No. 05-259

In The Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

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

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

In June of 1997, Sheila White was hired to operate the forklift in the Maintenance of Way Department at the Tennessee Yard facility of the Burlington Northern Santa Fe Railroad. Because forklift operator was a new job and there was not a forklift operator classification under the applicable collective bargaining agreement, White was classified as a track laborer. White was the only woman who worked in the department and the only person in the department qualified to operate a forklift.[1]

On September 16, 1997, White filed an internal complaint of sexual harassment and discrimination by her foreman, Bill Joiner.[2] On September 26, 1997, Burlington Northern suspended Joiner for ten days. On the same day, Marvin Brown, the Roadmaster who supervised both White and Joiner, removed White from the position of forklift operator and directed her instead to do only the work of a track laborer. Brown gave a series of conflicting

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[1] One of White's supervisors warned her that the railroad and her fellow workers would not readily accept a woman in the department. III Tr. 477 ("I mean I think I may have told her that the railroad, you know, that they're not really particularly crazy about women working, especially in this department, you know, and I told her, I said, you know, they may, you know, pick on you or even try to, you know, get you out. . . ."), 480-81 ("If you got guys that has been on the job for 25 – 20, 25, 30 years and have never worked with a woman a day in their life . . . – not saying that they was discriminating, but because of the fact that a woman had never worked there . . . and a lot of guys just didn't know how to accept that and, for one, didn't even know how to deal with a woman, I mean, you know, they know how to deal with their wives at home, but they didn't know how to deal with the fact of actually now working with a woman because a woman had never worked there before.")

[2] The harassment included "discussion of her period in front of male co-workers, daily reminders of her foreman's belief that she should not be in her present job position because she is a woman, a request that she shine a flashlight upon a man while urinating, [and] bathroom facilities that did not adequately protect her expectation of privacy." (JA 46).

explanations for this decision, which the jury concluded had been taken to punish White for complaining about sexual harassment.[3]

Witnesses for both plaintiff[4] and defendant[5] agreed that the work White was thereafter required to do as a track laborer was far less desirable than her duties as a forklift operator. The district judge noted that there was

> lots of testimony from lots of people that [track laborer work] was a lot more strenuous, that it . . . required much more exertion, that it was a lot dirtier, that it frankly almost looks like a different job from being a forklift driver, except that it wasn't a different classification.[6]

"[T]rack laborers must carry heavy objects (e.g., heavy, cumbersome jacks that weigh approximately 110 pounds.)" (JA 49). "Some of the dirty aspects of the job include 'picking up tools, oiling them from down on the ground where sometimes it require[d] you to get on your knees and hands'. . . . Adverse aspects also included prolonged sun exposure." (Pet. App. 107a). The track laborers themselves characterized the forklift job as a more desirable and "easier" position.[7] White testified that she had not been required to work on the railroad tracks while she was assigned to operate the forklift.[8] In denying the company's motion for judgment as a matter of law, the trial judge concluded

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[3] Brief in Opposition, 4-5; Pet. App. 6a.

[4] I Tr. 127-28.

[5] II Tr. 406-08; III Tr. 521, 534, 617.

[6] III Tr. 701; *see* Pet. App. 4a, 25a, 106a-107a, 118a.

[7] II Tr. 406; III Tr. 534, 617.

[8] I Tr. 86-87 (describing duties as a forklift operator), 119 ("[prior to the reassignment] all I knew was forklift. I never experienced working on the railroad tracks. I didn't have any knowledge of working on the railroad tracks.")

> that the tremendous variation of assignments within the job classification means that we can't just look at the job classification to determine whether or not there was a change for her – in the conditions of her employment, and we can look at exactly what she was doing and not doing. . . . [The] pretty graphic distinctions within the range of assignments available and the fact that she went from, no question, an easy job to, I think without much doubt, the most difficult and dirtiest job within the range of jobs available in that classification [are] enough to allow this to go to the jury.[9]

On December 4, 1997, White filed a charge with EEOC alleging that Burlington Northern (and Roadmaster Brown in particular) had retaliated against her and had discriminated against her because of her gender. (JA 30). On December 11, 1997, Brown directed that White be "remove[d] from service."[10] The local General Chairman of the union that represented White testified that this decision meant White was dismissed.[11] Exercising her rights under the applicable collective bargaining agreement, White requested that this dismissal be reviewed at a hearing before a company official.[12] That hearing was held on January 6, 1998; White was represented by the union General Chairman, who called several witnesses on her behalf. On January 16, 1998, the company rescinded the dismissal, reinstated White and directed that she be awarded back pay for the period of time she was out of work. (JA 62).

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[9] III Tr. 703-04.

[10] I Tr. 153; IV Tr. 747; Pet. App. 5a.

[11] II Tr. 337 ("dismissed"), 348 ("discharged"), 355 ("dismissed.")

[12] JA 56. Under the local practice this hearing is referred to as a "formal investigation." III Tr. 498, 510.

White offered substantial evidence as to the injury caused by the loss of her job during this period.[13] While White's appeal was pending, she

> was without a job and without income and she did not know if or when she would be allowed to return to work. During this period, White sought medical treatment for emotional distress and incurred medical expenses.

(Pet. App. 7a; *see id.* at 22a, 23a, 111a, 119a). In denying the company's motion for judgment as a matter of law, the trial judge explained:

> Did she get everything back if somebody retaliated against her based on protected activity? Absolutely not. She had Christmas without – I mean do I have to really recite the record? I mean she had Christmas without income, without a job, with total insecurity. She was depressed. Her daughter . . . says her mom was lethargic, just hardly the same person as she had been in the summer. So, you know, money is often the least of the damage inflicted in these types of cases. . . .[14]

White brought suit under section 704(a) of Title VII, alleging that the September 1997 reassignment and the December 1997 removal from service were motivated by an intent to retaliate against her for complaining about sexual harassment and for filing a charge with EEOC. The jury concluded that Burlington Northern had unlawfully

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[13] I Tr. 154 ("[I]t affected me and my children, because it was the holiday time. That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. And I got very deep – I got very depressed because I didn't have no – I couldn't even have a Christmas dinner, a meal, and so like I said, I had – I was anxious, couldn't sleep at all, and I was just destroyed, I was just upset about the whole thing, no income coming in or anything.")

[14] III Tr. 706.

retaliated against White; it awarded $40,000 in compensatory damages and $3,250 for medical expenses.

SUMMARY OF ARGUMENT

I. The literal language of section 704(a) prohibits *any* action taken against an employee because he or she engaged in protected activity. Section 704(a) of Title VII forbids an employer to "discriminate against" an employee for that reason. Both "discriminate" and "against" are unambiguous terms. "To discriminate is to make a distinction, to make a difference in treatment or favor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (*quoting* Floor Manager's Interpretive Memorandum, 110 Cong. Rec. 7213 (1964)). A retaliatory action is "against" an employee if it is unfavorable or adverse to the interests of that worker.

Petitioner and several amici urge this Court to add to the express requirements of section 704(a) an additional element, requiring proof that the retaliatory act not only constituted discrimination against the victim, but also that the retaliatory act was (or led to consequences that were) "materially adverse" or a "significant change in employment status." But when Congress wished to impose a limitation on the broad prohibitions of Title VII, it did so expressly. There are eleven such express statutory exceptions in Title VII. The courts have no authority to add a twelfth.

Section 704(a) serves the essential purpose of "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The effective functioning of those mechanisms – the EEOC, state anti-discrimination agencies, and federal and state courts – requires that employees who wish to file charges or complaints, to speak with government investigators, or to testify at hearings or trials be "completely free from coercion." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). Even comparatively minor retaliatory acts could significantly impede disclosure or

investigation of very serious discriminatory practices. The EEOC long ago properly concluded that "every instance of unremedied retaliation against persons who engage in Section 704(a) opposition . . . has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination." EEOC Compliance Manual (CCH) § 491.2 (1975). The anti-retaliation provisions of the NLRA, on which Title VII was modeled in 1964, had by then a well-established interpretation forbidding any adverse change in work assignments.

A complete ban on retaliatory practices is particularly important where, as here, a plaintiff has been retaliated against for complaining about sexual harassment. Under *Ellerth v. Burlington Industries*, 524 U.S. 742 (1998), a sexual harassment victim may be unable to obtain redress for such harassment if he "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765. If, as petitioner contends, it is *lawful* to retaliate against women who complain about sexual harassment, so long as the retaliation does not cause a "significant change in employment status," a prudent employee might reasonably conclude that it would be unwise to report instances of harassment. If this Court upholds as lawful the retaliatory measures taken against White, it would be entirely reasonable for any Burlington Northern employee to fear the consequences of complaining about harassment.

Ellerth does not limit the scope of section 704(a). With regard to section 703, *Ellerth* does not hold that it is legal for an employer to discriminate against workers on the basis of race, color, national origin, religion or gender so long as that discrimination falls short of causing a "significant change in employment status." The issue in *Ellerth* was not what discriminatory practices are forbidden by section 703, but when prohibited discrimination (including harassment) can fairly be said to be the action of an employer. Under established agency principles, which *Ellerth* undertook to apply, not modify, an employer is

liable in any case in which the official who engaged in the unlawful discrimination was "aided in" that violation by his or her official authority. The retaliatory actions in this case – assigning White to track work and then ending her employment – could only have been taken by a company supervisor using such official authority.

We urge this Court to apply section 704(a), as written, to forbid any retaliatory act taken against an employee who engaged in protected activity. The EEOC favors a somewhat narrower interpretation, construing section 704(a) to forbid only retaliatory acts that are "reasonably likely to deter a charging party or others from engaging in protected activity." EEOC Compliance Manual § 8, par. 8008 (1998). This EEOC interpretation is consistent with the purpose of section 704(a), and has not proven difficult to administer during the six years it has been applied in the Ninth Circuit. White would prevail under the EEOC interpretation of section 704(a).

II. An employer cannot "cure" a violation of section 704(a) by providing the employee with partial relief. An employee wrongfully dismissed in violation of section 704(a) is entitled to reinstatement, back pay, and (on the appropriate showing) compensatory and punitive damages. An employer cannot, by providing some of this relief (here reinstatement and back pay), obtain immunity from the other relief provided by Title VII. The action of an employer in providing such relief, however, may support the efforts of the employer to establish a defense to punitive damages to the extent that it may show that the retaliation was "contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 546 (1999).

III. Where, as here, a company official has unlawfully used his authority to end a worker's employment, agency principles dictate that the employer is legally responsible for that violation of section 704(a). Petitioner's contention that that unlawful action was an "interim" one – in the sense that the employer assertedly intended at a

later time to reconsider that initial action – does not affect Burlington Northern's legal responsibility for that unlawful initial action.

ARGUMENT

I. SECTION 704(a) FORBIDS *ANY* DISCRIMINATION AGAINST EMPLOYEES WHO ENGAGE IN PROTECTED ACTIVITY

A. THE TEXT OF SECTION 704(a) FORBIDS ALL ACTIONS BY AN EMPLOYER TAKEN AGAINST AN EMPLOYEE BECAUSE HE OR SHE ENGAGED IN PROTECTED ACTIVITY

(1) The Text of Section 704(a) Requires Only That The Retaliatory Action Be "Against" The Employee Who Engaged in Protected Activity

Section 704(a) 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 participated in any manner in an investigation, proceeding, or hearing under this title.

