



MANAGEMENT INSIGHT

Employee Relations Newsletter

NOVEMBER 2006

DAS Human Resource
Services Division

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Executive &
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NOTICE TO EMPLOYEES ON INCLEMENT CONDITIONS CLOSURES

It's that time of year again. While it is the duty of state agencies to remain open to serve the public, sometimes the state is compelled to curtail or close operations due to inclement conditions. Many of the collective bargaining agreements, including SEIU and AFSCME, have Inclement Conditions articles. The SEIU 05-07 contract, Article 123—Inclement or Hazardous Conditions, Section 1 (a) includes the following:

“...The Employer/Agency will announce such closure or curtailment to employees no later than 5:00 a.m., and may accomplish this through pre-designated internet web sites, telephone trees, radio stations and/or television media. The Agency shall notify employees of these designations and post the notices on Agency bulletin boards by November 1st of each year. Notifications do not apply to employees who are required by the Agency to report to work. Employees required to report to work shall be notified of this designation no later than November 1st of each year. Such designations may be modified with two (2) weeks advance notice to the affected employee(s).”

For unrepresented staff there is the Temporary Interruption of Employment policy that contains information on office closure procedures and identifies regional media outlets that are contacted in the event of office closures. The policy may be accessed at: <http://egov.oregon.gov/DAS/HR/docs/advice/P6001501.pdf>

Special rule for FLSA-exempt employees

Due to Fair Labor Standards Act regulations, the State has determined that FLSA-exempt employees will not be compelled to use leave, with or without pay, in connection with inclement weather closures which last less than a full workweek. FLSA-exempt employees who have the option of reporting to their work sites or alternate work sites and choose not to do so, or who have prior approval to be off on the affected days, are not covered by this rule. Many of the state's collective bargaining agreements have special articles which address these issues.

If you are unfamiliar with the inclement conditions articles in the collective bargaining agreement or agreements covering represented employees in your agency, now would be a good time to review them to assure your agency's compliance. Please contact your agency's Human Resources department if you have any questions regarding these provisions.



“After the pre-dismissal hearing was concluded, the State amended its charges against the Grievant to state a new, June 3, date of misconduct... ..without a second pre-dismissal hearing.”



ARBITRATION & CASE SUMMARIES

In the Matter of the Arbitration Between AFSCME Local 3943 and the State of Oregon, Department of Corrections (Arbitrator, John F. Wormuth; June 6, 2006)

In the pre-dismissal notice, the Grievant was alleged to have engaged in misconduct on June 4. At the pre-dismissal hearing, the Grievant presented evidence which proved that the misconduct could not have occurred on June 4. In the dismissal notice which was subsequently sent to the Grievant, the State changed the date of the alleged misconduct to June 3. The Arbitrator found that the date change violated the Grievant’s due process rights since the Grievant had not been given an opportunity to address the change at a pre-dismissal hearing prior to her dismissal. The Arbitrator also found that the State failed to meet its burden of proof that the misconduct occurred on June 3. The Grievant was reinstated with back pay and benefits.

Facts: The Grievant, a Correctional Corporal at Santiam Correctional Institution, was discharged on October 7, 2005 based on several allegations of misconduct. The primary charge was that the Grievant allowed her domestic partner (“Partner”), a co-worker, to enter the Control Center without first obtaining permission of the Officer in Charge. Such conduct would be considered a serious breach of security because of the Control Center’s function. It is established procedure that the Officer in Charge must clear all individuals who enter the Control Center. The Grievant was also charged with attempting to intimidate and retaliate against a subordinate co-worker for reporting the alleged unauthorized access.

The State’s investigation concluded that there had been unauthorized access and that it occurred on June 4, 2005. The pre-dismissal charges and hearing notice identified the June 4 date. At the hearing, the Grievant presented evidence which proved that no unauthorized access had occurred on June 4. She also denied that she had ever allowed her Partner unauthorized access to the Control Center. After the pre-dismissal hearing was concluded, the State amended its charges against the Grievant to state a new, June 3, date of misconduct. The Grievant was discharged based on the new date of misconduct without a second pre-dismissal hearing.

Question Presented: Did the State have just cause to dismiss the Grievant?

Discussion and Ruling: The Arbitrator initially addressed the State’s charge that a pattern of misconduct justifies the dismissal.

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“Usually,” noted the Arbitrator, “a pattern of misconduct is associated with a trail of corrective measures the employer has utilized to modify the errant behavior.” In this case, however, the Grievant had no prior history of discipline. The alleged unauthorized access occurred “only once.” There is, moreover, no evidence that the Grievant previously engaged in a pattern of conduct similar to the alleged retaliation. As such, concluded the Arbitrator, these alleged charges fail to support a pattern of misconduct.

