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EMPLOYMENT CASES

Victories for Workers

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In the U.S. Supreme Court's 2005-06 term, which saw two new conservative justices, Chief Justice John G. Roberts Jr. and Associate Justice Samuel A. Alito Jr., assume the bench and change the court's ideological balance, few could have predicted the number of significant victories for workers. Issuing decisions notable for their lack of dissent, as well as their largely pro-employee results, the court rejected the heightened standards for retaliation claims under Title VII of the Civil Rights Act of 1964 favored by employers and several courts of appeals; provided a more expansive view of certain evidentiary and jurisdictional issues under Title VII; and enlarged the scope of compensable work for wage and hour employees under the Fair Labor Standards Act.

The most anticipated employment case of this term was *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), in which the court considered the proper scope of Title VII's anti-retaliation provision. In a landmark 9-0 ruling written by Justice Stephen G. Breyer, which surprised both employers and employees alike, the court held that the anti-retaliation provision of Title VII prohibits a broad spectrum of adverse actions against an employee—not simply employment-related actions—and the challenged action need only be harmful enough to dissuade a reasonable worker from complaining of discrimination. In so ruling, the court resolved a split among the circuits and specifically rejected the more exacting employment-related and "ultimate employment action" standards favored by several lower courts.

Plaintiff Sheila White, a forklift operator at Burlington, complained about sexual harassment and was thereafter reassigned to the less desirable position of track laborer. Soon after filing an Equal Employment Opportunity Commission (EEOC) charge alleging discrimination and retaliation, she was suspended without pay, allegedly for insubordination. Although later reinstated with back pay, White filed suit alleging that the reassignment and suspension amounted to unlawful retaliation under Title VII. A jury agreed and awarded her compensatory damages. A divided 6th U.S. Circuit Court of Appeals reversed the judgment and found in Burlington's favor on the retaliation claims. After a rehearing en banc, the full court of appeals affirmed the judgment for White, but differed on the proper standard to apply.

The Supreme Court first considered whether the challenged action must

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be employment- or workplace-related to constitute unlawful retaliation. The court noted but rejected the more exacting standards of various lower courts, which have held that the action must be employment-related or even an ultimate employment action, such as hiring, discharge or compensation. The court specifically rejected the notion that the substantive and anti-retaliation provisions of Title VII must be construed similarly to apply only to employment-related or workplace actions, basing its analysis on the actual language of each provision, as well as the broader purpose of the anti-retaliation provision.

The court concluded: "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *Id.* at 2414.

In next considering how harmful the challenged action must be to constitute retaliation, the court adopted the formulation set forth by the 7th and D.C. circuits, in which the employee must demonstrate that the challenged action was materially adverse, i.e., would likely have dissuaded a reasonable worker from making a claim. In setting forth this standard, the court specifically intended to separate significant from trivial harms, and reiterated that Title VII does not set forth a "general civility code for the American workplace" or provide redress for "petty slights or minor annoyances" that often occur at work.

The court did note, however, that the anti-retaliation provision of Title VII seeks to ensure "unfettered access" to Title VII's remedial mechanisms, and that it does so by prohibiting actions that are likely to deter reasonable employees from complaining to the EEOC, the courts or their employers. The court explained that it adopted a general standard because the significance of any action will often depend upon the particular circumstances and, stated simply, "Context matters." *Id.* at 2415.

Evidence of pretext

The importance of context was again noted in *Ash v. Tyson Foods Inc.*, 126 S. Ct. 1195 (2006), a per curiam decision in which the court rejected the 11th Circuit's analysis of the employer's use of racial epithets, as well as the standard the 11th Circuit employed for assessing when evidence of comparative qualifications shows pretext. At the trial level, the court granted judgment as a matter of law in favor of the employer after a jury had awarded compensatory and punitive damages under Title VII and 42 U.S.C. 1981 to two African-American poultry plant workers who were passed over for promotion in favor of arguably less qualified white employees.

In affirming the trial court in part, the 11th Circuit ruled that the use of the word "boy" by the selecting official toward the plaintiffs was not alone evidence of discriminatory intent, unless modified with a racial classification such as "black" or "white." It also ruled that the plaintiffs' evidence of pretext, which was based on their superior qualifications, was insufficient because such evidence only establishes pretext when " 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.' " *Id.* at 1197.