This provision on its face has six distinct elements: (1) the plaintiff must be an "employee," (2) the defendant must be an "employer," (3) the plaintiff must have engaged in a form of protected activity, (4) the employer must be legally responsible for the discrimination complained of, (5) the employer must have engaged in "discriminat[ion] . . . because" of that protected activity, and (6) the action complained of must be "against" the plaintiff.

Petitioner does not contend that any of these six statutory elements was not established, or that any of the

terms of section 704(a) is somehow ambiguous. In the instant case there is no dispute that at the relevant time White was an "employee," and Burlington Northern was an "employer," and White had engaged in protected activity. Burlington Northern does not deny that it was legally responsible for the decision to alter White's job duties. The meaning of "discriminate" is well-established. "To discriminate is to make a distinction, to make a difference in treatment or favor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (*quoting* Floor Manager's Interpretive Memorandum, 110 Cong. Rec. 7213 (1964)).[15] The jury found that Burlington Northern officials had acted with such a discriminatory motive, and the company does not in this Court challenge the correctness of that finding of fact.

Finally, the action complained of must also be "against" the plaintiff. A retaliatory act is "against" an employee if that action is unfavorable to the interests of the plaintiff. In the instant case, the jury concluded that the retaliatory actions had caused $43,250 in damages. The correctness of that finding of fact was not disputed in the courts below.

The question presented is whether, in addition to the six expressly stated elements of a claim under section 704(a), there is an unstated *seventh* requirement. Petitioner urges that there is just such a seventh element, a requirement that a plaintiff must also show that the retaliatory act taken against her resulted in a "significant change in employment status."

This proposal that the courts fashion such an additional requirement for a section 704(a) claim cannot be reconciled with the actual language of section 704(a).

[15] The Interpretative Memorandum issued by Title VII's floor managers stated more fully that "the concept of discrimination . . . is clear and simply has no hidden meanings. To discriminate is to make a distinction in treatment or favor." 110 Cong. Rec. 7213 (1964).

Section 704(a) is quite specific in spelling out the elements which must be established to make out a section 704(a) claim. Courts are no more at liberty to add to that list than they would be to dispense with one of the statutory requirements. The text of section 704(a) addresses quite specifically the issue raised by petitioner's brief – the type of impact which a retaliatory act must have on the plaintiff in order to support a section 704 claim. What the statute requires – all that the statute requires – is that the retaliatory act be "against" the plaintiff.

The suggestion that the courts fashion some additional limitation on the statutory elements of a section 704(a) claim is inconsistent with the considerable precision with which Title VII as a whole is written. The prohibitions in section 703 and 704 take the form of definitions of several "unlawful employment practice[s]." Section 703 delineates a number of prohibitions involving discrimination on the basis of race, color, national origin, sex and religion; section 704, in addition to forbidding retaliation, bars certain discriminatory advertisements. Congress circumscribed the Title VII prohibitions with eleven specific statutory exceptions. Ten of the exceptions are expressly applicable only to claims under section 703. Section 703(h), for example, exempts from the prohibition against sex discrimination practices that are lawful under the Equal Pay Act. Section 703(e)(1) permits distinctions based on gender, religion or national origin which constitute a bona fide occupational qualification.[16] Only a single

[16] In addition, section 702(a) exempts employment of individuals of a particular religion by a religious institution. Section 703(e)(2) exempts employment of individuals of a particular religion by certain educational institutions affiliated with religious organizations or which have a religious curriculum. Section 703(i) exempts preferential treatment by certain employers of Native Americans. Section 701(k) exempts certain abortion-related benefits from the scope of the prohibition against gender discrimination. Section 703(h) exempts certain bona fide seniority systems. The same section exempts certain ability tests. Section 703(k)(1)(A)(i) delineates the practices which can be utilized

(Continued on following page)

exception applies to practices otherwise forbidden by section 704(a); section 702(b) provides that the requirements of Title VII do not apply where they would compel an employer, union, or other entity to violate the laws of a foreign country where the workplace is located. The content and application of these eleven express statutory exceptions reflect a highly specific and exhaustive delineation of the circumstances in which Congress thought it appropriate to limit the literal reach of the various prohibitions of sections 703 and 704.

When Congress has wanted to limit the types of retaliatory acts forbidden by a statute, and thus implicitly to permit other forms of retaliation, it has done so expressly. Section 1587 of Title 10, for example, protects certain civilian employees within the Department of Defense only from a retaliatory "personnel action." The statute includes a specific definition of a "personnel action" under section 1587. 10 U.S.C. § 1587(a)(3). But section 704(a) emphatically is not framed in the narrower terms of section 1587. Petitioner contends that section 704(a) only forbids those retaliatory acts that are "materially adverse" or "significantly adverse," or involve a "significant change" in a plaintiff's "employment status." But although Congress has utilized just such phrases in numerous other statutes, none of these limiting phrases is to be found in text of section 704(a).

Petitioner asserts that an additional element of a section 704(a) claim is contained in the phrase "unlawful *employment* action." (Pet. Br. 45). That phrase, petitioner urges, requires that a plaintiff prove that the retaliatory act "negatively affect the employment of employees." (Pet. Br. 18) (Emphasis omitted). It is unclear how this assertion, even if correct, would help petitioner; the actions

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despite their discriminatory effect. Section 703(k)(3) exempts from the bar on practices with a discriminatory impact certain prohibitions against the employment of individuals using illegal drugs.

complained of clearly concerned White's employment, and the jury in awarding substantial damages necessarily determined that the effect of those actions was negative. In any event, section 704(a) does not require an "employment action."[17] As used in Title VII, "unlawful employment action" is not an element of a claim under section 704(a) or, indeed, under any provision of section 703. Rather, "unlawful employment action" is the catchall phrase for all conduct forbidden by Title VII, a phrase whose various meanings are *defined* by the various subsections of Title VII. The use of this phrase no more contains an additional requirement of "employment of employees" than it does a suggestion that any provision of Title VII forbids only "action," as opposed to deliberate *in*action (e.g., a failure to promote). Many of the provisions of Title VII clearly apply to things other than the "employment of employees." For example, section 703(c) forbids unions to exclude individuals from membership on an impermissible basis, a prohibition unrelated to whether those members have jobs.

If section 704(a) applied only to workplace retaliation, a wide variety of highly effective non-workplace retaliatory measures could lawfully be used to suppress opposition to discrimination or cooperation with federal or state authorities. Such an interpretation of section 704(a) would be inconsistent with the decision of this Court in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), that section 704(a) prohibits retaliation against former employees by denying them recommendations. The United States correctly advised this Court of the danger of non-workplace retaliation.

> [T]he lower courts have recognized that post-employment retaliation for filing a discrimination charge can take many forms, all of which can seriously chill employees' willingness to

[17] *Rochon v. Gonzales*, 2006 WL 463116 *6 (D.C.Cir. 2006) (opinion by Ginsburg, J.); *Washington v. Illinois Department of Revenue*, 420 U.S. F.3d 658, 659-60 (7th Cir. 2005).

> complain to or cooperate with the EEOC, and can therefore impair the EEOC's ability to investigate and prevent discrimination.[18]

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983), this Court recognized, for example, that the prosecution of a non-meritorious lawsuit "may be used by an employer as a powerful instrument of coercion or retaliation."

(2) Section 704(a) Does Not Contain and Is Not Subject To The "Terms" and "Conditions" Element of a Section 703(a)(2) Claim

Petitioner argues that the prohibition in section 704(a) is limited to retaliation affecting a "terms [or] conditions . . . of employment," a phrase included not in section 704(a) but only in section 703(a)(2). As we explain below,[19] plaintiff would prevail in this case even if it involved discrimination on the basis of gender (governed by section 703) rather than unlawful retaliation (governed by section 704(a)). But the very different language of sections 703 and 704(a) makes clear that they should be construed independently.

The express terms of sections 703 and 704(a) are decidedly different. First, as explained above, Title VII contains nine different exceptions which expressly apply only to (some or all of) the unlawful employment practices forbidden by section 703, and do not affect claims under section 704. In this regard section 704(a) is expressly *broader* than section 703. Under the section 702(a) exception for religious organizations, for example, a church

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[18] Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), No. 95-1376, 20 n.10.

We set forth in an appendix to this brief a list of cases involving non-workplace retaliation.

[19] *See* pp. 28-33, *infra*.

could decide to dismiss an employee because she was an atheist, but it could not dismiss even an atheist because she complained about sexual harassment.

On the other hand, in other respects section 704(a) is expressly *narrower* than section 703. Section 703 forbids a number of types of discriminatory practices that are not unlawful under section 704(a). Section 703, for example, forbids certain practices that have "a disparate impact on the basis of race, color, religion, sex or national origin" (42 U.S.C. § 2000e-2(k)(1)(A)); nothing in section 704(a) forbids practices, adopted and applied without any retaliatory purpose, that have a disparate impact on workers who engage in protected activities. Unlike section 703, which generally forbids any distinctions for or against individuals on the basis of race, national origin, sex or religion, section 704(a) forbids only distinctions against (but not in favor of) those who engage in protected activities. It would be unlawful under section 703 to give bonuses to employees who convert to a particular religious faith, but quite permissible under section 704(a) to give bonuses to workers who report sexual harassment.

Petitioner's proposal to conform the interpretation of section 704(a) to the meaning of section 703 is further confounded by the fact that section 703 itself has nine different prohibitions, with widely divergent language.[20] Of the nine prohibitions of section 703 itself, only one – section 703(a)(1) – refers to discrimination in the terms and conditions of employment. To the extent (if any) that

[20] 42 U.S.C. § 2000e-2(a)(1) (discrimination by employer with respect to compensation, terms, conditions, or privileges of employment), 2000e-2(a)(2) (other practices by employer), 2000e-2(b) (discrimination by employment agency), 2000e-2(c)(1) (discrimination by union with regard to membership), 2000e-2(c)(2) (other practices by union), 2000e-2(c)(3) (union actions causing employer to discriminate), 2000e-2(d) (discrimination in apprenticeship and training programs), 20003-2(k) (practices with a disparate impact), 2000e-2(l) (alteration of test scores).

inclusion of the words "terms" and "conditions" in section 703(a)(1) carries with it some sort of limitation on the practices forbidden by that provision (a question this Court need not decide), the deliberate absence of that very limiting language from the remaining eight provisions of section 703, and from section 704(a), reflects an affirmative congressional decision to impose no such restrictions on those other prohibitions of Title VII.[21] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

It is not the least illogical that section 704(a) may at times forbid types of practices that might be lawful under section 703. "Minor" acts of actual or threatened retaliation, by deterring testimony, charges, or other opposition activities, could permit an employer or other defendant to engage with impunity in major violations of section 703. A retaliatory act against a single employee may deter numerous other employees from complaining about a widespread problem of sexual harassment, or keep from the government information which would lead to far reaching changes in the employer's practices. Assignment to less desirable work would not be sufficient by itself to create (although it could well would contribute to) a hostile work environment forbidden by section 703, but a threat to so reassign any worker who complained about sexual harassment could well deter such complaints and thus seriously damage compliance with Title VII. It is entirely understandable that Congress would have chosen to make a "federal case" out of even minor acts of retaliation,

[21] Petitioner also argues that the phrase "discriminate against" in section 704(a) is also found in section 703; but four of the prohibitions in section 703 do not use even this terminology. Sections 703(a)(2), 703(c)(2), 703(k), and 703(l).

because those actions can obstruct the enforcement and implementation of *federal* law.

