amicus briefs.

However, beneath the surface, there were stronger currents suggesting EEOC Deterrence was the true betting favorite all along. First, the EEOC had a strong interest in *Robinson v. Shell Oil* and several related cases it subsequently cited in the revised 1998 compliance manual. For example, in *EEOC v. L. B. Foster* (1997), the 9th Circuit accepted the EEOC’s belief that a negative reference may imply retaliatory motive even if a plaintiff has no chance of obtaining the job. Second, the EEOC had already opposed Ultimate Employment and Adverse Employment in several cases. Third, the EEOC wrote an amicus brief in *Robinson*, and Justice Thomas cited this brief, along with the 1991 EEOC compliance manual in his *Robinson v. Shell Oil* ruling. In fact, Thomas, a former director of the EEOC, used both authorities to rule that the “primary purpose” of Section 704(a) is to “deter victims from complaining to the EEOC,” thereby “maintain[ing] unfettered access to statutory remedial mechanisms.” Because no other

opinions were expressed in *Robinson*, hindsight suggests that seven of the nine justices in *BNSF v. White* already understood and supported EEOC Deterrence in 1997. Of course after the fact, Breyer repeated the exact words used by Thomas in *Robinson v. Shell Oil* in supporting EEOC Deterrence in *BNSF v. White*.

### The Ultimate Employment Standard

On the surface, BNSF had what a casual observer might think was a strong defense. BNSF argued that retaliation claims should be limited to “ultimate employment decisions,” as supported by the 5th and 8th Circuits (see *Mattern v. Eastman Kodak*, 1997 & *Manning v. Metropolitan Life*, 1997). For example, in *Mattern*, the 5th Circuit limited actionable retaliation claims to “hiring, granting leave, discharging, promoting, and compensating.” This standard, which is clearly employer friendly, was supported in amicus briefs written on behalf of SHRM (Society for Human Resource Management) and NFIB (National Federation of Independent Business), and by the EEAC (Equal Employment Advisory Council) on behalf of approximately 340 of the country’s largest private-sector employers. The defense argument was that neither of Sheila White’s complaints constituted an ultimate employment decision. The defense argued that reassignment to track labor work was a permissible lateral transfer within the same job classification and pay grade as forklift operation, and the 37-day suspension was temporary and properly addressed via BNSF’s internal grievance procedure.

However, beneath the surface, stronger currents dictated that Ultimate Employment was dead in the water. It was never a serious contender in the lower court rulings in *BNSF v. White*. As important, although reasonable people may disagree on whether the facts in cases like *Mattern* and *Manning* are “trivial” or not, there are many other cases with more compelling facts than *Mattern* or *Manning* in which courts supported off-the-job actions that did not constitute ultimate employment actions. For example, in *Berry v. Stevinson Chevrolet* (1996), an employer filed false criminal charges against an employee who complained about discrimination. And in *Rochon v. Gonzales* (2006), a Black FBI agent twice sued for racial discrimination and received two settlements, the second for \$40,000 in damages. He filed a retaliation claim after receiving credible death threats from a prison inmate and, contrary to its own stated policies, the FBI afforded no protection to him or his family.

The bottom line is that in *BNSF v. White*, Breyer rejected Ultimate Employment deeming it restrictive and limited in scope. Of course, as noted above, this was hardly surprising. The difficult part of this case for legal pundits is that Justice Alito also rejected Ultimate Employment and at the same time signaled that he would likewise favor the plaintiffs in cases like *Berry* and *Rochon*, but under Adverse Employment rather than EEOC Deterrence.