The Supreme Court first concluded that while the disputed word "boy" will not always be evidence of racial animus, it "does not follow that the term, standing alone, is always benign." As with the *Burlington Northern* decision, the court emphasized that context is crucial in determining whether a remark is evidence of animus. The court identified five factors that courts can consider in determining the meaning of a disputed remark: context, inflection, tone of voice, local custom and historical usage. The Supreme Court also rejected the 11th Circuit's standard for assessing evidence of superior qualifications. The court noted that "[t]he visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from qualifications." *Id.*

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The court reiterated that evidence of comparative qualifications can, in some circumstances, show pretext. The court declined to define what standard should govern pretext claims based on qualifications, stating only that "[i]t suffices to say here that some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results." *Id.* at 1198. Rather than lead to consistent results, however, the *Ash* decision has thus far resulted in a host of inconsistent rulings by the lower courts on what a plaintiff is required to demonstrate to show pretext based on qualifications.

In *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), an 8-0 decision delivered by Justice Ruth Bader Ginsburg, the Supreme Court reversed the 5th Circuit's affirmance of the trial court's dismissal of a plaintiff's sexual harassment claim, concluding that Title VII's requirement that an employer have 15 or more employees in order to be covered by the statute relates to the merits of the claim, and is not jurisdictional. In *Arbaugh*, two weeks after judgment had been entered on a jury verdict for the plaintiff, the employer moved to dismiss on the ground that it did not have 15 employees—a defect that, it argued, and the trial court concluded, deprived the court of subject-matter jurisdiction and could thus be raised at any stage of litigation, even after judgment. The high court reversed this determination, concluding that the numerical threshold of Title VII was simply an element of a claim (like proof of motive or causation), which is waived if the defendant fails to contest it prior to trial. In rendering what it referred to as a "readily administrable bright line" test, the court concluded: "When Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 1237.

A unanimous Supreme Court handed wage-and-hour plaintiffs a substantial victory under the Fair Labor Standards Act (FLSA) in *IBP Inc. v. Alvarez*, 126 S. Ct. 514 (2005), a case in which the court clarified certain standards for compensable work and compensable activities. Justice John Paul Stevens, writing for the court, concluded that because donning and doffing protective gear is "integral and indispensable" to an employee's "principal activity" of work, that time is covered by the FLSA. *Id.* at 517. The court further concluded that under the continuous workday rule, the time employees spend walking to and from the production floor after donning gear or before taking off gear is also covered under the act. The court further held, however, that the time employees spend waiting to don the first piece of gear is a "preliminary" activity which is not covered by the act.

The sole loss for employees

Employees suffered their only defeat of the term in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), a 5-4 decision written by Justice Anthony M. Kennedy. While some commentators and the press have characterized *Garcetti* as a broad defeat for whistleblowers, the case has a much narrower reach, and applies only to public employees and, even then, only in a limited set of circumstances. Plaintiff Richard Ceballos, a supervising deputy district attorney in Los Angeles County, was asked by defense counsel to review a pending criminal case in which they contended that the police affidavit used to obtain a critical search warrant was inaccurate.

After reviewing the affidavit, Ceballos concluded that the police made serious misrepresentations. He then conveyed his findings to his supervisors and followed up with a memorandum recommending dismissal of the case. The state nevertheless proceeded with the prosecution. At a hearing challenging the warrant, Ceballos testified about the defects in the affidavit. Ceballos alleged that soon thereafter, he was subjected to a series of retaliatory employment actions. Ceballos brought suit under 42 U.S.C. 1983, claiming that his employer's actions were in retaliation for his protected speech, in violation of the First and 14th amendments to the U.S. Constitution.

The trial court's dismissal of Ceballos's case on summary judgment was reversed by the 9th Circuit, which held that his "allegations of wrongdoing in the memorandum constituted protected speech" under the Constitution, having satisfied the public-concern requirement of the First Amendment. The high court reversed, reiterating that when public employees speak as citizens about matters of public concern, they face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. The court concluded that Ceballos was acting pursuant to his official responsibilities and therefore not as a citizen. It held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes. Thus the Constitution does not "insulate their communications" from employer discipline. The court noted that federal and state whistleblower protection laws and labor codes, but not the First Amendment, provide relief when public employees speak in the course of their employment.

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