Turning to the evidence in support of the State’s case that there had been unauthorized access on June 3, the Arbitrator observed that, “There is a substantial delay between the time the incident is thought to have occurred and the taking of witnesses’ statements. Because of the time lapse between the witnesses’ interviews and the event, the reconstruction of the event is the product of memory. ... A key element of an investigation is that it be conducted promptly so that potential evidence is not lost to the frailty of memory.” Two of the State’s witnesses stated that they had seen the Grievant’s Partner at the Control Center, but neither identified June 3 as the date (one said it was on June 5, the other, June 7). A third witness stated that she had seen the Grievant’s Partner appear to be stepping out of the Control Center, between 22:40 and 22:45 hours, but she was “unable to place [the Partner] in the Control Center, or to provide a specific calendar date other than early June.”

Looking at all of the witness evidence presented, the Arbitrator observed: “There are four individual witnesses who have presented consistent testimony or statements concerning the alleged unauthorized presence of [the Partner] in the Control Center. First is the testimony and statement of the Grievant that she never admitted [her Partner] to the Control Center.... The second is the testimony and statements of [the Partner]. ... When questioned about whether or not she was in the Control Center, [she] has consistently denied it.” The third is the witness who testified that she saw the Partner exit the Control Center but did not actually see her in the Center. The fourth is an officer who was on duty at the Control Center on the evening of June 3 (from 15:10 to 23:10 hours) who, “... is clear in her interview that she did not see [the Partner] in the Control Center on June 3.”

“In cases of conflicting testimony,” explained the Arbitrator, “a reasonable measure to establish credibility is the standard of consistency.... The State has the burden of proof and must prove [the Partner] was in the Control Center on June 3. The witnesses whose testimony is consistent in their accounting of the events of June 3 cannot place [the Partner] in the Control Center.”

Turning to the investigation, Arbitrator Wormuth explained that a “fair and complete investigation” is part of just cause. During the investigation, “... the Grievant is to have a full and complete opportunity to present evidence of his/her innocence and any mitigating circumstances that would relieve or reduce the proposed discipline.” In this case, noted the Arbitrator, the

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a “fair and complete investigation” is part of just cause. During the investigation, “... the Grievant is to have a full and complete opportunity to present evidence of his/her innocence and any mitigating circumstances that would relieve or reduce the proposed discipline.”

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“... the State ignored its contractual obligation to allow the Grievant to address the State’s findings and conclusions. This is not a simple oversight explained by an incidental error, but is a significant violation of the Grievant’s contractual rights.”

Grievant participated in a pre-dismissal hearing at which she presented evidence to answer the State’s charges, “... which according to the State happened on June 4...” However, “It was not until the letter of dismissal was issued that the Grievant learned she was being discharged for admitting [her Partner] to the Control Center on June 3.” By doing this, continued the Arbitrator, “... the State ignored its contractual obligation to allow the Grievant to address the State’s findings and conclusions. This is not a simple oversight explained by an incidental error, but is a significant violation of the Grievant’s contractual rights.” As such, concluded Arbitrator Wormuth, “This alone is sufficient reason to sustain the Grievance. The state did not have just cause to discharge the Grievant.” There is, noted the Arbitrator, no need for him to address the subordinate charges in light of this “serious violation of the Grievant’s contractual rights.”

Finding that, “The State’s amendment of the date on which the incident is alleged to have occurred violated the Grievant’s due process rights,” the Arbitrator ordered that the Grievant be reinstated with back pay and benefits.

HELPFUL HINT:

Relationship Between Pre-dismissal and Dismissal Notices

It is a cardinal rule that charges in a dismissal letter exactly match the charges which were stated in the pre-dismissal notice. The purpose of this rule is to avoid the situation that arose in the arbitration summarized above. If a new charge appears for the first time in the dismissal letter, the employee could argue that he or she did not have a pre-dismissal opportunity to present evidence rebutting the charge and, if applicable, mitigating circumstances. This would likely constitute a violation of the employee’s due process rights. One exception to this rule is omitting from the dismissal letter one or more of the charges which had appeared in the pre-dismissal notice. Generally, such an omission would not constitute a violation of the employee’s due process rights as long as the remaining charges in the dismissal notice had appeared in the pre-dismissal notice, those charges alone support the dismissal and the employee was given an opportunity to present rebutting and/or mitigating evidence concerning the remaining charges. If a charge is added after the pre-dismissal notice is given to the employee, the safest approach is to issue a new pre-dismissal notice which includes the new charge. If a pre-dismissal conference has already been held, a second conference should be scheduled so that the employee is able to respond to the added charge.