## The Adverse Employment Standard

This standard requires a nexus between 703(a) and 704(a). In effect, you cannot have an actionable retaliation claim unless the retaliatory act interfaces with the terms, conditions, and privileges of employment. The 6th Circuit Court, for example, requires that an alleged retaliatory act must involve a “materially adverse change in the terms and conditions of employment.” In order to constitute an “adverse employment action.” Clearly, the retaliatory act itself does *not* have to constitute an “ultimate employment decision,” as illustrated, for example, in the *Berry* and *Rochon* cases cited above. Another example is in hostile environment sexual harassment. By definition, hostile harassment involves severe or pervasive abuse sufficient to *interfere with* the terms and conditions of employment but requires no tangible employment consequences (see for example *Meritor v. Vinson*, 1986). More on that later.

I was not surprised that EEOC Deterrence became a strong contender in the retaliation debate. However, I was surprised that it became enough of a key feature in this particular case (*BNSF v. White*) for the Bush administration to weigh in on Sheila White’s side, at the same time supporting Adverse Employment. Fortunately, this did not require a deep-sea fishing expedition but merely plain reading of the lower court rulings. The 6th Circuit rendered two rulings. In the first ruling (310 F. 3d 443 [2002]), a divided three-judge panel overturned the jury award because the two majority judges believed that the acts cited by Sheila White did not rise to the level of “adverse employment actions.” The dissenting judge (Clay) agreed with the standard used but not the conclusion reached. He wrote:

Like the majority, I recognize that this Court requires a materially adverse employment action for a plaintiff to state a *prima facie* case of Title VII retaliation. Unlike the majority, however, I believe that Plaintiff satisfied her requirement in that regard.

There was no mention of EEOC Deterrence in the first ruling. However, when reviewed a second time by en banc panel of 13 judges (364 F. 3d 795 [2004]), all 13 agreed with the jury award, including the 2 majority judges from the first ruling. However, Judge Clay introduced EEOC Deterrence, and seven judges favored Adverse Employment and six favored EEOC Deterrence. Obviously, this close (7 to 6) vote is what motivated the Solicitor General to join the fray.

## The Supreme Court Ruling

To reiterate, Breyer and Alito favored the plaintiff but for different reasons. Breyer adopted the EEOC’s viewpoint on retaliation and Alito supported the 3rd Circuit Adverse Employment viewpoint he articulated in *Jensen v. Potter*.

Breyer conceded the EEOC used the term “adverse employment action” in its 1991 compliance manual (and also the 1988), but dug deeper, citing the 1972 reference manual where the EEOC stated Title VII “is intended to provide

exceptionally broad protection for protestors of discriminatory employment practices.” He noted that based on this principle, and on the myriad of cases the EEOC has joined, that Sections 703(a) and 704(a) are “not coterminous,” meaning a 703(a) is not a requirement for making a 704(a) claim. He then rejected both Adverse Employment and Ultimate Employment. Accordingly:

The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called “ultimate employment decisions.”

Breyer defined EEOC Deterrence as follows:

We conclude 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. We also conclude that the provision covers those (and only those) employer actions that would have been *materially adverse* to a reasonable employee or job applicant. In the present context that means that the employer’s actions must be harmful to the point that they could well dissuade a *reasonable worker* from making or supporting a charge of discrimination (*emphasis added by author*).

Breyer also ruled that the “anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces injury or harm.” In his view, the “materially adverse” and “reasonable worker” components of the EEOC Deterrence standard does this and therefore insulates courts from having to weigh trivial complaints. From Alito’s perspective, this is a logical contradiction. Accordingly:

[T]he majority itself identifies another purpose of the anti-retaliation provision: “to prevent harm to individuals” who assert their rights... Under the majority’s test, however, employer conduct that causes harm to an employee is permitted so long as the employer conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination.

Indeed, Alito argued that Breyer’s ruling could lead to unintended “perverse results” in which “the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act that prompted the retaliation.” Accordingly:

A reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation; the costs of filing the charge, including possible retaliation, will have to be great to outweigh the benefits, such as preventing the continuation of the discrimination in the future and obtaining damages and other relief for past discrimination. Because the possibility of relatively severe

retaliation will not easily dissuade this employee, the employer will be able to engage in relatively severe retaliation without incurring liability under §704(a). On the other hand, an employee who is subjected to a much milder form of discrimination will be much more easily dissuaded. For this employee, the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge. These topsy-turvy results make no sense.

