



Analysis: The "No Blood No Foul" Rule. When is an Employer's Conduct Severe Enough to Constitute Retaliation?

I [previously wrote](#) about the Supreme Court's retaliation decision in *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006) ("Burlington Northern v. White"), in which the [US Supreme Court](#) substantially broadened the ability of employees to file retaliation claims under [Title VII of the Civil Rights Act of 1964](#). It was a unanimous (9-0) decision.

I wanted to set out some additional thoughts about *Burlington Northern*, because it addresses an issue that has troubled the courts in interpreting the federal anti-discrimination laws: When is an employer's conduct serious enough in disadvantaging an employee so that the employee has a claim under the employment discrimination laws? The answer is easy when the employer's decision affects the employee's pocket book, like with termination, failure to hire, demotions, and the like. The answer has been much harder when the employer's conduct didn't directly affect the employee's pocket book.



NBA referees struggle with a similar issue: where is there enough physical contact on the court to justify calling a foul on a player. So let's explore some parallels between these employment discrimination issues and the NBA's "no blood no foul" rule.

The NBA's "No Blood No Foul" Rule

If you watch [National Basketball Association](#) games, you might be struck by how much physical contact there is on the court and how rarely the referees call personal fouls over that physical contact. Fans of the NBA have only a partially kidding way to refer to the "standard" by which the referees decide how much contact will result in a personal foul being called. It's the "no blood no foul" rule. In other words, the referees will allow a lot of physical contact, and *will only call a foul when someone gets bloodied as a result of the contact*.

Let's assume, with our tongues in our cheeks, that there is such a rule (no blood no foul) that NBA referees apply, regardless of what is written in the [Official Rules](#). The idea behind the "no blood no foul" rule is this: there is so much fast-paced hurley-burly contact on the basketball court, much of which makes it more exciting for the fans, that

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calling a foul for any physical contact (or a lower defined level of physical contact) would slow down the game for fans and make the game less enjoyable, unreasonably impede the skill of the players, and makes it impossibly hard for officials to identify "contact". So the appearance of blood is a more "objective" indication that the contact really mattered and really constituted an unfair interference with the other player.

The Supreme Court Struggles With "When is there a Foul"?

Courts for years have struggled with the employment discrimination equivalent of the "no blood no foul" rule. For the courts, assuming unlawful discrimination occurred: when is the consequence of the discrimination serious enough and objectively discernible so that courts will recognize a claim and intervene by activating the court's process and potentially awarding damages.

Except for situations involving hostile work environment, the courts have translated the NBA's blood requirement into a tangible economic consequence. Thus, much in the spirit of the NBA, the courts have said economic harm must be demonstrable as a result of discrimination, or else the courts won't entertain the claim no economic consequence, no legal violation, case dismissed.

Three Approaches on Whether There is a Discrimination Foul

Before the supreme court’s decision in Burlington Northern, the courts had struggled over, in effect, how much blood to require, or even whether to require any blood at all.

We need to put aside, for the moment, claims involving a hostile work environment. In such claims, there is no “blood” requirement. The courts recognize claims for hostile work environment, and will award damages, even where there is no economic consequence, as long as the plaintiff proves that the environment issue was severe or pervasive enough so as to interfere with what he an employee's work environment. That situation, where the courts do not require any economic consequence, is the exception rather than the rule.

So for retaliation claims, the courts have historically adopted three different tests for determining the minimal level of severity required before the court will recognize a claim for the employee. The following options start with the most severe level of misconduct the rough equivalent of blood veritably gushing out of the NBA player:

First, some courts have only recognized a claim if there had been an "ultimate employment decision" in retaliation for an employee's opposition to discriminatory conduct. "Ultimate employment decisions" are things like hiring, granting leave, discharging, promoting, and compensating.

