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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent submits this supplemental brief pursuant to Rule 25.5 of this Court.

Under the unique circumstances of this case, the brief for the United States constitutes "intervening matter that was not available in time to be included in a brief." A majority of the government's argument consists of an attack on the literal reading of section 704(a) advanced by respondent.[1] If this Court were to adopt the government's narrow reading of section 704(a), it is far from certain that respondent would prevail. The original panel of the Sixth Circuit that heard this case applied a version of the "materially adverse" formulation now advanced by the United States and concluded that the retaliation that occurred in this case was lawful under section 704(a). (Pet. App. 93a-103a). The interpretation of section 704(a) proposed by the Solicitor General is different from that of petitioner, and constitutes a candid repudiation of the position heretofore taken by the EEOC. (U.S. Br. 15-16 n.4). The new matters raised by the government's brief could not have been addressed in the brief for respondent; the two briefs were filed on the same day.

[1] *Compare* R. Br. 8-28 *with* U.S. Br. 9-20.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF SECTION 704(a) IS INCONSISTENT WITH THE TEXT AND PURPOSE OF THAT PROVISION

A substantial portion of the government's argument is devoted to three inter-related propositions: that section 704(a) forbids only the types of actions forbidden by section 703, that section 703 is limited to discrimination in the terms and conditions of employment, and that section 704(a) does not forbid retaliation outside the employer-employee relationship. (U.S. Br. 9-20). These contentions are squarely inconsistent with the position taken by the United States in this Court in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

In *Robinson*, the court of appeals had held that section 704(a) does not forbid retaliation against former employees; the lower court reasoned that section 704(a) forbids only the types of employment practices covered by section 703(a), and thus was limited to retaliation occurring when the victim was still an employee. *Robinson v. Shell Oil Co.*, 70 F.3d 325, 330-31 (4th Cir. 1995).[2] The United States, urging this Court to reverse the decision of the circuit

[2] It is unclear whether, or to what extent, the United States now believes that *Robinson* should be overruled. In some passages, the government asserts that section 704(a) does not apply to retaliation "outside of the employment relationship." (U.S. Br. 19). That would seem to mean that retaliation against a former employee – one who no longer has such a relationship with the employer – would always be lawful. Elsewhere, the United States states more ambiguously that the retaliation need only be "employment-related conduct." (U.S. Br. 18). That might apply to some types of retaliation against a former employee (e.g., if it prevented the victim from obtaining employment with another employer) but not to others (e.g., a harassing lawsuit).

court, correctly objected that this line of reasoning misconstrued the relationship between sections 704(a) and 703.

> That analysis reflects a misunderstanding of Title VII in several respects. It overlooks important differences between Section 703 and Section 704 of Title VII. Section 703(a) declares it to be an "unlawful employment practice" to violate Title VII's substantive prohibition against discrimination with respect to certain specified actions by employers, all of which are related to employment. Section 704(a) provides that it shall also be an "unlawful employment practice" to discriminate against a covered individual "because he has made a charge" under Title VII. Violations of Section 704(a) are not limited to the "unlawful employment practice[s]" listed in Section 703(a). Rather, Section 704(a) "speaks unconditionally, without limitation to acts causing particular harms. . . . " *Smith v. Secretary of the Navy*, 659 F.2d 113, 119 n.56 (D.C.Cir. 1981).[3]

The United States made the same point at oral argument. "[Section] 704, unlike 703, doesn't say discrimination in the terms, conditions or privileges of employment. It just says discrimination."[4]

The government does not explain how even its new reading of the relationship between sections 704(a) and 703

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[3] *Robinson v. Shell Oil Co.*, No. 95-1376, Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, 22-23 (footnote omitted). That footnote read in part, "The unconditional nature of Section 704(a) reflects its broad purpose of ensuring the effectiveness of the prohibitions on employment discrimination." *Id*. at 23 n.12.

[4] Transcript of Oral Argument, *Robinson v. Shell Oil Co.*, 1996 WL 656475 *22.

supports its suggestion that section 704(a) applies only to retaliation constituting a "materially adverse employment action." Even under section 703(a)(1) any work assignment, employer-imposed working condition, or benefit is a "ter[m], conditio[n] or privileg[e] of employment." The phrase "materially adverse" is nowhere to be found in the government's eleven page discussion of the connection between section 704(a) and 703. (U.S. Br. 9-20).

