

# H.R. ALERT\*

APRIL 2006

## United States Supreme Court Holds Plant Manager's Occasional Reference to African American Employees as "Boy" Potentially Probative of Discriminatory Intent

Two African American employees filed suit under Title VII and Section 1981, alleging race discrimination arising from non-promotions. The plaintiffs were superintendents at a Tyson Foods owned and operated poultry plant. They had sought promotions to fill the two shift manager positions, but two white males had been selected. Plaintiffs then filed suit in the Northern District of Alabama. The jury returned a verdict for both plaintiffs. The district court revisited defendant's Rule 50 motion for judgment after trial and ordered a new trial as to both plaintiffs. The Eleventh Circuit affirmed the district court's finding that one plaintiff had not offered sufficient evidence to show pretext under the burden-shifting analysis. The Eleventh Circuit also reversed the Rule 50 ruling as to the second plaintiff, but held that the evidence did not support a grant of punitive damages. The plaintiffs then appealed to the United States Supreme Court. The Supreme Court recently issued its decision in *Ash v. Tyson Foods Inc.*, 126 S.Ct. 1195 (2006).

On review, the Supreme Court held that the Eleventh Circuit had erred in two respects. First, there was evidence that Tyson's plant manager, who made the promotional decision, referred to the plaintiffs as "boy" on some occasions. The Eleventh Circuit held that the use of the term "boy" was not evidence of discriminatory animus because it was not modified by a racial classification such as "white boy" or "black boy." The Supreme Court disapproved and held that while it is true that the word "boy" alone will not always be evidence of racial animus, the term is not always benign. Accordingly to the Court, "the speaker's meaning may depend on various factors including,

context, inflection, tone of voice, local custom, and historical usage." The Eleventh Circuit's requirement that a modifier be necessary was, therefore, erroneous.

The Supreme Court also held that Eleventh Circuit erred in its articulation of the standard used when determining whether or not the defendant's proffered nondiscriminatory reason for its hiring decision was pretextual. Plaintiffs had offered evidence that their qualifications were superior to the two white applicants who received the promotion. The Eleventh Circuit had stated that "pretext can only be established through comparing qualifications only when the disparity in qualifications is so apparent as to virtually jump off the page and slap you in the face." The Supreme Court explained that under their decisions, evidence of qualifications may, in some cases, illustrate pretext. The Eleventh Circuit's explanation of words jumping off the page was unhelpful and imprecise and the Supreme Court suggested that the Eleventh Circuit articulate a formulation consistent with other standards. The Supreme Court cautioned that their ruling was not meant to be read as holding that plaintiffs had proven sufficient evidence of pretext.

*Employer Tip:* Employers should keep in mind that references and nicknames that, standing alone, may appear innocuous or inoffensive may nonetheless be offensive depending on the speaker's tone, context and local factors. Supervisors should thus recognize and understand the implications that could arise from such references. This is particularly true in email communications where tone is often more difficult to measure and often misread.

## United States Supreme Court Hears Oral Arguments Regarding What Constitutes Retaliation in *White v. Burlington N & Santa Fe Railroad Company*

On Monday, April 17, 2006, the United States heard oral arguments in *White v. Burlington N. and Santa Fe Railroad Company*, 364 F.3d 789 (6<sup>th</sup> Cir. 2005), *cert. granted*, 126 S.Ct. 797 (Dec. 5, 2005). Specifically, the Supreme Court granted certiorari to determine what constitutes retaliation under Title VII. The following issues are presented for review:

1. Does a "materially adverse change in the terms of employment" constitute retaliatory discrimination as held by the Sixth Circuit;
2. Does "any adverse treatment that is reasonably likely to deter" a plaintiff from engaging in protected activity

constitute retaliation as held by the Ninth and Seventh Circuits; or,

3. Does only an "ultimate employment decision" constitute retaliation as held in the Fifth and Eighth Circuits?

In *White*, the Sixth Circuit had rejected the plaintiff's request that the Court adopt a new definition of adverse employment action to include "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or other from engaging in protected activity." The Sixth

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Circuit held, however, that it would continue to narrowly define “adverse employment action” as a materially adverse change in the terms of employment, relying on the U.S. Supreme Court’s definition of tangible employment action in *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998).