Other federal statutes expressly treat actions which interfere with the enforcement of federal law as more serious than the law whose enforcement is at issue. Title 18 imposes severe penalties for actions which interfere with compliance proceedings: up to five years for obstruction of justice (18 U.S.C. § 1505), up to 10 years for reprisals against a witness or informant (18 U.S.C. § 1513(e)) or for witness tampering (18 U.S.C. § 1512(b)), and up to 20 years for the destruction of evidence (18 U.S.C. § 1512(c)). Those penalties are applicable even in criminal cases in which the maximum penalty for the underlying offense was significantly lower.[22] An employer which retaliated in certain ways against a witness in a Title VII trial would be guilty of a felony, even though violation of Title VII itself is not even a misdemeanor.

(3) Other Provisions of Title VII Restrict Comparatively Minor Section 704(a) Claims

Section 704(a) does not exempt from the statutory prohibition a class of retaliatory acts with comparatively minor significance or harm. But other express provisions of Title VII do in practice preclude the imposition of liability for many relatively minor allegedly retaliatory acts, and even reduce the likelihood that such claims will be brought at all.

First, section 701(b) makes clear that a plaintiff alleging unlawful retaliation must establish, under traditional agency principles, that the retaliation complained of

[22] The maximum penalty for assault not involving a dangerous weapon is six months (18 U.S.C. § 113(a)(4)), but if a perpetrator assaulted the victim in the same way because he or she had testified at trial, the maximum penalty for that retaliatory assault would be ten years (18 U.S.C. § 1513(b)).

can fairly be attributed to the employer. *Burlington Industries v. Ellerth*, 524 U.S. 742, 754 (1998). The most serious acts of retaliation (such as a dismissal, suspension or reassignment) usually involve an express use of agency power; an employer is necessarily liable for such utilization of official authority. *See Ellerth*, 524 U.S. at 758-60. On the other hand, many of the less serious retaliatory acts, such as hostile remarks, dirty looks, ostracism, or the denial of lunch invitations, do not involve any use of official power, even if engaged in by a supervisor. In the absence of such an official use of company authority, a plaintiff ordinarily[23] could not hold an employer liable for a retaliatory act unless he or she could show that the disputed action was motivated by a desire to further the interests of an employer. *Ellerth*, 524 U.S. at 756. Many unofficial retaliatory acts, however, may be motivated only by personal pique that a popular supervisor or fellow employee faced discipline for sexual harassment or other discrimination. Actions taken with such a personal motive are outside the scope of employment. *Ellerth*, 524 U.S. at 756-57. In the instant case, however, there is no dispute that removing White from her work on the forklift and assigning her to work on the tracks required an exercise of official authority.

Second, section 704(a) requires a plaintiff to establish that an allegedly retaliatory action was "against" him or her. The standard is an objective one. The official (or officials) who took the action complained of must have known, or had reason to know, that that action was adverse to the interests of the plaintiff. That is unlikely to be in dispute where, for example, an employer has denied a worker a promotion, a raise or a bonus. On the other hand, if some employment action, such as a minor shift in duties, is truly trivial, the responsible official may well have no

[23] An employer would be liable for a hostile environment under the various circumstances described in *Ellerth* and *Faragher*.

reason to know that the affected employee would care one way or the other. Certainly an employer could not be said to have acted "against" an employee if it gave that worker what was objectively a promotion, unaware that the employee in question preferred his or her existing less well-paid or prestigious position. But an employer would be liable for "pouncing on employees' . . . vulnerabilities . . . seeking out devices that would be harmless to most people but would do real damage to selected targets." *Washington v. Illinois Department of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005). In the instant case, company officials themselves testified that track labor work was far less desirable than operating a forklift; removing White from her job and taking her off the payroll was obviously action taken "against" respondent.

Third, an employee seeking monetary relief must establish that he or she was injured. That will, of course, be obvious if the action complained of caused economic injury, such as a reduction in pay. Section 1981a(a)(1) also authorizes an award of "compensatory damages," but only on proof that the plaintiff actually sustained some "damag[e]." If the action complained of was trifling, a plaintiff's claim to damages, even for emotional distress, may well be insubstantial. Summary judgment would be appropriate regarding damages (and, if that were the only relief sought, on the entire claim) if no reasonable jury could find that a plaintiff had sustained compensable injury. In this case, however, petitioner has never questioned the sufficiency of the evidence to support the jury's finding that the proven retaliatory actions had caused White $40,000 in damages and $3,250 in medical bills.

As a practical matter, these three provisions mean that employees with only minor, non-economic claims will often, and not inappropriately, have difficulty retaining an attorney to litigate such claims. Few if any Title VII plaintiffs have the funds to pay an attorney on an hourly basis. Section 706(k) only provides for awards of counsel fees to a "prevailing" plaintiff. A prudent attorney will be less likely to agree to handle a case with a greater risk of

failure on the merits. A potential case involving only a comparatively minor retaliatory act runs just such a high risk of failure. Such a case may be rejected (at trial or on summary judgment) because the plaintiff cannot show the action complained of was objectively "against" him or her, or was an act for which the employer is liable under agency principles. If a plaintiff has no claim for backpay, and any arguable other injury was slight, there would be a significant likelihood that the plaintiff would not prevail because the trier of fact concluded that the acts complained of caused no harm. No harm, no fee. Few attorneys would even consider taking a case alleging only that the plaintiff had suffered a dirty look, rude remark, or exclusion from a luncheon because of the high probability that they would never be paid for their legal services. This inescapable economic reality, like Adam Smith's unseen hand, will often weed out insubstantial cases, without imposing on the courts the burden of developing and applying some classification scheme for separating minor and non-minor cases.

B. NEITHER THE PURPOSE NOR THE LEGISLATIVE BACKGROUND OF SECTION 704(a) WARRANTS DISREGARDING THE LANGUAGE OF THE TEXT

"If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must be regarded as conclusive.'" *Russello v. United States*, 464 U.S. 16, 20 (1983). In this instance, the purpose and legislative history background of section 704(a) are entirely consistent with a literal reading of that provision.

(1) The Purpose of Section 704(a)

Section 704(a) serves the same essential purpose as most if not all anti-retaliation provisions: "Maintaining unfettered access to statutory remedial mechanisms. Cf.

NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972)." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The anti-retaliation provisions of the National Labor Relations Act, like section 704(a), forbid an employer to "discriminate against" an employee because he or she engaged in protected activity. 29 U.S.C. § 158. This Court's description in *Scrivener* of the purpose of the NLRA anti-retaliation provisions is apposite here.

> "Congress has made it clear that it wishes all persons with information about [unlawful] practices to be *completely free* from coercion against reporting them to the Board. . . ." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). This *complete freedom* is necessary, it has been said, "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB*, 89 U.S.App. D.C. 261, 263, 191 F.2d 483, 485 (1952).

405 U.S. at 121-22 (emphasis added). Congress did not seek to secure compliance with these or most other federal statutes through continuing detailed federal monitoring and supervision.

> Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960).

Section 704(a) of Title VII is but one example of the scores of anti-retaliation provisions that have been adopted by Congress. These provisions play an indispensable role in the enforcement of federal law. Most of the United States Code addresses the activities of corporations and other private and public institutions. When those entities or their officials violate federal law, the violations

are often known only (or at least first) to the individuals who are employees of the very entities or subordinates of the very officials who have broken the law. Law breakers obviously have a powerful incentive to use their power as employers to pressure potential whistle blowing employees to withhold that information. Federal anti-retaliation statutes, by forbidding reprisals against employees who report violations of the law to federal authorities, assure that the national government will have access to that essential information and testimony.[24]

In many of these statutes, including section 704(a), Congress has extended the same protection to employees who report misconduct to higher officials within their own institutions, thus facilitating voluntary compliance with the law. Those salutary provisions have long played a critical role in bringing about compliance with a wide range of federal laws. As one prominent federal official recently observed regarding the importance of laws forbidding retaliation against employees of the federal government itself, "employees have used statutory procedures – including internal channels at their agencies – on countless occasions to correct abuses without risk of retribution."[25]

Forty-three federal statutes,[26] like section 704, provide that an employer may not "discriminate against" workers who disclose to federal officials (and in some instances to supervisors or others) violations of particular federal statutes. These similarly worded provisions facilitate the enforcement of a wide range of federal laws. Federal anti-retaliation statutes using that terminology, for example, protect employees who disclose to the federal government unlawful practices that pose a threat to safety to workers

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[24] *See* Brief for the United States as Amicus Curiae, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), No. 02-1672, 13-14.

[25] Porter Goss, "Loose Lips Sink Spies," New York Times, Feb. 10, 2006, p. A27 col. 1.

[26] A list of these statutes is set forth in an appendix to this brief.

in mines or other workplaces, or to the safety of the public on airplanes, boats, automobiles or railroads. Employees at plants which process nuclear fuel or weapons are protected against "discriminat[ion]" if they reveal safety or security problems to federal officials. Similarly phrased anti-retaliation provisions are found throughout the nation's environmental protection statutes. Federal laws protecting investors are safeguarded by anti-retaliation provisions in federal banking and securities laws, including the Sarbanes-Oxley Act adopted after the collapse of the Enron corporation. Taxpayers are protected by anti-retaliation laws which bar reprisals against workers who disclose fraud or false claims by federal contractors.

Virtually all of these statutes, like section 704(a), provide – without limitation as to the type of retaliatory act – that an employer may not "discriminate against" an employee who engages in protected activities. If a flight attendant recognized that the pilot was drunk, if a mine worker knew that safety equipment was defective or missing, if an airplane mechanic realized that required maintenance was not being performed, if a worker at a nuclear weapons plant noticed violations of security precautions, Congress wanted those employees to be confident that they could without risk of reprisal – any reprisal – report those problems to their superiors or to the federal government. Section 704(a) of Title VII should be construed in the same manner as these other anti-retaliation statutes, which have the same salutary purpose and which also forbid employers to "discriminate against" workers who engage in protected activities.

A literal reading[27] of section 704(a) is consistent with the intent of Congress that employees who engage in

[27] The Department of Labor, in publications widely distributed and available on its website, has repeatedly assured workers that the numerous anti-retaliation provisions which the Department enforces forbid *all* acts of retaliation. "OSHA Workers' Page" (http://www.osha.gov/as/opa/worker/index.html) ("You cannot be transferred, denied a

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protected activities enjoy "complete freedom" from retaliation. *NLRB v. Scrivener*, 405 U.S. at 122. Any retaliatory act has the potential to deter protected activities. The EEOC long ago concluded that as a practical matter "*[e]very* instance of unremedied retaliation against persons who engage in Section 704(a) opposition . . . has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination."[28] Once an employer has evidenced animosity toward those who engage in protected activities and a willingness to act on that animus, no employee could have confidence that subsequent retaliatory acts would not be more serious.