Ashland Police Association vs. City of Ashland (ERB Case No. UP-50-05; August 23, 2006)

The City's legal department conducted an investigation and prepared a report regarding an incident involving the City's Police Chief. The Police Association twice requested a copy of the report and the City twice refused to provide it. The Employment Relations Board found that the initial refusal was justified since it was not apparent how the report was relevant to contract administration and the Association failed to identify how it was potentially relevant. The Board found that the second refusal was a violation of the City's duty to provide the information under the PECBA. The Association on this occasion did identify how the information was relevant. The City's claims of confidentiality and attorney-client privilege did not justify a complete failure to comply but did exempt from disclosure certain conversations between the City Attorney and City Administrator.

Facts: The City's Police Chief responded to a call involving a man who had barricaded himself in a structure. At the scene, the man attempted to stab the Chief. In response to a request by the City Administrator, the City's legal department conducted an investigation and wrote a report regarding the incident. In June, 2005, the Ashland Police Association (Association) requested a copy of the report. The City refused to produce the report, on the grounds that it is a confidential document protected by the attorney-client privilege. Approximately six months later, the Association again requested a copy of the report – this time asserting that the report is relevant to disciplinary actions taken against two Association members – and the City again declined to produce it.

Question Presented: Were the City's refusals to provide the requested information violations of the Public Employee Collective Bargaining Act (PECBA)?

Discussion and Ruling: Citing *Washington County School District No. 48 vs. Beaverton Education Association & Paul Nelson*, 5 PECBR 4398, 4405 (1981), the Employment Relations Board (Board) explained that, "In contract administration, the duty [to supply information] arises so long as the information sought is of probable or potential relevance to a grievance or other contractual matter." However, "... a responding party has no duty to provide irrelevant information and ... where relevance is not apparent, the requesting party has an obligation to inform the other party concerning relevance." (Citing *Oregon School Employees Association vs. Salem-Keizer School District 24J*, 10 PECBR 252, 262 (1987).)

In this case, it was stipulated by the parties that the initial Association request for a copy of the report was made in connection with concerns the Association had with the Police Chief's actions and administration, as well as the standard of conduct the City was applying to the Chief. While the

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Association “is entitled to express its concerns about the Chief,” such concerns, explained the Board, “... can be the basis for an information request only if ... potentially relevant to contract administration.” Noting that the connection between the report and contract administration is not apparent from the record before it, and that the Association had failed to identify how the Report is potentially relevant to contract administration, the Board concluded that based on the initial request, the Association “... has not carried its burden of proving that it is entitled to the Report ...”

Six months later, when the Association again requested a copy of the report, “circumstances had changed.” This time, noted the Board, the Association wrote that it was renewing the request because, “... two members of our Association have recently received substantial discipline....” The City replied that unless the Association could “convince” it of the relevance of the request to a contractual matter, it would not produce the report since it is “confidential and protected under the attorney-client privilege.” Addressing the relevancy issue, the Board explained that, “All the union needs to establish is that the subject of the request has potential value in aiding it in the performance of its statutory duties of representation of bargaining unit members.” (Citing *Oregon State Police Officers’ Association vs. State of Oregon*, 11 PECBR 718 (1989).) In this instance, the request “... was reasonably related to disciplinary actions taken against two Association members.” As such, “... the request contained the requisite level of specificity to obligate the employer to provide the requested information.”

“All the union needs to establish is that the subject of the request has potential value in aiding it in the performance of its statutory duties of representation of bargaining unit members.”

Moving to the confidentiality question, the Board explained that, “When addressing claims of confidentiality in ORS 243.672 (1) (e), ‘this Board balances a labor organization’s need for information against any legitimate and substantial confidentiality interests established by the employer.’ ” After the Association provided the City with information establishing the potential relevance of the information sought, “The burden then shifted to the City to prove that its claim of confidentiality was not merely a blanket denial.” Further, “... a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning that which an employer legitimately claims a partial confidentiality interest, the employer must bargain toward an accommodation which addresses the union’s information needs and the employer’s justified interests.” (Citing *Pennsylvania Power & light Co.*, 301 NLRB 138 (1991).) The City, in this case, “... failed to work with the [Association] to create an accommodation that could provide the requested information while protecting its own interests.” As a result, found the Board, “... the City did not meet its burden of proof.”