## Fifth Circuit Holds “Paramour Favoritism” Is Not Prohibited By Title VII

In *Wilson v. Delta State University*, 143 Fed.Appx. 611 (5<sup>th</sup> Cir. 2005), the Fifth Circuit Court of Appeals held that “paramour favoritism” is not prohibited by Title VII. The plaintiff in *Wilson*, a male, was employed as the director of the University’s Audio-Visual Center from 1983 until 2001. In 2000, the University’s President appointed Dr. Michelle Roberts as the Chief Information and Planning Officer. This was an internal promotion and Dr. Roberts became Wilson’s supervisor. The working relationship between Wilson and Dr. Roberts deteriorated quickly. Wilson complained to the University President that Dr. Roberts was not qualified for her position and only received the job because she was having an affair with a University Administrator. Shortly thereafter, Wilson’s job was eliminated as part of Dr. Roberts’ departmental consolidation plan.

Wilson filed suit in the United States District Court for the Northern District of Mississippi, alleging he was fired in retaliation for complaining that Dr. Roberts had received her appointment and promotion because she was having an affair

Based on the facts of the case now before the Supreme Court, the Sixth Circuit held that a thirty-seven (37) day suspension without pay followed by reinstatement with back pay was an adverse employment action because the evidence supported plaintiff’s contention that the suspension was motivated by a discriminatory intent. The Supreme Court is soon expected to clarify what constitutes “retaliation” under Title VII and this decision will impact employers in all circuits.

with a University Administrator. Defendant filed a motion for summary judgment seeking dismissal of the retaliation claim. The motion was denied. At trial, the University moved for a judgment as a matter of law and the Court granted the motion, finding that Wilson had not made out a prima facie case of retaliation because he had not engaged in a protected activity under Title VII. Wilson then appealed to the Fifth Circuit.

On appeal, the Fifth Circuit held that paramour favoritism is not a practice made unlawful by Title VII. The Court explained that “when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender.”

*Employer Tip:* While “paramour favoritism” is not actionable under Title VII in the Fifth Circuit, we encourage employers to maintain non-fraternization policies because quite often, intimate relationships between co-workers in a company, gives rise to claims of sexual harassment and retaliation.

## Fifth Circuit Dismisses FMLA Suit Against Employer Citing Lack of Adequate Notice Concerning Employee’s Health Condition

In *Willis v. Coca Cola Enterprises, Inc.*, \_\_\_ F.3d \_\_\_, 2006 WL 827359 (5<sup>th</sup> Cir. 2006), the Fifth Circuit Court of Appeals affirmed the district court’s grant of an employer’s motion for summary judgment, finding the plaintiff, a former employee, failed to produce sufficient evidence that the employer was on notice that she had a serious health condition and, the plaintiff failed to prove her termination for violation of defendant’s “no call/no show policy” was a pretext for discrimination. Plaintiff was employed as a Senior Account Manager with defendant. Plaintiff called her supervisor on a Monday and informed him she was unable to come to work because she was sick. She also told her supervisor that she was pregnant, but did not tell him she was sick because she was pregnant. She called her employer the next day and asked where she should report to work. Her supervisor told her she needed a medical release from her doctor to return to work. The plaintiff explained she had a doctor’s appointment Wednesday and would obtain the release. Her supervisor believed she meant the next day even though her appointment was not scheduled until the following Wednesday, a week later. Plaintiff was terminated the next week and informed she was terminated for violating defendant’s no call/no show policy.

Plaintiff filed suit under FMLA and Title VII. The district court granted summary judgment on the FMLA claim, finding that plaintiff had not produced any evidence that she requested medical leave under FMLA. Plaintiff appealed this decision. On appeal, the Fifth Circuit explained that this case was novel in that the plaintiff did not allege that she had requested FMLA leave and was then denied; rather, plaintiff asserted that she was placed on “involuntary leave” when her employer required her to obtain a medical release to return to work and that she was fired after being placed on this “mandated” leave.

