No. 06-1172

# In the Supreme Court of the United States

ROLAND JOHNSON, PETITIONER

*v.*

JOHN E. POTTER, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
PETER D. KEISLER
*Assistant Attorney General*
MARLEIGH DOVER
KELSI BROWN CORKRAN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the court of appeals properly held that petitioner's employment discrimination claims that were or could have been raised in petitioner's prior lawsuit were barred by res judicata.

2. Whether the court of appeals properly rejected petitioner's constructive discharge claim.

3. Whether the court of appeals properly rejected petitioner's remaining retaliation claim.

## TABLE OF CONTENTS

Page

Opinions below . . . . . 1
Jurisdiction . . . . . 1
Statement . . . . . 1
Argument . . . . . 4
Conclusion . . . . . 9

## TABLE OF AUTHORITIES

Case:

*Burlington N. & Santa Fe Ry.* v. *White,* 126 S. Ct. 2405 (2006) . . . . . 4, 7

Statutes:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* . . . . . 2
42 U.S.C. 2000e-3(a) . . . . . 7, 8
42 U.S.C. 2000e-16 (2000 & Supp. IV 2004) . . . . . 5, 8
42 U.S.C. 2000e-16(a) (2000 & Supp. IV 2004) . . . 5, 9
Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* . . . . . 2

# In the Supreme Court of the United States

No. 06-1172

ROLAND JOHNSON, PETITIONER

*v.*

JOHN E. POTTER, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A6) is not published in the *Federal Reporter*, but is reprinted in 184 Fed. Appx. 138. The opinion of the district court (Pet. App. A9-A39) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 7, 2006. A petition for rehearing was denied on November 29, 2006 (Pet. App. A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In 1990, petitioner filed an employment discrimination suit against the United States Postal Service (Postal Service), alleging that the Postal Service had

denied him a promotion because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Pet. App. A5. The parties eventually agreed to settle the case. *Ibid*. In January 2002, petitioner filed a second Title VII lawsuit against the Postal Service (*Johnson II),* alleging that his supervisors had engaged in acts of retaliation against him because he had filed the first suit. *Ibid*. The district court granted summary judgment to the Postal Service, and the court of appeals summarily affirmed. *Id*. at A4-A6.

2. While the second lawsuit was still pending, petitioner filed a third Title VII lawsuit against the Postal Service (*Johnson III*), this time alleging both retaliation and constructive discharge. The district court granted summary judgment to the Postal Service on both claims. Pet. App. A9-A39.

The district court first held that all but two of petitioner's claims had been rejected in *Johnson II*, and that petitioner's effort to relitigate those claims was therefore barred by res judicata. Pet. App. A35-A36. The court identified petitioner's remaining two claims as a claim that a Postal Service administrator had allegedly retaliated against him by requiring excessive documentation to support his claim for leave under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, and a claim that a supervisor had allegedly retaliated against him by telling him, inter alia, that "if anyone were to be fired, he would be the first to go." Pet. App. A22, A35.

The district court held that the "excessive documentation" claim was barred by res judicata because petitioner could have raised that claim in *Johnson II*, but failed to do so. Pet. App. A35-A36. The court also concluded that petitioner's "excessive documentation" claim

failed on the merits, both because petitioner failed to establish that he had suffered an adverse employment action, and because petitioner failed to refute the Postal Service's evidence that the administrator had no knowledge of petitioner's protected activity. *Id.* at A36.

The district court rejected petitioner's claim that his supervisor's remarks constituted actionable retaliation. Pet. App. A22. The court concluded that the alleged remarks were insufficient to constitute an adverse employment action. *Id.* at A36. The court also concluded that petitioner had failed to refute the supervisor's legitimate non-discriminatory explanation for the remark about petitioner being the first to go. *Id.* at A36-A37.

