INTEREST OF AMICUS CURIAE AND STATEMENT OF CONSENT

The National Employment Lawyers Association (NELA) is a nationwide nonprofit, nonpartisan organization of approximately 3,000 lawyers who regularly litigate employee claims of employment discrimination under both federal and state Civil Rights Acts, and who seek to protect the integrity of those acts.

The ruling of the court below limits the scope of the retaliation provisions contained in all pertinent Civil Rights Acts, notwithstanding a recent decision of the United States Supreme Court that held that provisions of this type should be applied in a broader fashion. Because affirming the court below would threaten the ability of NELA lawyers to bring claims to remedy acts of retaliation arising from complaints of employment discrimination, would chill meritorious claims, and would represent an unwarranted departure from and contradiction of the U.S. Supreme Court's well-reasoned opinion, reversing the decision below is a matter of substantial concern to NELA, its members, and their clients. NELA has filed numerous amicus briefs in the United States Supreme Court and in the United States Courts of Appeals in all circuits.

The Florida Chapter was founded in 1993 and has approximately 200 participating attorneys around the state. The Florida Chapter's amicus activity has been mostly specialized in the area of the Florida Civil Rights Act -- the statute at

issue in the instant case. The Florida Supreme Court has accepted amicus briefs from Florida NELA in seven cases. Florida NELA has also filed numerous amicus briefs in the District Courts of Appeal, including filing as an amicus before this Court.

All parties have consented to Florida NELA's appearance in this case.

SUMMARY OF ARGUMENT

This action arises from a challenge to Defendant/Appellee Broward County Board of Commissioners' (hereafter "the County") policy of terminating internal investigations of discrimination complaints upon the filing of an administrative charge of discrimination. The lower court found that this policy did not result in adverse employment actions sufficient to support a claim for retaliation under the Florida Civil Rights Act (FCRA).

The ruling of the lower court is contrary to the plain language of the retaliation provision of the FCRA which, as confirmed by a recent opinion of the U.S. Supreme Court, must be read more expansively.[1] The correct inquiry is not whether the challenged action falls within a finite list of employment decisions deemed to be "tangible." Rather, the court should have considered whether the challenged policy would tend to dissuade a reasonable employee from filing an administrative charge of discrimination.

Applying the correct standard, it is clear that the policy meets the definition of an adverse employment action. Under this policy, employees must choose between the benefits of seeking internal remedies, and the right to seek review by a government agency. This is a choice that employers are not permitted to impose

[1] That decision was rendered under Title VII of the Civil Rights Act of 1964. Title VII's provisions, including those prohibiting retaliation, are substantively identical to the FCRA. In fact, the FCRA was patterned after Title VII. Consequently, federal case law interpreting Title VII is applicable to the FCRA. See, e.g., Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla. 2000); Brown Distrib. Co. of West Palm Beach v. Marcell, 890 So.2d 1227, 1230, n. 1 (Fla. 4th DCA 2005).

upon employees. Consequently, the lower court erred in granting the County's Motion to Dismiss.

ARGUMENT

I. Standard of Review

The question presented for review in this brief is an issue of statutory interpretation. The court below ruled on this issue as a matter of law and, consequently, this review involves a purely legal issue that is subject to the *de novo* standard. See, e.g., Maggio v. Florida Department of Labor & Employment Security, 899 So.2d 1074 (Fla. 2005).

II. The Lower Court's Narrow Application of the FCRA's Retaliation Provision is Contrary to Recent U.S. Supreme Court Precedent.

A. The Plain Language of the FCRA, as Confirmed by the U.S. Supreme Court in Burlington Northern, Favors an Expansive Prohibition Against Retaliation.

The retaliation provision of the FCRA provides as follows:

> It is an unlawful employment practice for an employer…to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

Florida Statute 760.10(7). By its plain meaning, this provision prohibits all employer actions that are motivated by an employee's protected activities of opposing or seeking relief from unlawful discrimination. However, despite this clear language, a consensus of opinion regarding the appropriate scope of this and similar federal statutory retaliation provisions failed to emerge from decades of

litigation. Instead, numerous opinions limiting claims of retaliation to "ultimate employment actions" such as discharge, pay decreases and demotions, undermined clear statutory provisions and substantially clouded this issue.