In its opinion, the Court discussed an employer’s ability to place an employee on involuntary FMLA leave so long as the employee has given sufficient notice of a “serious health condition.” The Court then held that while defendant had placed the plaintiff on involuntary leave, thereby suggesting defendant was aware of plaintiff’s medical problem, the plaintiff had not produced sufficient evidence to show that defendant was on notice that she had a “serious health condition” such as sickness because of her pregnancy. The Court explained that a “complaint of sickness will not suffice as notice of a need to take FMLA leave.” According to the Court, FMLA does not require an employer to investigate whether or not FMLA leave is implicated every time

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an employee is sick since employees must adequately explain their reasons for requesting the sick leave. As stated by the Court, FMLA would not work if “employees, for the purpose of litigation, can later designate leave as FMLA-qualifying without making a proper showing, at the time they requested leave, that put their employer on notice that FMLA leave was necessary due to a serious health condition.”

*Employer Tip:* The employer had documentation regarding the nature of plaintiff’s original complaint such that the Court was able to determine the plaintiff had not put the employer on sufficient notice that she had a “serious health condition.” The key to the employer’s avoidance of liability was the lack of notice from the employee for the reason she needed leave. Employers should maintain detailed records regarding employee’s sick absences in the event FMLA leave is triggered or sought, particularly if the employer has a no call/no show policy.

### Employer’s Explanation That Employee Was not Sufficiently Suited to a Position was not Specific Enough to Meet Employer’s Burden Under McDonnell Douglas

In *Patrick v. Ridge*, 394 F.3d 311, (5<sup>th</sup> Cir. 2004), the Fifth Circuit Court of Appeal reversed the district court’s grant of defendant’s motion for summary judgment on plaintiff’s claims under the Age Discrimination in Employment Act (“ADEA”). The plaintiff, an INS employee, was denied two promotions to supervisory positions. Plaintiff filed suit under the ADEA. The federal agency claimed that the employee was not selected for the position because she was not sufficiently suited for the position. The agency also claimed that the best qualified candidate was selected after rejecting the plaintiff and five other employees.

The Fifth Circuit found that plaintiff had sufficiently put forth a *prima facie* case of age discrimination. The Court determined that the district court erred in determining the agency had met its burden of producing a legitimate, non-discriminatory reason for its decision. The Court held that the agency’s statement that the plaintiff was not “sufficiently suited” for the position

was not specific enough to meet its burden of producing a legitimate, non-discriminatory reason for its action. The Court explained that an employer’s subjective belief that a plaintiff was not sufficiently suited for the position was at least as “consistent with discriminatory intent” as it was with non-discriminatory intent. The agency could have found that the plaintiff was not “sufficiently suited” because of her age. The Court described the agency’s explanation as a content-less and nonspecific explanation insufficient to justify the adverse decision. The Court disregarded the agency’s explanation that it hired what it considered to be the “best qualified” candidate because the candidate was not available when the plaintiff was rejected for the position.

On remand, the district court dismissed plaintiff’s separate claim of retaliation under the ADEA finding that Congress had not waived sovereign immunity. *Patrick v. Chertoff*, 2005 WL 1827876 (5<sup>th</sup> Cir. 2005.)

### Immigration Reform Heads Back To Congress

Congress resumed on Monday, April 24, 2006, following a two-week recess and is expected to revisit the issue of major immigration reform legislation. Some proponents of a reform bill seek inclusion of several key policies, including provisions which would allow alien workers additional opportunities to work in the United States under the “Guest Worker Program.” Other legislators seek provisions to allow thousands of illegal immigrants the ability to become permanent residents. This legislation proposal has prompted fierce congressional debates. Other

notable provisions include tougher penalties on employers who knowingly retain illegal workers and the possibility of increased border protection.

We will keep you apprised of any developments arising out of this legislation. In the meantime, if you have any questions regarding your obligations under current immigration or I-9 regulations, please do not hesitate to contact us.

The Phelps Dunbar New Orleans Employment Law Group is pleased to welcome and announce that **Jo Ann Butler** has joined the firm as Counsel and will practice in the area of Employee Benefits/Executive Compensation.

Ms. Butler holds both an LL.M. in Taxation and a J.D. from Temple University School of Law.

She is admitted to practice in New Jersey and Pennsylvania.



## MARK YOUR CALENDARS

### New Orleans Employment Law Breakfast Briefings

June 22 and September 14

### New Orleans Employment Law Seminar

Thursday, November 9

*For more information, please contact: Michelle Prentice at 504-584-9250*

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Inquiries concerning topics addressed in the *H.R. Alert* may be directed to Nan Alessandra, Jane Armstrong, Kim Boyle, or David Korn. Your comments, questions, and suggestions are encouraged.

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