Alito also criticized another major point in Breyer's ruling requiring lower courts to consider the "context" in which employment actions occur. Accordingly:

Although the majority first states that its test is whether a "reasonable worker" might well be dissuaded...it later suggests that at least some individual characteristics of the actual retaliation victim must be taken into account. The majority comments that "the significance of any given act of retaliation will often depend upon the particular circumstances," and provides the following illustration: "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."

This is an obvious reference to *Washington v. Illinois Dept. of Revenue* (2005), where Chrissie Washington had a flextime schedule (7am to 3pm) permitting her to care for her mentally retarded child. After claiming racial discrimination for employment decisions made by her supervisor, the supervisor ordered her to work a 9am to 5pm shift. Washington refused. Her position was then abolished and she was laterally transferred to the same position, but with a new supervisor. The new assignment had a 9am to 5pm shift and Washington was forced to reapply for flextime. Washington then used sick leave and vacation time to continue to care for her child.

In the end, of course, it's Breyer's opinion that counts, and his opinion is that Sheila White won on a more restrictive standard (Adverse Employment) in the lower courts; therefore, she also wins on the less restrictive standard (EEOC Deterrence).

### **Interpretation and Conclusions**

The stated goal in *BNSF v. White* was to "harmonize" the provisions in Sections 703(a) and 704(a) in Title VII and, by implication, provide a one-fits-all solution for nondiscrimination and relation provisions in related statutes as well. I'm not so sure this happened. I think there are multidimensional issues and that these issues will require future Supreme Court rulings. What I will do below is state what I think some of these issues are and leave them for a future column or (big hint) for other SIOP members to write about in future issues of *TIP*.

First, much attention has been devoted to the dimension of the relative "restrictiveness" of the three standards. Ultimate Employment is undoubtedly

more restrictive (for plaintiffs) than either EEOC Deterrence or Adverse Employment, but I'm not so sure the latter two standards are dramatically different from each other from a functional perspective. I see a cadre of cases other than *BNSF v. White* where EEOC Deterrence and Adverse Employment did or would reach the same conclusion (e.g., *Jensen v. Potter*, 2006, *Berry v. Stevinson Chevrolet*, 1996, & *Rochon v. Gonzales*, 2006). Such cases featuring clear-cut acts of retaliation for opposition or participation where, in my judgment, there was *both* deterrence *and* interference with the terms and conditions of employment. I don't have enough remaining space for a rundown, so I will have to leave this issue for a future column (or for someone else). My question is, for the majority of cases, does it really matter which of the two less restrictive standards is used?

Second, and closely related to the first point, the dimension or principle of "fairness" dictates that neutral observers should be as opposed to frivolous and trivial complaints as they are to illegal acts of discrimination. Indeed, a common theme in many Supreme Court rulings is that Title VII is not a "civility statute." For example, there is no coverage under any standard for coworkers who apply the "cold shoulder" to whistleblowers. Simply put, people are allowed to be people, and even when someone complains, there is nothing in any law that says others must be as friendly and collegial as they were before. Breyer and Alito each claimed the better cure for such "trivial" complaints. I'm not so sure either cure is adequate. Breyer says there has to be "harm" plus a "reasonable person" assessment of deterrence to complain. and Alito says there has to be a "material effect" on "terms and conditions of employment." Both viewpoints adequately address situations where coworkers apply the "cold shoulder," and reasonable people, properly instructed, should see the difference. What's not clear to me is how either viewpoint defines the line where triviality ends and harm and deterrence (Breyer) or interference with terms and conditions of employment (Alito) begins. You tell me.