This phrase first makes its appearance at page 21 of the brief for the United States. There the government asserts (correctly in our view) that to establish a prima facie case under section 704(a) a plaintiff must show that he or she has suffered an "adverse employment action."[5] The United States then observes that a number of courts of appeals have "held that an employee must show a materially adverse change in the terms, conditions, or privileges of employment *to satisfy* the adverse action element of the prima facie case." (U.S. Br. 21) (emphasis added). This sentence is somewhat perplexing. The whole thrust of the government's brief is to urge this Court to hold that the complained of retaliation cannot merely be "adverse," it must be "materially adverse." (Although the matter is not free from doubt, we take it that the government uses the term "materially" in its ordinary meaning of "to a significant extent or degree."[6]) If "materially adverse" requires injury or change more serious than what is

[5] That is consistent with our proposed literal reading of section 704(a), which requires discrimination "against" the plaintiff. That is the meaning of "adverse" in ordinary English. Webster's Third New International Dictionary, 31 (1981) (defining "adverse" as "in opposition to one's interests," "unfavorable," "detrimental").

[6] Webster's Third New International Dictionary, 1392 (1981).

merely "adverse," it makes no sense to assert that only proof of "materially adverse" action will "satisfy" the requirement of "adverse" action.

This additional requirement of "material" adversity would be unwarranted even in an action under section 703. Section 703(a)(2) forbids an employer, inter alia,

> to limit . . . his employees . . . in any way which would . . . *adversely* affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (emphasis added). When Congress chose to use the term "adverse" in Title VII,[7] it emphatically did not include the additional requirement that the discriminatory action be "materially" adverse. That choice is assuredly a deliberate one; the term "adverse" is used more than 1300 times in the United States Code, but the more limited phrase "materially adverse" is utilized in only seven federal statutes.[8]

The government acknowledges that its reading of section 704(a) would in some circumstances permit an employer to engage in retaliatory actions that "would deter employees from charging discrimination." (U.S. Br. 19). On the government's view, any objection that an employer would thus be able – by using properly crafted retaliatory techniques – to prevent workers from complaining to the EEOC, testifying at trial, or objecting to sexual harassment, is "tantamount to a policy objection to

[7] The term adverse, not modified by "materially," is also in section 703(c)(2).

[8] 11 U.S.C. §§ 101, 702; 12 U.S.C. §§ 1843, 1844; 15 U.S.C. §§ 78q, 78eee; 16 U.S.C. § 6205.

the line drawn by Congress." (U.S. Br. 20). But in its brief in *Robinson v. Shell Oil Co.*, the United States saw no such line limiting the reach of the section 704(a) ban on retaliation, which the Solicitor General correctly characterized as "unconditional."

> At a minimum the statute is ambiguous. . . . [I]n construing a statute, the Court should adopt that sense of its words which best promotes the policy and objectives of the legislature. *[King v.] St. Vincent's Hospital*, [502 U.S. 215,] 221 [(1991)]. . . . Strong protection from retaliation toward employees who complain to, or cooperate with the EEOC is essential to the effectiveness of Title VII. . . . [9]

As the government correctly recognized in this earlier brief, the policy of protecting employees from retaliation – all retaliation – is the policy of the Congress itself.

II. THE GOVERNMENT'S PROPOSED INTERPRETATION OF SECTION 704(a) FAILS TO PROVIDE A CLEAR AND PREDICTABLE STANDARD FOR THE LOWER COURTS

The government suggests its proposed interpretation of section 704(a) will provide the lower courts with "a workable, objective, and uniform standard." (U.S. Br. 20). To the contrary, far from being workable, objective or uniform, what the government proposes is hardly a standard at all.

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[9] *Robinson v. Shell Oil Co.*, No. 95-1376, Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, 16.