Protection from retaliation is of particular importance in cases of sexual (or other) harassment violating Title VII. Under *Ellerth v. Burlington Industries*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), an employer is vicariously liable for harassment by a supervisor, subject in some situations to a specific affirmative defense. In order to establish that defense, an employer must demonstrate inter alia "that the plaintiff employee unreasonably failed to take advantage of any

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raise, have your hours reduced, be fired, or punished *in any other way* because you exercised any right) (emphasis added); "The Whistleblower Program" (http://www.osha.gov/dep/oia/whistleblower/index.html) ("the Act prohibits any person from discharging or *in any other manner* discriminating against any employee because the employee has exercised rights under the Act") (emphasis added); "Whistleblowers and Corporate Fraud" ("your employer may *not* discharge or *in any manner* discriminate against you because you provided information . . . or assisted in an investigation") (Sarbanes-Oxley Act) (second emphasis added); "Protecting Whistleblowers" ("*Any* adverse action that results *directly* from your efforts to improve safety and health on the job or the environment is considered discrimination") (first emphasis added); "Rights of Trucking Employees Involved in Safety Accidents" ("Employers are prohibited from firing, demoting, or *in any other way* discriminating against an employee who . . . [r]eports violations of vehicle safety requirements") (emphasis added).

[28] EEOC Compliance Manual (CCH) § 491.2 (1975) (emphasis added).

preventative or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765. If, as petitioner urges, section 704(a) were now construed to permit certain forms of reprisals against women workers who complain about sexual harassment, victims would legitimately be afraid to do so. The leading Fifth Circuit case establishing that circuit's "ultimate employment decision" standard involved retaliation against a woman because she had complained about sexual harassment; the Fifth Circuit held that the retaliation was lawful, despite an unchallenged jury determination that the retaliation in that case had caused $50,000 in damage. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).[29] Petitioner endorses the extraordinary result in *Mattern* as "faithful to *Ellerth*." (Pet. Br. 13). If this Court were to sustain Burlington Northern's contention that it may lawfully engage in the type of retaliation that occurred in this case, any Burlington Northern employee who knew of that ruling would quite reasonably be fearful of ever complaining about sexual harassment.

Petitioner and several amici urge this Court to adopt a clear rule that only certain specified types of retaliation are forbidden by section 704(a); such a rule would make equally clear that all other types of retaliation are permissible. That is precisely what this Court should *not* do. Such a holding would declare an open season on employees who engage in protected activities, albeit with small bore weapons. It would be permissible for an employer to threaten to use those judicially approved methods of retaliation in order to coerce an employee into withdrawing a Title VII charge, dismissing a Title VII action, or refusing to testify at a trial or administrative hearing. "That cannot be what Congress intended." *Deavenport v. MCI Telecommunications Corp.,* 973 F. Supp. 1221, 1226 (D. Colo. 1997).

[29] We set forth in an appendix to this brief other decisions within the Fifth Circuit upholding as lawful retaliatory acts taken against women who complained about sexual harassment.

The EEOC's interpretation of section 704(a), although narrower than our reading of that provision, is consistent with its purpose. The Commission's 1972 Interpretive Manual concluded that "every" unremedied retaliatory act had a chilling effect.[30] Early Commission decisions held that retaliatory unfavorable job assignments were forbidden by section 704(a).[31] The Commission's 1984 Policy Guidance stated that a section 704(a) charging party need only show that he or she "was in some manner subject to adverse treatment."[32] In 1998 the Commission modified this standard in a manner favorable to employers, concluding that section 704(a) would not be violated by a retaliatory act so slight that it would not "deter a charging party or others from engaging in protected activity." EEOC Compliance Manual, § 8, par. 8008 (1998). That construction of section 704(a) is consistent with the purpose of the statute.[33] A rule that permitted an employer to retaliate against witnesses or charging parties in a manner that could deter testimony or the filing of charges would interfere with the functioning of the Commission. This Court has correctly been "reluctant to approve rules that may jeopardize the EEOC's ability to investigate . . . cases." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 n.11 (2002). Judicial administration of this EEOC standard has not proven in practice to present serious administrative

[30] *See* text at n.29, *supra*. The 1972 Interpretive Manual was published in 1975 as the EEOC Compliance Manual.

[31] EEOC Dec. No. 70-130 (Sept. 5, 1969), 1969 WL 2880, *1-2 (change in shift); EEOC Dec. No. 70-601 (March 9, 1990), CCH EEOC Decisions (1973) par. 6124 (refusal to follow normal policy of assigning light work to injured worker); EEOC Dec. No. 74-77 (Jan. 18, 1974), 1974 WL 3847 *4 ("imposing unpleasant work assignments.")

[32] 1984 Policy Guidance, § 614.4(d) at 614-6.

[33] *Rochon v. Gonzales*, 2006 WL 463116 *6 (D.C.Cir. 2006). The Department of Labor construes in a similar manner the similarly phrased anti-retaliation statutes which it enforces. *See Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003), 16 (retrievable by name at www.oalj.dol.gov).

problems. It has been in effect in the Ninth Circuit for six years without causing demonstrable problems.[34] A similar deterrence standard has long been a staple of First Amendment jurisprudence. Respondent would unquestionably prevail under the EEOC standard.

(2) The Legislative Background of Section 704(a)

The broad language of section 704(a) has its roots in the anti-retaliation provisions of the National Labor Relations Act. Although earlier federal measures had forbidden only retaliatory dismissals or demotions,[35] sections 8(a)(3) and 8(a)(4) of the NLRA deliberately were not so limited. Rather, they provided without limitation that an employer could not "discriminate against" a worker for engaging in such protected activity. The Chairman of the National Labor Board (a precursor to the NLRB) explained that this broad language was intended to reach all types of retaliatory acts.[36]

Sections 8(a)(3) and 8(a)(4) have long been broadly interpreted to forbid the sort of changes in work duties involved in the instant case.[37] Title VII was consciously

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[34] *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

[35] *The National War Labor Board*, 33 Harv. L.Rev. 39, 42 (1919); Executive Order 6711-B (1935).

[36] 1 Legislative History of the National Labor Relations Act 149 ("Collective bargaining to have any real meaning required the employer to refrain from *all* discriminatory practices which would undermine organization. The most effective weapon which the employer possesses to disrupt a union is of course dismissal. Others of a more subtle character include discrimination as to wage or hour differentials, advancement, demotion, hire, tenure, reinstatement, division of available work. *All these*, the bill declares to be labor practices which are unfair, and provides means for their prevention.") (testimony of Dr. Francis Haas) (emphasis added).

[37] We set forth in appendix to this brief a list of pre-1965 decisions under the NLRA regarding retaliatory reassignments.

This remains the Board's position. In widely circulated publications (available on the Board's website), the Board assures workers that the

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modeled after the NLRA, and the interpretation of the NLRA that was established by 1964 has been relied on by this Court in construing Title VII itself. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976).

Petitioner argues that in adopting the 1991 Civil Rights Act Congress prospectively ratified a limitation on section 704(a) claims to employment actions that are *materially* and *ultimately* adverse. "The adverse-employment action rubric (which *led to* the ultimate- and materially adverse-employment-action-tests) was by then already well established." (Pet. Br. 44) (emphasis added). But the keystone of petitioner's brief (with which in this instance we agree) is that an interpretation of section 704(a) to broadly forbid "*any kind* of adverse action" (Pet. Br. 7) (emphasis in original) is very different than the far narrow construction proposed by Burlington Northern. Petitioner does not claim that either the "materially adverse" or "ultimate employment action" doctrines were the prevailing interpretation of section 704(a) in 1991.[38] To the extent that the lower courts after 1991 replaced the simple requirement of an adverse action with a limiting requirement of a materially or ultimately adverse action, that was a major change in the law. To describe Congress as having ratified in 1991 a change in the law that occurred years later is like asserting that Cardinal Richlieu supported Robespierre because the Bourbon dynasty "led to" the French Revolution.

NLRA forbids retaliating against workers by "assigning employees more difficult work tasks" ("The National Labor Relations Board and You," 2) or "assigning to a less desirable shift or job." ("Basic Guide to the National Labor Relations Act," 15).

[38] The first Sixth Circuit decision applying a "materially adverse" requirement to a section 704(a) case appears to be *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999). The earliest Fifth Circuit decision limiting section 704(a) cases to ultimate employment actions appears to be *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). It was not until 2000 that the Ninth Circuit adopted its standard on this issue, embracing the current EEOC standard. *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

C. THIS COURT'S DECISIONS IN *FARAGHER*, *ELLERTH* AND *SUDERS* DO NOT HOLD THAT SECTION 703 FORBIDS ONLY DISCRIMINATORY CONDUCT THAT RESULTS IN "A SIGNIFICANT CHANGE IN EMPLOYMENT STATUS"

Petitioner relies primarily on three decisions of this Court regarding sexual harassment: *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Those cases, petitioner urges, demonstrate that section 703 forbids only discriminatory conduct that results in "a significant change in employment status." Petitioner argues that this asserted limitation on section 703 should be extended to section 704(a).

But *Ellerth*, *Faragher*, and *Suders* neither adopt, nor support, any such limitation on section 703. The issue in these three cases emphatically was not whether the actions complained of was discriminatory. The jury in *Faragher* had found, and the complaints in *Ellerth* and *Suders* sufficiently alleged, the existence of sexual harassment sufficiently severe and pervasive to create a hostile work environment. The sole issue before this Court was whether the employers in those cases were vicariously liable for the discriminatory conduct at issue.

This Court held that an employer's liability for harassment by a supervisor was governed by traditional principles of agency law.[39] This Court recognized several circumstances under which an employer would clearly be liable under agency principles for sexual harassment by a company official. First, an employer is liable for harassment or other discriminatory acts undertaken by an employee whose "purpose, however misguided, is wholly or in part to further the master's business." *Ellerth*, 524 U.S. at 756 (*quoting* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser

[39] *Ellerth*, 524 U.S. at 754; *Faragher*, 524 U.S. at 791; *Suders*, 542 U.S. at 144.

and Keeton on Law of Torts, § 70, p. 505 (5th ed. 1984)).[40] Second, an employer is liable for harassment or other discriminatory acts where the responsible official "was aided in accomplishing that [discrimination] by the existence of the agency relationship." *Ellerth*, 524 U.S. at 758 (*quoting* Restatement (Second) of Agency, § 219(2)(d)).

It was in this Court's discussion of the "aided in" branch of agency law that the phrase "tangible employment action" was used in *Ellerth* and *Faragher*. This Court declined to hold that the mere existence of an employment relationship between the victim and the company for which the supervisor also worked was sufficient by itself to satisfy the "aided in" requirement of agency law; as the Court explained in *Ellerth*, "there may be circumstances where the supervisor's status makes little difference." 524 U.S. at 763.