The Board next addressed the City’s assertion of attorney-client privilege. Under Oregon statutes, the attorney-client privilege covers a “... confidential communication made for the purpose of facilitating the rendition of professional legal services to the client....” In this case, however, “There are no stipulated facts or evidence indicating that the investigation was made for the purpose of facilitating the rendition of

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professional legal services or that the facts were gathered in anticipation of litigation.” According to the City, the investigation was requested “for the purposes of [the City Administrator’s] evaluation of an incident...” (Emphasis added by the Board.) Here, found the Board, “... the legal department was a scrivener and there was no rendering of professional legal services as it relates to its collection of facts.” However, while the Board noted that a “blanket assertion” of the attorney-client privilege does not excuse the City from producing the documents, it also found that, “... to the extent there were conversations between the city attorney and the City Administrator, those conversations would be exempt from disclosure.” The City was directed to produce the report.

**Back to Basics:
The Budget Process and Collective Bargaining—An Overview**

How does the state plan and pay for compensation increases which are agreed to in the collective bargaining process? Here are the essential steps in the process.

Budget Cycle – Agencies prepare and submit budget requests to the DAS Budget and Management Division (BAM) in August or September of even-numbered years. Prior to the legislative session, which begins in early January of the subsequent odd-numbered years, the Governor’s staff reviews the agency requests and develops a proposed budget for the next biennium, known as the Governor’s Recommended Budget (GRB). After submission of the GRB to the Legislature, the legislative review and examination process ultimately results in the approval of the Legislatively Adopted Budget.

Among other legal requirements, the GRB must balance to revenue projections for the next biennium. It must also identify the “current service level” for each agency for the next two years—*i.e.*, the costs of existing service levels, assuming no change in program services. The “current service level” does not include increases for negotiated wages and benefits. It does include existing compensation levels and expected merit increases. As such, agency operating expenses contained in the GRB for the 2005-07 biennium did not include any cost of living or special selective increases in wages or benefits over the amounts in effect for the 2003-2005 biennium.

Funds for Anticipated Wage and Benefit Increases – The state utilizes four funding sources for its spending, including these increases. The General Fund, generated mainly from corporate and individual income taxes, is the most flexible of the four. It may be used for any lawful purpose which the Legislature authorizes. The three other funding sources, Other Funds, Lottery Funds and Federal Funds, are generally limited to specific spending purposes. Other Funds are typically derived from fees and assessments. Lottery Funds are generated by the Oregon Lottery, and Federal Funds, as one would expect, come from the federal government.

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At the Governor's direction, the GRB may also include a proposed separate General Fund amount to be used for wage and benefit increases that might be agreed to in collective bargaining. The amount of this proposal is subject to legislative authorization. The Legislature may reduce or increase the original amount proposed. For the 2005-07 biennium, the Governor's proposal of \$130 million for wage and benefit increases was authorized without change by the Legislature. This amount was set aside in the Emergency Fund as a separate sum, pending conclusion of collective bargaining for the 2005-07 biennium.

Bargaining - The state's collective bargaining agreements typically have two-year terms, ending June 30 of odd-numbered years. Negotiations for successor collective bargaining agreements between the state and public employee unions generally begin four to six months before the end-of-term date – which is usually shortly after the GRB is released. During negotiations, the fiscal impact of each of the various proposals on agency budgets is assessed and calculated by DAS negotiators—usually with the assistance of the DAS Compensation Unit, BAM, and the affected agencies—in light of the General Fund amount allocated to the Emergency Fund.

DAS E-Board Report - At the conclusion of bargaining, DAS is required to report to the E-Board on changes affecting salaries and benefits that have been agreed to by the parties. The DAS report also includes planned compensation changes for classified unrepresented, unclassified and management service employees. For the current 2005-07 biennium, most of the compensation increases were reported to the E-Board at its November 2005 meeting. The E-Board *does not authorize or approve* any compensation changes, but it must receive the report prepared by DAS. When the report is received, increases may be paid to employees on the date they become effective. In some cases, this will result in retroactive adjustments to some bargaining units.

Release of Funds – In a separate action from the report described above, DAS, on behalf of state agencies, requests the E-Board to authorize the distribution of General Fund dollars set aside for compensation changes, and also requests proportionate increases to Other, Lottery and Federal Fund limitations. Because the distribution is based on actual positions approved by the previous Legislature, this request cannot be made until all agencies' Legislatively Adopted Budgets have been audited and entered into the state's central budget system. Typically, therefore, the request for distribution takes place at the E-Board's January (sometimes later) meeting following the close of session.

