No. 07-_____

In The
Supreme Court of the United States

MARALYN S. JAMES,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MARY LEECH*
3200 West End, Suite 500
P.O. Box 291564
Nashville, TN 37229
(615) 783-1709

RICHARD J. BRAUN
BRAUN & CROTWELL, PLLC
501 Union Street, Suite 500
Nashville, TN 37203
(615) 259-1550

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under *Burlington Northern & Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405 (2006), a retaliatory act violates section 704(a) of Title VII if that action might well deter "dissuad[e] a reasonable worker from making or supporting a charge of discrimination." The Question Presented is:

> Is a jury or the court responsible for determining whether a retaliatory act was sufficiently serious to satisfy the *Burlington Northern* standard?

PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Maralyn S. James respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on June 19, 2007.

OPINIONS BELOW

The May 17, 2004, order of the District Court entering judgment on the jury verdict is set forth at pp. 28-29 of the Appendix. The June 17, 2004 order of the District Court denying respondent's Rule 50 motion for judgment as a matter of law, which is not officially reported, is set forth at p. 27 of the Appendix.

The December 14, 2005 opinion of the Court of Appeals, which is unofficially reported at 159 Fed. Appx. 686 (6th Cir. 2005), is set forth at pp. 14-24 of the Appendix. The April 14, 2006, order of the Court of Appeals denying rehearing and rehearing en banc, which is not officially reported, is set forth at pp. 25-26 of the Appendix.

The October 2, 2006 order of this Court, vacating the 2005 decision of the Court of Appeals and remanding for reconsideration in light of *Burlington Northern & Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405 (2006), is reported at 127 S. Ct. 336 (2006), and is set forth at p. 13 of the Appendix. The June 19, 2007, opinion of the Court of Appeals, which is unofficially reported at 2007 WL 1786792 (6th Cir. June 20, 2007), is set forth at pp. 1-12 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on June 19, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3, provides in pertinent part:

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

STATEMENT OF THE CASE

From 1971 until 2003 petitioner Maralyn James worked as a librarian for the Nashville Public Library, which is operated by the Metropolitan Government of Nashville and Davidson County.

In October 2001, James wrote a letter to her employer complaining that she was being subjected to harassment and a hostile work environment. On January 29, 2002, James filed a charge with EEOC alleging discrimination in violation of federal laws and asserting that her employer had unlawfully retaliated against her. On April 16, 2002,

James filed a second charge of retaliation with EEOC. Petitioner commenced this action at the end of April, 2002.

In 2003 James proceeded to trial on her Title VII retaliation and discrimination claims. The jury rejected the discrimination claim, but found that respondent employer had retaliated against James, and awarded her $42,000 in damages. The respondent moved to set aside the verdict under Federal Rule of Civil Procedure 50(a), claiming that the asserted retaliatory acts did not constitute an "adverse employment action" within the scope of the anti-retaliation provision of section 704(a) of Title VII. Respondent did not, however, challenge either the finding of retaliatory motive or the amount of the damages awarded by the jury.

On appeal in 2005 the Sixth Circuit held that the retaliatory actions proven at trial were not adverse employment actions under section 704(a), and that those forms of retaliation thus were not forbidden by Title VII.

> At trial, James produced evidence of various harms the Government allegedly caused her (*i.e.*, denial of internal transfers, bad employment evaluations, imposition of cataloguing quotas, etc.). Those harms are not adverse employment actions.

(App. 20). In so holding, the court of appeals applied a series of earlier Sixth Circuit decisions which had narrowly interpreted the scope of the protections of section 704(a). (App. 20-21). The court of appeals directed the district court to grant the respondent's motion for judgment as a matter of law. (App. 24).

James filed a timely petition for rehearing and rehearing en banc. Both were denied on April 14, 2006. (App. 25).

On June 22, 2006, this Court decided *Burlington Northern & Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405 (2006). *Burlington Northern* held that a retaliatory act is unlawful under section 704(a) (and is materially adverse) if that action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 126 S. Ct. at 2415 (*quoting Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). That interpretation of section 704(a) was broader than the standard that the Sixth Circuit had applied in 2005 to James's case.