This Court used the phrase "tangible employment action" to refer to those instances in which a harasser manifestly *had* utilized his or her power or authority, and in which the discriminator was thus undeniably "aided in" that discrimination by his position with the employer.

> [W]e can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in the commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. . . . When a supervisor takes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . A co-worker can break a co-worker's arm as easily as a supervisor, [b]ut . . . one co-worker cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of

[40] *Ellerth* noted that although company officials most often engage in sexual harassment for purely personal motives, there were instances in which such harassment was intended to further the purposes of the employer. 524 U.S. at 757.

> the supervisor. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act.

524 U.S. at 760-62. These passages make clear that "tangible employment action" refers to the actual exercise by a supervisor of his or her official authority in directing or affecting a subordinate. As the United States recently explained, a tangible employment action is "conduct that depends on a grant of authority from the employer to the supervisor."[41]

The decision in *Ellerth* contains other language that petitioner construes as going beyond merely requiring that a supervisor have utilized official power. But the very foundation of *Ellerth* and *Faragher* was that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." 524 U.S. at 754. There assuredly is nothing in agency law which restricts a principal's liability for the acts of an agent that are aided by the agent's official authority to instances in which the action taken by the agent is more than "minor." A principal is equally liable regardless of whether an agent uses his or her authority to commit a minor or major tort or breach of contract.

The actual holding in *Ellerth* and *Faragher*, spelled out in identically worded paragraphs in those opinions, and described by both as the "holding" of those cases, contains no reference to significant changes in employment status. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. 807-08. The relevant portion of that holding states that "[n]o affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as a discharge, demotion, or *undesirable*

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[41] Brief for the United States as Amicus Curiae, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), No. 03-95, 22.

reassignment." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. 808 (emphasis added). This holding requires only that the official action need be "undesirable," not materially adverse, or serious, or involving a significant change in employment status.

The issue in *Suders* was whether (or, more precisely, when) a constructive discharge constitutes a tangible employment action. The critical question, this Court held, was whether the events that compelled the plaintiff to resign included an official action, some use of a supervisor's official authority. "*Ellerth* and *Faragher* . . . divided the universe of supervisor-harassment claims according to the presence or absence of an official act," 542 U.S. at 151, not the presence or absence of an official act causing a certain type or magnitude of harm. *Suders* contains numerous passages which reiterate that whether a supervisor's action is a tangible employment action turns on whether the supervisor used his or her supervisory authority.[42] Any such use of official power precluded the affirmative defense if it was "to the employee's disadvantage." 542 U.S. at 148.[43]

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[42] *E.g.*, 542 U.S. at 140-41 ("We conclude that an employer does not have recourse to the *Ellerth*/*Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge"), 144 ("an employer is liable for the acts of its agent when the agent 'was aided in accomplishing the tort by the existence of the agency relationship' "); 150 (explaining that the affirmative defense was available in *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003), because "the supervisor's behavior involved no official actions," "no direct exercise of company authority"); 152 n.11 (remanding for consideration of whether the affirmative defense might be unavailable because, although most of the harassment "involved unofficial conduct," the final incidents complained of "were less obviously unofficial.")

[43] *Suders* expressly approved *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), as a correct application of the rule that a tangible employment precludes the *Faragher*/*Ellerth* affirmative defense. 542 U.S. at 150. The official act involved in *Robinson* was the reassignment of a judicial secretary to work for a different judge, a reassignment that

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That *Ellerth*, *Faragher*, and *Suders* could not have intended to limit the prohibitions of section 703 to discriminatory actions that "significantly changes employment status" is made clear by the dramatic change that such a limitation would work on the long established meaning of section 703. Under the standard proposed by petitioner, women could be assigned to separate jobs than men so long as the differences in those jobs were not "significant." That assuredly is inconsistent with the intent of Congress "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). If section 703 applied only to "changes," it would not reach broad categories of discrimination which take the form of a refusal to alter a plaintiff's status, such as refusals to hire, denials of promotions,[44] raises or bonuses, or failures to stop known harassment by co-workers.

Under the petitioner's proposed standard, moreover, discriminatory assignments within a particular job title or position would not alter a worker's "status," and thus could never be illegal under section 703. Were this Court to so hold, whether it is legal to relegate minorities or women (or, on petitioner's view, people who testify at Title VII trials) to a particular type of work would vary from employer to employer, according to how each had structured its job titles. An employer could severely restrict the application of section 703 (and section 704(a)) simply by defining its job titles extremely broadly.[45]

(unlike the instant case) involved the identical work that the plaintiff had been doing before.

[44] Although the sentence in *Ellerth* relied on by petitioner expressly includes "failing to promote," that phrase is not contained in petitioner's proposed standard.

[45] In the instant case, the position of maintenance of way laborer includes 20 "key work activities" (including "performs all qualified duties, as necessary or as requested by management), 18 "key skill requirements," and several other tasks listed only in the "summary."

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Petitioner sets forth at page 30 of its brief a series of examples of the kinds of distinctions in assignment that under its proposed standard fall outside the prohibitions of section 703 (and 704(a)). Under that standard, an employer could assign female "law firm associate[s] [to] merely writ[e] briefs" while the male associates were "trying cases, which might be perceived as advantageous to partnership prospects." (Pet. Br. 30). A landscape company could assign African-Americans "to the dirtier tasks of mulching, weed control or grading," while whites were "riding [the] mower." (Id.) Jewish accountants could be directed "to do expense control and reimbursement," while gentile accountants did "the more prestigious task of preparing financial reports." (Id.). Far from being "trivial" or "trifling" distinctions with which Congress could not have intended to interfere, the examples cited by petitioner depict with unerring accuracy the discriminatory workplace that existed prior to the 1964 enactment of Title VII, and the very evils that statute was adopted to end.

Insofar as petitioner's argument relies on such a drastic modification of Title VII jurisprudence, it is a proposal to seriously weaken section 703 masquerading as a justification for substantially undermining section 704(a).

(JA 58-61). Even this list clearly is not inclusive; it makes no mention of White's own primary responsibility, operating a forklift.

D. THE COURTS HAVE NO AUTHORITY TO DISREGARD THE ACTUAL TEXT OF SECTION 704(a) IN THE NAME OF MANAGEMENT PREROGATIVES

Petitioner urges this Court to exclude "minor" retaliatory acts from the scope of section 704(a) in order to protect "management prerogatives." (Pet. Br. 28-31). Congress of course had no intention of authorizing the imposition of liability because of management decisions that did *not* involve an unlawful purpose or effect. In the instant case, however, petitioner does not question the correctness of the jury's finding that it acted with a retaliatory purpose, and petitioner does not claim that there is any legitimate management interest in retaliating against employees who engage in protected activities.

Petitioner instead advances a novel argument regarding management prerogatives. It asks this Court to bar imposition of liability in a case such as this in which there *was* an unlawful motive in order to prevent possible lawsuits against other employers whose actions were not motivated by such an improper purpose. Petitioner's argument rests on an empirical premise: that if minor retaliatory acts were declared unlawful, employers would be paralyzed by fear of the certain avalanche of baseless section 704(a) claims, virtually all of which would be certain to require a jury trial.

If it were appropriate for this Court to entertain such an empirical argument, it assuredly could not be sustained. For six years the Ninth Circuit has adhered to the EEOC's interpretation of section 704(a), which petitioner insists is so expansive as to permit litigation over "the most trivial workplace conduct." (Pet. Br. 46). But no tsunami of baseless section 704(a) claims has swept over the district courts in the Ninth Circuit.[46] Section 704(a)

[46] The Ninth Circuit adopted the EEOC standard in *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000). Since that time there have

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claims are not certain to reach a jury; district courts routinely grant summary judgment in such cases because of insufficient evidence of a retaliatory motive. As a practical matter, even irritable, chip-on-the shoulder workers have the good sense to understand the costs and risks involved in suing their employers, and attorneys – who usually will be paid only if they prevail on the merits – will rarely take a case which lacks significant merit and potential for recovery.

Petitioner's empirical assertions in any event do not provide an appropriate basis for resolving the question presented. Nothing in the language of Title VII authorizes the courts to legalize a category of otherwise forbidden retaliation whenever the judiciary thinks that doing so might enhance legitimate management prerogatives in *other* cases. Any statutory prohibition carries with it some risk that innocent defendants will be sued and incur significant litigation costs. When Congress enacts a law, it has presumably concluded that that unavoidable unfairness is outweighed by the importance of the underlying prohibition. The courts are not at liberty to reconsider that judgment.

Petitioner suggests that its proposed limitation on section 704(a) is necessary to prevent an increase in "[t]he already extraordinary number of Title VII filings." (Pet. Br. 29, 49). The number of Title VII charges filed with the EEOC in 2005 was actually the lowest in any year since 1992.[47] Narrowing the protections of section 704(a) simply

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been only 30 decisions reported in Westlaw even citing the relevant portion of *Ray* (headnote [8]), about one every other month.

[47] See http://www.eeoc.gov/stats/charges.html. The total number of charges in 2005 was 75,428, down from a high of 91,189 in 1994. The numbers cited by petitioner reflect only an increase in the number of instances in which a charging party asserted in a single charge that two or more different types of violations occurred. In the past, when employees generally took their first complaint to EEOC, retaliation occurred *after* the filing of the charge, and thus was not (and did not

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to reduce the number of retaliation charges filed with the EEOC is like modifying the permissible blood alcohol level in order to reduce the number of drunk driving charges.

E. PETITIONER'S PROPOSED STANDARD IS UNWORKABLY VAGUE

The petition in this case urged that review be granted "to bring uniformity and certainty to this badly muddled area of the law." (Pet. 9). We urge this Court to adopt the following straightforward standard regarding which actions an employer is forbidden to deliberately take against an employee because that worker has engaged in activity expressly protected by federal law: all.

Petitioner[48] proposes a more complicated, ambiguity-ridden rule. A retaliatory act is unlawful if, but only if, that action either (a) "adversely and significantly changes employment status"[49] or (b) created, by itself or in conjunction

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need to be) included in that charge. In recent years, as contemplated by this Court in *Ellerth*, employers have established and employees have increasingly utilized internal complaint mechanisms. Because any retaliation at that stage occurs *before* the filing of the charge with EEOC, charges today are more likely to raise both a claim of retaliation as well as the underlying discrimination claim. That is precisely what occurred in the instant case. (JA 29).

[48] Neither petitioner nor any of the amici appear to support adoption by this Court of the Fifth Circuit's "ultimate employment action" doctrine. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

[49] Pet. Br. 11. We understand this to be petitioner's proposed standard because petitioner describes it as "[t]he proper standard" (Pet. Br. 11) and repeats it most frequently. (Pet. Br. 2, 11, 13, 24, 25).

In two instances petitioner also describes the standard as including actions that "caus[e] a significant change in *benefits*." (Pet. Br. 9, 22) (Emphasis added). In four instances petitioner proposes a rather different formulation, "an employer-sanctioned adverse action officially changing [an employee's] employment status or *situation*." (Pet. Br. 9, 22, 25, 31) (Emphasis added). This formulation covers changes in a

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with other retaliatory actions, a hostile work environment.[50] This formula raises a wide range of questions that will guarantee years of litigation and uncertainty in the lower courts.