Negotiated compensation increases are implemented whether or not money is actually appropriated to pay for them. If the amount of money set aside is insufficient to cover these increases, DAS works with agencies to accommodate the increases within the agencies' approved budgets. In such cases, DAS also reports to the Governor and the E-Board on the impact which the lack of full funding has on agency budgets..

If you have any questions about this process, please contact Tom Perry, DAS Labor Relations, at 378-4201, or your agency's BAM analyst.

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Labor Relations 2007-2009 Bargaining Assignments

EVA CORBIN, Deputy Adm. 503-378-8321
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SEIU

- Central Table (w/Cowan)
- Home Care Workers (w/McCurdy)

CRAIG COWAN, State LR Mgr 503-378-5611
craig.l.cowan@state.or.us

AEE (w/Perry)

- Department of Transportation (DOT)
- Department of Forestry (DOF)
- Parks and Recreation Department (OPRD)

AFSCME

- Department of Corrections (DOC)
 - Security
 - Non-Security/Board of Parole
 - Adult Parole Officers (w/Hosie)
- Dept of Justice (DOJ/OAJA) (w/Schuh)

CIA

- Dept of Justice (DOJ) (w/Schuh)

SEIU

- Central Table (w/Corbin)

CATHY SCHUH, State LR Mgr 503-373-7608
cathy.r.schuh@state.or.us

AFSCME

- Dept of Justice (DOJ/OAJA) (w/Cowan)

CIA

- Dept of Justice (DOJ) (w/Cowan)

SEIU

- Human Services Coalition (w/McCurdy)
- Institutions Coalition (w/West)

ART MCCURDY, State LR Mgr 503-378-3138
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AFSCME

- Building Codes Division (BCD)
- Construction Contractors Board (CCB)
- Dept of Environmental Quality (DEQ)
- OSH Nurses (w/Hosie)

ONA (SOCP,EOTC, EOPC) w/Weeks

SEIU

- Human Services Non-Inst Coalition (w/Schuh)
- Homecare Workers (w/Corbin)

Susie Hosie, LR Trainee 503-378-2616
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AFSCME – Co Spokesperson

- Dept of State Lands (DSL) (w/Halpern)
- OSH Nurses (w/McCurdy)
- Oregon Youth Authority (OYA-JPPO's) (w/Weeks)
- Adult Parole Officers (w/Cowan)

SEIU

- Bargaining Team & Administrative Support

OTHER UNITS – AS SCHEDULE PERMITS

TOM PERRY, State LR Manager 503-378-4201
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AFSCME

- Central Table (w/Weeks)
- Real Estate Agency (REA)
- Dept of Land Conservation & Dev (DLCD)

SEIU

- ODOT Coalition

AEE (w/Cowan)

- Department of Transportation (DOT)
- Department of Forestry (DOF)
- Parks and Recreation Department (OPRD)

ALL TABLES - COST ANALYSIS

MICHAEL HALPERN, State LR Mgr 503-378-2705
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AFSCME

- Oregon Liquor Control Commission (OLCC)
- Employment Department (Hearings Panel)
- Dept of State Lands (DSL) (w/Hosie)
- Oregon State Fire Marshal (OSFM)
- Oregon State Police (OSP) Support Unit

OSPOA

- Department of State Police (OSP)

SEIU

- Special Agencies Coalition

STEA

- Department of Education (OSB & OSD)

JAN WEEKS, State LR Manager 503-378-6483
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AFSCME

- Central Table (w/Perry)
- Dentists at DOC
- Physicians at OSH, EOTC/PC
- Oregon Youth Authority (OYA) JPPO's (w/Hosie)
- State Operated Community Prog. (SOCP)

ONA

- Eastern Oregon Training Center (SOCP, EOTC, EOPC) (w/McCurdy)

AOCE

- Department of Corrections (DOC)

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AFSCME

- Oregon Military Department (OMD)
- Dept of Pub Safety Standards & Training(DPSST)
- Homeland Security (OEM) (TENTATIVE)

IAFF/PANG

- Oregon Military Department (OMD)

KFAFFA

- Oregon Military Department (OMD)

SEIU

- Institutions Coalition (w/Schuh)



“the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”