In the wake of the decision in *Burlington Northern*, James sought certiorari. This Court vacated the decision of the Sixth Circuit, and remanded the case for reconsideration in light of *Burlington Northern*. 127 S. Ct. 336 (2006).

Subsequent to this Court's decision in *Burlington Northern* but prior to the decision on remand in the instant case, a series of Sixth Circuit decisions held that it is for the courts to determine whether the facts or allegations of a particular case meet the *Burlington Northern* standard.[1] Proceeding in that manner, the appellate panel in this case made its own fact-bound determination about the deterrent impact of the retaliatory actions that had been taken against James. The court of appeals held that "James's allegations are not actionable because they . . . would not have dissuaded a reasonable person from filing a Title VII claim." (App. 9). Based on that finding, the Sixth Circuit once again held that the retaliation in question did not constitute a "materially adverse action,"

[1] See p. 7, *infra*.

and again held that the employer was entitled to judgment as a matter of law. (App. 9-12).

REASON FOR GRANTING THE WRIT

THERE IS A CONFLICT AMONG THE COURTS OF APPEALS REGARDING WHETHER THE COURT OR A JURY SHOULD DETERMINE WHETHER A RETALIATORY ACTION MEETS THE STANDARD IN *BURLINGTON NORTHERN V. WHITE*

Eighteen months ago this Court, resolving a substantive conflict among the courts of appeals, determined what type of retaliatory action is sufficiently serious to be unlawful under Title VII. A retaliatory act is forbidden if "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405, 2415 (2006) (*quoting Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). *Burlington Northern* arose under the anti-retaliation provision of Title VII; the lower courts have consistently applied the *Burlington Northern* standard as well to retaliation claims under other federal anti-discrimination statutes.[2] *Burlington Northern* has

[2] See, *e.g.*, *Csicsmann v. Sallada*, 2006 WL 3611729 *4 (4th Cir. Dec. 12, 2006) (Family and Medical Leave Act); *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006) (Age Discrimination in Employment Act; Americans With Disabilities Act); *Peace v. Harvey*, 2006 WL 3068677 *2 (5th Cir. Oct. 26, 2006) (Rehabilitation Act).

also repeatedly been applied by the lower courts to retaliation claims under the First Amendment.[3]

In the wave of litigation that followed *Burlington Northern*, a remarkably clear and widespread conflict has emerged regarding the administration of this standard; the courts of appeals are sharply divided as to whether judges or juries are to apply the *Burlington Northern* standard and are to determine in a given case whether the retaliatory actions in question would deter a reasonable employee from making or supporting a charge of discrimination. Ten different circuits have addressed this issue; four courts of appeals have rejected the approach taken by the Sixth Circuit in the instant case.

In the Sixth Circuit it is clear that judges – not juries – are to decide whether a retaliatory act is adverse under *Burlington Northern*, i.e. to determine whether a reasonable employee might well have been deterred by that act. In the instant case, the court of appeals overturned the jury's finding of liability based on a straightforward (appellate) finding: "James's allegations are not actionable because they . . . would not have dissuaded a reasonable person from filing a Title VII claim." (App. 9).[4] A week after the opinion in this case, another panel of the Sixth Circuit made a similar finding. In *McNeill v. U.S. Dept. of*

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[3] *Wrobel v. County of Erie*, 2007 WL 186264 *1 (2d Cir. Jan. 19, 2007); *Zelnik v. Fashion Institute of Technology*, 464 F.3d 217, 227 (2d Cir. 2006); *McLaurin v. City of Jackson Fire Dept.*, 2006 WL 379438 *1 (4th Cir. Dec. 19, 2006).

[4] The same panel had made a similar finding in its pre-*Burlington Northern* decision. "At trial, James produced evidence of various harms the Government allegedly caused her. . . . Those harms are not adverse employment actions." (App. 20).

Labor, 2007 WL 1880599 *6 (6th Cir. June 27, 2007), the panel which rejected the plaintiff's retaliation claim explained that "*we conclude* that a reasonable worker would not be dissuaded from blowing the whistle under these circumstances." (Emphasis added).

