BY STEVE KARDELL

Protections Against Workplace Retaliation Expanded

ALTHOUGH THE U.S. SUPREME COURT'S JUNE 22 decision in *Burlington Northern Santa Fe Railway Co. v. White* dealt with blue-collar working women encountering egregious discrimination, the decision has other beneficiaries: white-collar executives who are targets of more subtle retaliatory conduct and who decide to fight back.

First, some highlights of the decision. The *White* facts read less like a court case than a John Grisham plot outline. The protagonist is a female forklift operator, who prevails in a heroic nine-year battle for recognition of basic human decency — or at least the right to work inside driving a forklift.

In a surprise unanimous decision, the *White* court applied a broad interpretation of what constitutes actionable retaliation, grounding its assessment on the premise that enforcing the primary objective of Title VII of the Civil Rights Act of 1964 depends on employees' willingness to raise issues and file complaints.

In Sheila White's case, after she complained about "insulting and inappropriate remarks" by a supervisor, including his comment that women should not work in the maintenance of way department, she was transferred from her forklift-operator job to a less desirable track-laborer job, which involved removing and replacing parts of the railroad tracks, cutting brush and clearing litter from the right-of-way, according to the court's opinion. Later she was suspended for alleged insubordination for 37 days during the Christmas holidays. She subsequently was reinstated through a union grievance.

The essence of Burlington Northern's argument was this: Supervisors can do just about anything to complaining employees, even those with pending discrimination complaints, as long as the company doesn't dock their pay, fire them or take any action that would affect them from a monetary standpoint.

Although this position seems rather provocative, employers and their lawyers in the middle of the country had a ready explanation: the 5th and 8th U.S. Circuit Courts of Appeals let them do it. Both circuits limited actionable retaliatory conduct to ultimate employment acts the *White* court would later describe as " 'hiring, granting leave, discharging, promoting, and compensating.' "

Look for the influence of *White* to be felt in jurisprudence involving other important statutes, like the Sarbanes-Oxley Act of 2002, which itself includes non-retaliation provisions.

While employees cheer *White*, other criticize the decision, primarily on the ground that it will create a new super-protected class of employees, who can, with knowledge of how the process works, ensure a form of de facto due process for themselves: an employee can file a Title VII complaint, then sit back and know his job is secure, because any adverse employment action gives him a retaliation claim against the company.

Critics will argue this is a much broader result than either Congress or the U.S. Supreme Court intended. Those with a longer view will acknowledge that Title VII has always been about unintended consequences. The classic example is conservative Virginia Rep. Howard Smith's introduction of an amendment to include "sex" as one of Title VII's protected categories, which some argue was an attempt to ensure Title VII's demise.

Another way to justify the result is to consider Title VII's overarching statutory purpose: in the words of pre-eminent legal scholar Bruce Hornsby in his hit "That's Just the Way It Is ": Title VII is meant "to give those who ain't got a little more."

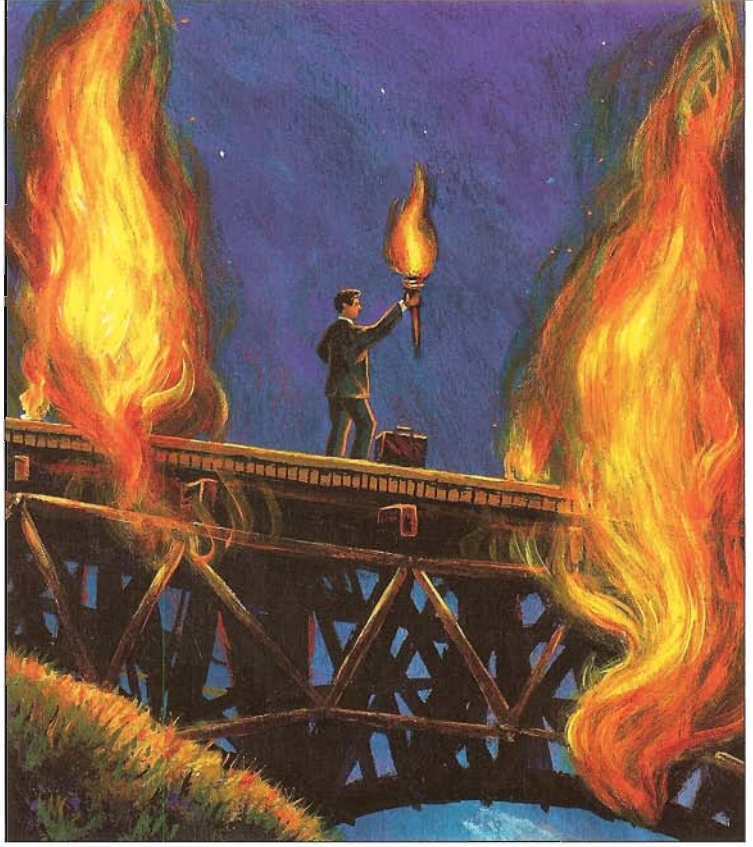
White accomplishes that objective — exponentially.