The district court also ruled against petitioner on his constructive discharge claim. Pet. App. A37-A38. The court concluded that collateral estoppel barred most of the underlying allegations, but that even if collateral estoppel did not apply, the allegations fell far short of establishing constructive discharge. *Ibid.*

The district court also concluded that petitioner was not entitled to additional discovery on his retaliation and constructive discharge claims. Pet. App. A34-A35. The court explained that petitioner had ample opportunity to conduct discovery in *Johnson II*, and that petitioner had not shown how additional discovery would assist his claims. *Ibid.*

3. The court of appeals summarily affirmed by an unpublished decision. Pet. App. A3-A6. The court held that res judicata barred all of petitioner's claims that were or could have been litigated in *Johnson II*. *Id.* at A5. The court held that petitioner's new allegations of retaliation were insufficient to constitute actionable retaliation because a necessary element of a retaliation claim is an "adverse employment action," and petitioner

had failed to satisfy that element. *Ibid.* The court of appeals also held that petitioner's allegations were insufficient to support an inference of constructive discharge. *Ibid.* Finally, the court of appeals held that the district court did not abuse its discretion in failing to grant petitioner additional discovery. *Id.* at A6.

4. After the court of appeals issued its summary affirmance, this Court decided *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006) (*Burlington Northern*). In that case, the Court held that a plaintiff alleging retaliation "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." *Id.* at 2415 (citation and internal quotation marks omitted). In a petition for rehearing, petitioner argued that the court of appeals' decision relied on a definition of retaliation that was inconsistent with the *Burlington Northern* standard. The petition for rehearing was denied. Pet. App. A1-A2.

**ARGUMENT**

Petitioner contends that the decision below conflicts with this Court's decision in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). For all but one of petitioner's claims, the court of appeals ruled in favor of the Postal Service for reasons unrelated to the holding in *Burlington Northern*. With respect to one claim, the court relied on a standard for retaliation that is different than the one announced in *Burlington Northern*. But petitioner brought *Burlington Northern* to the court's attention in his petition for rehearing, and the court denied the petition; the question whether peti-

tioner's allegations meet the *Burlington Northern* is fact-bound; and a plaintiff seeking to prove a retaliation claim against the federal government must show that alleged retaliation took the form of a "personnel action[]," 42 U.S.C. 2000e-16(a) (2000 & Supp. IV 2004), a requirement that petitioner has failed to satisfy here. The petition for a writ of certiorari should therefore be denied.

1. The district court dismissed all but two of petitioner's retaliation claims on the ground that it had rejected them in an earlier lawsuit and that petitioner's effort to relitigate them was therefore barred by res judicata. Pet. App. A35-A36. The district court also dismissed one of the two remaining retaliation claims —the "excessive documentation" claim—on res judicata grounds, explaining that petitioner had the opportunity to include that claim in the earlier lawsuit but had not done so. *Ibid.* The court of appeals affirmed those res judicata rulings. *Id.* at A5. The court held that "[t]he District Court correctly determined that, in so far as [petitioner] alleged claims for retaliation that were [or] could have been raised in *Johnson II*, his claims were barred by res judicata." *Ibid.* Because nothing in *Burlington Northern* has any bearing on the doctrine of res judicata, *Burlington Northern* provides no basis for reexamining those fact-bound claims, and they otherwise do not merit review.

2. *Burlington Northern* also has no bearing on the dismissal of petitioner's constructive discharge claim. The court of appeals held that petitioner's allegations "fall far short of establishing a constructive discharge." Pet. App. A5. The court explained that petitioner's allegations "do not legally suffice to sustain an inference that a reasonable person would have been compelled to

resign." *Id.* at A5-A6 (citation and internal quotation marks omitted). Because *Burlington Northern* addressed the standard for proving retaliation, and did not address the standard for proving a constructive discharge, *Burlington Northern* provides no basis for reexamining petitioner's constructive discharge claim. Likewise, that fact-bound claim does not otherwise merit review.