The government offers three quite different characterizations of its proposal. First, it asserts that a plaintiff must show that the retaliatory act resulted in a "materially significant disadvantage." (U.S. Br. 22). This seems congruent with the phrase "materially adverse." Since both "materially" and "significant" mean "important," this formulation requires something like a very important disadvantage. Paying someone less because she complained about sexual harassment would be a disadvantage (or adverse); a pay cut of $100 a week might be materially adverse, but a smaller pay cut (say, $10) might not. A retaliatory transfer to a more distant office might be materially significant (at a distance of perhaps 50 miles), materially adverse (perhaps 25 miles) or small enough to be legal (possibly at 10 miles). To apply this type of standard, the lower courts would have to develop some sort of rating system to evaluate the comparative disadvantageousness of different acts of retaliation. How adverse a retaliatory act is would at times depend on the circumstances of the employee. For example, if an employer transferred all women who complained about sexual harassment at its Bethesda store to a store in Annapolis, that would be materially (perhaps even materially significantly) adverse for workers who lived in Bethesda, not at all adverse for a worker who happened to live in Annapolis, and only slightly adverse for a worker who lived in between the two cities but closer to Bethesda.

That, however, is not the government's only formulation; indeed, it is not the formulation it proposes to use in the instant case. Elsewhere in its brief, the United States proposes that the legality of a retaliatory act should turn on whether it constitutes a "significant change" in responsibilities, working conditions or benefits. (U.S. Br. 21, 27,

28). Under this approach, it would not matter *how* adverse the impact of that change was, so long as the change itself was "significant." Thus if a supermarket retaliated against a butcher by reassigning her to work as a cashier, there would be an almost total change in responsibilities, but the worker might find that change only slightly (or, perhaps, not at all) disadvantageous. Application of this approach would require the courts to develop a system for rating the significance of changes in responsibilities (e.g., how much of the employee's time was now devoted to different tasks, and how different those tasks were), working conditions (changes in location, hours, temperature), or benefits (alterations of wages, pension contributions, flex time). The government suggests that this "significant change in responsibilities" test, not the "materially significant disadvantage" test, should be used here. (U.S. Br. 27-28). Its proposed analysis turns solely on the alteration in White's work responsibilities, not on how adverse those changes were for her.

Third, the government explains that the controlling question is about the *type* of harm the employer caused. Retaliation is materially adverse if it brings about "objectively tangible harm," but not if it causes "[p]urely subjective injuries." (U.S. Br. 23). The meaning of this distinction (and of this alternative explanation of "materially adverse") is not entirely clear. The government may intend to bar only claims based on purely idiosyncratic employee preferences, such as a worker who claims he was retaliated against by being assigned to work in an office painted yellow, his least favorite color. That would rule out relatively few retaliation claims. On the other hand, perhaps the government means that there must be an economic harm, such as lost wages or medical expenses; that would

exclude many of the cases for which Congress amended Title VII to authorize awards of compensatory damages.

The United States does not ask this Court at this time to decide among these (or possibly other) glosses on the exceedingly malleable phrase "materially adverse." Nor does the government suggest that the Court itself should in this case begin to develop the appropriate rating scheme (e.g., how far away can an employer transfer an employee without that action causing a "materially significant disadvantage" or constituting a "significant change?") All this, and perhaps more, is to be left to the lower courts. "In practice," the government surprisingly assures the Court, "the results under the various formulations may not vary greatly" from the EEOC "reasonably likely to deter" standard. (U.S. Br. 16 n.9).

Three things about the government's new position are actually clear. First, that interpretation would mean that there would be some forms of retaliation – serious enough to deter protected activity – that would be lawful under section 704(a). (In its briefs in the lower courts, the Department of Justice, as counsel for federal defendants, has identified a number of retaliatory practices which the government suggests are per se lawful).[10] Second, that interpretation would impose on the lower courts the

[10] Brief of Appellee, *McAdams v. Harvey*, No. 04-16263-AA (11th Cir.), 2005 WL 3147709 *5 ("a failure to receive a bonus . . . does not constitute a materially adverse action."); Brief of Appellee, *Webster v. Rumsfeld*, No. 04-1739 (4th Cir.), 2005 WL 2044700 *24 ("the loss of a bonus is not an adverse employment action where the employee is not automatically entitled to a bonus."); Brief of Appellee, *Smith v. Cohen*, No. 00-10199 (5th Cir.), 2000 WL 34214783 *36 (same); Brief of Appellee, *Groves v. Rubin*, No. 00-12113GG (11th Cir.), 2000 WL 34020498 *22 (same).

unenviable and potentially endless task of deciding from among an infinite variety of retaliatory tactics that are to be declared permissible under the law. Third, that interpretation cannot be reconciled with the language and purpose of section 704(a).

CONCLUSION

For the above reasons, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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