EXEC PLAINTIFFS

Notwithstanding the protections of *White*, an executive with an internal complaint — Title VII-based or otherwise — is in a precarious position. Here are some post-*White* tips for the corporate whistleblower.

COMPLAINT DESK

- A RECENT U.S. SUPREME COURT DECISION EXPANDS THE KINDS OF EMPLOYER ACTIONS THAT CONSTITUTE RETALIATION AGAINST A COMPLAINING EMPLOYEE.
- EXECUTIVES ASSERTING PROTECTED STATUS SHOULD USE STRATEGIC, SPECIALIZED APPROACHES.
- USING AN ANONYMOUS HOTLINE TO REPORT PROBLEMS LEAVES THE REPORTING PARTY UNPROTECTED BY *WHITE*.



An exec must ensure that his immediate supervisor has real-time knowledge of all issues that he has raised with either corporate human resources or in-house counsel. Avoid airing concerns via the company's anonymous hotline.

Here's why: Hotlines, much in favor in the post-Enron era, may not provide protection. That's because, in every retaliation case, the plaintiff must prove that 1. the individual supervisor had knowledge of the protected complaint and 2. as a result of the protected conduct, reacted in a hostile fashion. But corporate hotlines are built around anonymity. Consequently, to qualify for the more expansive retaliation protections of *White*, a complaining party must cease to be anonymous and ensure that his supervisor knows of the particular conduct. That's not exactly a process that facilitates a close working relationship with the boss.

White means a complaining executive probably will face regular sessions with the human resources department, ostensibly to determine whether the company is accommodating the exec's concerns. The HR function will be to keep the exec's supervisor from overstepping the line, while at the same time looking for opportunities to bring closure to this situation. Approach these remedial meetings with extreme caution.

Complaining execs often find themselves frozen out, as management looks for any legitimate excuse to initiate discipline, up to and including termination. That means a would-be retaliation plaintiff must display performance and demeanor that are at all times above reproach, despite finding himself disinvited to power lunches, being left off of key committees and seeing his social status within the organization plummet.

The good news is, however, that now if the executive can show that such conduct hindered his professional advancement, the company is potentially liable. The test is: Would such professional ostracism be considered materially adverse to a reasonable person?

A separate basis for recovery under *White* would be emotional distress damages, which, although subject to Title VII caps, are a matter for the jury's determination. An exec potentially could recover these damages if he can prove that the professional ostracism caused significant emotional distress.

White provides a psychological boost to employees and the lawyers who represent them. Most companies are systemically averse to challenges that undermine their ability to deal with employees on a day-to-day basis. The new employer responsibilities that *White* imposes will require, to some degree, an interactive process. Implementing such an ongoing dialogue will not be an easy task, since under these strained circumstances, a supervisor must maintain a normal working relationship with a subordinate he instinctively perceives as disloyal, disruptive and unproductive. Having to coddle a perceived troublemaker is guaranteed to get on a supervisor's last nerve.

The test after *White* is: Would such professional ostracism be considered materially adverse to a reasonable person?

Still thinking about lodging a complaint? A certain percentage of companies — those committed to diversity, focused on equality in the workplace and driven by a strong commitment to comply with applicable employment laws — will welcome an exec's or other employee's articulated concerns and will work energetically toward a mutually satisfactory remedial solution.

The other 99 percent will see a complaining executive as a migraine headache. For the latter, a negotiated exit strategy is advisable. Bring your lawyer. ELA

Steve Kardell is a partner in Dallas' Clouse Dunn Khoshbin who represents executives and employees (protected category or otherwise) who are victims of alleged corporate skullduggery, malfeasance or general unsportsmanlike conduct. He is the author of the book "Nobody's Safe, The Executive's Guide to the Post-Enron Era," scheduled for publication in the fall of 2006, and he teaches corporate compliance at Southern Methodist University Dedman School of Law.