Third, retaliation claims are themselves multidimensional. Some involve the same acts as in the original complaint (e.g., more harassment after initial harassment; more undesirable assignments after initial undesirable assignments), some involve different acts (e.g., harassment after demotion; demotion after harassment), and some involve nonworkplace acts (e.g., negative references, false legal charges). Also, some claims target supervisors, some target supervisors and coworkers, and some target only coworkers. Each claim, of course, must be viewed in its "context," but this is no easy issue either. For example, I believe a "reasonable person" would have no difficulty seeing that Chrissie Washington was harmed by losing flextime and that there was intent to discourage her legal claim. However, what about a situation (that was posed to me) where an employee claims illegal discrimination by a supervisor, a higher source orders a reassignment to protect both parties, there is no existing or intended harm or change in the terms and conditions of employment, but the employee experiences the "cold shoulder" treatment by her new fellow coworkers? Because Title VII is not a "civility statute," the claim should be

viewed as “trivial.” Will such a claim (a) survive summary judgment and/or (b) fall within the boundaries of triviality for a reasonable juror? You tell me.

Fourth, I’m concerned about the boundary line between “tangible employment actions” in sexual harassment claims and “adverse employment consequences” in retaliation claims. For example, in *Burlington v. Ellerth* (1998), examples of tangible employment actions included “hiring, firing, failing to promote, reassignment with *significantly* different responsibilities, or a decision causing a *significant* change in benefits.” Hiring, firing, and failure to promote are easily delineated. However, other two (reassignment & benefits) require “significant” changes. Does this imply that a 703(a) discrimination claim of sexual harassment based on reassignment or benefits has a different threshold than a 704(a) retaliation claim based on reassignment or benefits? You tell me.

Finally, I have a parallel concern for hostile environment harassment by coworkers. *Burlington v. Ellerth* instructs us that when the harassment is by coworkers, the plaintiff must prove the employer knew or should have known the harassment was occurring (i.e., reckless disregard; see also *Faragher v. Boca Raton*, 1998). That’s a fairly clear standard for coworker hostile harassment as a 703(a) discrimination claim. However, it’s not clear to me from Breyer’s ruling whether the same standard applies to coworker hostile harassment as a 704(a) retaliation claim. In other words, it is possible that a coworker harassment claim failing the *Ellerth–Faragher* standard in Section 703(a) could, nevertheless succeed as a Section 704(a) claim? Again, you tell me.

I’m sure there are other questions in addition to those I raised. My hope is that the SIOP members who communicated with me on these and related issues, and anyone else who would like to join the discussion, tackle these and related questions in future issues of *TIP*. So consider this an open invitation. The deadline for the January 2007 issue is November 1.

## Reference

Zink, D. L., & Gutman, A. (2005). Statistical trends in private sector employment discrimination suits. In F. J. Landy (Ed.) *Employment discrimination litigation: Behavioral, quantitative, and legal perspectives*. San Francisco: Jossey Bass.

## Cases Cited

- Berry v. Stevinson Chevrolet, 74 F. 3d 980, 984, 986 (CA10 1996).
- Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998).
- Burlington Northern Santa Fe (BNSF) v. White. Case No. 05-259, Decided June 22, 2006.
- EEOC v. L. B. Foster, 123 F.3d 746 (3d Cir. 1997).
- Faragher v. Boca Raton, 524 U. S. 775 (1998).
- Jensen v. Potter, 435 F. 3d 444 (CA3 2006).
- Manning v. Metropolitan Life Ins. Co., 127 F. 3d 686, 692 (CA8 1997).
- Mattern v. Eastman Kodak Co., 104 F. 3d 702, 707 (CA5 1997).
- Meritor v. Vinson 477 US 57 (1986).
- Robinson v. Shell Oil Co., 519 U. S. 337 (1997).
- Rochon v. Gonzales, 438 F. 3d 1211, 1217–1218 (CADC 2006).
- Washington v. Illinois Dept. of Revenue, 420 F. 3d 658, 662 (CA7 2005).