

### **3<sup>RD</sup> QUARTER 2006 EMPLOYMENT DECISIONS**

#### **Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S.     ;126 S.Ct. 2405, 165 L.Ed.2d 345 (June 22, 2006)**

This Supreme Court case, while technically decided prior to this quarter, is important enough to address here. The Burlington case has clarified “retaliation” under Title VII –previously some Circuits required the same standard for retaliation that they apply to a substantive discrimination offense, holding that the challenged action must “result in an adverse effect on the ‘terms, conditions, or benefits’ of employment.” Other circuits included behavior that would have been material to a reasonable employee, and others required an “ultimate” employment decision such as hiring, firing and demotion. Justice Breyer wrote that the anti-retaliation statute in Title VII, is not limited to stopping employment related behavior, but also forbids behavior that might occur outside the workplace. The court also determined however, that only those employer actions that would have been materially adverse to a reasonable employee or job applicant would be covered. Reassignment of duties can potentially constitute retaliatory discrimination within scope of Title VII retaliation provision, even though unaccompanied by demotion or change in pay – whether the reassignment rises to the level of retaliation will depend on whether it is materially adverse to a reasonable employee.

#### **Metropolitan Atlanta Rapid Transit Authority v. Mosley; --- S.E.2d ----, 2006 WL 1914633 (Ga.App.), 06 FCDR 2405, July 13, 2006**

Plaintiff was one of 600 employees supervised by the individual defendant. The defendant supervisor had previously had two grievances filed against him by other female employees. The Plaintiff contended that as she was walking into the dispatch office, the defendant supervisor appeared to wish to shake her hand, but as the Plaintiff took his hand, the supervisor allegedly spun her toward him so that her backside was compressed against the front of his body, he rubbed his hand along her side between her waist and underarm, squeezed her waist, “moaned” and then smiled. The interaction lasted for approximately two seconds. The supervisor later admitted hugging Plaintiff and denied the remaining allegations. Plaintiff filed an internal complaint and the supervisor was reprimanded and ordered to go to counseling. Plaintiff then sued the supervisor, and her employer, MARTA.

The Court of Appeals affirmed a granting of summary judgment on Plaintiff’s claim of intentional infliction of emotional distress holding that although crude and inappropriate, the supervisor’s actions did not rise to the necessary level to become intentional infliction of emotional distress - only appropriate “when a defendant’s conduct is so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community”.

However the Court of Appeals did state that the action for battery could be supported by even minimal touching. The Court held that “generally speaking, an “unlawful touching” is one which is offensive, and an “offensive touching” is one which proceeds from anger, rudeness, or lust; the test is what would be offensive to an ordinary person not unduly sensitive as to his dignity”. Therefore summary judgment was not appropriate for the battery claim against the supervisor. Because MARTA had notice of the supervisor’s tendencies to be sexually inappropriate, neither was summary judgment appropriate for the negligent retention claim against it, as it related to the battery claim.

Plaintiff also brought a claim against MARTA alleging that it failed to provide safe work environment but did not allege that her supervisor ever placed her in fear of her physical safety. The court held that the duty imposed upon an employer to provide its employees with a safe working environment contemplates safety in the physical sense; that is, the workplace be organized and maintained in such a manner as to minimize the likelihood of physical injury. As

Plaintiff's physical safety was not threatened, summary judgment on behalf of MARTA was appropriate for this claim.

**Remediation Resources, Inc. v. Balding;--- S.E.2d ----, 2006 WL 2271261 (Ga.App.), 06 FCDR 2590 (Aug. 9, 2006)**

**Gassaway v. Precon Corp.;--- S.E.2d ----, 2006 WL 1882673 (Ga.App.), 06 FCDR 2332 (July 10, 2006)**

These cases arose from automobile collisions in which the employer was sued under the theory of respondeat superior, and the Courts had to determine whether the employee was in the scope of employment. To determine whether the employer would be liable the plaintiff had to show that the employee was, at time of the accident, acting within the scope of his employment and on the business of the employer. Clearly an important issue is the ownership of the vehicle involved in the accident.

In the **Remediation** case a truck owned by the employer, and driven by the employee negligently struck the Plaintiff's deceased's vehicle. When a vehicle is owned by the employer and driven by an employee, there is a presumption that the employee is in the scope of his employment, and the burden is on the employer to show otherwise. Once the employer provides uncontroverted testimony that the employee was not in the scope, the burden shifts to the plaintiff to provide a fact that shows that the employee was in scope. That fact, the **Remediation** court held, can be minimal. The court was clear that all the Plaintiff had to show was that mingled in with a personal errand, the employee intended to also perform, at some time during the trip, a job related activity. This job related fact is sufficient, even if the trip would not have been made if not for the personal activity and even if the employee would not have requested that the employer pay for any of the employee's time doing the job related activity.