What changes concern an employee's "status"?

The linchpin of petitioner's proposed standard is a new and critical legal distinction between retaliatory acts that do and do not affect an employee's "status." Retaliatory acts that do not change a worker's "status" are lawful per se (subject to a hostile work environment exception). On the other hand, retaliatory acts that affect a worker's "status" are reviewed under the "significance" standard. Petitioner explains this distinction only so far as to state that changes in work assignments within the same job title are not "status" changes, but that transfers to a position with a new title do constitute a new employment "status." This distinction would require the lower courts to decide among the myriad of other possible changes affecting a worker which do and do not constitute changes in "status." With regard to the work done by an employee, for example, courts would have to resolve whether a change in the hours, shift, facility in which an employee worked constitutes a shift in "status." The lower courts would also have to determine whether a change in a worker's benefits could constitute a change in "status," and if so which benefits: wage rates, overtime, expense accounts, pensions, life insurance, research grants, severance pay, medical coverage, the number of vacation, sick, or personal days, or use of a company car or dining room.

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worker's "situation," as well as his or her "status," and does not require that change to be "significant."

[50] Pet. Br. 32.

What changes involve "employment" status?

Because under this proposed standard it matters whether a change affects "employment" status, the lower courts would be required to address what types of actions and changes should be deemed to relate to employment. This would raise two types of issues. First, questions would have to be resolved regarding individuals who have some connection with a firm, but are no longer active employees, such as retirees (who might be getting pension or medical care benefits), former employees (who might be getting severance or other benefits), or laid off workers. In this regard adoption of petitioner's standard would raise questions about the continuing soundness of *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (section 704(a) applies to denial of reference to former employee), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (section 704(a) retaliation claim by former-employee denied rehire). Second, it would be necessary to decide when actions outside the workplace itself but affecting current employees could be said to be related to their employment relationship.

When is a change in employment status "significant"?

A transfer to a new position would constitute a change in "status"; courts would have to determine when the differences between a plaintiff's new and old position were "significant." There is a wide range of types of differences that could exist between those two positions: location, shift, hours, physical difficulty of the work, safety, dirt, noise, noxious fumes, degree of administrative responsibility, the length and nature of the worker's commute, the extent to which each job utilizes the worker's skills, the potential for promotion, raises, or learning new skills, the possibility of overtime, the risk of layoff, the opportunity to affect policy, the availability of benefits such as flex time, the prestige attached to the position, the comparative risk of harassment or other (lawful or unlawful) abusive behavior by colleagues or superiors, and the interesting or boring nature of the work involved. The lower courts

would have to determine how much weight to give each of these types of factors in deciding whether any particular transfer involved a "significant" change.

Are there retaliatory practices that should be analyzed outside this formula?

The lower courts today appear to be in agreement that an employer would violate section 704(a) if it retaliated against an employee by reducing his or her wages. Petitioner repeatedly stresses that in the instant case the disputed change of duties did not involve a reduction in pay. (Pet. Br. 26, 28). But if petitioner's general rule applies even to wages, then a "minor" (rather than "significant") pay cut would be a permissible form of retaliation. One amicus indeed asserts that only an "extreme" reduction in pay would be illegal under section 704(a).[51] If, on the other hand, retaliatory changes in wages are unlawful per se, the courts would have to decide whether such a per se rule applied to other retaliatory acts that could reduce the amount of money an employee made, such as reduced overtime, bonuses, pension contributions, assignment to clients who generate large commissions, or per diem allowances.

How should courts deal with retaliatory conduct that will or may "cause" a significant change in employment status at a subsequent point in time?

A retaliatory action which at the time of trial (or motion for summary judgment) has not yet caused such a result will often be capable of leading to that very result at a later date. For example, a change in jobs, or even duties within the same job, may increase the danger that a worker will subsequently be laid off, demoted, or denied a promotion, partnership, or raise. The lower courts would

[51] Brief of the Society for Human Resource Management, et al., p. 14.

have to decide among a number of different standards for evaluating retaliatory acts which have not yet caused a significant change in employment status, but which might do so in the future: (1) classify the retaliation as unlawful if there is a sufficiently great probability (however defined) that it will in the future lead to a consequence sufficient in type or magnitude, (2) treat such a retaliatory act as unlawful if the employer intended (or, perhaps, foresaw or could have foreseen) such an ultimate consequence, or (3) hold that the employer has violated the law only if and when the required consequence actually occurs, forcing future judges and juries (possibly years later) to determine whether a later seriously adverse action was caused by the earlier retaliation.

II. AN EMPLOYER CANNOT "CURE" A VIOLATION OF SECTION 704(a) BY PROVIDING PARTIAL RELIEF FOR THE VIOLATION

Petitioner asserts that an employer is not liable for "corrected actions." (Pet. Br. 35). If an employer could show that it had already provided a plaintiff with all the relief that a court could award, a complaint would of course be dismissed.

But that is not petitioner's point. Rather, petitioner contends that an employer which provides a plaintiff *partial* relief is entitled to immunity from suit for the remaining relief. With regard to an unlawful dismissal (or suspension without pay) violating section 704(a), petitioner argues that a plaintiff is barred from seeking compensatory and punitive damages if the employer has restored the plaintiff to work and provided full backpay.

Petitioner asserts that reinstatement and back pay are a "substantially comprehensive remedy for improper suspension and/or dismissal," and that the other harms caused by an unlawful suspension or dismissal, such as "temporary humiliation and fear of losing a job, and short term eco nomic difficulties of being without a paycheck – generally

must be borne by the employee." (Pet. Br. 41). In 1991 Congress amended Title VII to provide compensatory damages for the express purpose of shifting just those costs from the employee to the employer.

> "Who should bear the[se] non-wage costs of intentional, illegal discrimination, the perpetrator of discrimination or the victim?" Under current Title VII law, it is the victim. Because Title VII permits no recovery of compensatory . . . damages, discrimination victims cannot be made whole for these types of losses. . . . [T]he deficiency in Title VII's remedial scheme hinders both of Title VII's principal goals: that of making discrimination victims whole for their losses, and that of encouraging citizens to act as private attorneys general to enforce the statute.

H.R. Rep. 101-644, pt. 1, p. 39 (101st Cong., 2d Sess.) (1990).

Petitioner insists compensatory damages are unimportant in dismissal or suspension cases because the affected employees rarely if ever suffer any injury other than the loss of income that would be fully remedied by backpay. Other injuries, petitioner asserts, occur only in "extraordinary cases" and involve at most only "some hardship." (Pet. Br. 41). Being out of work for weeks or months may well cause little or no hardship to an individual with a large well-balanced portfolio of stocks and bonds. But employees who lack such resources, unfortunately, are not "extraordinary cases." To the contrary, tens of millions of working men and women live from paycheck to paycheck. For those men and women, even a few weeks out of work can mean less (or at least different) food on the table and a decline in quality of life; months of unemployment can easily lead to eviction from a home or repossession of a car. For workers who have limited skills or live in an area with significant unemployment, losing a job does not conveniently leave them "free to obtain temporary, substitute employment" (Pet. Br. 41); it is a

prescription for long term joblessness and economic disaster. Although in the instant case the reinstatement occurred in 37 days, petitioner insists that an employer's right to avoid liability by partially correcting a violation is not related to "the length of time it took." (Pet. Br. 41 n.12; *see* Pet. Br. at 36 n.9 ("An employer may cure an adverse action . . . before that action is the subject of litigation."))

Prior to 1991, when Title VII was amended to permit compensatory and punitive damages, a court could award only backpay and other equitable relief. Petitioner insists that Congress could not possibly have regarded as unlawful an employment practice for which Title VII before 1991 provided no remedy. (Pet. Br. 36). To the contrary, that is precisely what Title VII says, and what Congress believed.[52] The definition of an "unlawful employment practice" in section 704(a) is not and has never been tied in any way to the type of relief available under section 706. The precise problem which prompted Congress in 1991 to authorize compensatory damages was that the limitations in section 706 meant that the relief available for certain types of violations was either inadequate or non-existent. "In cases . . . in which prior law afforded no relief, [the 1991 Act] can be seen as creating a new cause of action." *Landgraf v. USF Film Products*, 511 U.S. 244, 283 (1994).

Petitioner urges that employers would be encouraged to voluntarily offer workers partial relief (here, reinstatement and backpay) if by doing so they could obtain immunity from liability for other forms of relief provided by Title VII (compensatory and punitive damages). That is probably so. But this Court has no authority to exempt such employers from their legal obligation to pay compensatory

[52] Congress provided for compensatory damages under the 1991 Civil Rights Act precisely because "[a]ll too frequently, Title VII leaves victims of employment discrimination without remedies of any kind for their injuries and allows employers who intentionally discriminate to avoid any meaningful liability." H.R. Rep. 101-644, pt. 2, p. 35 (101st Cong., 2d Sess.) (1990).

or punitive damages. Such a system of self-absolution would seriously undermine a key purpose of the 1991 Civil Rights Act, to increase deterrence of Title VII violations.

> The failure to provide compensatory and punitive damages in Title VII leaves the statute without a meaningful deterrent to intentional discrimination on the job. As Judge Clarence Thomas, former Chair of the U.S. Equal Employment Opportunity Commission has stated: ["T]he equitable remedies available under Title VII are not as compelling as the civil damages available under other federal statutes. . . . [T]here have to be disincentives available rather than merely equitable relief."

S. Rep. 101-315, p. 35 (101st Cong., 2d Sess.) (1990). Title VII itself creates a specific scheme for encouraging resolution of retaliation (and discrimination) claims short of litigation; section 706(b) directs the EEOC to seek to resolve meritorious claims through "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The hallmark of this statutory scheme is that settlements involving less than full relief, while entirely permissible, require the assent of the aggrieved plaintiff. It would be fundamentally inconsistent with section 706(b) to permit employers to impose on aggrieved employees a partial remedy to which the employees are unwilling to agree.

Employers already have substantial incentives to provide partial relief without awaiting litigation or even the filing of an EEOC charge. Reinstatement cuts off the accumulation of further liability for backpay or compensatory damages. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). An offer of backpay will largely eliminate the risk of suit by workers who have suffered no significant other injury. If suit were brought, an employer's action in reinstating with backpay an improperly dismissed employee would provide significant support for an employer's efforts to avoid liability for punitive damages to the extent

that it showed that any unlawful action engaged in by a company official was "contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 546 (1999).

III. PETITIONER IS LEGALLY RESPONSIBLE FOR ITS OWN ACTION IN REMOVING WHITE FROM SERVICE FOR 37 DAYS

A. THIS ISSUE IS NOT WITHIN THE SCOPE OF THE QUESTION PRESENTED

The Question Presented in the petition framed a question about what types of retaliatory acts are sufficiently serious to be unlawful; there was, the petition argued, an inter-circuit conflict regarding "the appropriate standard for proving an adverse employment action." (Pet. 8).[53] In the courts below petitioner argued only that any violation that had occurred when White was removed from her job had been adequately remedied because the company reinstated White with backpay;[54] Burlington Northern never denied legal responsibility for the initial decision to remove White from employment.