These clouds of uncertainty finally parted with the issuance of the United States Supreme Court's Opinion in Burlington Northern & Santa Fe Railway Company v. White, 126 S.Ct. 2405; 165 L.Ed.2.d 345 (2006). There, the Court, interpreting the retaliation provision set forth in Title VII of the Civil Rights Act of 1964, rejected the notion that this provision extends only to "ultimate employment decisions." 126 S.Ct. at 2414. Rather, this provision prohibits any action that a reasonable employee would find to be "materially adverse," such that it might dissuade him or her from making or supporting a charge of discrimination. Id. at 2415.

Under the clarified standard set out in Burlington Northern, courts should no longer merely consider the *nature* of the action alleged to be retaliatory. No longer is there a finite list of actions deemed sufficiently tangible to rise to the level of adverse employment actions. Instead, the focus must be on the *impact* the challenged action would likely have upon a reasonable employee wishing to oppose an unlawful practice or to participate in the investigation of a charge.

The Court in Burlington Northern provided several illustrative examples of this *impact* analysis. For example, the Court noted that:

> a change in an employee's work schedule may make

> little difference to many workers, but may matter enormously to a mother with school age children.

126 S.Ct. at 2415. Similarly, the Court stated:

> a supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Id. at 2415-16. Applying this line of reasoning, the Court found that the plaintiff's suspension (notwithstanding the fact that she was reimbursed for all lost wages), nonetheless was sufficient to support a retaliation claim, as the suspension (which occurred during the Christmas season) caused uncertainty, stress and emotional anguish during the month she went without a paycheck. Id. at 2417.

B. Contrary to Burlington Northern, the Lower Court Narrowed the Scope of the FCRA's Retaliation Provision.

Against this backdrop, the lower court had occasion to evaluate a somewhat unusual example of retaliatory conduct. The County currently maintains a policy requiring the discontinuation of the internal investigation of complaints of discrimination immediately upon the filing of an administrative charge with the United States Equal Employment Opportunity Commission (EEOC) or the Florida Commission on Human Relations (FCHR). The lower court concluded that this policy was not "discriminatory per se" because Plaintiffs/Appellants did not "set

forth any entitlement to an internal investigation," nor did they allege that the policy impacted their "job, working conditions, or compensation." Order on Defendant's Motion to Dismiss, p. 3.

In using this terminology, the lower court demonstrated that, despite the ruling in Burlington Northern, its focus was the *nature* of the challenged policy, rather than its *impact* upon Plaintiffs/Appellants. The court's disregarding of Burlington Northern is further evinced by the case law relied upon by the lower court. For example, the lower court relied heavily upon Reilly v. Metro-North Commuter Railroad Company, 1996 WL 665620 (S.D.N.Y. 1996), and Browne v. City University of New York, 419 F.Supp. 2d 315 (E.D.N.Y. 2005). However, these decisions were rendered under Second Circuit precedent, which utilized a narrow definition of the term "adverse employment action" in evaluating retaliation claims. This line of cases is no longer applicable, post-Burlington Northern, as was recently noted:

> The Supreme Court's decision in White altered the standard previously used by the Second Circuit, which defined an adverse employment action as a "materially adverse change in the terms and conditions of employment [that] is more disruptive than a mere inconvenience or an alteration of job responsibilities." Under that standard, prototypical examples of adverse employment actions included termination, demotion via a reduced wage, salary or job title, a material loss of benefits, or significantly reduced job responsibilities. White however, found that standards such as these **improperly limited Title VII's antiretaliation provision to retaliatory actions that affect the terms**

and conditions of employment.