Similar appellate findings can be found in several other Sixth Circuit cases in which that court itself, rather than a jury, determined whether the *Burlington Northern* standard had been met. *Michael v. Caterpillar Financial Service Corp.*, 2007 WL 2176220 *7 (6th Cir. July 31, 2007) (one retaliatory act alleged by plaintiff "does not amount to a materially adverse action"; "[n]or did [two other alleged retaliatory acts] constitute materially adverse actions."); *Watson v. City of Cleveland*, 202 Fed. Appx. 844, 855 (6th Cir. 2006) ("these actions would not dissuade a reasonable employee from invoking the protections of Title VII.")

Even when plaintiffs do prevail in the Sixth Circuit, that occurs only if the appellate panel itself makes its own finding that the alleged retaliatory action would have deterred protected activity. In *Jordan v. City of Cleveland*, 464 F.3d 584, 595 (6th Cir. 2006), the court of appeals upheld the plaintiff's retaliation claim only after the court itself held that the proven retaliatory acts in that case "amply qualify as a materially adverse action." In *Randolph v. Ohio Dept. of Youth Services*, 453 F.3d 724, 736-37 (6th Cir. 2006), the Sixth Circuit upheld that plaintiff's retaliation claim, but only after the court itself

concluded that the action taken against the plaintiff "constitutes a materially adverse action."[5]

Five other circuits have adopted the practice of the Sixth Circuit, and insist on determining themselves whether the retaliatory act asserted by a plaintiff was materially adverse under *Burlington Northern*. The Fifth Circuit in *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. Appx. 437 (5th Cir. 2007), made quite clear that in that circuit it is judges not juries who determine whether the fact-bound *Burlington Northern* standard has been met.

> Under the facts before us, *we conclude* that [the alleged retaliatory act] would not "have dissuaded a reasonable worker from making or supporting a charge of discrimination."

214 Fed. Appx. at 441 (*quoting Burlington Northern*) (emphasis added). In *Collins v. Board of Trustees of University of Alabama*, 211 Fed. Appx. 848 (11th Cir. 2006), the Eleventh Circuit rejected the plaintiff's retaliation claim explaining that

> *We conclude* that [the alleged retaliatory act] did not rise to the level of an adverse employment action under *Burlington Northern*. . . .

214 Fed. Appx. at 849 (emphasis added). Similarly, in *Csicsmann v. Sallada*, 211 Fed. Appx. 163 (4th Cir. 2006), the Fourth Circuit held that the asserted retaliatory

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[5] In both of the cases in which the Sixth Circuit made a finding that the retaliatory act was "materially adverse," the plaintiff had actually suffered a substantial loss in wages. *Jordan*, 464 F.3d at 585 (denial of enhanced wages); *Randolph*, 453 F.3d at 736-37 (unlawfully dismissed plaintiff reinstated with only 77% of her lost back pay).

action did not meet the *Burlington Northern* standard because "*this court* has never found" that a materially adverse action existed based on the type of retaliation alleged in that case. 211 Fed. Appx. at 168 (emphasis added).[6]

In the Eighth Circuit as well courts, not juries, administer the *Burlington Northern* standard.

> The standard is . . . objective, requiring *us to consider* whether a reasonable employee in the plaintiff's position might have been dissuaded from making a discrimination claim because of the employer's retaliatory action. . . . [T]his [alleged retaliatory] action does not rise to the level of a materially adverse action.

Higgins v. Gonzales, 2007 WL 817505 at *8-*9 (8th Cir. March 20, 2007) (emphasis added). In *Carpenter v. Con-Way Central Express, Inc.*, 2007 WL 913661 (8th Cir. March 28, 2007), the plaintiff claimed that his employer had retaliated against him by deliberately permitting another worker to harass him. The Eighth Circuit made its own determination that the retaliatory harassment was not sufficiently harmful to constitute an adverse action; "[*w*]*e find* [the harassment] was not so severe and

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[6] In other cases panels in the Fourth Circuit straightforwardly assume the responsibility for making the fact-bound determination regarding whether particular retaliatory acts would or would not deter protected activity.