NOTES FROM THE DEPARTMENT OF JUSTICE

by Sally Carter—Labor & Employment Section

NEW US SUPREME COURT CASE ON ANTI-RETALIATION— *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. VS. WHITE*

Introduction

On June 22, 2006, the United States Supreme court issued its decision in the case of *Burlington Northern & Santa Fe Railway Co. v. White*. In what most observers have termed an important pro-employee decision, the Court made two rulings concerning what constitutes retaliation under Title VII of the Civil Rights Act of 1964. First, the Court ruled that the anti-retaliation provision of Title VII “is not limited to discriminatory actions that affect the terms and conditions of employment.” Instead, “the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.” Second, the Court ruled that the kind of action the anti-retaliatory provision protects against is a “materially adverse” action, which it defined as an action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Facts

The railroad company hired Sheila White as a track laborer in June 1997. White’s original duties as a track laborer involved such tasks as “removing and replacing track component, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way.” Soon, however, White was assigned to operate a forklift, a task that was within the job description of a track laborer but was considered to be less arduous and cleaner than most of the laborer position’s standard duties. In September 1997, White complained to railroad officials that her immediate supervisor had made inappropriate and sexist remarks to her. Although the railroad disciplined the supervisor for his remarks, management also removed White from forklift duty and assigned her back to the standard laborer tasks.

In October 1997, White filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging gender-based discrimination and retaliation. In December 1997, White filed a second retaliation charge with the EEOC, stating that management “had placed her under surveillance and was monitoring her daily activities.” Subsequently, following a verbal disagreement between White and her new immediate supervisor, the railroad suspended White without pay on the charge of insubordination. After White invoked internal grievance procedures and the railroad, in following the procedures, came to the conclusion that White had

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not been insubordinate, White was reinstated and given backpay for the 37 days she had been suspended. White filed a third complaint with the EEOC, alleging retaliation based on the suspension.

Legal Background to Case

Title VII forbids both discrimination against various protected classes and retaliation against an employee (or job applicant) who has "'opposed' a practice that Title VII forbids or has 'made a charge, testified, assisted, or participated in' a Title VII 'investigation, proceeding, or hearing.'" In discrimination cases, an alleged discriminatory action has to be one that affects the terms and conditions of a plaintiff's employment. In retaliation cases prior to *Burlington Northern*, different Circuit Courts of Appeals had come to different conclusions about (1) whether an allegedly retaliatory action had to be employment or workplace related and (2) how harmful the action had to be to constitute retaliation. The Supreme Court heard *Burlington Northern* in order to resolve the split among the Circuits.

The Supreme Court's Burlington Northern Analysis

The Supreme Court first held that the scope of the anti-retaliation provision of Title VII should not be limited to employment or workplace related actions, as the anti-discrimination provisions have been. The Court explained that a limited construction of the anti-retaliation provision would "fail to fully achieve the anti-retaliation provision's primary purpose, namely, maintaining unfettered access to statutory remedial mechanisms."

Next the Court turned to the issue of how harmful the action in question had to be in order to qualify as actionable retaliation. The Court held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Court stated that it spoke "of *material* adversity because we believe it is important to separate significant from trivial harms." The Court does not intend to have a complaining employee immunized from "those petty slights or minor annoyances that often take place at work and that all employees experience." The Court explained that "normally petty slights, minor annoyances, and simple lack of good manners" will not deter employees from complaining about discrimination, and therefore the anti-retaliation provision of Title VII does not reach such low-level actions.

The Court emphasized that it referred to reactions of a "*reasonable* employee because we believe that the provision's standard for judging harm must be objective." The Court also explained that it phrased the standard for what constituted sufficient harm in "general terms because the significance of any given act of retaliation will often depend upon the particular circumstances."

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“Context matters,” explained the Court. For instance, a schedule change in a work schedule may not be of any importance to many workers, but of significant importance to a young mother with school-age children. In other words, an action that might discourage a reasonable person with certain life circumstances from reporting discrimination might not discourage a reasonable person with different life circumstances. “By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.”

“Context matters...an action that might discourage a reasonable person with certain life circumstances from reporting discrimination might not discourage a reasonable person with different life circumstances.”

In applying these standards, the Court affirmed the jury’s findings that two of the railroad’s actions amounted to retaliation: “the reassignment of White from forklift duty to standard track laborer tasks and the 37-day suspension without pay.” The Court rejected the railroad’s argument that a reassignment of duties cannot be retaliation when both sets of duties fall within the same job description. The Court explained that reassignment of job duties is not automatically retaliatory, but that in *Burlington Northern* there was considerable evidence that the forklift-operator assignment was considered a better job than the standard track laborer one, which was regarded as dirtier and more arduous. As to the suspension without pay, the Court was not persuaded by the railroad’s argument that White was ultimately reinstated with backpay. The Court noted that “White and her family had to live for 37 days without income. . . . Many reasonable employees would find a month without a paycheck to be a serious hardship. . . . [T]he jury’s conclusion that the 37-day suspension without pay was materially adverse was a reasonable one.”

