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Proskauer Rose Files Amicus Brief in Major Employment Discrimination Case Now before the U.S. Supreme Court

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Decision in Burlington Northern & Santa Fe Railway Co. v. Sheila White Will Resolve Lower Court Dispute Over Definition of Unlawful Retaliation

With the U.S. Supreme Court poised to decide what constitutes actionable retaliation under Title VII of the Civil Rights Act of 1964, attorneys at Proskauer Rose LLP, an international law firm with one of the nation's top labor and employment practices, have filed an amicus brief in the case of Northern & Santa Fe Railway Co. v. Sheila White. Submitted on behalf of the Society for Human Resource Management (SHRM) and the National Federation of Independent Business (NFIB) Legal Foundation, the brief urges the Supreme Court to resolve disputes in lower courts by ruling that only final and formal tangible employment actions - such as hiring, firing, or failing to promote - may constitute discriminatory action on the part of an employer.

"The Supreme Court has previously promoted internal grievance procedures to resolve employee complaints under Title VII and limited the definition of actionable retaliation to tangible employment actions which encompass final, official acts of the employer," said Allan H. Weitzman, a partner in the Labor and Employment Department of Proskauer Rose who prepared the amicus brief along with Proskauer partners Paul Salvatore and Edward Cerasia II and associate Heather G. Magier. "In this case, the lower court's decision on behalf of the employee establishes a low threshold for actionable retaliation that encourages employees to bypass internal mechanisms and pursue litigation prematurely. This goes against the spirit and letter of Title VII as well as past decisions by the Supreme Court."

The case arises from a dispute between a Burlington Northern employee and her boss, who the employee claimed sexually harassed her. After the employee filed a complaint with the company, the supervisor was suspended and the employee was reassigned to a different position, which she had previously occupied, with equal pay and benefits. Soon after, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that her reassignment constituted retaliation and sex discrimination. In a subsequent unrelated incident, the employee was accused of insubordination and suspended without pay. However, an internal investigation found that she had not been insubordinate and she was reinstated with back pay.

The United States Court of Appeals for the Sixth Circuit ruled that these actions - the reassignment of the employee to a previously-held position and the reversal of her suspension with no economic harm - constituted unlawful retaliation because the employee suffered "...a materially adverse change in the terms of her employment." The Sixth Circuit also found that the fact that the employee participated in an internal grievance process did not preclude her from bringing action under Title VII.

However, it is the position of SHRM and NFIB Legal Foundation that the Sixth Circuit's decision, coupled with other lower courts' recognition of an expanding and volatile range of retaliation claims, jeopardizes legitimate employer

practices and opens the door for an increase in litigation.

"EEOC statistics show that Title VII retaliation complaints nearly doubled between 1992 and 2004 - from 10,499 claims to 20,240. A primary reason for this is confusion as to what does and doesn't constitute employer retaliation," said Proskauer's Weitzman. "The risk of even more litigation is real and there is an urgent need for clarity in this area."

SHRM and NFIB Legal Foundation would like the Court to overturn the Sixth Circuit's decision because, according to Proskauer's amicus brief: "...neither job transfers to equal paying positions nor interim suspensions that are subsequently overturned through internal complaint procedures constitute actionable retaliation under Title VII, because only a final, ultimate tangible employment action may be the basis for a claim of unlawful retaliation under Title VII."

Oral argument before the Supreme Court has not yet been scheduled in the case.

NFIB Legal Foundation is the voice for small business in the nation's courts and the legal resource for small business owners nationwide. With 600,000 members, NFIB is the nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. SHRM represents more than 200,000 members worldwide.

About Proskauer Rose

Proskauer Rose, founded in 1875, is one of the nation's largest law firms, providing a wide variety of legal services to clients throughout the United States and around the world from offices in New York, Los Angeles, Washington, D.C., Boston, Boca Raton, Newark, New Orleans and Paris. The firm has wide experience in all areas of practice important to businesses and individuals, including corporate finance, mergers and acquisitions, general commercial litigation, private equity and fund formation, patent and intellectual property litigation and prosecution, labor and employment law, real estate transactions, bankruptcy and reorganizations, trusts and estates, and taxation. Its clients span industries including chemicals, entertainment, financial services, health care, hospitality, information technology, insurance, internet, manufacturing, media and communications, pharmaceuticals, real estate investment, sports, and transportation. The firm can be found online at <http://www.proskauer.com>.

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