Second, moving down in terms of the level of severity, some courts had recognized a claim where there had been an "adverse effect" on the "terms, conditions, or benefits" of employment. That is a broader test because it encompasses conduct by the employer that is on a lower level than the "ultimate employment decisions." For example, suppose an employer negatively evaluates an employee so that the negative evaluation results in a lower raise. Under the "ultimate employment decision" standard, a performance evaluation does not ring the bell. But under the standard of an adverse affect on the "terms, conditions, or benefits" of employment, the negative evaluation would be

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included, potentially providing the support for the claim of retaliation.

Third, some courts have abandoned any blood requirement at all. The Supreme Court recognized that there was a different rule in terms of the requirement for a specific level of severity between the substantive discrimination provision of Title VII and the retaliation provision. Economic consequence was required under the substantive discrimination provisions, but not under the retaliation provision. This distinction was tied closely to the different language in the prohibition sections on discrimination and retaliation.

Substantive Prohibitions Versus Retaliation Prohibitions

Since this third approach is tied closely to a carefully reading of Title VII's retaliation provision, let's look at the difference between the substantive and retaliation provisions in Title VII (and a good but of the Supreme Court's analysis in *Burlington Northern v. White* was based on the difference between these provisions).

Section 703(a) of Title VII contains the substantive anti-discrimination provision: "it shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

The anti-retaliation provision of title VII, in section 704(a), has a different prohibition provision: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

The Supreme Court in *Burlington Northern v. White* noted that the key words in the substantive provision "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" "explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision." This is at pages 2411-2412.

"The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provisions seek to prevent harm to individuals based on what they do, i.e., their conduct."

The Supreme Court recognized that the language in the retaliation provision was not limited to conduct in the workplace. "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." Examples that the court noted, from earlier decisions, were: an employee of the FBI complained, and the FBI retaliated by refusing to

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investigate death threats a federal prisoner had made against the employee. Another example: the employer filed false criminal charges against a former employee who complained about discrimination.

"A provision limited to employment-related actions would not deter the many forms of effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose", namely, "[m]aintaining unfettered access to statutory remedial mechanisms."

Thus, "the purpose reinforces what language already indicates", that the "anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."

Key Ruling: "Materially Adverse" Action

The Supreme Court posed the issue as addressing "the level of seriousness to which this harm must rise before it becomes actionable retaliation." The Supreme Court agreed with the Seventh and District of Columbia Circuits. The Supreme Court concluded that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination".

The Supreme Court said that it described the rule in terms of "material adversity" to separate "significant from trivial harms." There is no "general civility code for the American workplace." The "ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" must be filtered out of the universe of claims that the courts will recognize. The law will not "immunize" the employee from those "petty slights or minor annoyances that often take place at work and that all employees experience." "Personality conflicts at work that generate antipathy and snubbing by supervisors and coworkers are not actionable" under Title VII. So "normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence."

The rule was stated in terms of a "reasonable employee" because the "standard for judging harm" must be "objective." An objective standard is "judicially administrable." That standard avoids the "uncertainties and unfair discrepancies" that can "plague a judicial effort to determine a plaintiff's unusual subjective feelings."

"Materially Adverse" Action versus "Petty Slights"

The court gave further examples of how to distinguish between "petty slights" and "material" changes that might deter a reasonable employee from complaining about discrimination. For example, while a "schedule change in an employee's work schedule may make little difference to many workers, it may matter enormously to a young mother with school age children." The court cited one example of an employee with a disabled child needing flex-time scheduling.

The supervisor's refusal to invite an employee to lunch is normally trivial. But to retaliate by "excluding an employee from the weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." The court noted that whether action is

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significantly adverse "will often depend upon the particular circumstances. Context matters." An act that would be "immaterial in some situations is material in others."

The standard is tied to the "challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint."

The key in examining the employer's challenged retaliatory action is to "screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination."

In the case, the employee had been assigned from forklift duty, which was considered desirable, to standard track labor tasks.

"Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spent more time performing the more arduous duties and less time performing those that are easier or more agreeable." Thus, one of the categories of adverse retaliatory action that did not require financial consequence was "unpleasant work assignments."