Case law since Burlington Northern

Burlington Northern is recent enough that the Supreme Court has not yet had another chance to rule on whether a particular action constitutes retaliation or not. The Ninth Circuit Court of Appeals, whose cases are binding on Oregon employers, has interpreted the new standard only once, in a case that was tried to a jury under the Ninth Circuit’s prior rulings. Before *Burlington Northern*, the Ninth Circuit had said that a plaintiff in a retaliation case had to establish “adverse treatment that [was] based on a retaliatory motive and [was] reasonably likely to deter the charging party or others from engaging in protected activity.” This standard is not markedly different from the *Burlington Northern* standard, and so it is not surprising that the Ninth Circuit concluded the change did not affect the case, *Freitag v. Ayers*. The case involved a female correctional officer in the California prison system who brought both sex-discrimination and retaliation charges. The Court held that the actions that the jury had found retaliatory under the old standard would almost certainly be “considered materially adverse by a reasonable employee.” The actions were the plaintiff’s being temporarily removed from her duty station in a Secure Housing Unit; her being required to undergo a psychiatric evaluation; and her being subjected to internal affairs investigations.

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Other Circuit Courts have also issued rulings interpreting the *Burlington Northern* standard. Although their cases are not binding on the Ninth Circuit and therefore not on Oregon, they do have persuasive value. That is, the cases might be used to persuade the justices of the Ninth Circuit that they should rule in a particular way. Thus, they are worth considering. Some cases deal with actions so harmful that they clearly can qualify as retaliation. For instance, terminating an employee continues to qualify as retaliation. As the Tenth Circuit Court of Appeals put it, being fired “obviously qualifies as ‘materially adverse’ in the sense that it might have dissuaded a reasonable employee from making [a] complaint.”

Other cases address actions of a somewhat less drastic nature. In a Sixth Circuit case, an employee who had made allegations of sex discrimination was placed on administrative leave and terminated, and later reinstated with seventy-percent back pay. The Court drew an analogy to White’s 37-day suspension without pay, and concluded that the “termination and concomitant loss of income constitutes a materially adverse action under Title VII, notwithstanding [the plaintiff’s] later reinstatement with back pay.”

In another case whose holding follows *Burlington Northern* in a fairly straightforward fashion, an employee in a supervisory position was subjected to a transfer that did not change his salary, benefits, job title, grade, or hours of work. The Second Circuit held that “a rational factfinder could permissibly infer that a reasonable employee in the position of DSS Assistant Commissioner could well be dissuaded from making a charge of discrimination if doing so would result in a transfer to an office in which, inter alia, he would not be allowed to perform the broad discretionary and managerial functions of that position, no one would report to him, and he would be forced to do work normally performed by clerical and lower-level personnel.” The Court thus reversed the trial court’s grant of summary judgment to the defendant employer.

Finally, in a case from the Third Circuit, three white police officers alleged they were each subjected to a pattern of harassment after complaining about discrimination against African-American officers. The Court reversed a grant of summary judgment by the trial court, finding that the officers had brought forth “triable issues as to whether they suffered unlawful retaliation.” Among other findings, the Court found a reasonable jury could conclude that one of the officers was subjected to a materially adverse action because of the discipline the officer incurred for having made the comment that a supervisor “‘should be shot for what he does to us, and everybody else, and what he says about us, and everybody else.’” The officer had his weapon taken away, his duties changed, had to undergo a psychiatric evaluation, received a negative performance evaluation, received a 30-day suspension, and was transferred from his duty station. The officer claimed that the comment was a casual one and was not intended literally. Taking the facts in the light most favorable to the plaintiff, as a court must do at the summary judgment stage, the Court found that a factfinder could reasonably conclude that the discipline the officer received for his comment was an overreaction and inappropriately severe discipline.