3. *Burlington Northern* is also inapplicable to petitioner's claim that he was entitled to conduct additional discovery. The district court denied petitioner's request for additional discovery because petitioner "already had a full opportunity" to conduct discovery in *Johnson II*, and because petitioner failed to show that additional discovery "would be helpful." Pet. App. A34. The court of appeals affirmed, explaining that petitioner "had already enjoyed a full opportunity to conduct discovery in *Johnson II*," and that petitioner "failed to identify any new facts as to which he needed discovery that might reasonably [be] expected to raise a genuine issue of material fact." *Id.* at A6 (brackets in original; citation and internal quotation marks omitted). Petitioner has not offered any basis for revisiting those determinations in light of *Burlington Northern*. In particular, he has not identified any facts that he sought to uncover through discovery that were irrelevant under the standard applied by the court of appeals, but relevant under *Burlington Northern*. And that claim does not otherwise merit review.

4. That leaves only petitioner's claim that his supervisor's remarks constituted actionable retaliation. Petitioner alleges that, after he wrote a letter to his supervisor complaining of harassment, his supervisor "confronted him about the letter," stating "why don't you be

a man and talk about the letter." Pet. App. A73. According to petitioner, his supervisor also stated that she knew that petitioner's "problem" was that he was "seeing 'dollar signs,' and that it wasn't going to happen off 'her career.'" *Ibid.* Petitioner also alleges that his supervisor told him that "if anyone were to be fired, he would be 'the first to go.'" *Ibid.*

The district court dismissed the claim on the ground that those remarks did not establish an adverse employment action, either separately or together. The district court also held that petitioner had failed to rebut the legitimate non-discriminatory reason for the "first to go" comment—that the Postal Service had legitimate business reasons for eliminating petitioner's position and that he had the least seniority among the clerks. Pet. App. A36-A37. The court of appeals affirmed, holding that the alleged comments were insufficient to establish an "adverse employment action." *Id.* at A5.

In *Burlington Northern*, the Court held that a plaintiff alleging retaliation under 42 U.S.C. 2000e-3(a) need not establish that a challenged action is "employment-related." 126 S. Ct. at 2414. Instead, the Court held that such 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." *Id.* at 2415 (citation and internal quotation marks omitted). The court of appeals issued its decision prior to this Court's decision in *Burlington Northern*, and it did not apply the *Burlington Northern* standard in assessing the legal sufficiency of petitioner's claim that his supervisor's comments constituted actionable retaliation. For several reasons, however, there is no need in this case to

vacate the judgment and remand the case for reconsideration in light of *Burlington Northern*.

First, the court of appeals had an opportunity to reconsider its decision in light of *Burlington Northern*, and it refused to alter the result. In his petition for rehearing, petitioner argued that *Burlington Northern* required the court of appeals to vacate its decision. The court of appeals, however, denied the petition for rehearing.

Second, the supervisor's alleged remarks do not necessarily constitute actionable retaliation under the *Burlington Northern* standard. That is particularly true when the comments are interpreted in the context in which they were allegedly made—that the Postal Service had legitimate business reasons for eliminating petitioner's position and that petitioner had the least seniority among the clerks. Pet. App. A36-A37. In addition, the comment about a "firing" ("if anyone was fired, he would be the first to go") was not addressed specifically to petitioner but instead was made in the subjective as to "anyone." And petitioner does not allege that anyone at the Postal Service ever attempted to fire him. The question whether the alleged remarks satisfy the *Burlington Northern* standard is fact-bound and therefore does not warrant review.

Third, *Burlington Northern* established the standard for proving retaliation under the anti-retaliation prohibition in Section 2000e-3(a), and that prohibition does not apply to the federal government. Instead, any retaliation claim against the federal government must be brought under 42 U.S.C. 2000e-16 (2000 & Supp IV 2004), which expressly limits the federal government's waiver of sovereign immunity to "personnel actions affecting" federal employees. Petitioner has failed to ex-

plain how the supervisor's alleged remarks could constitute a "personnel action[]" within the meaning of Section 2000e-16(a).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

PETER D. KEISLER
*Assistant Attorney General*

MARLEIGH DOVER
KELSI BROWN CORKRAN
*Attorneys*

MAY 2007