

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   BURLINGTON NORTHERN AND                   :

4       SANTA FE RAILWAY COMPANY,                   :

5                   Petitioner                   :

6           v.                   :   No. 05-259

7   SHEILA WHITE.                   :

8   - - - - -X

9   Washington, D.C.

10    Monday, April 17, 2006

11               The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:04 a.m.

14   APPEARANCES:

15   CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf

16       of the Petitioner.

17   GREGORY G. GARRE, ESQ., Deputy Solicitor General,

18       Department of Justice, Washington, D.C.; on behalf

19       of the United States, as amicus curiae.

20   DONALD A. DONATI, ESQ., Memphis, Tennessee; on behalf

21       of the Respondent.

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	CARTER G. PHILLIPS, ESQ.	
4	On behalf of the Petitioner	3
5	GREGORY G. GARRE, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae	26
8	DONALD A. DONATI, ESQ.	
9	On behalf of the Respondent	37
10	REBUTTAL ARGUMENT OF	
11	CARTER G. PHILLIPS, ESQ.	
12	On behalf of the Petitioner	57
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument  
next in Burlington Northern and Santa Fe Railway  
Company v. White.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice,  
and may it please the Court:

There is no more vexing set of issues in the  
employment discrimination context than arise out of  
issues of retaliation under section 704 of title VII.  
As the Solicitor General's brief and a couple of the  
other amici briefs point out, the number of -- the  
number of these claims has increased by more than 100  
percent over the course of the last decade, more than  
30 percent of the EEOC's docket is now made up of  
retaliation claims, and the cost of an average  
contested retaliation claim exceeds \$130,000 per case.  
Plainly, this is a fundamentally important question,  
and the standard to be applied under section 704 is  
critically important to both employers and employees.  
And the Respondent has given you truly a  
choice and not a shadow in this particular case because

1 the Respondent's analysis of section 704, based  
2 essentially on the language, any discrimination, is  
3 that everything that is in any sense against an  
4 employee, any act of retaliation, no matter how  
5 trivial, is nevertheless a basis for a section 704  
6 lawsuit.

7 This is a position that's embraced by none of  
8 her supporting amici. It's a position that's been  
9 embraced by no court of appeals up until this point,  
10 and it is a position that is utterly untethered in the  
11 relationship between section 704 and its language and  
12 section 703, which is the heart and soul of the anti-  
13 discrimination norms in title VII.

14 CHIEF JUSTICE ROBERTS: It has been endorsed  
15 by the EEOC, though.

16 MR. PHILLIPS: Not -- not that broad -- no,  
17 not even the EEOC in its most aggressive  
18 interpretation, which obviously the United States has  
19 rejected in this case, ever went to the point of saying  
20 any. And I'll give you a good illustration of that  
21 because in the guidelines, the commission always said  
22 that in a situation where there was absolutely no  
23 question of retaliation, charge filed against a  
24 supervisor, supervisor disinvites an employee to lunch,  
25 a lunch that's held with all the other employees -- it

1 has always been the position of the -- of the EEOC that  
2 in that circumstance, that would not be enough to raise  
3 even a fact issue to go to a jury on.

4 Under the Respondent's theory of this case,  
5 it is clear to me that being disinvited to a lunch  
6 would, in fact, be a basis for a Federal lawsuit under  
7 section 704.

8 So there is no one, neither governmental nor  
9 nongovernmental, that has embraced the extreme position  
10 that the Respondent has put forward under section 704.

11 And indeed, it's very difficult for me to  
12 understand why Congress would ever have adopted a rule  
13 that was more protective of those against whom --  
14 against -- where retaliation takes place as opposed to  
15 the core of who was protected by section 703, which is  
16 the people who are in the protected class in the first  
17 instance.

18 To adopt the rule, I think, of the Respondent  
19 in this case would not only increase the number of  
20 claims another 100 percent, at least, in the future,  
21 but it seems to me would render completely meaningless  
22 the observation of this Court in Weber that management  
23 prerogatives are to be left undisturbed to the greatest  
24 extent possible. There are no management prerogatives  
25 once an employee has filed a complaint under -- and,

1   therefore, is protected under section 704. At that  
2   point, everything becomes essentially a straitjacket  
3   problem.

4               I don't think there's a rationale to support  
5   that interpretation, and so therefore the question is,  
6   what is the right standard under section 704?

7               And here, it seems to me the United States  
8   and Burlington Northern are on exactly the same page.  
9   We believe that this Court announced the appropriate  
10   standard under section 703 in dealing with harassment  
11   cases. That's the Ellerth standard, and we believe  
12   that the Ellerth standard is the proper one for  
13   defining a tangible employment action.

14              JUSTICE SCALIA: But 703 has the language and  
15   704 doesn't. I mean, 703 has language limiting it to  
16   -- to employment, prerogatives of employment. 704  
17   doesn't.

18              MR. PHILLIPS: Right. Justice Scalia, this  
19   Court has also said that that negative pregnant has  
20   never been used as an overarching interpretive guide.  
21   You have to evaluate 703 and 704 in tandem, and it  
22   seems much easier to interpret 704 as simply using  
23   discrimination against as a shorthand for the wide  
24   range of discriminations that are outlined in section  
25   703. It seems quite cumbersome, at a minimum, and

1 probably worse if Congress were to actually sit down  
2 and try to rewrite every aspect of 703 in order simply  
3 to say in addition to the protected classes that 703  
4 protects, there is certain conduct under 704 that we  
5 protect in exactly the same way that we protect --

6 JUSTICE SCALIA: No. It wouldn't have to do  
7 -- I mean, fairly -- you know, to be fair, it wouldn't  
8 have had to say that. It would have said any -- any  
9 act that is discrimination under 703. Any act that is  
10 discrimination under 703. Seven words it could have  
11 said.

12 MR. PHILLIPS: They could have said it that  
13 way, but it seems to me quite clear that Congress still  
14 intended for 703 and 704 to be interpreted in pari  
15 materia. And -- and again, you -- you still run into  
16 the same problem, Justice Scalia, as to why is it that  
17 Congress would want to protect more thoroughly 704  
18 plaintiffs than it would 703 plaintiffs. And it seems  
19 to me there's no --

20 JUSTICE SCALIA: That's a curiosity. It is.

21 JUSTICE BREYER: Well, the answer would be  
22 because Congress is worried that people won't complain.  
23 That's why. And there are millions of ways of  
24 harassing people. They start issuing a complaint. You  
25 do all kinds of things. You freeze them out. You --

1 you insult them. You -- I mean, it's easy to think of  
2 things that don't rise to the level of the -- Ellerth.

3           So, I mean, if I -- maybe I'm right, maybe  
4 I'm wrong, but if I'm right, why not just take, say,  
5 the D.C. Circuit standard? They -- they say that you  
6 have to show that the employer's action would have been  
7 material, which means the action might well have  
8 dissuaded a reasonable worker from making or supporting  
9 a charge of discrimination. Now, how about that? That  
10 has the virtue of allowing a person not to be harassed,  
11 et cetera, who wants to make a complaint, and it also  
12 allows the judge to focus on the particular case and  
13 see if what the person is doing is reasonable. It  
14 holds the complainant to a standard of reasonableness,  
15 which is common in law.

16           JUSTICE SCALIA: And the issue would be, I  
17 assume, how much a reasonable person likes a free  
18 lunch.

19           MR. PHILLIPS: That would be -- that would be  
20 the question.

21           JUSTICE BREYER: Well, in fact, if it turns  
22 out to be the power lunch of all time and, in fact, the  
23 person can't be at the power lunch because she's a  
24 woman, for example, and therefore, her future career is  
25 likely to take a real nose dive, why shouldn't that



1 count as a violation?

2 MR. PHILLIPS: Well, I will tell you, Justice  
3 Breyer, that the -- at least one of the problems with  
4 that is that the EEOC's guidelines expressly state that  
5 that is not a claim that's actionable under section  
6 704.

7 JUSTICE GINSBURG: They say one lunch, but  
8 not if there's a weekly lunch, and the only person who  
9 gets left out is the person who filed a charge under  
10 title VII. That's -- a one-at-a-time curiosity the  
11 EEOC guidelines leave out, but if it's a routine lunch  
12 with all the preferred employees and they leave out the  
13 one who filed a title VII charge, that would fit  
14 within the EEOC's definition.