> Neither [of the alleged retaliatory acts] would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

Parsons v. Wynne, 2007 WL 731398 at *1 (4th Cir. March 9, 2007) (*quoting Burlington Northern*).

pervasive as to create a hostile work environment." 2007 WL 913661 at *5 (emphasis added).

In the Seventh Circuit the rule is just as clear and firmly established. In six cases since *Burlington Northern* the Seventh Circuit has insisted that the judges of the appellate court – not a jury – are to decide whether a retaliatory act would have deterred protected conduct. For example, in *Roney v. Illinois Dept. of Transp.*, 474 F.3d 455, 459 (7th Cir. 2007) the Seventh Circuit made a series of determinations as to whether various retaliatory acts were materially adverse, rejecting them because the court concluded that it was "*unlikely* that [a particular retaliatory act] would have deterred a reasonable employee from making a charge of discrimination."[7] (Emphasis added). That sort of probability determination was precisely the kind of assessment with which a jury might disagree. In *Phelan v. Cook County*, 463 F.3d 773, 781 n.3 (7th Cir. 2006) the court of appeals upheld the plaintiff's retaliation claim only because of "*our* conclusion that [the plaintiff] suffered an adverse employment action." (Emphasis added). In *Szymanski v. County of Cook*, 468 F.3d 1027, 1031 (7th Cir. 2006), the Seventh Circuit rejected the plaintiff's retaliation claim because "*we find* that there is nothing in the record which establishes an adverse . . . action." (Emphasis added). In *Thomas v. Potter*, 202 Fed. Appx. 118 (7th Cir. 2006), the employer allegedly retaliated against the plaintiff by transferring him to the night shift; the Seventh Circuit acknowledged that night shift work was "undesirable or inconvenient," but determined

[7] See 474 F.3d at 459 ("it is unlikely that a reasonable employee would view [the retaliatory assignment to which plaintiff objected] as materially adverse;" "[two other retaliatory acts] fal[l] short of constituting materially adverse action.")

that such an undesirable assignment "does not rise to the level of harm sufficiently serious to 'dissuad[e] a reasonable worker from making or supporting a charge of discrimination.'" 202 Fed. Appx. at 119 (*quoting Burlington Northern*). The Seventh Circuit made similar fact-bound determinations in several other retaliation cases. *Novak v. Nicholson*, 2007 WL 1259054 *5 (7th Cir. April 12, 2007) (finding that "[the harassing acts complained of] . . . would not 'deter a reasonable employee from complaining about discrimination.'") (*quoting Nair v. Nicholson*, 464 F.3d 766, 768 (7th Cir. 2006)); *Schmidt v. Canadian National Railway Corp.*, 2007 WL 755171 at *4 (7th Cir. March 13, 2007) (finding that alleged retaliatory acts "did not rise to the level of a materially adverse action.").

Four circuits, on the other hand, have emphatically held – to the contrary – that juries, not judges, are to determine whether the *Burlington Northern* standard has been satisfied. The Third Circuit has announced and applied that rule in three cases.

> [I]t would not be unreasonable *for a jury* to conclude that [the assertedly retaliatory] treatment would deter a reasonable employee from exercising her rights.

Hare v. Potter, 2007 WL 841031 *11 (3d Cir. March 21, 2007) (emphasis added).

> We conclude that the evidence was sufficient *for the jury* to find that [the employer's] actions . . . "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Ridley v. Costco Wholesale Corp., 217 Fed. Appx. 130, 135 (3d Cir. 2007) (*quoting Burlington Northern*) (emphasis added).

> [The plaintiff] argues that a jury could consider his [retaliatory] transfer to be a materially adverse action and we agree. . . . We find that *a reasonable jury* could conclude that [the disputed] transfer . . . is the kind of action that might dissuade a police officer from making or supporting a charge of unlawful discrimination.

Moore v. City of Philadelphia, 461 F.3d 331, 347 (3d Cir. 2006).

The Second Circuit has also repeatedly held that application of the *Burlington Northern* standard is a matter for the trial jury.