In its merits brief, however, petitioner raises a new and quite distinct issue. Even if this Court concludes that White suffered an actionable injury when she was removed from employment in retaliation for her EEOC charge, Burlington Northern now asserts that it is not

[53] In petitioner's merits brief the Question Presented has been rewritten to omit reference to what constitutes an adverse action, and to frame a question about an employer's liability for an action (however adverse) that was to be reviewed following an employer-initiated investigation. (Pet. Br. i).

[54] Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law, 4 ("Plaintiff . . . failed to prove at trial that she suffered an adverse employment action as a result of Percy Sharkey pulling her out of service."); Final First Brief of Appellant/Cross-Appellees, 15 ("A temporary suspension is not an adverse employment action.").

legally responsible for that retaliatory act. This contention was not raised in the courts below, and it is not fairly encompassed within the Question Presented.

Consideration of this new claim is particularly inappropriate because it would turn at least in part on two factual issues that the lower courts were never asked to resolve. First, this argument rests on petitioner's assertion that at the time of the December 11 decision company officials intended to conduct on their own initiative an investigation of White's actions, and that White was reinstated as a result of that planned inquiry. (Pet. Br. 36-37) ("White's initial suspension was always tentative.") Petitioner criticizes the Sixth Circuit for misstating the facts.[55] But the factual assertions now advanced by petitioner are inconsistent with its representations in the court of appeals[56] and are not supported by the record.[57]

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[55] Pet. Br. 38 n.10.

[56] Supplemental Brief of Defendant/Appellant/Cross-Appellee on Rehearing En Banc, 24 ("under the particular process here White had to request a review of her situation, as opposed to other companies that place employees on decision-making leave and then investigate whether the employee requests it or not"); Final Third Brief of Appellant/Cross-Appellee, 11-12 ("Brown had nothing to do with that hearing [which led to White's reinstatement] and had no knowledge of what happened regarding White's suspension after he advised Sharkey on the matter.").

[57] There were at this facility two possible types of investigations, an "internal investigation" initiated by the company itself and based on interviews by human resources officials (III Tr. 492, 494, 498) and a "formal investigation," a term of art for the adversarial hearing conducted by union and company representatives at the request of the disciplined worker or the union. (III Tr. 498, 552).

Brown initially testified that White had been suspended pending an internal investigation by the company itself. (III Tr. 510). But on cross-examination he conceded that that was not true, and that White's dismissal would have been permanent if she had not exercised her right to ask for a hearing. (III Tr. 553-54). McGee, who was responsible for conducting all company internal investigations (III Tr. 588), testified that she never talked to White at any time after September 1997, several months *before* White lost her job. (III Tr. 648).

Second, petitioner relies heavily on its proposed interpretation of Rule 91(b)(5) of the CBA. It is far from clear that Rule 91(b)(5) has the meaning claimed by petitioner. This new dispute about the meaning of Rule 91(b)(5) would (if raised prior to trial) require consideration of evidence regarding the negotiation of that provision. Restatement (Second) of Contracts, § 214 (1981).

In the Joint Pretrial Order in the district court, however, petitioner did not advance either of these factual contentions. Thus neither that Order nor the instructions directed the jury to decide whether company officials intended on December 11 to conduct any further inquiry or whether the parties to the collective bargaining agreement intended that Rule 91 would modify Burlington Northern's potential liability under Title VII. Judgment as a matter of law was not sought with regard to either factual issue, since neither had been determined by the jury. If petitioner wished to advance a legal theory under which those factual issues were of importance, it was obligated to do so before the August 2000 trial in this case. Petitioner cannot now ask this Court to resolve such factual issues, and it cannot plausibly request five years after that trial that a second evidentiary hearing now be held on factual issues it failed to raise in the Joint Pretrial Order.

B. AN EMPLOYER WHICH FOR A PURPOSE FORBIDDEN BY SECTION 704(a) DISMISSES OR SUSPENDS A WORKER WITHOUT PAY – AND THEN REINSTATES THAT WORKER – IS LEGALLY RESPONSIBLE FOR ANY RESULTING INJURY

The issue raised by petitioner, although important, is in certain respects a narrow one.

Petitioner argues only that Title VII provides no relief for injuries if (a) they were sustained when an employer, at its own initiative, was considering whether to finalize

an interim adverse action, and (b) the employer on its own initiative ultimately overturned that interim action and provided any backpay to which the worker is entitled. Petitioner does not suggest that this limitation would apply to an employee-initiated appeal, and does not ask this Court to overrule the decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), that Title VII plaintiffs are not required to exhaust private remedial mechanisms, and that plaintiffs who do so are not precluded from also seeking redress in federal court.

We, on the other hand, acknowledge that an employer faces no liability if a supervisor suspends an employee, pending an employer-initiated investigation, because that supervisor actually believes that such a suspension is necessary to avoid safety, discipline or other problems. The absence of such liability, however, has nothing to do with any distinction between interim and final decisions. If the supervisor's decision to impose the suspension was made (even mistakenly) for entirely legitimate reasons, untainted by any discriminatory or retaliatory purpose, no unlawful employment action has occurred; it remains lawful whether or not the employee is ultimately reinstated. In this case, however, the jury found that the Burlington Northern official who made the December 11 decision to end White's employment, Roadmaster Brown, did so because of a desire to retaliate against White for engaging in protected activities, not because Brown actually believed that White had been insubordinate or actually thought that the possibility of insubordination was sufficiently great that suspension was a prudent precaution.

The legal issue[58] is thus whether an employer is responsible for injuries caused by an unlawfully motivated

[58] As we note *supra*, the record does not support petitioner's contention that the events that occurred between December 11 and January 16 were an employer-initiated investigation. We explain in this portion of our brief why petitioner would still be liable even if that were what had occurred.

dismissal or suspension if some other (or even the same) official subsequently decides, as a result of an employer-initiated further inquiry, to reinstate that worker with backpay.

(1) Liability Under Agency Principles

Burlington Northern officials made two distinct decisions regarding White's removal from service. First, on December 11, 1997 Roadmaster Brown removed White from service; that action caused the injury complained of, and the jury found that it was taken to punish White for having engaged in protected activity. Second, on January 16, 1998 Bernie Vaughn, the Division Engineer, reinstated White to her job and awarded her backpay. That action caused no injury, and there is no finding or claim that it was the result of an unlawful motivation. Petitioner claims that only the January 16 action was an "official action" of the company.

The extent of petitioner's liability for the actions taken on December 11 is controlled by agency principles. An employer is liable for injuries caused by its agents if the agent was aided in the commission of the wrong by the exercise of powers conferred by the employer. That is precisely what occurred here. Only a supervisor exercising company authority could have removed White from her job and from the company payroll. It is of no significance under agency law that a *subsequent* official action may countermand that earlier decision. So long as the injury complained of was caused by a company official exercising his or her official authority – be it a tort, a breach of contract, or a Title VII violation – it does not matter whether that action was avowedly interim in nature or was later to be reviewed by a higher ranking official.

Nothing in the text of section 704(a) overrides these agency principles. The command that employers not "discriminate against" workers for protected activities is not limited to discrimination in the making of "final" decisions. The standard for the award of punitive damages

set out in *Kolstad* does to some degree distinguish between lower level officials (who may be violating a company anti-discrimination policy) and higher management (which may be making every reasonable effort to enforce such a policy). But there is no comparable limitation on the award of compensatory damages.

(2) The Collective Bargaining Agreement

The collective bargaining agreement between Burlington Northern and the Brotherhood of Maintenance Way Employees did not and could not immunize the company from suit.

Petitioner contends that the CBA embodies an agreement to modify in two ways the usual terms of Title VII. First, the union assertedly agreed to surrender White's right to compensatory and punitive damages in return for the procedures and remedies in Rule 91. "The union and management deemed the employee fully protected by the bargained-for procedure." (Pet. Br. 38). Second, the union assertedly consented to a modification of normal agency rules, relieving Burlington Northern from liability for any "interim" disciplinary decisions. "Labor and management agreed on what constitutes the 'decision of the Carrier' on discipline." (Pet. Br. 39). Even though under agency principles the initial imposition of discipline by a lower level supervisor would be an action for which an employer was liable, the CBA assertedly provided otherwise.

No collective bargaining agreement could legally modify or waive in this way the remedies provided by Title VII or the agency principles which Title VII directs the courts to apply.

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of those

> rights would defeat the paramount congressional purpose behind Title VII.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

Rule 91 assuredly does not purport to modify or affect in any way the remedies and liability principles established by Title VII. Rule 91(b)(5), on which petitioner relies, merely provides: "A decision will be rendered by the Carrier within 10 days after completion of the investigation." (JA 57). This sentence cannot plausibly read as asserting that such a post-investigation decision would be the *sole* decision that constitutes a decision of the carrier.[59]

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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[59] The Brotherhood of Maintenance of Way Employes, which was the party to the CBA in question, rejects petitioner's interpretation of Rule 91(b)(5). Brief of the American Federation of Labor and Congress of Industrial Organizations and the Brotherhood of Maintenance of Way Employes Division, International Brotherhood of Teamsters as *Amici Curiae* in Support of Respondent.

Federal Statutes Forbidding An Employer To "Discriminate Against" Employees Who Engage in Protected Activities

2 U.S.C. § 1317(a) (various rights of congressional employees)

3 U.S.C. § 417(a) (various rights of certain employees in the office of the President)

5 U.S.C. § 7116 (unfair labor practices by federal agencies)

10 U.S.C. § 2409(a) (reporting violations of the law by federal contractors)

12 U.S.C. § 1441a(q)(1) (reporting possible violations of the law to the Thrift Depositor Protection Oversight Board)

12 U.S.C. § 1790b (reporting possible violations of the law by credit unions or supervising federal officials)

12 U.S.C. § 1831j (reporting possible violations of the law or gross mismanagement by banks or federal agencies overseeing banks)

15 U.S.C. § 2622 (control of toxic substances)

15 U.S.C. § 2651(a) (asbestos hazard)

18 U.S.C. § 1514A (employees of publicly traded corporations who disclose information to the SEC, Members of Congress, or federal regulatory agencies)