15 MR. PHILLIPS: That would fit under the  
16 EEOC's definition, although I don't think it's an  
17 answer to Justice Breyer's hypothetical --

18 JUSTICE GINSBURG: But it wouldn't fit under  
19 your --

20 MR. PHILLIPS: -- that was talking the big  
21 power lunch.

22 JUSTICE GINSBURG: Under your definition,  
23 lunch is lunch, and so there would never be -- there  
24 couldn't be --

25 MR. PHILLIPS: No, not under my -- no, that's

1 not necessarily the case, Justice Ginsburg. In my --  
2 you know, there are two standards under -- under an  
3 adverse employment action. The first one is whether  
4 there's a tangible action, and that's the Ellerth  
5 standard. And then there's always the pervasive and  
6 severe standard, so that if you have -- you know, being  
7 routinely excluded rises to the level of pervasive or  
8 severe, that would still be actionable under 704 in  
9 exactly the same way that that's actionable under 703.

10 JUSTICE GINSBURG: Well, does it or doesn't  
11 it? The -- the facts are simply that the manager takes  
12 out all the employees, except this one that filed the  
13 title VII charge, once a week. Is that --

14 MR. PHILLIPS: And -- and does it on a  
15 pervasive basis, sustained and pervasive basis.

16 JUSTICE GINSBURG: Does it once a week, and  
17 I'm not using any adjective to characterize it. It  
18 just happens once a week.

19 MR. PHILLIPS: Well, I think you probably  
20 have a jury question at some point, depending on how  
21 long it went on for because it would become -- it would  
22 become a pervasive practice. And under those  
23 circumstances, this Court has a rule that allows that  
24 to become a jury issue. But if it's only once or  
25 twice, it strikes me that that's not a particular

1 problem.

2 JUSTICE KENNEDY: Well, how about excluding  
3 from the forklift forever or a year? You can't work  
4 the forklift for a year.

5 MR. PHILLIPS: Well, the -- the reason why  
6 that's not a problem is that there is no economic  
7 effect that attaches to not working on the forklift for  
8 a year or for 10 years. The -- the proof in this case  
9 is absolutely clear.

10 JUSTICE KENNEDY: Well, it has an effect on  
11 your back.

12 MR. PHILLIPS: But that was not the -- but  
13 the -- but she didn't get hired as a forklift operator.  
14 She was hired as a track laborer, Justice Kennedy.

15 JUSTICE KENNEDY: Yes, but you've got a jury  
16 --

17 JUSTICE SOUTER: Okay, but if that argument  
18 is sound --

19 JUSTICE KENNEDY: -- you've got a jury  
20 finding here. You've got a jury finding this was  
21 discriminatory.

22 MR. PHILLIPS: Well, there's -- there's no  
23 question that there's a jury finding of retaliation.  
24 The question is whether or not this is a tangible  
25 employment action.

1 JUSTICE SOUTER: Yes, but if your -- if your  
2 argument is sound, Mr. Phillips, then -- then any  
3 employer is well advised to define job categories by  
4 having one really nice job within the category and one  
5 really rotten job within the category. And if anybody  
6 who's got the nice job does something like make a title  
7 VII complaint, automatically gets, in effect,  
8 reassigned to the rotten job, and your answer will be,  
9 you know, there's no economic effect. They're getting  
10 the same amount of money each week. I mean, that would  
11 seem to me -- asks for an end run around the whole  
12 concept of retaliation.

13 MR. PHILLIPS: Justice Souter, let me -- in  
14 the first place, it's not a very practical hypothetical  
15 because, one, when you -- when you define your job  
16 positions --

17 JUSTICE SOUTER: Well, isn't -- isn't there a  
18 big difference between sitting on a seat and running a  
19 forklift and -- and picking up steel rails with your  
20 bare hands?

21 MR. PHILLIPS: Well, one, she wasn't  
22 typically picking up steel rails with her bare hands.  
23 All of this stuff is done mechanically. She was  
24 pulling nails out of rails periodically. So I'm not  
25 sure that that's precisely the way to characterize it.

1                   But the -- but at the end of the day, it  
2   still seems to me that what Ellerth tells you you  
3   should look at is primarily whether there is a -- a  
4   direct economic effect. And if there is no direct  
5   economic effect, then what you ought to be looking for  
6   is whether or not the -- the conduct is severe or  
7   pervasive, and -- and if it is --

8                   JUSTICE SOUTER: Okay, but --

9                   MR. PHILLIPS: -- then, it seems to me,  
10  there's a separate action. But that's not the claim  
11  she brought in this case.

12                  JUSTICE SOUTER: Okay, but do you -- do you  
13  agree that direct economic effect cannot be the only  
14  criterion here?

15                  MR. PHILLIPS: No, I don't think it can be  
16  the only criterion. I think that you would have a  
17  situation -- and a lot of times the -- the economic  
18  effect will be either immediate or potentially indirect  
19  in the sense of the hypothetical the commission uses in  
20  its guidelines where a butcher is shifted over to be a  
21  cashier. And in that situation, that's a fundamentally  
22  different job with a fundamentally different career  
23  path. And it may not have any economic effects in the  
24  short run, but in the long run, it will have. And that  
25  may be an answer in part to your question, Justice

1 Souter, about just one big job classification that --

2 JUSTICE STEVENS: May I ask you this  
3 hypothetical? Supposing people like to work the  
4 forklift, but nobody had a -- a right to do it, but  
5 they traded every day or something like that, and the  
6 company put out a notice that said anybody who -- who  
7 files a claim will not be eligible to ride on the  
8 forklift ever again.

9 MR. PHILLIPS: Right. That's a quid pro quo  
10 violation.

11 JUSTICE STEVENS: That would be a violation?

12 MR. PHILLIPS: This Court held in -- in  
13 Ellerth that those kinds of quid pro quos are -- are  
14 subject to liability.

15 JUSTICE STEVENS: So anytime there's an  
16 advance notice that you will -- there will be some kind  
17 of action in response to a -- a claim, that would be  
18 retaliation.

19 MR. PHILLIPS: Right, because the employer --  
20 I mean, employers aren't going to --

21 JUSTICE STEVENS: Even though it was not an  
22 adverse job action.

23 MR. PHILLIPS: -- adopt that kind of a  
24 standard.

25 I'm sorry, Justice Stevens?

1 JUSTICE STEVENS: Even though it did not  
2 amount to -- did not have any economic effect on the  
3 employee.

4 MR. PHILLIPS: Well, in that -- you know, in  
5 -- under those circumstances, it seems to me that the  
6 standard is slightly different for quid pro quo  
7 violations than they are for simply tangible employment  
8 actions.

9 JUSTICE STEVENS: So a quid pro quo violation  
10 does not have to be an adverse employment action.

11 MR. PHILLIPS: It -- right, because the --  
12 there are -- I mean, they are all adverse employment  
13 actions. There's a tangible employment action.  
14 There's a quid pro quo action, and then there's the --

15 JUSTICE STEVENS: It seems to me that -- that  
16 interpretation requires you to interpret 703 and 704  
17 differently.

18 MR. PHILLIPS: No. I -- I don't believe so  
19 because I'm -- I'm -- what I'm trying to do at least is  
20 to apply the Ellerth standard under 703 for each of the  
21 three elements in the same way that I'm trying to apply  
22 them under 704.

23 JUSTICE SCALIA: But -- but are you? I'm --  
24 I'm a little concerned that -- that you're trying to  
25 persuade us to interpret 704 the same as 703 at the

1 expense of watering down 703. I don't understand how  
2 you can concede that -- that refusing to invite  
3 somebody to lunch, if it's more than -- more than a  
4 single lunch, could be a violation of 703. How does  
5 that come within the -- with respect to compensation,  
6 terms, conditions, or privileges of employment?

7 MR. PHILLIPS: Well, I think that if -- if  
8 you could certainly envision a circumstance -- and  
9 again, this goes to the pervasiveness of it. It's --  
10 it's a fundamental, sort of constructive adjustment of  
11 your employment situation. Terms and conditions is a  
12 fairly capacious term, Justice Scalia, and I could well  
13 imagine that if you were being systematically treated  
14 differently and differently from every other employee  
15 --

16 JUSTICE SCALIA: Not -- not by the --

17 MR. PHILLIPS: -- then at some point it  
18 becomes severe or pervasive in a way that -- that, it  
19 would seem to me, would raise a jury trial issue.