Spector v. Board of Trustees of Community-Technical Colleges, 463 F.Supp.2d 234, 248 (D.Conn. 2006) (emphasis added) (citations omitted).[2]

C. Under the Burlington Northern Standard, Plaintiffs/Appellants Were Subjected to an Adverse Employment Action.

Applying the correct standard, the impact of the County's policy is evident, and unquestionably falls well within the Burlington Northern definition of "adverse employment action."[3] Indeed, to find that a reasonable employee would not deem exclusion from the internal investigation mechanism to be materially adverse to his or her interests would require a court to accept the premise that such mechanisms exist solely for the benefit of the employer. Clearly, this is not the case. Employees benefit greatly from internal investigations. They provide employees with an opportunity to resolve disputes in a setting that is more expedient and less adversarial than the litigation process. Moreover, due the informal nature of such investigations, and the lack of a third-party decision maker who can impose an outcome, both the employer and co-worker witnesses are typically more open and receptive to internal investigations as compared to

[2] Another decision relied upon by the lower court, Lynch v. Baylor University Medical Center, 2006 WL 2456493 (N.D.Tex. 2006), likewise was rendered prior to Burlington Northern and expressly relied upon the now overturned 2nd Circuit precedent.

[3] Other courts, applying an "impact analysis" of the type required by Burlington Northern, previously concluded that policies of this type are sufficiently material to support claims of retaliation. For example, in EEOC v. Board of Governors of State Colleges and Universities, 957 F.2d 424, 431 (7th Cir. 1997), the court found that a collective bargaining agreement provision that mandated that internal grievance procedures be discontinued upon the filing of a charge of discrimination was retaliatory because it would allow the employer to "deter its employees' exercise of their… rights by imposing adverse employment consequences."

litigation. This open approach, in many cases, results in an outcome that permits the employee to maintain a positive working relationship with his or her employer. Thus, when an investigation is terminated because an employee has filed an administrative charge of discrimination (which is merely a precursor to potential litigation), a materially adverse consequence is visited upon the employee.

The lower court's ruling suggests that the County's policy merely "requires an employee to use the proceedings [internal investigation, administrative charge] sequentially rather than simultaneously. Order on Defendant's Motion to Dismiss, p.3. However, in making this statement, the Court ignores a key practical consideration. While an internal investigation is taking place, the statute of limitations within which an administrative charge must be filed continues to run. Consequently, under the County's policy, an employee may not have the opportunity to "use the proceedings sequentially" without risking the loss of the right to proceed under the FCRA or Title VII. Rather, employees can be placed in a "Catch-22," having to choose between filing a charge and losing access to internal dispute resolution mechanisms, or continuing to seek an internal remedy and losing the right to bring a formal charge if those efforts fail. Employees should not be placed in such an untenable position when attempting to vindicate their statutorily protected rights.

CONCLUSION

Employees who believe they have been subjected to discriminatory practices are not required to exhaust internal dispute resolution mechanisms established by their employers. When such mechanisms are utilized, it is because the employee elects to initiate a grievance, in the hope of obtaining a remedy. The mere fact that employees choose to invoke these procedures is proof enough that they believe that doing so will conveys a material benefit upon them.

The County's policy removes this benefit upon the filing of an administrative charge of discrimination. Thus, the policy will tend to dissuade a reasonable employee from filing a charge. This is precisely what retaliation provisions (such as the one set forth in the FCRA), as interpreted in Burlington Northern, are designed to prevent and prohibit.

Therefore, this court should reverse the decision of the circuit court and remand this action for further proceedings.

David H. Spalter, Esq.
Florida Bar No. 858323
Jill S. Schwartz & Associates, P.A.
180 North Park Avenue, Suite 200
Winter Park, Florida 32789
Telephone: (407) 647-8911
Facsimile: (407) 628-4996
Email: dspalter@schwartzlawfirm.net

Counsel for Amicus Curiae
National Employment Lawyers
Association, Florida Chapter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail this __ day of May, 2007, upon Andrew J. Meyers, Esq., Jeffrey J. Newton, Esq., James D. Rowlee, Esq., Broward County Attorneys' Office, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301, and to William Amlong and Karen Coolman Amlong, Amlong & Amlong, P.A.,500 Northeast Fourth Street, Fort Lauderdale, Florida 33301.

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David H. Spalter

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

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David H. Spalter