20 U.S.C. § 3608 (disclosure of asbestos hazard in school)

20 U.S.C. § 4018 (disclosure of asbestos hazard in school)

22 U.S.C. § 4115 (rights of Department of State employees to join, or refrain from joining, union)

29 U.S.C. §§ 158(a)(3), 158(a)(4) (National Labor Relations Act)

29 U.S.C. § 215(a)(3) (Fair Labor Standards Act)

29 U.S.C. § 623(d) (Age Discrimination in Employment Act)

29 U.S.C. § 660(c)(1) (Occupational Safety and Health Act)

29 U.S.C. § 1140 (ERISA)

29 U.S.C. § 1855(a) (Migrant and Seasonal Agricultural Worker Protection Act)

29 U.S.C. § 2002 (Employee Polygraph Protection Act)

29 U.S.C. § 2615(a) (Family and Medical Leave Act)

30 U.S.C. § 815(c)(1) (mine safety)

30 U.S.C. § 1293(a) (surface mining control and reclamation)

31 U.S.C. § 3730(h) (false claims against the United States)

31 U.S.C. § 5328(a) (disclosure to federal officials of violations of laws regarding reports of monetary transactions)

33 U.S.C. § 948a (longshore and harbor workers' compensation)

33 U.S.C. § 1367(a) (water pollution prevention and control)

38 U.S.C. § 4311(b) (rights of members of the armed services to reemployment)

41 U.S.C. § 265(a) (violations of the law by federal contractors)

42 U.S.C. § 300j-9(i)(1) (safety of public water systems)

42 U.S.C. § 2000e-3(a) (Title VII)

42 U.S.C. § 5851(a)(1) (nuclear whistleblower protection)

42 U.S.C. § 6971(a) (solid waste disposal)

42 U.S.C. § 7622(a) (air pollution)

42 U.S.C. § 9610(a) (CERCLA)

42 U.S.C. § 12203(a) (Americans with Disabilities Act)

46 U.S.C. § 2114(a) (maritime safety)

46 U.S.C. App. § 1506(a) (unsafe cargo containers)

49 U.S.C. § 20109(a) (railway safety)

49 U.S.C. § 31105(a) (commercial motor vehicle safety)

49 U.S.C. § 42121(a) (whistleblowing by employees of air carriers or contractors or subcontractors of air carriers)

49 U.S.C. § 60129(a) (pipeline safety)

50 U.S.C. § 2702(a) (whistleblowing related to military atomic energy facilities)

Decisions Under Section 8 of the National Labor Relations Act January 1, 1960 to July 1, 1964 Regarding Retaliatory Assignments

Guerdon Industries, Inc., 127 NLRB 810 (1960) ("[employer] discriminatorily transferred [employee] to a less desirable job at the same rate of pay . . . and . . . discriminatorily ordered [employee] to perform certain work . . . with the knowledge that such work was detrimental to [employee's] health.")

Quality Food Markets, Inc., 126 NLRB 349 (1960) ("[employer] discriminatorily transferred [employee] from its Calumet store to its Lake Linden store.")

Montauk Iron & Steel Corp., 127 NLRB 993 (1960) (warehouse employee "was assigned by the employer's managing agent to 'yard' or 'outside' work.")

Manbeck Baking Co., 130 NLRB 1186 (1961) (employee who "was employed as a dough mixer for a 2 1/2 year period . . . was transferred . . . to a panwashing assignment in the basement.")

Minnesota Manufacturing Co, Inc., 132 NLRB 1398 (1961) (clothes pressers assigned to work as sewing machine operators)

Beiser Aviation Corp., 135 NLRB 399 (1962) (because he had testified, the employee (1) was forced to spend three days at a table placed in the center aisle of the jet engine room while attempting to carry out what the trial examiner found to be an "impossible assignment", and (2) was relieved of his record-keeping duties and directed instead to do the work of an ordinary mechanic.)

Anderson-Rooney Operating Co., 134 NLRB 1480 (1961) ("[employee] was discriminatorily transferred from his job at the Sunray building to the Mid-Continent Building.")

Park Inn Hotel, Inc., 139 NLRB 669 (1962) ("[employer] discriminated against the . . . waitresses upon their return after the strike by assigning them more onerous and less agreeable work")

Morris, Seawall & Co., 138 NLRB 1067 (1962) (employee was transferred, without prior notice, to a distant store to which, lacking a car, he could not readily commute.)

Trumbull Asphalt Co. v. NLRB, 314 F.2d 382 (7th Cir. 1963) (upholding NLRB finding that the employer violated the NLRA by "discriminating against . . . employees due to their union activities, by assignments to disagreeable work.")

Sea-Land Service, Inc., 146 NLRB 931 (1964) (union official's duties changed from those of "chief clerk" to those of "regular clerk.")

American Compressed Steel Corp., 146 NLRB 1463 (1964) (employee "transf[erred] . . . from his over-the-road hauling to the disagreeable job of hauling tin cans from local dumps, a task which involved picking up, dumping, and frequently raking filthy, vermin-infested cans")

Daylight Grocery Co., 147 NLRB 733 (1964) (employee "was transferred to the grocery department in another store.")

Retaliation Actions Not Affecting Employment Relation Between Retaliator and Victim

Bailey v. USX Corp., 850 F.2d 1506, 1507-08 (11th Cir. 1988) (unfavorable job reference)

Beckham v. Grand Affair of North Carolina, Inc., 671 F. Supp. 415, 419 (W.D.N.C. 1987) (causing arrest and prosecution of former employee)

Bernofsky v. Administrators, of the Tulane Educational Fund, 2000 WL 422394 *3 (E.D.La. 2000) (negative job reference)

Berry v. Stevinson Chevrolet, 74 F.3d 980, 984 (10th Cir. 1996) (filing false charges resulting in arrest and prosecution of former employee)

Bievere v. American Airlines, Inc., 1996 WL 560073 *3 (E.D.La. 1996) (causing denial of workers' compensation claim)

Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994) (effort by former employer to have plaintiff decertified as a teacher)

Clardy v. Silverleaf Resorts, Inc., 2001 WL 1295480 *4 (N.D.Tex. 2000) (obstructing efforts to obtain workers' compensation)

Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977) (warning prospective employer that plaintiff had filed Fair Labor Standards Act claim against former employer)

EEOC v. Outback Steakhouse of Florida, Inc., 75 F. Supp. 2d 756 (N.D.Ohio 1999) (bad faith counterclaim)

EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775, 776 (W.D.Va. 1980) (bad faith lawsuit)

Flowers v. Runyon, 1999 WL 259523 *7 (E.D.La. 1999) (falsifying information to law enforcement authorities for purpose of having plaintiff made responsible for an accident she did not cause)

Gliatta v. Tectum, Inc., 211 F. Supp. 2d 992, 1007 (S.D.Ohio 2002) (bad faith counterclaim)

Gustafson, Inc. v. Bunch, 1999 WL 304560 *1 (N.D.Tex. 1999) (bad faith lawsuit)

Jernigan v. Bank of America Technology and Operations, Inc., 2004 WL 2826825 *7 (N.D.Tex. 2004) (vandalizing car)

Nelson v. Upsala College, 51 F.3d 383, 384-85 (3d Cir. 1995) (barring plaintiff from setting foot on college campus open to the public)

Passer v. American Chemical Society, 935 F.2d 322, 331 (D.C.Cir. 1991) (cancellation of major public symposium in honor of former employee)

Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991) (plaintiff allegedly physically attacked, shot at and threatened by former employer)

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (refusal to provide job reference)

Rochon v. Gonzales, 2006 WL 463116 (D.C.Cir. 2006) (refusal to investigate death threats against plaintiff)

Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1163-64 (10th Cir. 1977) (modification of letter of reference

to warn that plaintiff had filed a sexual harassment charge against her former employer)

Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1529 (11th Cir. 1990) (persuading subsequent employer to dismiss plaintiff)

Ward v. Wal-Mart Stores, Inc., 140 F. Supp. 2d 1220, 1230 (D.N.Mex. 2001) (baseless opposition to plaintiff's claim for workers' compensation)

Commission Decision 72-0139 (1972) (unwarranted opposition to unemployment compensation) (*see* 1998 Policy Guidance § 614.7(F)(2))

District Court and Court of Appeals Decisions in The Fifth Circuit Holding Permissible Under Title VII Retaliatory Acts Taken Against Women Because They Complained About Sexual Harassment

Ackel v. National Communications, Inc., 339 F.3d 376, 380, 385 (5th Cir. 2003)

Battee v. Eckerd Drugs, Inc., 1997 WL 340941 *8 (N.D.Tex. Jun. 12, 1997)

Belmear v. Mary Kay Inc., 2000 WL 127282 *5 (N.D. Tex. Feb. 3, 2000)

Bievere v. American Airlines, Inc., 1996 WL 560073 *3 (E.D.La. Sep. 30, 1996)

Braunig v. Bank of America Texas, N.A., 1998 WL 1784213 *5 (W.D.Tex. Aug. 27, 1998)

Buchanan v. Heerema Marine Contractors, U.S., Inc., 2005 WL 2458019 *5-6 (S.D.Tex. Oct. 5, 2005)

Buenrostro v. Flight Safety International, Inc., 2001 WL 674171 *10 (W.D.Tex. Mar. 2, 2001)

Campos v. Runyon, 1998 WL 299950 *4 (E.D.La. May 29, 1998)

Carlson v. Rockwell Space Operations Co., 985 F. Supp. 674, 690-91 (S.D.Tex. 1996)

Cochrane v. Houston Light and Power Co., 996 F. Supp. 657, 661 (S.D. Tex. 1998)

Davis-Cox v. Dallas Area Rapid Transit, 1998 WL 874935 *3 (N.D.Tex. Dec. 3, 1998)

Disney v. Horton, 2000 WL 490848 *4 (N.D.Miss. Apr. 14, 2000)

Donaldson v. Burlington Industries, Inc., 2004 WL 1933602 *3 (5th Cir. Aug. 31, 2004)

Doss v. Martinez, 2001 WL 493166 *10 (N.D.Tex. May 4, 2001)

Gage v. VIJ, Inc., 2001 WL 1398719 *2 (N.D.Tex. Nov. 6, 2001)

Gates v. City of Dallas, Texas, 1998 WL 133004 *6 (N.D.Tex. Mar. 18, 1998)

Harris v. Fritz Companies, Inc., 1999 WL 61413 *4 (N.D.Tex. Jan. 27, 1999)

Harper v. City of Jackson Municipal School Dist., 149 Fed. Appx. 295 (5th Cir. 2005)

Hockman v. Westward Communications, L.L.C., 282 F. Supp. 2d 512, 523 (E.D.Tex. 2003)

Hopkins v. Nationwide Recovery Systems, Ltd., 1997 WL 42527 *4 (N.D.Tex. Jan. 30, 1997)

Ingram v. City of Farmers Branch, 2001 WL 720476 *6 (N.D.Tex. Jun. 25, 2001)

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Kahn v. Summers, 2000 WL 1901405 *1 (5th Cir. Dec. 4, 2000)

Lamb v. City of West University Place, 172 F. Supp. 2d 827, 836 n.7 (S.D.Tex. 2000)

Larkin v. Baylor Medical Center of Irving, 1999 WL 304559 *4 (N.D.Tex. May 7, 1999)

Longoria v. Kelly Services, Inc., 2005 WL 1866145 *7 (S.D.Tex. Aug. 4, 2005)

Matheny v. Safesite, Inc., 2004 WL 1932866 *8 (N.D.Tex. Aug. 31, 2004)

Matherne v. Cytec Corp., 2002 WL 506816 *10 (E.D.La. Mar. 28, 2002)

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Webb v. Cardiothoracic Surgery Associates of North Texas, P.A., 139 F.3d 532, 540 (5th Cir. 1998)

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