However, reassignment of job duties is not "automatically actionable." Whether a particular reassignment is "materially adverse" "depends upon the circumstances of the particular case" and should be judged from the "perspective of a reasonable employee in the plaintiff's position, considering all the circumstances."

The court also found that the fact that the employer suspended White for 37 days with no pay was a materially adverse action, even though the lost income was later paid to the employee. An "indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay."

Justice Alito's Concurring Opinion

Justice Alito wrote a concurring opinion in which he concurred in the judgment. He would have applied the conventional requirement that the adverse employment action must constitute a "tangible employment action", and he thought the reassignment to the substantially less desirable position and duties constituted such an "adverse employment action."

He was concerned about part II-D of the Court's opinion, in which the court concluded that the only threshold requirement was materially adverse action that would dissuade a reasonable employee from complaining about discrimination. He thought that test was unnecessary, and that the court should have employed the test requiring some tangible effect on the compensation, terms, conditions, or privileges of employment.

Justice Alito describes a number of policies (“purposes”) behind the anti-retaliation provision in Title VII: (1) preventing employers from engaging in retaliatory measures which will dissuade employees from engaging in protected activity, and (2) prevent harm to individuals that assert their rights.

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The Take-Away Rules in Burlington Northern v. White

The Supreme Court broadened retaliation claims in 2 ways:

First: Retaliatory conduct is not limited to an employer's action at the workplace, and it is not limited to action taken while the plaintiff is still working for the employer.

Second: Action by the employer may violate the anti-retaliation provision even if it does not cause a tangible loss, such as pay, for the plaintiff. The conduct may violate the law if it is "materially adverse" (as opposed to "trivial") to the employee, and might dissuade a "reasonable worker" from "making or supporting a charge of discrimination". So, for example, transfers to different positions, even though they involve no loss in pay or benefits or promotional opportunities, might constitute unlawful action because, if the transfer is to what a reasonable worker would view as a less attractive job, that might dissuade a reasonable worker from complaining of discrimination.

Finally, Back to the NBA

After all of this legal stuff, grab a beer and watch the NBA's play of the day:

[This video is not functional on the PDF version of my blog article uploaded to JDSupra and LinkedIn. To view the video, click this link to go to my original blog article:

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Finally, but only if you are hardcore NBA fan, read the [NBA's Rule 12](#), Part B on "Personal Foul", under Section I "Types". This will give you the NBA's *real* rule on personal fouls:

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B. Personal Foul

Section I--Types

a. A player shall not hold, push, charge into, impede the progress of an opponent by extending a hand, forearm, leg or knee or by bending the body into a position that is not normal. Contact that results in the re-routing of an opponent is a foul which must be called immediately.

b. Contact initiated by the defensive player guarding a player with the ball is not legal. This contact includes, but is not limited to, forearm, hands, or body check.

EXCEPTIONS:

(1) A defender may apply contact with a forearm to an offensive player with the ball who has his back to the basket below the free throw line extended outside the Lower Defensive Box.

(2) A defender may apply contact with a forearm and/or one hand with a bent elbow to an offensive player in a post-up position with the ball in the Lower Defensive Box.

(3) A defender may apply contact with a forearm to an offensive player with the ball at any time in the Lower Defensive Box. The forearm in the above exceptions is solely for the purpose of maintaining a defensive position.

(4) A defender may position his leg between the legs of an offensive player in a post-up position in the Lower Defensive Box for the purpose of maintaining defensive position. If his foot leaves the floor in an attempt to dislodge his opponent, it is a foul immediately.

(5) Incidental contact with the hand against an offensive player shall be ignored if it does not affect the player's speed, quickness, balance and/or rhythm.

c. Any player whose actions against an opponent cause illegal contact with yet another opponent has committed the personal foul.

d. A personal foul committed by the offensive team during a throw-in shall be an offensive foul, regardless of whether the ball has been released.

e. Contact which occurs on the hand of the offensive player, while that hand is in contact with the ball, is legal.

EXCEPTION: Flagrant, elbow and punching fouls.



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