> [A] *rational factfinder* could permissibly infer that a reasonable employee in the position of [the plaintiff] could well be dissuaded from making a charge of discrimination if doing so would result in [the allegedly retaliatory transfer that occurred].

Kessler v. Westchester County Dept. of Social Services, 461 F.3d 199, 209-10 (2d Cir. 2006).

> *A factfinder* might well conclude that the defendants' . . . actions alleged in the amended complaint – if proven true – would be sufficient to dissuade a reasonable worker.

Wrobel v. County of Erie, 211 Fed. Appx. 71, 73 (2d Cir. 2007) (emphasis added).

> We . . . do not believe . . . that *a jury* could conclude that the [alleged retaliatory action] would deter an individual of ordinary firmness. . . .

Zelnik v. Fashion Institute of Technology, 464 F.3d 217, 227 (2d Cir. 2006) (emphasis added).

The District of Columbia Circuit also has ruled that it is for juries to decide whether a retaliatory act could well have deterred protected conduct. In *Vlikonja v. Gonzales*, 466 F.3d 122 (D.C. Cir. 2006), that court of appeals reversed the dismissal of the plaintiff's retaliation claim because "a *reasonable jury* could find that the prospect of the [retaliatory action alleged] could dissuade a reasonable employee from making or supporting a charge of discrimination." 466 F.3d at 124 (emphasis added). See *Czekalski v. Peters*, 475 F.3d 360, 365 (D.C. Cir. 2007) ("[w]hether a particular reassignment of duties constitutes an adverse action for purposes of Title VII is generally a *jury question*. See *Burlington Northern*. . . .") (Section 703(a) discrimination case) (emphasis added).

Most recently the Tenth Circuit joined the Second, Third and District of Columbia Circuits in holding that application of the *Burlington Northern* standard to the circumstances of a case is a matter for a jury.

> To warrant trial . . . we hold that a plaintiff need only show that *a jury* could conclude that a reasonable employee in [plaintiff's] shoes would have found the defendant's conduct sufficiently adverse that he or she might well have been dissuaded by such conduct from making or supporting a charge of discrimination.

Williams v. W. D. Sports, 2007 WL 2254940 *10 (10th Cir. August 7, 2007) (emphasis added).

The speed with which this widespread conflict has emerged since this Court's decision in *Burlington Northern* reflects the large volume of retaliation cases that are filed in the federal courts under Title VII, the Americans With Disabilities Act, the Age Discrimination in Employment

Act, the Family and Medical Leave Act, and the Rehabilitation Act of 1974. As the petitioner in *Burlington Northern* explained, "[r]etaliation filings [with the EEOC] under Title VII nearly doubled between 1992 and 2004, from approximately 10,000 to approximate 20,000, and now constitute a quarter of all Title VII filings." In fiscal year 2006 allegations of retaliation were made in 29.8% of all charges filed with the EEOC.[8]

The division that exists among the lower courts regarding the respective roles of judge and jury in applying the standard in *Burlington Northern* also occurred in this Court. Justice Alito, in his separate opinion in *Burlington Northern*, took the approach utilized by the Sixth Circuit. Equating the standards under section 704(a) (which forbids retaliation) and under section 703(a) (which forbids discrimination on the basis of race, national origin, gender and religion), Justice Alito concluded (as did the majority) that White's claim should be upheld. In doing so, Justice Alito himself applied to the facts of White's claim the standard he favored.

> The actions taken against respondent . . . fall within the definition of an "adverse employment action". . . . [A]lthough I would hold that a plaintiff asserting a § 704(a) retaliation claim must show the same type of materially adverse employment action that is required for a § 703(a) discrimination claim, *I would hold* that [the plaintiff] met that standard in this case. . . .

126 S. Ct. at 2422 (emphasis added).[9]

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[8] http://www.eeoc.gov/stats/charges.html visited September 10, 2007.