20 JUSTICE SCALIA: And -- and going to lunch is  
21 the conditions of employment.

22 MR. PHILLIPS: Going to lunch once, no.

23 JUSTICE SCALIA: Privilege.

24 MR. PHILLIPS: Going to lunch twice, I'm sure  
25 not. But, you know, if it is a continuous process, at



1 some point it strikes me that it would become somewhat  
2 problematic. Yes.

3 JUSTICE GINSBURG: But let's get the --

4 MR. PHILLIPS: But -- and that is why it's  
5 important, and it goes back to Justice Breyer's  
6 question, if I can go back to that for a second,  
7 because he asked about the D.C. Circuit's opinion,  
8 which, you know, of course, adopted the EEOC's now-  
9 discredited theory of this case and, again, untethers  
10 703 from 704. That's the problem with the D.C.  
11 Circuit's interpretation.

12 JUSTICE BREYER: Why? Why? You see, I can  
13 think of a million things. I can't think literally of  
14 a million, but it does seem --

15 MR. PHILLIPS: I suspect you could, actually.

16 (Laughter.)

17 JUSTICE BREYER: -- to me there are many,  
18 many possible ways of really discouraging a worker from  
19 complaining that are not quite as tangible as the list  
20 under 703. So the D.C. Circuit -- and I think even the  
21 SG here, which seems like a variation of the D.C.  
22 Circuit -- much -- the standards seem much -- not as  
23 different as you might -- as it seems to me you're  
24 saying. But -- but they're -- they're trying to be a  
25 little vaguer and a bit broader than the specific

1 Ellerth language because they recognize there are many  
2 possible ways of seriously injuring a person with the  
3 intent or -- to stop them from complaining. That gives  
4 effect to the language differences.

5 MR. PHILLIPS: Right.

6 JUSTICE BREYER: It leaves it up to case-by-  
7 case. It leaves it up to the administrative agency,  
8 all in areas where I frankly don't know one lunch from  
9 another.

10 MR. PHILLIPS: I'm sorry?

11 JUSTICE BREYER: I don't know one lunch from  
12 another often, but the -- the EEOC might and -- and so  
13 might a judge who hears evidence.

14 MR. PHILLIPS: Justice Breyer --

15 JUSTICE BREYER: And that's the virtue of  
16 their standard.

17 MR. PHILLIPS: -- I mean, you can ask Mr.  
18 Garre what his view is with respect to the waiting on  
19 the position of the Solicitor General here.

20 But it still seems to me that there is a  
21 fundamental difference between the way the D.C. Circuit  
22 is analyzing this case and -- and the way this Court  
23 analyzed it Ellerth. And the fundamental difference is  
24 -- I agree with you. There are other circumstances  
25 that are not tangible employment actions that are,

1 nevertheless, actionable under both 703 and 704, but  
2 those are -- those are taken care of under the Meritor  
3 standards. The -- the assumption is that they are both  
4 retaliatory in purpose and that they are severe or  
5 pervasive.

6 JUSTICE GINSBURG: What about the --

7 MR. PHILLIPS: When you reach that standard,  
8 then you create a question of fact for the jury.

9 JUSTICE GINSBURG: -- what about the Seventh  
10 Circuit case that posed the question of same job, same  
11 character of work, except that the employee had flex  
12 time, which enabled her to take care of her disabled  
13 child when she could leave at 3:00, and she's just  
14 changed to -- same job except it's got to be 9:00 to  
15 5:00. Would that fit within your definition?

16 MR. PHILLIPS: I doubt it actually, Justice  
17 Ginsburg, because I think typically mere  
18 inconveniences, even -- even significant  
19 inconveniences, have traditionally been rejected as  
20 bases for taking an issue to the jury.

21 JUSTICE GINSBURG: Even though the jury has  
22 made a finding that the only reason that was done was  
23 in retaliation for her having filed a complaint.

24 MR. PHILLIPS: Justice Ginsburg, every one of  
25 these cases is based on the assumption that the only

1 reason it was done is because of retaliation.

2 JUSTICE GINSBURG: Right.

3 MR. PHILLIPS: The lunch is in exactly the  
4 same position.

5 JUSTICE GINSBURG: But you would say that's  
6 outside --

7 MR. PHILLIPS: So that can't be the standard.

8 JUSTICE GINSBURG: -- that would be outside  
9 704 if this is done deliberately in retaliation for  
10 filing a complaint. Just switch her from a work  
11 routine that she could easily manage and still take  
12 care of her family and to one that is impossible for  
13 her to manage.

14 MR. PHILLIPS: Justice Ginsburg, if you adopt  
15 the other approach, what you say is that every change  
16 in assignments within the ordinary course of business  
17 is subject to claim by a plaintiff --

18 JUSTICE GINSBURG: Not -- not --

19 MR. PHILLIPS: -- in any situation --

20 JUSTICE GINSBURG: -- not every --

21 MR. PHILLIPS: -- where he or she thinks  
22 she's been retaliated against.

23 JUSTICE GINSBURG: Not everyone, but only the  
24 ones that would, in fact, deter a reasonable person  
25 from filing a charge. And that would not be every

1 trivial --

2 MR. PHILLIPS: And -- and again, the problem  
3 with that legal standard, Justice Ginsburg, is it is  
4 not the same one that applies under section 703, and it  
5 seems to me there's no reason to provide greater  
6 protections under 704 to plaintiffs than you would have  
7 under section 703.

8 JUSTICE SCALIA: Why wouldn't you say that  
9 Justice Ginsburg's hypothetical would be covered by the  
10 Meritor standard, if in fact this woman couldn't --  
11 couldn't really do the job with this -- with this new  
12 time assignment? Why wouldn't it qualify as being  
13 sufficiently severe or persuasive --

14 MR. PHILLIPS: Pervasive.

15 JUSTICE SCALIA: -- to alter the conditions  
16 of the victim's employment and create an abusive work  
17 environment?

18 MR. PHILLIPS: I mean, to be sure, that's a  
19 possibility -- that's a possible answer.

20 JUSTICE GINSBURG: But that -- this is a  
21 peculiar effect on one person, but for most people --

22 MR. PHILLIPS: But it could be severe enough.

23 JUSTICE GINSBURG: -- most people it wouldn't  
24 matter. But --

25 MR. PHILLIPS: Right, but the question is, is

1 it severe, I think, to that person? I think that is  
2 the Meritor standard, is, is it severe to the  
3 individual plaintiff?

4 JUSTICE GINSBURG: So you're changing your  
5 answer. You originally told me that, no, that that  
6 wouldn't fit because it's the same job.

7 MR. PHILLIPS: Right. Well, that's because  
8 that's the tangible employment aspect of it. Justice  
9 Scalia says you're right about -- well, I don't know if  
10 he said I'm right about the tangible -- tangible  
11 employment aspect of it. But he says, you know, as you  
12 recognize, there is a second category of claims, and  
13 the second category of claims is the Meritor standard,  
14 which I've been arguing for.

15 JUSTICE ALITO: Isn't a change in the hours  
16 that a person works a change in the terms and  
17 conditions? You change your -- somebody's shift from  
18 the day shift to the -- to the night shift, isn't that  
19 a change under 703?

20 MR. PHILLIPS: It -- it probably depends on  
21 whether or not it was the expectation of the -- of the  
22 employee that -- that he or she would have a certain  
23 set of hours, because an awful lot of employees take a  
24 job with the expectation that they'll work any hours.  
25 Now, you may get into a particular pattern and -- and

1 even set yourself up for that, but if -- if the  
2 expectation is that you were going to work potentially  
3 24 hours and you shift from one set to another, that I  
4 don't think is a change in terms and conditions of  
5 employment within the meaning of 703.

6           If I could just shift slightly to the  
7 suspension, pending investigation, part of the case.  
8 And there are two parts, and it's important to  
9 recognize that if the Court sets aside either one of  
10 those claims, then we're entitled to a new trial  
11 because the damages flow directly from both and there  
12 was no specific -- there was no special verdict in this  
13 case to identify what -- where the damages come from.