The **Remediation** court emphasized that this decision was because the employer owned the vehicle! In the event that the employee is in a vehicle owned by the employee, Georgia courts, including the **Gassaway** court, have required that the errand or mission itself must **specifically** be made at the employer's request or direction.

**Walker Elec. Co. v. Byrd; --- S.E.2d ----, 2006 WL 2382796 (8-18-06)**

Plaintiff was an "at-will" employee, who had been orally promised a per diem compensation in addition to hourly wages. The employee's relationship with the employer terminated and the employer refused to pay the per diem compensation already due the employee for work performed during his employment on the basis that he was an "at-will" employee. The court of appeals held that the employee had a valid cause of action for the employer's alleged breach of oral contract because the claim was based on services actually performed by him up to time of his discharge, and not for damages or for compensation for services not performed.

**Lockhart v. Marine Mfg. Corp.;--- S.E.2d ---, 2006 WL 2347824 (Ga.App.) Aug. 15, 2006**

The Georgia Court of Appeals again reiterated the difficulty in pursuing a claim of intentional infliction of emotional distress. The court made it clear that whether a claim rises to the requisite level of outrageousness and egregiousness to sustain such a claim for intentional infliction of emotional distress is a question of law. Plaintiff Lockhart, an African American, alleged that he experienced four incidents of racist-laden and insulting comments originating from three Marine employees, including his own supervisors. The first comment mentioned having the Ku Klux Klan visit his home, the second insinuated that he used food stamps, and in the third incident the plant manager swore at Mr. Lockhart, and the "n" word was used. Lockhart quit after the third incident, and the supervisor involved came to his home and apologized. Lockhart returned to work. The last incident occurred when the same supervisor who made the

KKK remarks, suggested that Mr. Lockhart sold drugs because he bought a boat. At no time did Lockhart complain to upper management about any of these incidents. He was terminated as a result of a fistfight with another employee.

The long standing requirement to prove a claim of intentional infliction of emotional distress is to show that: (1) the defendant's conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a casual connection between the wrongful conduct and the emotional distress; and (4) the emotional distress was severe.

Here, the Court of Appeals found that Lockhart's claim failed the second prong because the comments at issue fell "into the type of derogatory comments made in the workplace which generally are not considered extreme and outrageous." The court found that "comments made within the context of one's employment may be horrifying or traumatizing, but are generally considered a common vicissitude of ordinary life. Liability for intentional infliction of emotional distress has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.... Such does not include mere insults, indignities, threats, annoyances, petty oppressions, or other vicissitudes of daily living." The court said that Plaintiff Lockhart should have been hardened to the insults, although they were insulting and degrading remarks. The court pointed out that these four comments occurred over a fifteen month period of time. It also considered the fact that Lockhart did not complain about the remarks, and that they came from different people, and were not systematic abuse from one person. The court also took into consideration the apology for the worst incident, and the fact that Lockhart returned to work after the apology.

**Williams v. Asplundh Tree Expert Co.; Slip Copy, 2006 WL 2474042 (M.D.Fla.) Aug. 25, 2006**

This unpublished case from the Middle District of Florida raised an interesting issue. The Plaintiff sued his employer alleging, among other claims, that he was subject to a hostile work environment. The Employer raised the *Faragher* defense, alleging that the employer exercised reasonable care to prevent and correct any hostile work environment and further asserting that Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by Defendant or to avoid harm otherwise. Plaintiff did not, in this case, complain of harassment, while still an employee of employer.

The Plaintiff filed a Motion to seeking an Order requiring the Defendant employer to produce documents associated with its internal investigation into Plaintiff's allegations of harassment and discrimination. The Defendant employer withheld the documents claiming they were work product in that they were produced in anticipation of litigation. The Plaintiff argued Defendant waived any privilege by invoking the *Faragher* defense. The Court disagreed finding that simply asserting a *Faragher* defense did not automatically put the investigation at issue. The Court noted Defendant's assertion it would not use the investigation to support its affirmative defense but rather would show that it had a widely disseminated anti-discrimination and harassment policy, that Plaintiff was aware of the policy and failed to report any alleged discrimination or harassment until after his employment ended. The Court found that because Defendant was not attempting to assert the adequacy of its investigation as a defense, Defendant had not waived any work product protections.

**Clark v. St. Joseph's/Candler Health System, Inc.; Slip Copy, 2006 WL 2228929 (S.D.Ga.); Aug. 3, 2006**

This case has an excellent analysis of whether an employer has enough employees under Title VII (An "employer" for Title VII purposes is one that employs "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year."). The case includes an analysis of whether another entity is a joint employer, allowing the court to

find two ostensibly separate entities which are “highly integrated with respect to ownership and operations,” a single employer under Title VII, thereby meeting the numerosity requirement under Title VII.