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Practice Tips for HR

The Labor and Employment Section of the Department of Justice recommends the following practice tips for state agencies:

- Evaluate your agency's policies in order to ensure that you have sufficient procedural safeguards preventing retaliation against employees who have filed civil-rights complaints under federal or Oregon law. Consider providing additional training to your managers on this topic, especially since *Burlington Northern* may increase the tendency of employees to bring retaliation complaints.
- Use increased caution when taking action concerning employees who have filed complaints, remembering the Supreme Court's admonition, "Context matters."
- Do not let the fact that an employee has filed a complaint stop you from taking *appropriate* disciplinary or other action concerning the employee. Do, however, ensure that the employee is being treated similarly to employees who have not filed complaints. Moreover, be particularly careful to document the reasons that the discipline or other action is appropriate.

Consider providing additional training to your managers on this topic

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1. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006).
 2. *Id.* at 2412-13.
 3. *Id.* at 2414.
 4. *Id.* at 2415 (internal quotation marks omitted).
 5. *Id.* at 2409.
 6. *Id.* at 2410.
 7. *Id.* at 2412-13.
 8. In the federal court system, the Supreme Court is, of course, at the top; its rulings are binding throughout the United States. One step down from the Supreme Court are the appellate courts, called Circuit Courts of Appeals, of which there are twelve. States are grouped geographically in the Circuits, and Oregon is in the Ninth Circuit.
 9. *Id.* at 2414.
 10. *Id.* at 2412 (internal quotations omitted).
 11. *Id.* at 2414-15.
 12. *Id.* at 2415 (internal quotations omitted).
 13. *Id.* at 2415.
 14. *Id.*
 15. *Id.*
 16. *Id.*
 17. *Id.*
 18. *Id.*
 19. *Id.*
 20. *Id.* at 2416.
 21. *Id.*
 22. It is implicit in the case that White's pay grade was not changed.
 23. *Id.*
 24. *Id.*
 25. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).
 26. *Freitag v. Ayers*, 463 F.3d 838 (9th Cir. 2006).
 27. *Id.* at fn 6.
 28. *Argo v. Blue Cross and Blue Shield of Kansas*, 452 F.3d 1193, 1202 (10th Cir. 2006).
 29. *Randolph v. Ohio Dept. of Youth Services*, 453 F.3d 724, 736 (6th Cir. 2006).
 30. *Id.* at 736-37.
 31. *Kessler v. Westchester County Dept. of Social Services and Westchester County*, 461 F.3d 199 (2nd Cir. 2006).
 32. *Moore v. City of Phila.*, 461 F.3d 331 (3rd Cir. 2006).

LABOR RELATIONS STAFFING UPDATE

Retirement - Cathy Schuh, State Labor Relations Manager, will retire on December 31, 2006.

UPCOMING..... *Appointing Authorities will be sending out a memo on Management Concepts and Responding to Requests for Bargaining Information.*



ABOUT HRSD'S SECTIONS:

[Human Resource Management & Consultation](#)

The HR Management and Consultation (HRMC) Section develops and implements the state's workforce management plan; develops and administers HRSD rules and policies; and provides consulting services and technical assistance to agency HR offices.

[HR Systems, Services and Audits](#)

HRSD established the HR Audit Program in July 2001 under the authority of State Policy 10.025.01 (pdf), "Audit of Human Resource Management Practices." The purpose of the program is to fulfill statutory obligations under ORS 240.215(2); 240.309(4); and 240.311(1) and legislative direction received during the 2001-03 budget approval process. The HR Audit Program is designed to improve the state's human resource management practices by: 1) identifying areas of noncompliance and providing state agencies with direction on required corrective actions; and 2) identifying best practices and sharing those practices with all state agencies.

[Statewide Training & Development Services](#)

Statewide Training and Development Services is committed to increasing the effectiveness of Oregon state government by providing state and local government employees with high quality training that is accessible, affordable, and relevant. Our staff and instructors are dedicated to making your education experiences the best they can be.

[Statewide Recruitment Services](#)

Our purpose is to provide statewide leadership in recruiting a skilled, diverse workforce for the state of Oregon. We focus on providing innovative solutions for improving the state's recruitment process, creating and implementing a viable and sustainable succession planning process to provide workforce bench strength, and increasing representation of minority candidates in recruitment pools at all levels.

[Labor Relations Unit](#)

The Labor Relations Unit represents the Governor on behalf of all executive branch agencies in collective bargaining. Currently the Labor Relations Unit administers 31 collective bargaining agreements. These cover approximately 27,000 employees in 62 different agencies, boards, and commissions. These employees are represented by 10 different labor organizations and one SEIU bargaining unit of approximately 12,000 home care workers.

[Classification and Compensation](#)

Classification and Compensation is responsible for maintaining the State's compensation plan for approximately 40,000 employees in classified, unclassified and management service positions, and is responsible for development and maintenance of the classification system.