14           And our argument with respect to the  
15 suspension, pending investigation, is that there was  
16 simply no final action taken by the employer in this  
17 context until 15 days later. She was suspended for  
18 insubordination by her supervisor. Under the  
19 collective bargaining agreement, all she had to do was  
20 send in a letter. If she didn't want to send in a  
21 letter, the -- the decision would become final and  
22 there would be final action that's clearly subject to a  
23 claim under section 704.

24           She did send in a letter. There was an  
25 informal investigation. The informal investigation

1 concluded that there was no basis for suspending her  
2 for insubordination, and she was reinstated with  
3 complete back pay.

4 JUSTICE SCALIA: So she was docked in her pay  
5 for 2 weeks. I mean, for some people, this would be a  
6 real hardship, no pay for 2 weeks. I mean, it's --  
7 it's final as far as she's concerned, for those 2  
8 weeks.

9 MR. PHILLIPS: Except that it was all -- it  
10 was -- it was reinstated.

11 JUSTICE SCALIA: Yes, well, they went back  
12 later and -- and made up for their mistake. But -- but  
13 the -- it seems to me the issue is whether a mistake  
14 was made that -- that was final action that hurt her.  
15 I don't see why -- it's certainly official action. I  
16 mean, you can't say --

17 MR. PHILLIPS: There is official action.

18 JUSTICE SCALIA: -- it's not official just --  
19 just because it was decreed by a -- you know, a track  
20 boss or something. It -- it was an action of the  
21 company because the company cut -- cut off her pay for  
22 2 weeks. Right?

23 MR. PHILLIPS: Right, but then the question  
24 still remains, Justice Scalia, for it to be a tangible  
25 employment action, is it -- is it available to the



1 employer to cure, when the purpose of this entire  
2 statutory scheme is to avoid litigation and to provide  
3 informal mechanisms for protecting the rights of the  
4 employee.

5 JUSTICE GINSBURG: But it didn't --

6 JUSTICE SOUTER: Yes, but if the employer --

7 JUSTICE GINSBURG: -- it didn't cure. I  
8 mean, it was 37 days, right, that she went without pay?

9 MR. PHILLIPS: Right.

10 JUSTICE GINSBURG: Not just 2 weeks. And she  
11 understandably experienced much stress in that time.  
12 She worried about how she would be able to feed her  
13 children, could she get them Christmas presents. That  
14 was -- there was nothing that she got, when it was  
15 determined that she hadn't been insubordinate, that  
16 compensated her for that stress and, indeed, for the  
17 medical expense that she incurred because she had that  
18 stress.

19 MR. PHILLIPS: Justice Ginsburg, there still  
20 remains the core question of whether this is a tangible  
21 employment action. It's not a long-term action. It's  
22 not an economic effect, and the fact of -- of anxiety  
23 -- that happens all the time in the work place. It's  
24 not actionable.

25 JUSTICE GINSBURG: But when -- when somebody

1 is suspended, it seems to me that is as tangible as it  
2 can get. It gets registered officially. This person  
3 is suspended, and if she doesn't do something about it,  
4 she's out.

5 MR. PHILLIPS: But she did something about  
6 it, and it was corrected, Your Honor.

7 I'd like to --

8 JUSTICE GINSBURG: But --

9 JUSTICE SOUTER: Yes, but --

10 JUSTICE GINSBURG: -- official action is --  
11 is different from -- the problem with Ellerth was that  
12 if there's nothing formally that had been done, the  
13 employer -- this -- Ellerth was concerned with  
14 vicarious liability, nothing official. There had been  
15 none -- the boss wouldn't know about it. But somebody  
16 who is suspended, that is an official -- that's a  
17 tangible action.

18 MR. PHILLIPS: To be sure. And the question  
19 is, can you cure it? And that's the fundamental issue  
20 we ask you to decide.

21 Can I reserve the balance of my time?

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
23 Phillips.

24 Mr. Garre.

25 ORAL ARGUMENT OF GREGORY G. GARRE

1           ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

2           MR. GARRE: Thank you, Mr. Chief Justice, and  
3 may it please the Court:

4           Because title VII prohibits an employer from  
5 suspending an employee for 37 days without pay because  
6 of her sex or from reassigning her from one  
7 responsibility that's material different -- materially  
8 different than another responsibility because of her  
9 sex, it prohibits an employer from doing so because she  
10 filed an EEOC charge complaining about discrimination.

11           Title VII's anti-retaliation provision  
12 creates an additional basis for unlawful  
13 discrimination, but it does not create a different or  
14 more expansive concept of discrimination in the  
15 statute's core prohibitions.

16           CHIEF JUSTICE ROBERTS: Counsel, in -- in the  
17 absence of any suggestion that the collective  
18 bargaining process is also infected with sex  
19 discrimination, why can't we rely on that process to  
20 give some basis to the job descriptions? In other  
21 words, forklift operator was not a separate job from  
22 rail yard employee, and if the union wanted to make  
23 them separate jobs, they could negotiate that, but they  
24 didn't. So why -- why do we regard that as a material  
25 change when you're doing one part of a job as opposed

1 to another part of a job?

2 MR. GARRE: Well, I think the problem that  
3 Justice Souter identified, I believe, where an employer  
4 or even a collective bargaining agreement could  
5 identify categories that had so many different  
6 responsibilities --

7 CHIEF JUSTICE ROBERTS: Well, but the  
8 difference there is that's an employer unilaterally.  
9 We don't have that here. The employer is dealing with  
10 the union. If the jobs really were that different, the  
11 union would categorize them differently and negotiate  
12 for that.

13 MR. GARRE: Here, what we know and what the  
14 jury found -- and this is actually -- it's important to  
15 keep in mind. This is a jury finding. The jury was  
16 instructed properly on what would constitute a material  
17 adverse employment action. The instruction is at page  
18 63 and 64 of the joint appendix.

19 One of the conditions that a jury could find  
20 an adverse action based on was a materially significant  
21 change in responsibilities. The jury heard evidence on  
22 the different types of responsibilities that the  
23 Respondent performed, and it concluded that being  
24 changed, being reassigned after 3 months of working the  
25 forklift, to manually repairing railroad track was a

1 materially significant change in responsibilities.

2 That's the language that comes from this --

3 CHIEF JUSTICE ROBERTS: Doesn't your approach  
4 require an employer to keep shuffling the employees  
5 around so they don't get a sort of adverse possession  
6 of particular types of job responsibilities?

7 MR. GARRE: I don't think so. I think it  
8 would be ultimately a jury question in this particular  
9 category of claims. As -- if -- if it were the case  
10 that employees typically worked the forklift and then  
11 the next day worked the -- worked the track, then the  
12 next day did something else, then I don't think a jury  
13 could find that there was a material -- materially  
14 significant change in responsibilities.

15 JUSTICE SCALIA: No. That's his point. I  
16 mean, that's his point, that -- that the one way to  
17 avoid the problem is to keep shifting people around.

18 MR. GARRE: Well, that -- that --

19 JUSTICE GINSBURG: That would have been  
20 impossible here because there was no one in that entire  
21 unit who could operate a forklift except this one  
22 employee.

23 MR. GARRE: That's right. And -- and if --  
24 if employees were shifted around for one reason or the  
25 other, then I still think it would be unlikely to be a

1 material change in their responsibilities when they  
2 went --

3 JUSTICE GINSBURG: Is it -- is it -- was it  
4 in this category, this track category? Because it was  
5 something new for the employer. There hadn't been a  
6 forklift operator. I gather there had only been one  
7 before.

8 MR. GARRE: There was testimony to that  
9 effect, Justice Ginsburg. Also, when -- when  
10 Respondent was hired, they had just lost their existing  
11 forklift operator, someone who had done that.

12 In any event, I don't think the evidence will  
13 permit a court, if it agrees that material adverse  
14 employment action is the test, to overturn the jury's  
15 finding that the change here was materially adverse.

16 CHIEF JUSTICE ROBERTS: With respect to the  
17 suspension, what -- what if she had been -- during the  
18 process of investigation, she had been allowed to stay  
19 on the job with pay? In other words, the facts are the  
20 same. It's just that the -- the sort of stay process  
21 works the other way and she's not relieved until the  
22 end of the company's investigation. Is the initiation  
23 of that an materially adverse employment action?

24 MR. GARRE: Well, I think most courts have  
25 held that where you have suspension with pay, then you

1 don't have material adverse employment action. Now, at  
2 some level, if the suspension is so long, 6 months, a  
3 year, then effectively you could have a different type  
4 of material adverse action, but where it's a 2-week  
5 suspension to investigate, that would not be material  
6 adverse action. In fact, as -- as the AFL-CIO amicus  
7 brief points out, I think, that's the favored practice  
8 in the industry.

9           Now, we -- we do think that with respect to  
10 the standard, that as this Court recognized in  
11 Faragher, it makes good sense to harmonize  
12 discrimination standards. And here, we think that  
13 Congress intended the courts to harmonize the standard  
14 for section 704, the anti-retaliation provision, with  
15 the standard for section 03, the act's core  
16 prohibitions.

17           Justice Scalia, it does -- the section 704  
18 does omit the phrase, terms, conditions of employment,  
19 but as we've explained in our brief, we think it is  
20 reasonable to read the discriminate against as a  
21 shorthand for the unlawful employment practices  
22 identified in section 703.

23           It's also important to keep in mind that  
24 Congress knows how to write a broader anti-retaliation  
25 statute when it wants to. Look at the ADA, the Family

1 Medical Leave Act. These are statutes which, by their  
2 terms, prohibit employers from any attempt to  
3 intimidate, coerce, threaten, or interfere with the  
4 exercise of rights. Look at the Family Medical Leave  
5 Act --

6 JUSTICE SCALIA: I don't know if that hurts  
7 you or helps you. I mean, that -- that eliminates what  
8 seems to me is the strongest argument of the -- of your  
9 side, which is that it makes no sense to impose greater  
10 sanctions upon somebody who -- who files a complaint  
11 than it does upon somebody who -- who violates  
12 somebody's race, religion, or whatever by -- by  
13 discriminating.

14 MR. GARRE: Well, we --

15 JUSTICE SCALIA: You're telling me it does  
16 make sense, that we've done it in other areas.

17 MR. GARRE: With respect, what I'm telling  
18 you is that Congress has determined in that some areas  
19 it may be important to have a broader provision  
20 protecting against intimidation and coercion. I mean,  
21 if the Court interprets discriminate against to include  
22 all that kind of conduct, then it renders those  
23 provisions redundant.

24 JUSTICE GINSBURG: Does your test cover the  
25 person who's a former employee who complained under



1 title VII, wants a recommendation letter, and isn't  
2 given one for retaliation -- as retaliation for having  
3 complained under title VII?

4 MR. GARRE: It does, Justice Ginsburg. As  
5 the Government explained in its brief in the Robinson  
6 case, post-employment references are reasonably viewed  
7 as a term, condition, or privilege of employment  
8 because it's routine for employees to request them and  
9 routine for employers to provide them.

10 Now, if I could address the --

11 JUSTICE BREYER: Well --

12 MR. GARRE: -- the reasonably likely to deter  
13 test that you referred to, Justice Breyer.

14 If the Court disagrees with our submission  
15 that the statute should be written in pari materia,  
16 then as we said in our brief, we think that that is the  
17 next best test to adopt. But -- but the Court should  
18 -- it should be clear to the Court how much broader  
19 that test is than the material adverse action test.

20 JUSTICE BREYER: It's not -- it's not -- the  
21 -- the words of the statute that I think are relevant  
22 is it -- is it -- you can't discriminate with respect  
23 to his compensation, terms, conditions, or privileges  
24 of employment. Now, the words I just cited are present  
25 in 703. So that's the substantive offense. Those

1 words, as Justice Scalia pointed out and others, are  
2 missing in 704, and that suggests that you could have a  
3 broader definition than those words I just cited as to  
4 what counts as harm flowing from a discrimination.  
5 That's the statutory argument.

6 And then you add, there could be good reason  
7 for that. These people typically are at work and there  
8 are lots of subtle forms of harm and some not so  
9 subtle.

10 MR. GARRE: Well, again, we think Congress  
11 knows how to write that statute, and it does it  
12 differently. It has a different provision. For  
13 example, in the Family Medical Leave Act, not only  
14 included the coercion and intimidation language, it  
15 also said in any manner discriminate.

16 We also think, again, going to our  
17 interpretation of discriminate against, it makes sense  
18 to read that for a -- as a shorthand for the -- the  
19 unlawful practices spelled out and detailed in section  
20 703.

21 JUSTICE BREYER: Well, I'd be curious. In  
22 the -- in the Seventh Circuit, they have a test, I  
23 gather, like the D.C. Circuit, which you've  
24 characterized as broader. Have there suddenly been a  
25 flow of these claims towards the Seventh Circuit? Is

1    there any empirical data that this concern that has  
2    been brought up is empirically present in the Seventh  
3    Circuit?

4               MR. GARRE:   Two -- two points with respect to  
5    that.

6               First, no, I don't know of empirical data in  
7    the Seventh Circuit.

8               Second, we know that retaliation charges are  
9    -- are rising.  They've more than doubled in the past  
10   decade.

11              And third, the Seventh Circuit test is  
12   essentially like the -- the test that this Court  
13   applies in the First Amendment context to determine  
14   when there's retaliation.  This Court in the Rutan case  
15   observed that something as trivial as failing to hold a  
16   birthday party for an employee could satisfy that test.  
17   Applying this test in the lower courts, courts have  
18   held that an officer not being able to see his police  
19   dog would be -- could go to a jury, that -- that a  
20   shunning conduct less than hostile work environment  
21   could go to a jury, that failing to hold employee  
22   feedback meetings could go to a jury --

23              JUSTICE ALITO:  But if 704 doesn't  
24   incorporate 703 why would the -- the EEOC test be the  
25   next best test?  If Congress -- there's nothing in 704

1     that refers to the EEOC standard, is there?

2                 MR. GARRE:  That's -- that's true.  I mean,  
3     at that point, we think it would just be a policy  
4     decision.  Again, we think that Congress made the  
5     policy decision that the tests should be harmonized.

6                 JUSTICE ALITO:  Well, Congress could have --  
7     could have said -- could have thought not only do we  
8     not want people who -- who file complaints not to  
9     suffer those things that would deter a reasonable  
10    person from filing a complaint, but we just don't want  
11    them to suffer at all for having engaged in this  
12    protected activity.

13                MR. GARRE:  That's possible.  That would be  
14    --

15                JUSTICE ALITO:  What -- what basis would  
16    there be for deciding that Congress had one policy  
17    objective as opposed to the other there?

18                MR. GARRE:  We think that the balance that  
19    Congress struck in title VII was from -- between  
20    detering all forms of discrimination and not -- not  
21    allowing every employee grievance to become a Federal  
22    court case.  I think the Court has recognized  
23    repeatedly not all work place conduct that's offensive  
24    or even harassing violates title VII, and we think that  
25    that same compromise should inform the Court's

1 interpretation of section 704 of the statute.

2 If there are no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr. Garre.  
4 Mr. Donati.

5 ORAL ARGUMENT OF DONALD A. DONATI

6 ON BEHALF OF THE RESPONDENT

7 MR. DONATI: Mr. Chief Justice, may it please  
8 the Court:

9 When Burlington Northern reassigned Ms. White  
10 from the forklift to the track and then removed her  
11 without pay for 37 days during Christmas, it, quote,  
12 discriminated against Ms. White under any reasonable  
13 standard, the EEOC standard, the plain language  
14 standard, or the standard that the unanimous en banc  
15 court of the Sixth Circuit adopted. Whatever standard  
16 the Court applies, Ms. White should prevail, if it's a  
17 reasonable standard, other than that of the -- of the  
18 Petitioner.

19 CHIEF JUSTICE ROBERTS: What if she'd been  
20 operating the forklift for only a week and then she was  
21 reassigned? Would that still be discrimination under  
22 any standard?

23 MR. DONATI: With respect to the motivation,  
24 if there -- if there was a motivation, a retaliatory  
25 motivation, according to the proper reading of 704, it

1 would be because what that aims at is motivation.

2 And the question was asked, and -- and a  
3 legitimate question was asked. Why would Congress make  
4 704(a) more expansive than 703? Well, if you look at  
5 the text of 704(a) at the beginning of the caption, it  
6 says, discriminate in assisting, participating, or  
7 cooperating with enforcement.

8 This -- this provision, as the dissent said  
9 in the Jackson case last term, in referring to  
10 retaliation, the dissent made this -- made this point  
11 about the relationship between retaliation and the  
12 primary right. The dissent indicated that the primary  
13 right is being protected by the retaliation provision,  
14 that without the retaliation provision, the primary  
15 right could be impeded, inhibited, and prevented from  
16 individuals having access to the remedial mechanisms.

17 It doesn't take much to intimidate an  
18 individual from filing a claim of discrimination if  
19 they have an economic interest. It takes much, much  
20 less to intimidate a witness to come and testify when  
21 they have no basis.

22 What 704 was aimed at was allowing the law  
23 enforcement agency here, the EEOC, to have access to  
24 complaints about discrimination and witnesses, allowing  
25 the courts to have access to complaints and witnesses

1 because without that free access and without 704 acting  
2 as a guardian around the primary rights, the primary  
3 rights would be eviscerated.

4           This is a perfect example of -- of a case  
5 where that's the situation. You have a -- a woman here  
6 who did exactly what this Court asked her to do in  
7 Ellerth. She complained internally about sexual  
8 harassment. She was hired because of her forklift  
9 responsibilities. She was immediately put on the  
10 forklift. She performed for 90 days competently as a  
11 forklift operator. No complaints about what she did.  
12 Because she complained about sexual harassment, the  
13 jury found, and correctly, she was removed from the  
14 forklift.

15           JUSTICE SCALIA: I'm -- I'm a supervisor, and  
16 the employee files a complaint against me as a  
17 supervisor. Thereafter, I am not as friendly to that  
18 employee as I used to be. I don't smile and say, good  
19 morning, how are you, as I used to. All right?

20           (Laughter.)

21           JUSTICE SCALIA: And you wouldn't expect me  
22 to. This person has, you know, hauled me onto the  
23 block. Now, am -- am I discriminating against that  
24 person?

25           MR. DONATI: No, Justice Scalia.

1 JUSTICE SCALIA: I'm not? I'm not treating  
2 her the way I did before.

3 MR. DONATI: No. Until there is some use of  
4 official authority that affects that individual, you're  
5 not discriminating. That's a -- that's a personal  
6 matter between you and the individual.

7 JUSTICE SCALIA: Sort of like taking her to  
8 lunch.

9 MR. DONATI: If it's -- if it's a blue collar  
10 worker and it's -- it's not part of their  
11 responsibility and they sometimes eat together in the  
12 lunchroom or not, that would not be. However, if it is  
13 a --

14 JUSTICE SCALIA: Now, you say it -- it has to  
15 be part of my -- it doesn't have to relate to her terms  
16 and conditions of employment, you say --

17 MR. DONATI: No --

18 JUSTICE SCALIA: -- because it's not the same  
19 as 703. But somehow you say it -- it has to. Does it  
20 have to or not have to?

21 MR. DONATI: There are situations where it  
22 would be broader than 703. 704 would be broader. An  
23 example. If a CEO of a company came up to an African  
24 American male and punched him because he's Black, that  
25 would not rise to the level of a hostile work



1 environment under your test. It wouldn't alter that  
2 individual's terms and conditions of employment.

3           However, if the CEO came up to an individual  
4 who had filed a charge of discrimination -- of  
5 discrimination, and said, I don't like you filing  
6 charges of discrimination, and pushed that individual,  
7 that would have the effect of impeding individuals from  
8 complaining. And that's -- that's a situation that's  
9 different because Congress anticipated that -- that  
10 retaliation is only as varied as the human imagination.  
11 Congress could have easily --

12           JUSTICE SCALIA: Yes, I worry about that, as  
13 -- as varied as the human imagination. Juries can have  
14 wonderful imaginations. I mean, that -- that is the  
15 problem. Is it meant to be this -- this uncontrolled,  
16 this uncabined?

17           MR. DONATI: Your Honor --

18           JUSTICE SCALIA: What -- what is your  
19 criterion that is going to stop every little thing from  
20 -- from being deemed a retaliatory measure, such as not  
21 saying good morning to this employee?

22           MR. DONATI: There are several things that  
23 are built into the statute. First is 701(b). It has  
24 to be an act of the employer, and those trivial matters  
25 --

1 JUSTICE SCALIA: Yes, I understand that. But  
2 almost any act of his subordinates will be deemed act  
3 of the -- of the employer where retaliation is  
4 concerned, I'll bet you.

5 What else besides that?

6 MR. DONATI: Plus, you always have to show  
7 causation, and many, many cases are dismissed on the  
8 basis of summary judgment, even termination cases on  
9 the basis of causation.

10 JUSTICE SCALIA: I'll give you causation.

11 But I'm talking about the triviality -- the  
12 triviality of the action in question. Is there no test  
13 that eliminates a trivial action from the aggrieved  
14 employee who -- who wants to litigate?

15 MR. DONATI: Your Honor, both the EEOC test,  
16 as well as our test, is one based upon a reasonable  
17 person under all of the circumstances. And -- and the  
18 trial courts frequently say under this set of --

19 JUSTICE SCALIA: A reasonable person would  
20 what -- would what?

21 MR. DONATI: Under our standard, it would be  
22 --

23 JUSTICE SCALIA: A reasonable person would  
24 consider it to be?

25 MR. DONATI: Adverse.

1 JUSTICE SCALIA: Adverse.

2 MR. DONATI: If it was -- if it was  
3 unfavorable to the plaintiff. On the EEOC standard, it  
4 would be if it deterred an individual from filing a  
5 charge.

6 And, Justice Scalia, we have cited favorably  
7 the EEOC standard. What we were asked to do here --

8 JUSTICE SCALIA: Why is the EEOC standard any  
9 more based in the text of the statute than -- than the  
10 standard proposed by your adversary here?

11 MR. DONATI: That's why we proposed one  
12 that's based with what the statute means. And -- and  
13 the statute is very clear. The plain language is  
14 unambiguous. That's our first test, which is  
15 unfavorable to the employee based upon an objective  
16 standard.

17 But if the Court felt it necessary to -- to  
18 back to a position that was not quite so expansive, the  
19 EEOC standard is -- is the one that's most rational  
20 because it's based in the purpose of 704(a).

21 JUSTICE GINSBURG: You won on the basis of  
22 the standard that the Sixth Circuit used, which was not  
23 your standard and not the EEOC standard. Why should  
24 this Court deal with anything other than that the  
25 petitioner's standard is unsatisfactory, that at least

1 the Sixth Circuit standard -- why should the Court deal  
2 with the universe of cases when it has this case before  
3 it, two actions, and a unanimous Sixth Circuit judgment  
4 that says these two actions fall within 704?

5 MR. DONATI: Justice Ginsburg, you're exactly  
6 correct. You don't have to reach the issue about how  
7 expansive 704 is here. You can affirm the Sixth  
8 Circuit's decision based upon the material adverse  
9 employment action standard that they articulated, that  
10 was litigated below, that the defendant did not object  
11 to, and which we won on.

12 CHIEF JUSTICE ROBERTS: Counsel, you said  
13 earlier that the act -- one of the protections against  
14 trivial charges was that the act had to be the act of  
15 the employer. If the employer sets up a review system  
16 in which the final act of the employer is the decision,  
17 why is a preliminary charge, initial suspension, review  
18 -- why are those also considered acts of the employer?

19 MR. DONATI: Mr. Chief Justice, I want to  
20 answer one question related to that. The collective  
21 bargaining agreement did not cover the forklift.  
22 That's in the trial transcript on page 524. It was a  
23 new position. It was not covered by the collective  
24 bargaining. So they --

25 CHIEF JUSTICE ROBERTS: What does that mean,

1 it was not covered by the collective bargaining  
2 agreement? Presumably you paid -- the person who did  
3 that was paid wages pursuant to the collective  
4 bargaining agreement.

5 MR. DONATI: It was not a defined job within  
6 the collective bargaining agreement.

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. DONATI: And if you look at the -- the  
9 job title, which is part of the joint appendix, forklift  
10 is not mentioned, and it was not part of that.

11 But to answer your question specifically with  
12 respect to these facts, the -- in this case here, she  
13 was discharged. If you look at the joint appendix, on  
14 rule 91(b) -- and that's found at page 54 and 55 of --  
15 I'm sorry. 55 of the joint appendix. This is the rule  
16 under which she requested the, quote, investigation.  
17 By its very terms, it doesn't even apply until an  
18 employee is, quote, disciplined or, quote, dismissed.  
19 She was dismissed when she was removed from service.  
20 Then she asked for a hearing under subpart (b), and she  
21 was given an investigation.

22 This Court, in its jurisprudence dealing with  
23 statute of limitations, said in the Morgan case that an  
24 act of discrimination occurs when it happens. Well,  
25 when she was happened -- when this happened, she lost

1 pay, she lost benefits. She was terminated. Even --  
2 even their own witness, Roadmaster Brown, testified had  
3 she not asked for an appeal, she was terminated. So it  
4 was a discrete act at that time.

5 CHIEF JUSTICE ROBERTS: Your position is that  
6 it would be an -- it would be a covered employment  
7 action even if none of that were true, she didn't lose  
8 pay, she didn't lose benefits, so long as there was the  
9 initiation of the disciplinary action. You regard that  
10 as sufficiently adverse under 704.

11 MR. DONATI: Well, under these facts, it was  
12 sufficiently adverse because she lost pay. Now, in a  
13 -- in a theoretical sense, if she had not lost pay,  
14 that still could be adverse under 704(a). It depends  
15 upon the effect and the motive. I don't think that  
16 anyone would quarrel under 703 if an African American  
17 was suspended without pay because of race, that that  
18 would be actionable. Why would it not be actionable in  
19 this context?

20 There's a difference between damages and  
21 whether or not there's actionability under this one  
22 little part of -- of the claim. Perhaps if she was --  
23 was suspended for a retaliatory motive and 5 days later  
24 she was returned, she may have no damages, and -- and  
25 the claim might -- but in terms of --

1 CHIEF JUSTICE ROBERTS: Other than  
2 eligibility for punitive damages.

3 MR. DONATI: Well, assuming that you could  
4 get through the hurdles. And I don't think punitive  
5 damages would necessarily sound there. In the Kolstad  
6 case, the Court indicated one factor to consider would  
7 be how quickly the -- the defendant corrected the  
8 situation. I mean, if you have a -- if there's a  
9 legitimate process that's -- that's available and a  
10 supervisor who has authority to suspend does that for a  
11 retaliatory motive and -- and that process corrects it,  
12 it may be a factor in punitives, but it's not a factor  
13 whether a -- an act has been taken because the act is a  
14 discrete act. It caused her to lose compensation and  
15 -- and to lose benefits. So it could affect the  
16 punitive damages.

17 Now, with respect to the -- the statutory  
18 construction -- well, let me address the -- the  
19 forklift issue just a -- a little bit further.

20 If you take the position that the -- the  
21 petitioner has here, Ms. White -- it's a jury finding.  
22 Their witnesses testified -- went from the most easy  
23 or one of the most easy positions to the most difficult  
24 position because she complained about sexual  
25 harassment. That's the finding of fact. They don't

1 dispute the findings of fact. That's the finding of  
2 fact. So if -- if he's correct, tomorrow, if his --  
3 his position is affirmed, they could tell everyone who  
4 complains about sexual harassment, that if you do that,  
5 we're going to transfer you to the most difficult  
6 position in the company.

7 JUSTICE SCALIA: Suppose -- suppose I  
8 disagree with you as to the standard, that is, I think  
9 704 and 703 both require something related to the  
10 employment. Would -- what would the outcome be? Would  
11 -- would the case have to go back to be submitted to  
12 the jury under that standard? What standard did the  
13 jury find --

14 MR. DONATI: Your Honor, if -- if you look at  
15 -- if you look at the joint appendix at page 63, the  
16 trial judge actually instructed the court -- instructed  
17 the jury, listing six factors. Those six factors are  
18 listed in a footnote in Ellerth, which you cite  
19 favorably as what the standard is -- or what the  
20 standard is for vicarious liability. So the court --  
21 the jury was instructed on material adverse employment  
22 action standard. It was tried on the material adverse  
23 employment action standard.

24 I argued that the forklift position was  
25 materially adverse. The defendant, if you look at the



1 transcript of the closing at pages 48 and 49, didn't  
2 even challenge that it was adverse. Everybody that  
3 heard the proof, common sense told you that when you  
4 went from a forklift running things around to pulling  
5 out railroad ties, it was adverse. So to answer your  
6 question, Justice Scalia, we traveled all the way up to  
7 this Court on the material adverse employment action  
8 standard, and we won.

9 JUSTICE ALITO: What does -- what does  
10 material mean?

11 MR. DONATI: That's a great question, and we  
12 --

13 (Laughter.)

14 MR. DONATI: -- and we -- we truly struggled  
15 with that. We found nothing in the statute, the text  
16 of the statute to say material. Where it uses adverse,  
17 at -- at section 703(a)(2), it uses the term adverse,  
18 but it doesn't use it with the term material. And --

19 JUSTICE SOUTER: Well, do -- do you think it  
20 does anything more than just eliminate clearly de  
21 minimis action?

22 MR. DONATI: I'm sorry. I didn't --

23 JUSTICE SOUTER: Do -- do you think the --  
24 the materially modifier here does anything other than  
25 eliminate obviously de minimis behavior on the part of

1 the employer?

2 MR. DONATI: I don't think it does anything  
3 other than that.

4 It could also be interpreted as -- as this  
5 Court said in the -- in the Wrigley case involving  
6 interpretation of statutes, that there's a de minimis  
7 rule. It could -- it could also be applied that way,  
8 that every -- every statute -- there's a -- that --  
9 that construction applies some de minimis level view.

10 But in terms of this case, this was  
11 definitely material. I mean, it was substantial  
12 injury, substantial action to -- to Ms. White.

13 But with respect to the forklift, their  
14 witnesses testified -- and we cite at pages 2 and 3 of  
15 the brief -- that they considered it easier. The  
16 supervisor, Mr. Brown, testified that the men  
17 considered it easier. And it clearly was.

18 CHIEF JUSTICE ROBERTS: What -- what if she  
19 operated the forklift usually 3 out of 5 days, and the  
20 other 2 days was pulling up the rail ties and -- and  
21 the shift was now she does -- operates the forklift 2  
22 out of 5 days and 3 out of 5 days she's pulling up rail  
23 ties? Is that materially adverse?

24 MR. DONATI: That probably would not -- I  
25 probably could not convince a jury that that was

1 materially adverse. But --

2 JUSTICE SCALIA: Well, that isn't the test, I  
3 mean, whether you can convince a jury.

4 I think you -- you have to acknowledge that  
5 -- that before we -- we say that these trial  
6 instructions were adequate to -- to give you your  
7 victory, we -- we have to find that at least a  
8 reasonable jury could conclude under section 703 that  
9 -- that both of these -- both of these adverse actions  
10 qualified as discrimination under 703, if -- if we're  
11 going to use that test. Right? You acknowledge that.

12 MR. DONATI: I acknowledge and the facts --  
13 and the Sixth Circuit unanimously affirmed that -- that  
14 the facts were there. And I could -- I could go on for  
15 30 minutes about the facts, and they're -- they're  
16 contained in the first --

17 JUSTICE SCALIA: Okay, but that -- that is at  
18 least what -- what's before us here, that if -- if we  
19 go the 703 equals 704 route, we would have to conclude,  
20 in order to affirm here, that a reasonable jury could  
21 find. This jury did, but we'd have to find that that's  
22 reasonable. Right?

23 MR. DONATI: Yes.

24 You know, I would like to address two things  
25 that have been mixed. Apples and oranges have been

1 mixed here about tangible employment action, and that's  
2 the standard this Court has adopted.

3           What the Court did in Ellerth was apply the  
4 rules of vicarious liability in a discrete set of -- of  
5 cases, harassment cases. Harassment cases arise out of  
6 the word condition. As you indicated, sexual  
7 harassment has to alter the condition, and it has to be  
8 severe or pervasive. And what the -- the petitioner is  
9 -- is saying is that because of your application of  
10 tangible employment action to vicarious liability, that  
11 you really defined what constitutes discrimination.

12           Well, that's not what the -- the ruling was.  
13 You were strictly limited to whether instances of  
14 vicarious liability, when -- when employers will be  
15 found liable. At the outset, that needs to be, I  
16 think, clarified that it was not a finding of what  
17 constitutes discrimination.

18           And with respect to also the Ellerth  
19 situation, any test that this Court adopts should not  
20 be a per se test where some things are per se legal,  
21 because when you say that an act of retaliation is per  
22 se legal, it provides safe harbor for people to do  
23 things to individuals. Most employers are --

24           JUSTICE BREYER: Am I right in thinking -- I  
25 just want to clarify this -- that in the circuit court,

1 they applied a pretty tough standard, namely, a  
2 standard that sounds a lot like Ellerth, the Kocsis, or  
3 whatever it is? Tangible employment actions, a  
4 significant change in employment status, hiring,  
5 firing, failing to promote, reassignment with  
6 significantly different responsibilities, or a decision  
7 causing a significant change in benefits. And that's  
8 basically what the jury was instructed.

9 MR. DONATI: That's --

10 JUSTICE BREYER: And you won under the  
11 toughest standard.

12 MR. DONATI: That's correct, a very tough  
13 standard.

14 JUSTICE BREYER: So in a sense, you have  
15 nowhere to go but up.

16 (Laughter.)

17 MR. DONATI: Exactly right. And I find --  
18 and I find myself, Justice Breyer, here sort of arguing  
19 against the standard that I won under.

20 JUSTICE BREYER: You don't care what standard  
21 --

22 MR. DONATI: And I don't care what standard  
23 it is.

24 JUSTICE BREYER: -- for this case.

25 MR. DONATI: I don't care what the standard

1 is for this case.

2 But if you adopt a -- a standard that is --  
3 is broad -- or you have to adopt a national standard or  
4 -- and you don't have to here. You don't have to make  
5 these -- make these findings.

6 But if you do and you adopt a material  
7 adverse employment action standard, there always needs  
8 to be a provision that prevents per se rules because --  
9 and in the Sixth Circuit, they talk about unique  
10 circumstances. Some other circuits talk about unusual  
11 or exceptional circumstances because if you -- if you  
12 black letter something, that this is legal retaliation,  
13 employers who want to will engage in that process.

14 JUSTICE SCALIA: Yes, and the other argument  
15 is that if you don't do it, there's no way to -- to get  
16 a case dismissed before it goes to a jury. You're  
17 saying every claim is going to be a jury trial. I  
18 mean, that -- you know, come on.

19 MR. DONATI: Justice Scalia, every claim  
20 would not be a jury trial because you're going to have  
21 to show the causation issues and damages issues. And  
22 --

23 JUSTICE SCALIA: But the triviality issue  
24 would be out of the case. No matter how trivial, it  
25 goes to a jury. That's -- that's what you want us to

1 say.

2 MR. DONATI: No, Your Honor, that's not what  
3 I want --

4 JUSTICE SCALIA: Well, then we have to have  
5 some per se rules.

6 MR. DONATI: Well, the -- the rule that you  
7 could apply that would not have per se rules and would  
8 ferret out any kind of -- of trivial matters would be  
9 the EEOC standard with a de minimis rule.

10 JUSTICE GINSBURG: Don't you want us to  
11 exclude this ultimate employment decision? I think  
12 that's one thing. In order to win, you have to say  
13 what counts is the suspension and not the ultimate  
14 decision.

15 MR. DONATI: Yes, Your Honor. Under the  
16 ultimate employment action standard of the Fifth  
17 Circuit, the -- the suspension would be in question.

18 JUSTICE GINSBURG: So for you to win to  
19 preserve your Sixth Circuit victory, that would have to  
20 be ruled out.

21 MR. DONATI: The Court should find that  
22 that's not applicable and it's not appropriate under  
23 title VII and -- and that would be necessary for us to  
24 prevail, even though the defendant did not argue  
25 ultimate employment action standard at the trial level,

1 didn't ask for such an instruction, didn't raise that  
2 issue until subsequent to the -- this. But you're  
3 correct. We would need the Court to say that that does  
4 not apply.

5           And then one other issue about -- about  
6 bright line rules. I advise and many lawyers advise  
7 women every day that complain about sexual harassment.  
8 And Mr. Phillips is absolutely correct. There has  
9 been a rise in retaliation claims. And, of course,  
10 it's complex what the reasons are, but anecdotally I  
11 can tell you a lot of it sits at the foot of Ellerth  
12 because employers establish policies, they publish  
13 the policies, they educated women and men about those  
14 policies. People use those policies, and women who  
15 complain about sexual harassment, such as Ms. White,  
16 internally and then are retaliated against, when they  
17 go to the EEOC, they file a retaliation claim. And  
18 there's been an increase of those claims.

19           But if this Court applies a black line rule,  
20 a per se rule, where you say something is legal, that  
21 you can do what you did to Ms. White, then I'll have to  
22 advise individuals to go to the EEOC. There might be  
23 some retaliation and it's legal. And a woman placed in  
24 a situation like that will not complain about sexual  
25 harassment. And the protection, the guardian that rule



1 -- that 704(a) has around the primary right will be  
2 eliminated, and the primary right will be adversely  
3 affected because women will no longer complain. So  
4 whatever rule you apply, don't apply a black letter,  
5 per se rule because you're going to cause serious harm  
6 to the underlying primary rights.

7 If there are no more questions.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. DONATI: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Phillips, you  
11 have 2 minutes remaining.

12 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

13 ON BEHALF OF THE PETITIONER

14 MR. PHILLIPS: Thank you, Mr. Chief Justice.

15 Let me begin by focusing on the jury  
16 instruction in this case. The jury was not instructed  
17 with the Ellerth standard. There's a variant of the  
18 Ellerth standard, and it was not upheld by the court of  
19 appeals on the Ellerth standard.

20 What the court of appeals said was in the  
21 Sixth Circuit there is a unique circumstances standard  
22 that arises out of its particular way of analyzing  
23 these issues, and under that standard, it could be  
24 upheld. And that was the same basis on which the  
25 district court at Pet. App. 118a upheld this particular

1 verdict.

2           So the question of the right standard to be  
3 applied and whether a reasonable jury could find it  
4 under these circumstances, Justice Scalia, is clearly  
5 presented in this case, and it's an issue that this  
6 Court still has to decide.

7           Second, with respect to the suspension, the  
8 -- the collective bargaining agreement specifically  
9 provides for discipline and then 15 days. It's not a  
10 final decision. There's nothing in that collective  
11 bargaining agreement that says it's a decision of the  
12 employer. To the contrary, the decision at the end of  
13 the -- of the investigation is the decision of the  
14 carrier. And we don't need a final employer action  
15 standard in order to prevail on this. What we need is  
16 the opportunity to cure and a reasonable way under --  
17 under section 704, as the D.C. Circuit held  
18 specifically in Taylor.

19           And then finally, with respect to the  
20 observation about, you know, don't make any per se  
21 rules, well, the truth is there aren't going to be any  
22 per se rules. There will be a lot of cases that get  
23 dismissed out under a tangible employment action theory  
24 because there aren't tangible employment actions. But  
25 there will always be available the severe and -- and

1 pervasive standard, which is always going to constrain  
2 any employer from -- from adopting those kinds of  
3 policies.

4           And the point that counsel made is that he  
5 recommends to every one of his employees -- he probably  
6 should recommend two things. One, you show up. You  
7 ought to file a complaint about discrimination in the  
8 work place because under his approach, you will,  
9 therefore, be super-protected under section 704 in a  
10 way you wouldn't have been by merely being protected  
11 under 703. That cannot possibly be what Congress  
12 intended or what is helpful for the work place. The  
13 Court should reject that approach, should reject the  
14 Sixth Circuit's view, and remand.

15           Thank you, Your Honors.

16           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
17 Phillips.

18           The case is submitted.

19           (Whereupon, at 12:04 p.m., the case in the  
20 above-entitled matter was submitted.)

21

22

23

24

25