[9] Justice Alito's opinion ends "I would hold that petitioner met that standard in this case, and I, therefore, concur in the judgment." The

(Continued on following page)

The majority opinion in *Burlington Northern*, which adopted a different substantive standard, also took a different approach regarding the application of that standard, holding that the dispositive question was whether "there was a sufficient evidentiary basis to support the jury's verdict." 126 S. Ct. at 2416. Rather than making its own determination of whether the retaliatory acts in question would have deterred a reasonable employee, the Court affirmed the jury verdict in *Burlington Northern* because "the jury's findings are adequately supported." *Id.*

The plaintiff in *Burlington Northern* had been reassigned from operating a forklift to more demanding work in the rail yard. After reviewing the evidence that "the jury had before it" regarding the duties of the two jobs, the Court concluded that "[b]ased on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee." 126 S. Ct. at 2417. The Court dealt similarly with the fact that the plaintiff had been suspended without pay for 37 days. Again, the Court summarized the evidence regarding the impact of that suspension on the plaintiff, and determined that "the jury's conclusion that the 37-day suspension was materially adverse was a reasonable one." 126 S. Ct. at 2418.

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term "petitioner" appears to be a clerical error. The petitioner in *Burlington Northern* was the employer. The employer, as the defendant, had no standard to meet; if Justice Alito had thought that application of his proposed standard favored the petitioner-employer, he would have voted to reverse the decision of the court of appeals, rather than concurring in the judgment which affirmed the decision in favor of the plaintiff.

The majority opinion, however, did not state in so many words that the lower courts were *required* to administer the *Burlington Northern* standard in the same manner. The introductory summary of the holding in *Burlington Northern*, moreover, referred only to the substantive standard that was adopted.[10] Perhaps for these reasons, the courts of appeals have not clearly understood whether the majority opinion in *Burlington Northern* determined that juries rather than judges should administer the substantive standard established by the majority opinion.

Although the Second, Third, Tenth and District of Columbia Circuits (like the *Burlington Northern* majority) regard that task as the responsibility of the jury, none of those courts of appeals relied on that aspect of this Court's opinion in reaching that conclusion. Prior to this Court's decision in *Burlington Northern*, it was common for the courts of appeals – although utilizing varying substantive standards – to treat the dispute about what constitutes a materially adverse action as a question for resolution by the courts.[11] The actual manner in which this Court applied the standard in *Burlington Northern*, in the absence of a more express holding, has

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[10] 126 S. Ct. at 2409.

[11] The court of appeals in *Burlington Northern* itself (in that case, as here, the Sixth Circuit) had applied a complex body of case law in determining – in agreement with the district court – that the retaliatory acts complained of were materially adverse under controlling precedent. *White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 802 (6th Cir. 2004) (en banc) ("Next we consider whether the job transfer at issue in the present case was an adverse employment action. Burlington Northern appeals the district court's decision that [the transfer] was an adverse employment action. We agree with the district court.")

proven insufficiently emphatic to persuade the Sixth Circuit or several other courts of appeals to abandon that practice.

The question presented by this case goes to the heart of one of the central changes in Title VII (and the Americans With Disabilities Act) adopted by Congress in the 1991 Civil Rights Act. Prior to 1991, all claims under Title VII were tried by judges. See *Curtis v. Loether*, 415 U.S. 189 (1974). As part of the 1991 Civil Rights Act, following a long and hard-fought legislative struggle, Congress decided that judges rather than juries should ordinarily try Title VII cases.[12] As the large volume of post-*Burlington Northern* litigation makes clear, there are numerous section 704(a) and other retaliation claims whose outcome turns on the application of the *Burlington Northern* standard to the retaliatory acts in question. The Sixth Circuit practice of consigning that fact-bound determination to judges, rather than juries, undermines what is now a central principle of Title VII enforcement.

Certiorari should be granted to resolve this important and frequently occurring question.

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[12] The right to trial by jury exists in any case in which compensatory or punitive damages are sought. 42 U.S.C. § 1981a(c).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

MARY LEECH*
3200 West End, Suite 500
P.O. Box 291564
Nashville, TN 37229
(615) 783-1709

RICHARD J. BRAUN
BRAUN & CROTWELL, PLLC
501 Union Street, Suite 500
Nashville, TN 37203
(615) 259-1550

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner