EXPANDING THE SCOPE OF THE EXPANSIVE APPROACH: THE *BURLINGTON NORTHERN* STANDARD AS A PER SE APPROACH TO FEDERAL ANTI-RETALIATION LAW

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"Revenge is a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out."[1]

INTRODUCTION

Retaliation is a remarkable social phenomenon with countless forms and far-reaching effects. The mere mention of the word causes employers to cringe in fear of a lawsuit, and the prospect of experiencing it can dissuade employees from taking part in statutorily protected activity. Moreover, subtle retaliatory acts have the potential to undermine the purpose of even the most skillfully drafted legislation. In the past, however, legal scholarship has tended to place little emphasis on retaliation, generally treating it as a minor component in the larger scheme of discrimination law. As this Note contends, the effects of retaliation reach far beyond discrimination law and warrant a greater understanding of its potential to generally influence the enforcement of federal law.

Section 703(a) of Title VII of the Civil Rights Act of 1964 prohibits private and public employers with fifteen or more employees[2] from discriminating against those employees on the basis of "race, color, religion, sex, or national origin."[3] In enacting this provision, however, Congress was concerned employers

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1. FRANCIS BACON, *Of Revenge*, *in* THE ESSAYS 72, 72 (John Pitcher ed., 1985).
2. Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2006).
3. 42 U.S.C. § 2000e-2(a)(1). It is unlawful for an employer
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

might circumvent the prohibition on discrimination by misusing their authority to dissuade employees from ever reporting unlawful conduct.[4] To protect against this possibility, and to encourage employees to report discrimination,[5] Congress was also careful to include language making it unlawful for employers to discriminate against employees who undertake action to carry out the underlying purposes of the Act's anti-discrimination provision.[6] Accordingly, section 704(a) prohibits employers from "discriminat[ing]" against employees who take part in protected activities,[7] such as opposing or refusing to participate in an unlawful practice,[8] filing a charge, or participating in an investigation, hearing, or proceeding.[9]

Just as Congress feared, however, employers commonly exploit their inherent power in order to deter employees from exercising their rights under section 704(a).[10] The case of Sheila White, which gave rise to *Burlington Northern & Santa Fe Railway Co. v. White*,[11] is but one of these stories. White worked as a forklift driver and track laborer for Burlington Northern and Santa Fe Railway Co. (Burlington) in Memphis, Tennessee, where male employees subjected her to ongoing sexual harassment and insults.[12] White reported the conduct to Burlington and was soon removed from forklift duties and assigned full-time to the less

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> individual of employment opportunities or otherwise adversely affect his status as an employee . . . .

Id. § 2000e-2(a).

4. Nancy Landis Caplinger & Diane S. Worth, *Vengeance is Not Mine: A Survey of the Law of Title VII Retaliation*, 73 J. KAN. B. ASS'N 20, 21 (2004).

5. *See* Sweeney v. West, 149 F.3d 550, 556 (7th Cir. 1998) ("The undoubted purpose of Title VII's prohibition against retaliation is to prevent employers from discouraging complaints or otherwise chilling the exercise of an employee's rights.").

6. Caplinger & Worth, *supra* note 4, at 21.

7. 42 U.S.C. § 2000e-3(a).

8. *See, e.g.*, Moyo v. Gomez, 32 F.3d 1382, 1385 (9th Cir. 1994) (finding prison guard engaged in protected activity in refusing to follow policy of denying showers to black inmates).

9. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding Title VII protects former employees who file an Equal Employment Opportunity Commission (EEOC) charge); Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999) (finding "all testimony in a Title VII proceeding is protected against punitive employer action"). For a detailed discussion of what constitutes a "protected activity" under Title VII, see Peter M. Panken, *Retaliation: The New Vogue in Employment Litigation—Don't Get Mad, Don't Get Even, Just Be Savvy*, *in* ALI-ABA COURSE OF STUDY 539–53 (2006), *available at* SL011 ALI-ABA 531, 539–53 (Westlaw).

10. Studies show that only a small percentage of women who experience sexual harassment report it. Those who do report it often fear retaliation by their employer. Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMP. RTS. & EMP. POL'Y J. 549, 586–87 (2001); *see also* David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1280 (2001) (discussing study finding 42% of women who sued their employers for sexual harassment did not report the harassment to their employers before suing, and only 15% did so in a timely manner).

11. 126 S. Ct. 2405 (2006).

12. *Id.* at 2409.

desirable and more physically arduous position as a general track laborer.[13] After she filed joint discrimination and retaliation claims with the Equal Employment Opportunity Commission (EEOC), White's supervisor suspended her for thirty-seven days without pay.[14] White filed suit against Burlington and was awarded $43,500 in compensatory damages on her retaliation claim.[15]

In reviewing the scope of Burlington's liability, the Supreme Court faced the broader task of construing the types of retaliatory behavior actually prohibited by section 704(a).[16] Recognizing that the underlying purpose of Title VII's ban on employment discrimination would be completely undermined absent a broad construction of the anti-retaliation provision, the Court adopted an expansive definition of the term "discriminate against," concluding that an employee may prevail on a claim of retaliation by proving that the employer's conduct was "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination."[17]

Currently, at least forty-two other federal statutes include similar provisions prohibiting employers from retaliating against employees who report violations of particular federal statutes.[18] This list includes well-recognized statutes, such as the Family and Medical Leave Act (FMLA),[19] the Age Discrimination in Employment Act (ADEA),[20] and the Fair Labor Standards Act (FLSA).[21] Many lesser known statutes, however, also contain such provisions, including laws governing the disclosure of asbestos hazards in schools,[22] mine safety,[23] and water pollution prevention.[24] Given the *Burlington Northern* Court's broad construction of Title VII retaliation, the question remains whether the lower federal courts will apply similar standards when interpreting the scope of the anti-retaliation provisions promulgated by these other laws.

This Note advises the lower courts to adopt the deterrence standard in determining the extent to which an employer's reprisals are actionable. Compared with other approaches,[25] this standard most effectively realizes Congress's intent; it encourages employee utilization of internal grievance mechanisms and promotes

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13. *Id.*
14. *Id.*
15. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 794 (6th Cir. 2004) (en banc), *aff'd*, 126 S. Ct. 2405.
16. *Burlington Northern*, 126 S. Ct. at 2408.
17. *Id.* at 2408-09. This standard is referred to as the "deterrence standard" or the "expansive approach" in this Note.
18. Brief for Respondent at 21, *Burlington Northern*, 126 S. Ct. 2405 (No. 05-259). For a complete list of these other federal statutes, see *infra* Appendix.
19. 29 U.S.C. § 2615(a) (2006).
20. 29 U.S.C. § 623(d) (2006).
21. 29 U.S.C. § 215(a)(3) (2006).
22. 20 U.S.C. § 3608 (2006).
23. 30 U.S.C. § 815(c)(1) (2006).
24. 33 U.S.C. § 1367(a) (2006).
25. *See infra* notes 31–39 and accompanying text.

employers' voluntary compliance with the law.[26] From a practical standpoint, the deterrence standard also forms the most workable criterion for judging retaliatory conduct.[27]

The objectives of this Note are threefold: (1) to analyze the *Burlington Northern* decision and the effect it will have on the lower federal courts' treatment of Title VII retaliation and discrimination claims; (2) to highlight the many other federal statutes that include provisions prohibiting retaliatory treatment of employees who engage in protected activities; and (3) to propose that *Burlington Northern*'s deterrence standard should be adopted as a per se rule in construing employee rights under such federal statutes.

I. *BURLINGTON NORTHERN* AND THE CHARACTERIZATION OF ACTIONABLE RETALIATION

A. Divergent Approaches to Retaliation

Prior to *Burlington Northern*, the courts of appeals struggled to define what type of conduct constitutes adverse employment action under Title VII.[28] In particular, these inquiries focused on the application of the term "discriminate against" under section 704(a): "Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?"[29] Given the variance of pre-*Burlington Northern* decisions, employers across the country were able to "get away" with vastly disparate degrees of behavior aimed at deterring employees from reporting or opposing unlawful discrimination.[30] These decisions fall into three main groups: restrictive, intermediate, and expansive.[31]

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26. *See* Brief of the National Women's Law Central et al. as Amici Curiae Supporting Respondent at 16–17, Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (No.05-259) ("The deterrence standard is also consistent with [the] Court's decisions seeking to increase voluntary resolution of discrimination complaints through internal grievance procedures."); *infra* notes 154–192 and accompanying text.

27. *See infra* notes 205–207 and accompanying text.

28. *Compare* Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding transfer involving only minor changes in working conditions and no reduction in pay or benefits was not adverse employment action), *and* Mattern v. Eastman Kodak Co., 104 F.3d 702, 703–04 (5th Cir. 1997) (holding hostility from fellow employees, theft of employee's tools, verbal threat of termination, and reprimand for not being at assigned station were not adverse employment actions), *with* Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) ("[M]oving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments" could constitute adverse employment action.), *and* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455 (11th Cir. 1998) (holding that requiring plaintiff to work without lunch break, imposing one-day suspension, soliciting other employees for negative statements about employee, changing schedule without notification, and delaying authorization for medical treatment were adverse employment actions).

29. *Burlington Northern*, 126 S. Ct. at 2408.

30. *See supra* text accompanying note 28.

31. *See, e.g.*, Brian A. Riddell & Richard A. Bales, *Adverse Employment Action in Retaliation Cases*, 34 U. BALT. L. REV. 313, 313–14 (2005); Joan M. Savage, Note,

1. Restrictive Approach

Under one line of cases, the Fifth and Eighth Circuits applied the same standard for retaliation claims as that used in substantive discrimination claims under section 703(a).[32] Accordingly, section 704(a) did no more than prohibit employers from utilizing "ultimate employment decisions"[33] to retaliate against workers who engaged in protected activities. Such decisions included termination, demotion, granting leave, and reducing compensation.[34] Under this standard, an employer only would be liable for the most egregious forms of retaliatory conduct, even though more subtle acts might have just as easily and effectively dissuaded employees from reporting or opposing unlawful discrimination.[35] From an employer's perspective, however, this standard provided welcome insulation from liability for conduct only tangentially related to ultimate decisions.[36]

2. Intermediate Approach

A second group of cases decided by the Third, Fourth, and Sixth Circuits required a strong connection between the retaliatory conduct and the employment.[37] In general, these cases required plaintiffs to show they suffered

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Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation, 46 B.C. L. REV. 215, 216 (2004).

32. *Burlington Northern*, 126 S. Ct. at 2410.

33. Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997); *see also* Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (holding that mishandling of disability benefits and hostility directed towards employees by supervisors does not constitute adverse employment action absent evidence of change in work duties or conditions constituting material disadvantage).

34. Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995). In *Dollis*, the plaintiff alleged, *inter alia*, that she was refused opportunities for promotion, denied attendance at a training conference, and given false information regarding the procedure for procuring government travel funds. *Id.* at 779–80. The court found these were not in themselves "ultimate employment decisions" although they "arguably might have some tangential effect upon those ultimate decisions." *Id.* at 781–82.

35. *See Burlington Northern*, 126 S. Ct. at 2415–16. The Court provided examples of the potential effects of subtle forms of retaliation:

> A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. 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. (citations omitted).

36. *See Dollis*, 77 F.3d at 781–82 ("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.").

37. *See Burlington Northern*, 126 S. Ct. at 2410. In fact, the Sixth Circuit majority in this case applied an "adverse employment action" standard, finding that a plaintiff must show "materially adverse change in the terms and conditions of [the plaintiff's] employment." White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795

"materially adverse action" that negatively affected the "terms, conditions, or benefits of [their] employment."[38] Although this criterion allowed for greater recovery by employees than did the "ultimate decision" standard, advocates of a more expansive approach criticized its failure to recognize that retaliation takes many forms and that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships [that] are not fully captured by a simple recitation of the words used or the physical acts performed."[39]

3. Expansive Approach

Employees under the jurisdiction of the First, Seventh, Ninth, Eleventh and D.C. Circuits were fortunate to enjoy the broadest construction of section 704(a). Under the expansive approach, any materially adverse action reasonably likely to deter an employee from engaging in a protected activity constituted actionable retaliation.[40] Thus, an employer faced potential liability for unlawful retaliation even though the charged conduct was not an "ultimate decision" or one with a close nexus to the employment, so long as it might have dissuaded a reasonable worker from exercising his or her rights under section 704(a).[41]

(6th Cir. 2004) (en banc) (citing Hollins v. Atl. Co., 188 F.3d 652, 662 (6th Cir. 1999)) (alteration in original), *aff'd*, 126 S. Ct. 2405; *see also* Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997) (holding that requests by university officials that employee drop EEOC charge of racial and sexual harassment did not constitute retaliation after employee refused requests, absent evidence of "a materially adverse change in the terms and conditions of employment"); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (Derogatory comments and uncorroborated oral reprimands suffered by police officer did not rise to level of adverse employment action, as such conduct did not affect "compensation, terms, conditions, or privileges of employment.").

38. Von Gunten v. Maryland, 243 F.3d 858, 865–66 (4th Cir. 2001) (holding that temporary withdrawal of use of state vehicle and downgraded performance review were not actionable retaliation where use of vehicle was not employment "benefit" and performance review did not affect "a term, condition, or benefit of employment").

39. *Burlington Northern*, 126 S. Ct. at 2415 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998)).

40. *See, e.g.*, Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006) (holding Federal Bureau of Investigation's refusal to investigate death threats made against agent constituted actionable retaliation where such conduct was motivated by an intent to retaliate against agent for previously filing race discrimination claim); Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) (holding removal of employee's "flex-time" schedule could constitute actionable retaliation as schedule was specifically designed to accommodate employee's expressed need to care for disabled son); Marrero v. Goya of P.R., Inc., 304 F.3d 7, 23 (1st Cir. 2002) (holding transfer not affecting salary or job description after secretary filed EEOC charge did not constitute materially adverse action as "gauged by an objective standard"); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455–57 (11th Cir. 1998) (holding that depriving employee of lunch break, suspending from work, asking employees for negative statements about particular employee, changing schedule without notice, and delaying authorization for medical treatment constituted adverse employment actions).

41. The Ninth Circuit standard announced in *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), afforded an arguably greater degree of protection to employees. Plaintiffs in this circuit needed only show "adverse treatment that is based on a retaliatory motive and is

Advocates of this approach argue the expansive construction of retaliation is sufficient to encompass all types of conduct aimed at dissuading workers from reporting unlawful activity.[42] In addition, they contend that the materiality requirement makes it unlikely "petty slights, minor annoyances, and simple lack of good manners" will form actionable offenses.[43]

B. The Supreme Court Weighs In

After decades of inconsistency among the courts of appeals, the experiences of Sheila White provided the backdrop for the Supreme Court to refine the scope of actionable retaliation under Title VII. In doing so, the Court sought to put an end to the contradictory results produced by the various standards of actionable retaliation.[44]

The story of Sheila White is somewhat unconventional; it is not every day that the daughter of two teachers and the mother of three college-educated professionals takes up work as a forklift driver in an all-male rail yard.[45] When she was hired by Burlington in June of 1997 to work in the company's Maintenance of Way Department in Memphis, Tennessee, White expected to work until her children finished college and eventually retire from the job.[46] What she did not expect, however, was that her experiences in the rail yard would incite a change in employment law that would substantially enhance the legal rights of workers across the country.

Within months of beginning work, White lodged a sexual harassment and discrimination complaint with Burlington.[47] In her report, White claimed the rail yard's foreman, Bill Joiner, regularly told her a woman should not be working in the department and made insulting and inappropriate comments to White in front of the all-male staff.[48] On September 26, 1997, Burlington suspended Joiner for ten days.[49] The same day, Marvin Brown, Burlington's road master, informed White that she was being transferred from her coveted position as a forklift driver to the job of general track laborer.[50] As he explained, a "'more senior man' should have the 'less arduous and cleaner job' of forklift operator."[51]

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reasonably likely to deter the charging party or others from engaging in protected activity." *Burlington Northern*, 126 S. Ct. at 2411 (citing *Ray*, 217 F.3d at 1242–43).

42. *See Burlington Northern*, 126 S. Ct. at 2415.

43. *Id.*

44. *Id.* at 2411.

45. Shaila Dewan, *Forklift Driver's Stand Leads to Broad Rule Protecting Workers Who Fear Retaliation*, N.Y. TIMES, June 24, 2006, at A12.

46. *Id.*

47. Brief for Respondent, *supra* note 18, at 1.

48. *Id.* at 1 n.2.

49. *Id.* at 1.

50. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006). White described reassignment:

> I was moving spike cans that weighed 150 pounds; I was unloading plates and loading plates . . . . On the forklift I was pretty much stable because I knew exactly what I was doing. But the date that they took me off that forklift and put me in the yard to work with the

In October 1997, White filed a complaint with the EEOC, alleging her reassignment constituted unlawful gender discrimination and retaliation in response to her complaint against Joiner.[52] In early December, White filed a second retaliation complaint with the EEOC, alleging a Burlington employee "had placed her under surveillance and was monitoring her daily activities."[53] Several days later, Burlington suspended White for a total of thirty-seven days without pay.[54] Although Burlington's initial rationale for the suspension was "insubordination,"[55] an investigative hearing mandated under White's collective bargaining agreement proved that allegation inaccurate.[56] Burlington reinstated White in her track laborer position and compensated her for the time she was out of work.[57]

After she exhausted her administrative remedies,[58] White filed suit in federal court under section 704(a) of Title VII, claiming her September 1997 transfer and December 1997 suspension constituted retaliation in response to her internal complaint and EEOC charge of sexual harassment.[59] A jury found for White as to both claims, awarding her $43,500 in compensatory damages, including $3,250 for her medical expenses.[60] Although a divided Sixth Circuit

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> mens [sic], I didn't know the first thing about it. And everything out there is hot and heavy. You could easily get killed or hurt out there.

Dewan, *supra* note 45.

51. *Burlington Northern*, 126 S. Ct. at 2409 (citation omitted). At the trial, the "district judge noted that there was lots of testimony from lots of people that [track laborer work] was a lot more strenuous, that it . . . required much more exertion, [and] that it was a lot dirtier [than the work of a forklift operator] . . . ." Brief for Respondent, *supra* note 18, at 2. "Other witnesses testified that the forklift job was generally considered a physically easier and cleaner job than other track laborer positions, although it required more qualifications. Joiner testified that other track laborers complained about White being allowed to hold the position instead of a male employee." White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 792 (6th Cir. 2004) (en banc), *aff'd*, 126 S. Ct. 2405.

52. *Burlington Northern*, 126 S. Ct. at 2409.

53. *Id.*

54. *Id.*

55. On December 11, 1997, there was apparently a disagreement between White and her immediate supervisor, Peter Sharkey, regarding which truck should transport White from one location to another. Although the facts of the incident are in dispute, Sharkey later reported to Brown that White had been insubordinate, and he recommended her immediate suspension. *White*, 364 F.3d at 793.

56. *Burlington Northern*, 126 S. Ct. at 2409; Brief for Respondent, *supra* note 18, at 3.

57. *Burlington Northern*, 126 S. Ct. at 2409.

58. *Id.* at 2410. White also filed a charge with the EEOC based on her suspension. *Id.* at 2409; *see also supra* text accompanying note 52.

59. *See supra* text accompanying notes 47 and 52.

60. *Burlington Northern*, 126 S. Ct. at 2410; *see also* Brief for Respondent, *supra* note 18, at 4 (noting that White "sought medical treatment for emotional distress and incurred medical expenses" during her suspension).

panel initially reversed the judgment,[61] the full court of appeals heard the matter en banc and affirmed the judgment of the district court.[62]

The Supreme Court upheld the judgment of the Sixth Circuit's full panel and unanimously[63] concluded that (1) "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace" and (2) the provision prohibits an "employer's actions [that are] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[64] In doing so, the Court adopted the expansive approach and upheld the jury's finding that White's reassignment and suspension constituted retaliatory discrimination.[65]

To demonstrate the application of its decision, the Court offered two scenarios where the expansive approach would come into play.[66] The first example involved a schedule change, which is a minor inconvenience for many employees, but a huge burden for a young mother struggling to coordinate childcare for her small children.[67] In the Court's second example, a supervisor's refusal to invite an employee to lunch generally would be considered non-actionable.[68] If, however, the employee were not invited to a weekly training luncheon necessary for advancement in the company, the prospect of exclusion "might well deter a reasonable employee from complaining about discrimination."[69] These scenarios point out a central theme of the *Burlington Northern* decision, and one lacking in

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61. White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443 (6th Cir. 2002), *vacated*, 364 F.3d 789 (2004) (en banc), *aff'd*, 126 S. Ct. 2405.

62. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789 (6th Cir. 2004) (en banc), *aff'd*, 126 S. Ct. 2405. Although the full panel of the court of appeals reaffirmed the district court's judgment, not all members of the court agreed as to the proper standard regarding what constitutes retaliation. *Compare id.* at 795–800 (applying "tangible employment action" standard), *with id.* at 809 (Clay, J., concurring) (applying deterrence standard).

63. Justice Breyer delivered the unanimous opinion of the Court. Concurring in the judgment, Justice Alito would have applied the Sixth Circuit's "tangible employment action" standard. *Burlington Northern*, 126 S. Ct. at 2418–22 (Alito, J., concurring).

64. *Id.* at 2409. In reaching this conclusion, the Court noted the distinction between the substantive anti-discrimination provision, § 703(a), and the anti-retaliation provision, § 704(a):

> The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering . . . with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.

Id. at 2412 (citation omitted).

65. *Id.* at 2415–17.

66. *See id.* at 2415–16.

67. *Id.*

68. *Id.*

69. *Id.*

many of the earlier decisions[70] construing actionable retaliation: "[c]ontext matters."[71]

C. Outcomes of the Burlington Northern *Decision*

The effects of the *Burlington Northern* decision will likely be felt across the country. In some places—particularly those areas previously covered by the most stringent retaliation standards[72]—the decision substantially enhances legal protection for employees who report workplace discrimination and harassment. Under the deterrence standard, it is no longer "almost impossible to win a retaliation case unless the retaliation result[s] in dismissal."[73] Although the standard does not seek to impose "a general civility code for the American workplace,"[74] it does call upon the lower federal courts to recognize that retaliation takes many forms, depending on the circumstances and people involved.[75] As a result, employers face greater potential for liability and will likely make efforts to ensure employees who engage in the activities protected by section 704(a) do not face adverse treatment.[76]

1. For Concerned Employers, Caution is Key

In the wake of the *Burlington Northern* decision, employers are wise to make special efforts to implement and enforce workplace guidelines that prohibit any form of retaliation.[77] In accordance with such policies, prudent employers will be more apt to train supervisors and employees on non-retaliation policies[78] and discipline or even terminate those who retaliate against other workers.[79] Cautious employers will also likely make special efforts to review, both internally and with counsel,[80] any action to be taken with respect to employees who have participated in protected activities,[81] such as opposing or refusing to take part in conduct they

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70. *See supra* notes 32–39 and accompanying text.

71. *Burlington Northern*, 126 S. Ct. at 2415.

72. *See supra* notes 32–39 and accompanying text.

73. Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, N.Y. TIMES, June 23, 2006, at A22.

74. *Burlington Northern*, 126 S. Ct. at 2415 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

75. *See Oncale*, 523 U.S. at 81–82 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.").

76. *See* Tori L. Winfield, *Retaliation: Employers Had Better Watch Their Backs:* Burlington Northern & Santa Fe Railway Company v. White, 80 FLA. B.J. 53, 55 (2006).

77. *Id.*

78. *See* Victoria L. Donati & William J. Tarnow, *Key Issues and Analysis Relating to Retaliation and Whistleblower Claims*, *in* PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES: LITIGATION 665–66 (2006), *available at* 745 PLI/LIT 619, 665–66 (Westlaw).

79. Winfield, *supra* note 76, at 55.

80. *See* Donati & Tarnow, *supra* note 78, at 665–66.

81. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006).

deem unlawful,[82] filing a charge, making an internal complaint, or participating in an outside investigation.[83] To avoid potential liability, action should only be taken after a lawful, non-retaliatory motive has been established for the course of conduct.[84]

Because the *Burlington Northern* decision is new law (and is, in some places, a complete overhaul of preexisting legal attitudes towards retaliation),[85] employers should be warned that some courts might be more apprehensive about dismissing claims.[86] Given the legal, economic,[87] and reputational[88] risks to companies, concerned employers will likely recognize there is no such thing as an overabundance of caution when dealing with retaliation claims.[89]

D. Criticisms of the Deterrence Standard

Although the decision will no doubt be heralded as a landmark victory by advocates of workers' rights, *Burlington Northern* is also vulnerable to considerable criticism. One prediction is that the deterrence standard will do little to protect employees with bona fide claims and will, instead, inundate the federal courts with scores of baseless actions.[90]

Retaliation claims already comprise a substantial amount of employment litigation in federal courts: almost 20,000 of these claims were filed with the EEOC in 2005,[91] a number double the amount filed in 1992.[92] Retaliation claims now compose more than a quarter of the EEOC's annual docket.[93] It is important to consider, however, the circumstances surrounding these somewhat surprising statistics. First, the overall rise in retaliation charges filed since 1992 is explained to some degree by the fact that the EEOC began enforcing the Americans with Disabilities Act (ADA), including its anti-retaliation provision,[94] in July of that

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82. *See supra* note 8 and accompanying text.

83. *See supra* note 9 and accompanying text.

84. Winfield, *supra* note 76, at 55.

85. *See supra* notes 32–39 and accompanying text.

86. Winfield, *supra* note 76, at 55; *see also* Caplinger & Worth, *supra* note 4, at 20 ("A retaliation claim . . . may be more likely to survive summary judgment than a discrimination claim.").

87. *See infra* note 182 and accompanying text.

88. *See infra* notes 176 and 181 and accompanying text.

89. *See* Donati & Tarnow, *supra* note 78, at 664–68.

90. *See* Brief Amici Curaie of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America as Amici Curiae in Support of Petitioner at 10–11, Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (No.05-259).

91. U.S. Equal Employment Opportunity Comm'n, Charge Statistics, FY 1992 through FY 1996, http://www.eeoc.gov/stats/charges-a.html (last modified Jan. 31, 2007).

92. U.S. Equal Employment Opportunity Comm'n, Charge Statistics, FY 1997 through FY 2006, http://www.eeoc.gov/stats/charges.html (last modified Feb. 26, 2007). Despite the sharp increase in retaliation claims, the number of discrimination claims filed annually with the EEOC actually decreased during the same time period. *Id.*

93. *Id.*

94. 42 U.S.C. § 12203(a) (2006).

year.[95] Secondly, the rise in claims corresponds with two recent Supreme Court decisions. Under *Burlington Industries, Inc. v. Ellerth*[96] and *Faragher v. City of Boca Raton*,[97] an employer is now subject to vicarious liability for unlawful harassment perpetrated by a supervisory employee, unless the employer shows it exercised reasonable care to promptly prevent or correct the behavior and the plaintiff employee unreasonably failed to take advantage of such preventative or corrective opportunities.[98] Individuals who complain internally pursuant to complaint procedures enacted in the wake of *Faragher* and *Ellerth* might later feel they experienced retaliation, which results in their filing a retaliation claim. In combination, these factors help explain the inflated number of retaliation claims filed annually with the EEOC.

Critics of *Burlington Northern* contend the deterrence standard will only add to the "problem" of rising retaliation charges because nearly every plaintiff with a discrimination claim will bring a pendant retaliation claim.[99] Furthermore, because a retaliation action "is separate from direct protection of the primary right and serves as a prophylactic measure to guard the primary right,"[100] a plaintiff may prevail on a retaliation claim while failing on an underlying discrimination claim.[101] As opponents of the deterrence standard contend, the time and resources required to litigate these "add-on" retaliation claims would be wasteful and unduly burdensome for employers.[102]

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95. U.S. Equal Employment Opportunity Comm'n, The Americans with Disabilities Act of 1990, Titles I and V, http://www.eeoc.gov/policy/ada.html (last modified Jan. 15, 1997).

96. 524 U.S. 742 (1998); *see also infra* notes 161–162 and accompanying text.

97. 524 U.S. 775 (1998).

98. *Faragher*, 524 U.S. at 777–78.

99. For a discussion of "add-on" retaliation causes of action, see Peter M. Panken, *supra* note 9, at 598.

100. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 189 (2005) (Thomas, J., dissenting) (discussing Title IX sex discrimination).

101. Proof of actual discrimination is not an element of a retaliation claim. *See* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 794 (6th Cir. 2004) (en banc) (jury found for Burlington on sex discrimination claim and for White on retaliation claim), *aff'd*, 126 S. Ct. 2405 (2006); Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980 (7th Cir. 2000) (affirming dismissal of secretary's discrimination claim against large Chicago law firm and reversing dismissal of secretary's retaliation claim); Passatino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 506 (9th Cir. 2000) (affirming retaliation claim based on manager's informal complaint that advancement in company was limited by sex discrimination); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1141 (5th Cir. 1981) (affirming retaliation claim based on retail employer's failure to rehire plaintiff after plaintiff participated in store boycott despite plaintiff's failure to prove underlying race discrimination).

102. *See* Brief Amici Curaie of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America as Amici Curiae in Support of Petitioner, *supra* note 90, at 13 ("By allowing employees to litigate virtually *any* inconsequential decision reached by an employer, . . . [t]he result inevitably will be that many of these disputes end up like [*Burlington Northern*], with the parties at odds for many years at tremendous . . . financial cost to both.").

In addition, employer advocates contend *Burlington Northern*'s reliance on a reasonable person standard increases the time and money employers must spend to disprove an employee's claim because the significance of any alleged act will depend on its context.[103] As the argument goes, courts will be more likely to construe retaliation claims as jury questions than as issues properly settled by summary judgment.[104] If this assertion is realized, employers will be forced to bear the burden of expensive and time-consuming litigation.[105]

Others maintain *Burlington Northern*'s broad construction of retaliation will severely detract from employers' ability to manage their business affairs[106] because "[e]mployees who have accused their employers of discrimination are likely to view every subsequent action . . . through a prism of suspicion and distrust."[107] Given the high cost of litigation, critics contend this standard furnishes employees with "an effective veto power over routine work assignments and supervisory directives they did not happen to like."[108] That is, rather than face a lawsuit every time an employee cries "retaliation!," an employer might simply acquiesce to the employee's demands.

Perhaps the most viable critique of the deterrence standard is that it fails to provide clear and workable guidance for the lower federal courts. In his concurrence in *Burlington Northern*, Justice Alito argues the expansive approach might lead to inconsistent results.[109] Under this standard, he maintains, "the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation."[110] Therefore, it is conceivable that an employee who complains of egregious discrimination will not have a retaliation claim because the threat of retaliation did not dissuade the worker from making the complaint.[111] On the other hand, an employee who suffers only minor discrimination—and chooses not to report the incident—would have a viable retaliation claim.[112] As the argument goes, this

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103. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006) ("We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.").

104. Winfield, *supra* note 76, at 55.

105. *Id.*

106. *See* Brief Amici Curaie of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America as Amici Curiae in Support of Petitioner, *supra* note 90, at 11; Eric M.D. Zion, Note, *Overcoming Adversity: Distinguishing Retaliation From General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 209–10 (2001).

107. Brief Amici Curaie of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America as Amici Curiae in Support of Petitioner, *supra* note 90, at 11.

108. *Id.*; *see also* Brief of Petitioner at 29–30, *Burlington Northern*, 126 S. Ct. 2405 (No. 05-259) ("A construction worker could state a claim if he or she were asked to pour concrete rather than operate a jackhammer . . . . A law firm associate might complain that he is now merely writing briefs rather than trying cases . . . .").

109. *Burlington Northern*, 126 S. Ct. at 2420–21 (Alito, J., concurring).

110. *Id.*

111. *Id.* at 2421.

112. *Id.*

standard will produce "topsy-turvy results" that not only frustrate the underlying purpose of Title VII, but also provide an unhelpful and confusing guide for the lower courts.[113]

Justice Alito's next line of attack condemns the deterrence standard's use of the "reasonable worker" as a gauge for the types of conduct prohibited by section 704(a).[114] In construing the scope of actionable retaliation, Justice Breyer wrote that a plaintiff must prove the charged conduct "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[115] Justice Breyer also advised, however, that "the significance of any given act of retaliation will often depend upon the particular circumstances."[116] Thus, in determining whether charged conduct rises to the level of retaliation, the lower courts are to make both an objective analysis (regarding the act's effect on a "reasonable worker") and a subjective one (regarding the act's effect on a reasonable worker *who shares some characteristics* with the plaintiff).[117] Justice Alito criticizes the deterrence standard for its failure to define "[h]ow many . . . individual characteristics a court or jury may or must consider . . . ."[118] If, in fact, the lower courts do consider varying degrees of personal characteristics in deciding when charged conduct constitutes actionable retaliation, it is conceivable that the deterrence standard will do little to foster consistency among the courts of appeals.[119]

At this point, it remains unclear whether the Court's decision will prove workable at the national level. Will the deterrence standard advance the purpose of Title VII's anti-retaliation provision,[120] or will it release the floodgates to a barrage of petty claims and trivialities?[121] Given that the various courts already applying the expansive approach have not experienced an onslaught of frivolous claims,[122]

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113. *Id.*

114. *Id.*

115. *Id.* at 2415 (majority opinion) (quoting Rochon v. Gonzalez, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

116. *Id.*

117. *Id.* at 2421 (Alito, J., concurring).

118. *Id.*

119. That is, a court that previously applied the more stringent "ultimate decision" standard might be less inclined under *Burlington Northern* to consider a plaintiff's personal circumstances. Conversely, a court already utilizing the deterrence standard would be more apt to take into account a plaintiff's unique characteristics. Therefore, if Justice Alito is correct in that *Burlington Northern* allows courts leeway in the number of individual characteristics to consider, then the courts of appeals will possibly continue to produce widely divergent rulings. *See supra* notes 32–43 and accompanying text.

120. *See Burlington Northern*, 126 S. Ct. at 2412 ("The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.").

121. *See id.* at 2419 (Alito, J., concurring) ("There is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment.").

122. Donati & Tarnow, *supra* note 78, at 634.

there is no reason to assume the standard will produce profoundly divergent results at the national level.[123]

Consider, for example, the case of the Ninth Circuit, the "largest and busiest" of the thirteen federal circuits.[124] The Ninth Circuit has followed the deterrence standard since the *Ray v. Henderson*[125] decision in 2000. In arguing the deterrence standard would serve to overburden the federal judiciary,[126] however, Burlington failed to present evidence suggesting the Ninth Circuit (or any other court of appeals following the expansive approach, for that matter) has suffered an onslaught of meritless Title VII retaliation claims in the seven years since *Ray*'s inception.[127]

In addition, the experiences of the courts of appeals in the context of First Amendment retaliation claims[128] shed doubt on the "floodgates" arguments of Justice Alito and other critics of the deterrence standard. Virtually all the circuits apply a similar deterrence standard in considering retaliation claims under the First Amendment,[129] yet there is no evidence indicating the courts of appeals have been disproportionately burdened by such claims.[130]

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123. *Id.* ("The experience of the number of courts that have long adhered to the same expansive approach . . . compels the contrary conclusion.").

124. Ninth Circuit Overview, http://www.ce9.uscourts.gov/whatis.html (last visited Aug. 18, 2007).

125. 217 F.3d 1234, 1240 (9th Cir. 2000).

126. Brief of Petitioner, *supra* note 108, at 49–50. Burlington maintained:

> [The deterrence standard] would magnify the substantial number of retaliation filings, and the costs that they impose upon employers defending against them. . . . This Court cannot shield its eyes to the fact that, while true retaliation continues to occur, many retaliation claims are asserted by litigious or distrustful employees who are disposed to see retaliatory animus in post-filing employer conduct.

Id.

127. Brief of the National Women's Law Central et al. as Amici Curiae Supporting Respondent, *supra* note 26, at 21–22.

128. *See, e.g.*, Thaddeus-X v. Blatter, 175 F.3d 378, 386–87 (6th Cir. 1999) (en banc) ("The essence of such a claim is that the plaintiff engaged in conduct protected by [the First Amendment], the defendant took an adverse action against the plaintiff, and this adverse action was taken (at least in part) because of the protected conduct.").

129. *See, e.g.*, Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000) (A public employee's right to be free from reprisal for protected speech is violated by an action "sufficient 'to deter a person of ordinary firmness' from exercising his First Amendment rights.") (quotations omitted); *Thaddeus-X*, 175 F.3d at 396 ("[A]n adverse action is one that would 'deter a person of ordinary firmness' from the exercise of the right at stake.") (quotations omitted).

130. Brief for Respondent, *supra* note 18, at 25–26; Brief of the National Women's Law Central et al. as Amici Curiae Supporting Respondent, *supra* note 26, at 21–22.

II. SUPPORT FOR BROAD INTERPRETATION OF FEDERAL ANTI-RETALIATION PROVISIONS

Just as *Burlington Northern*'s true effect on Title VII litigation has yet to be determined, the influence the decision will have on other areas of federal law also remains unclear. It is possible the experiences of Sheila White, the female rail yard worker from Memphis, will profoundly affect the interpretation of scores of other anti-retaliation provisions adopted by Congress.

Title VII is not unique in its inclusion of an anti-retaliation provision. In fact, at least forty-two other federal statutes make it unlawful for employers to "discriminate against" employees who report violations of the particular statute to federal officials or supervisors.[131] These statutes are structured similarly to Title VII in that the anti-retaliation provisions are laid out separately from the primary law.[132] In addition to promoting the enforcement of the underlying law, these provisions further the key objective of "[m]aintaining unfettered access to statutory remedial mechanisms."[133]

This Note contends *Burlington Northern*'s Title VII deterrence standard should be adopted as a per se rule in forbidding reprisals against employees who engage in all types of protected activity under federal law. In light of Congress's historical willingness to extend broad "protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions,"[134] this proposition serves the dual purposes of promoting important judicial precedent[135] and maintaining the underlying goals of congressional legislation.[136]

A. Historical Precedent for Broad Construction of Anti-retaliation Legislation

The Supreme Court has historically employed a broad construction of provisions prohibiting retaliation against employees who engage in activities

131. Brief for Respondent, *supra* note 18, at 21; *see also supra* notes 19–24 and accompanying text.

132. *See* Brief of the Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae in Support of Respondent at 12 n.4, Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (No. 05-259); Peter M. Panken, *supra* note 9, at 598–605.

133. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (interpreting term "employees" to allow former employees to sue under Title VII for post-employment retaliation).

134. *Burlington Northern*, 126 S. Ct. at 2414.

135. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it.") (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).

136. *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (In prohibiting retaliation under the FLSA, "Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.").

protected by federal law.[137] In adopting the deterrence standard, the *Burlington Northern* Court relied heavily on the rationale contained in such decisions.[138]

The National Labor Relations Act (NLRA),[139] which is often analogized to Title VII[140] and contains similar provisions regulating discrimination[141] and retaliation,[142] prohibits "a *wide variety* of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities."[143] For example, in *NLRB v. Scrivener*, the Court considered whether an employer violated the NLRA's anti-retaliation provision by firing employees who cooperated with an investigation by the National Labor Relations Board (NLRB) into an unfair labor practice charge against the employer.[144] Answering in the affirmative, the Court noted, "Congress has made it clear that it wishes all persons with information about [unlawful] practices to be *completely free* from coercion against reporting them . . . ."[145] It further observed, "[t]his *complete freedom* is necessary, it has been said, 'to prevent the . . . channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'"[146]

The Court applied similar rationale in *Bill Johnson's Restaurants, Inc. v. NLRB* when considering the NLRB's authority to enjoin a groundless lawsuit filed by an employer to retaliate against an employee who engaged in activity protected by the NLRA.[147] In finding the charged conduct constituted retaliation, the Court noted that the NLRA's anti-retaliation measures "are *broad*, remedial provisions that guarantee that employees will be able to enjoy their rights . . . without fear of *restraint*, *coercion*, *discrimination*, or *interference* from their employer."[148]

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137. *See infra* notes 140–153 and accompanying text.

138. *See Burlington Northern*, 126 S. Ct. at 2414.

139. 29 U.S.C. §§ 158–169 (2006).

140. The Supreme Court has "drawn analogies to the NLRA in other Title VII contexts and [has] noted that certain sections of Title VII were expressly patterned after the NLRA . . . ." Hishon v. King & Spalding, 467 U.S. 69, 76 n.8 (1984) (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 768–69 (1976) (analogizing law dealing with discriminatory hiring and discharges under the NLRA to such law under Title VII)).

141. Under § 158(a)(3), it is "an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3).

142. Section 158(a)(4) makes it "an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act]." *Id.* § 158(a)(4) (2006).

143. Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 740 (1983) (emphasis added).

144. 405 U.S. 117 (1972).

145. *Id.* at 121 (quoting Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 238 (1967)) (emphasis added).

146. *Id.* at 122 (quoting John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951)) (emphasis added).

147. 461 U.S. at 740–41. In that case, a waitress filed unfair labor practice charges with the NLRB against Bill Johnson's Big Apple Restaurant, alleging that she was terminated because of her efforts to organize an employee union. *Id.* at 733.

148. *Id.* at 740 (emphasis added).

Similarly, the FLSA, with its "central aim of . . . achiev[ing] . . . certain minimum labor standards,"[149] makes it unlawful "to discharge or *in any other manner discriminate* against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding" under the FLSA.[150] The scope of this provision is necessarily broad, as Congress did not intend to promote observance of the FLSA through "continuing detailed federal supervision."[151] Congress instead preferred "to rely on information . . . from employees seeking to vindicate rights claimed to have been denied."[152] It follows that "effective enforcement [of the FLSA] could thus only be expected if employees felt free to approach officials with their grievances."[153]

B. Maintaining the Underlying Goals of Congressional Legislation

The deterrence standard promulgated by the *Burlington Northern* Court, and supported by earlier NLRA and FLSA decisions, provides a strong and practical framework for construing *all* federal anti-retaliation legislation. Compared with other approaches to defining actionable retaliation,[154] this model is the most logical method of encouraging employees to make use of internal grievance mechanisms,[155] thereby promoting employers' voluntary compliance with federal law.[156]

1. Encouraging the Use of Internal Grievance Mechanisms

Several recent Supreme Court decisions evidence the Court's belief that internal complaint mechanisms are effective tools for enforcing underlying substantive law while decreasing employer liability in the context of Title VII.[157] These in-house systems, which generally aim to prevent or mitigate unlawful activity in the workplace,[158] provide employees, employers, and society with several benefits, including:

> (1) the ability to stop discriminatory harassment's significant emotional and psychological toll . . . ; (2) the opportunity for an employer to avoid . . . liability . . . by preventing the hostility in the work environment from reaching a level of actionable severity and pervasiveness; and (3) the chance to ameliorate the costs of

149. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).
150. 29 U.S.C. § 215(a)(3) (2006) (emphasis added).
151. *Mitchell*, 361 U.S. at 292.
152. *Id.*
153. *Id.*
154. *See supra* notes 32–39 and accompanying text.
155. *See infra* notes 157–184 and accompanying text.
156. *See infra* notes 185–192 and accompanying text.
157. *See* Marshall, *supra* note 10, at 569 n.119 (discussing Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999), Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)).
158. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), *available at* http://www.eeoc.gov/policy/docs/currentissues.html.

> turnover, lost productivity, and absenteeism commonly associated with a hostile work environment.[159]

To the extent that employers, employees, and society at large stand to benefit from internal grievance mechanisms in the context of Title VII, the same can be said for actors covered by other types of federal anti-retaliation law.[160]

In *Burlington Industries, Inc. v. Ellerth*,[161] the Court recognized the profound benefits of such systems:

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. . . . [S]uch procedures . . . would effect Congress' intention to promote conciliation rather than litigation . . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.[162]

Despite the clear benefits of internal complaint procedures,[163] studies continue to indicate that the possibility of future retaliation is a key factor in many employees' decisions whether to report their employer's violations of federal law.[164] For example, one study showed that one-third of women in managerial positions suffered sexual harassment in the workplace but only twenty percent of those women reported the harassment to their employer.[165] One of the reasons most frequently given for the failure to report the harassment included "an expectation of adverse consequences for the reporter (e.g., the work situation will be made unpleasant, evaluations will suffer, etc.) . . . ."[166] Other studies found "nearly 70 percent of female employees questioned about their failure to report sexual harassment in the workplace considered the potential for retaliation to be a moderate or strong influence on their decision."[167]

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159. Marshall, *supra* note 10, at 553–54 (footnotes omitted).

160. *See infra* Appendix. For example:

> If a flight attendant recognized that the pilot was drunk, if a mineworker knew that safety equipment was defective or missing, if an airplane mechanic realized that required maintenance was not being performed, if a worker at a nuclear weapons plant noticed Violations of security precautions, Congress wanted those employees to be confident that they could without risk of reprisal—any reprisal—report those problems to their *superiors* or to the federal government.

Brief for Respondent, *supra* note 18, at 22 (emphasis added).

161. 524 U.S. 742 (1998).

162. *Id.* at 764 (internal citations omitted).

163. *See supra* text accompanying note 159.

164. Shirley Feldman-Summers, *Analyzing Anti-harassment Policies and Complaint Procedures: Do They Encourage Victims to Come Forward?*, 16 LAB. LAW. 307, 308 (2000) ("It is well established that most employees who experience sexual harassment on the job do not report the harassment to a supervisor or other management personnel.").

165. *Id.* at 308 n.9 (citing Ellen R. Peirce et al., *Breaking the Silence: Creating User-Friendly Sexual Harassment Policies*, 10 EMP. RESPS. & RTS. J. 225, 231 (1997)).

166. *Id.* at 309.

167. Marshall, *supra* note 10, at 586–87 (citing Feldman-Summers, *supra* note 164, at 309 & n.12).

It follows, then, that employees covered by *all* types of anti-retaliation legislation might remain silent rather than lodge an internal grievance with their employer if they fear that reporting unlawful acts[168] will lead to adverse consequences at work.[169] Inasmuch as *Burlington Northern*'s deterrence standard seeks to provide broad protection for employees covered by Title VII who utilize internal complaint mechanisms,[170] similar protection should be afforded employees covered by other anti-retaliation statutes so that they might also feel "free to approach officials with their grievances."[171]

If all employees do not receive the same level of protection as those covered by Title VII, the trend of underutilization[172] of internal complaint procedures is likely to continue.[173] As a result, employers stand to suffer from both economic loss and bad publicity. The most obvious effect of the underutilization of internal complaint mechanisms is that it "burdens employers with increased legal costs and liability exposure . . . ."[174] Employers who fail to self-correct unlawful activity are vulnerable to facing formal (and potentially more serious) charges later on in court.[175] In addition, employers who allow illegal activity to proliferate absent mitigating efforts run the risk that the ever-present media will make the public aware of the employer's propensity for unscrupulous practices.[176] Bad press "can lead to a consumer backlash, taking the form of an unwillingness to purchase the goods and services of the employer's business, thereby decreasing the employer's revenues."[177] Finally, employers who cannot rely on their employees to apprise them of unlawful activities might suffer from a loss of productivity and increased turnover due to undesirable working conditions.[178]

In construing the breadth of congressional anti-retaliation legislation, the lower courts are urged to follow the *Burlington Northern* Court's lead in adopting the deterrence standard. This criterion serves the interests of employees and employers alike. Employers will benefit from lower legal costs,[179] decreased

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168. *See infra* Appendix.

169. *See supra* notes 164–167 and accompanying text.

170. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006) ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.").

171. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

172. *See supra* text accompanying notes 164–167 (discussing extent of and underlying reasons for underutilization).

173. *See supra* text accompanying notes 164–167. Just as victims of sexual harassment tend not to report such unlawful conduct to their employer for fear of reprisal, it can be inferred that employees who are aware of other federal crimes in the workplace will forego reporting for the same reason.

174. Marshall, *supra* note 10, at 590.

175. *Id.* at 589.

176. *Id.* at 590.

177. *Id.*

178. *Id.* at 590–91.

179. Adherence to the expansive "reasonably likely to deter standard" by lower courts who construe federal anti-retaliation legislation will aid employees in avoiding unlawful retaliation, thereby decreasing the potential for costly litigation.

exposure to liability,[180] and diminished odds for bad publicity[181] and will avoid productivity loss and turnover.[182] Employees will benefit from a greater opportunity to report unlawful activity without fear of reprisal.[183] Moreover, society will gain from increased utilization of grievance mechanisms that "promote conciliation rather than litigation."[184]

2. Promoting Voluntary Compliance with the Law

In addition to encouraging employees to report unlawful conduct through internal complaint mechanisms, the deterrence standard also seeks to promote employers' *voluntary* compliance with the law, rather than "secur[ing] compliance with prescribed standards through continuing detailed federal supervision."[185] When an employer engages in unlawful activity, often employees, and not the government, are first aware of the alleged violation.[186] Due to their inherent powers, employers have a strong incentive to use a variety of means to ensure employees withhold damaging information.[187] If the fear of retribution does, in fact, dissuade employees from approaching their superiors or the government to report suspected unlawful activity, employers will have essentially succeeded in evading the underlying substantive law.

Furthermore, victims of retaliation are not the only parties affected by retaliation; the fear of reprisal will play into *all* employees' decisions whether to report the suspected unlawful activity. Because employees generally wish to avoid unpleasant working conditions, "[r]etaliation can deter not only its target, but all other employees from bringing complaints . . . to the employer's attention."[188]

Imagine the potential consequences of such a system: (1) A janitor employed by a school district discovers certain school buildings might house dangerous asbestos-containing material. The janitor wants to report the condition to the school district or the state government but fears being labeled a "snitch" by

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180. *See* Marshall, *supra* note 10, at 590.

181. *Id.* Adherence to the expansive deterrence standard by lower courts would provide clear guidance to employers who might otherwise (and perhaps unwittingly) engage in unlawful retaliation.

182. *Id.* at 590–91. Private companies face similar costs as a result of sexual harassment. Linda Stamato, *Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?*, 10 MEDIATION Q. 167, 167 (1992) ("[S]exual harassment costs a typical Fortune 500 company $6.7 million per year, a cost of $282 per employee.").

183. Studies show that fear of retaliation is a key factor in many employees' decision whether to report unlawful activity. *See supra* notes 164–167 and accompanying text. *Burlington Northern*'s expansive deterrence approach provides such employees with greater protection against unlawful reprisal.

184. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (discussing internal grievance procedures in the Title VII context); *see also* Marshall, *supra* note 10, at 553–54 (discussing societal benefits extended by the use of internal grievance systems).

185. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (discussing purpose and scope of FLSA anti-retaliation provision).

186. Brief for Respondent, *supra* note 18, at 20–21.

187. *Id.* at 21.

188. Brief of the National Women's Law Central et al. as Amici Curiae Supporting Respondent, *supra* note 26, at 9.

his supervisor.[189] After all, he has heard stories about this happening to other employees in the past. (2) A mechanic who works for a major airline feels that her co-workers are consistently careless or negligent in performing regular maintenance check-ups of commercial airplanes. She is concerned that these practices might cause in-flight complications and compromise the safety of airline passengers. She feels lucky, however, to have a steady, well-paying job and fears her supervisors might retaliate by falsely accusing her of wrongdoing if she tells management or the Federal Aviation Administration.[190] (3) A new secretary at a law firm notices a paralegal with severe back problems from an accident is unable to lift file boxes, as is periodically required of the firm's support staff. The paralegal tells the secretary that their supervisor refused to accommodate her back problem, and ever since her accident she has received negative performance reviews. The secretary suspects this might be a violation of the ADA, but he wants to maintain a good rapport with the supervisor and fears voicing his concerns might result in his exclusion from outside teambuilding activities.[191]

In each of these scenarios, employees confront the difficult choice of whether to report what they suspect to be unlawful activity in the face of potential retaliation. If these individuals knew their employers were not permitted to take *any* action to deter them from participating in protected activity—that is, to report the suspected asbestos, negligent airplane maintenance, or ADA violation—they would be more apt to report the alleged violations. In turn, their employers would be better informed and, therefore, better equipped to self-correct the illegal conduct. Overall, the respective purposes of the underlying federal statutes would be furthered: "Interpreting the anti-retaliation provision to provide broad

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189. *See* 20 U.S.C. § 3608 (2006):

> No State or local educational agency receiving assistance under this chapter may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee has brought to the attention of the public information concerning any asbestos problem in the school buildings within the jurisdiction of such agency.

190. *See* 49 U.S.C. § 42121(a)(1) (2006):

> No air carrier . . . may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . . .

191. *See* Americans with Disabilities Act (ADA), 42 U.S.C. § 12203(a) (2006):

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].

protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends."[192]

C. Towards an Effective and Workable Rule

The development of a per se rule to be used in construing the law in a particular situation is not a task to be taken lightly. Prudence requires that such a rule be both useful in responding to a legal dilemma and practicable in its administration; justice demands that it cater to the myriad contexts underlying any particular case. *Burlington Northern*'s deterrence standard, as applied to the full range of federal anti-retaliation law, would accomplish this ambitious undertaking.

Regardless of the precise impetus, the number of retaliation claims filed in recent years has risen.[193] As studies suggest, however, these already high figures tend to underestimate the true pervasiveness of workplace retaliation, as many employees choose not to exercise their rights for fear of reprisal.[194] Therefore, considering the profound effect unchecked retaliation could have on compliance with *all* laws containing anti-retaliation provisions, the lower federal courts would certainly benefit from the consistency of a per se rule defining retaliation in the full gamut of potential claims.

In addition to fulfilling an apparent need for a clear definition of retaliation, the *Burlington Northern* standard is also a workable model that can be effectively utilized by the lower federal courts. In order for anti-retaliation laws to serve their intended purposes—protecting the goals of the underlying law and "[m]aintaining unfettered access to statutory remedial mechanisms"[195]—they must proscribe a wide range of retaliatory conduct.[196]

This is not to say, however, that the solution to defining actionable retaliation lies in a "laundry list" of prohibited conduct. Such lists are inadequate,[197] especially with respect to the present issue, because there are simply too many types of retaliation to be contained in one list.[198] Furthermore, specifically prohibiting employers from taking certain courses of action (like termination, promotion, granting leave, or decreasing compensation)[199] with respect to employees that engage in protected activities would only serve to

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192. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006).

193. *See supra* notes 92–98 and accompanying text (discussing possible explanations for the rise in retaliation claims filed in recent years).

194. *See supra* notes 164–167 and accompanying text.

195. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

196. *See supra* text accompanying notes 67–69.

197. *See* Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) ("The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit."); *Burlington Northern*, 126 S. Ct. at 2416 ("[A] legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an 'act that would be immaterial in some situations is material in others.'" (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)).

198. *See* Rochon v. Gonzales, 438 F.3d 1211, 1216–17 (D.C. Cir. 2006).

199. The lower federal courts applying the restrictive approach generally limited prohibited conduct to such actions. *See supra* notes 32–36 and accompanying text.

educate employers on the types of retaliatory conduct in which they *may* engage.[200] This result would defeat the purpose of proscribing retaliatory conduct by aiding unscrupulous employers in the art of "getting away" with retaliation.

Similarly, a per se standard modeled after either the restrictive[201] or intermediate[202] approaches would weaken the effectiveness of the underlying legislation, as it would protect employees only from acts with a blatant retaliatory purpose. In effect, employers would be able to evade the legal repercussions of their conduct by providing a lawful pretext for retaliatory conduct.[203] In the context of a retaliation claim under the NLRA, the Supreme Court made it clear that if "the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise legal or even praiseworthy is not controlling."[204] Courts should avoid construing all types of anti-retaliation legislation to provide a safe harbor for clever, yet devious employers who provide legal explanations for their otherwise unlawful behavior. Rather, the construction of such laws should focus on whether an employer has a lawful *motive* for its conduct.

Moreover, the *Burlington Northern* Court's use of the "reasonable person" standard represents a more viable approach to construing the gamut of federal anti-retaliation law. Courts commonly apply "reasonable person" tests.[205]. As the *Burlington Northern* Court noted, "[a]n objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[206] Furthermore, by recognizing "the significance of any given act of retaliation will often depend upon the particular circumstances,"[207] the Court sought to ensure all retaliatory conduct, in its myriad forms, is prohibited. In effect, the standard leaves little, if any, opportunity for employers to evade the objectives of the underlying legislation.

Adopting the deterrence standard as a per se rule for construing federal anti-retaliation law also serves justice more effectively than the alternative of developing distinct and possibly divergent rules for dealing with violations of the other statutes prohibiting retaliatory action. How can one justify affording employees the broadest degree of protection when reporting violations of Title VII,

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200. *See supra* note 197.

201. *See supra* notes 32–36 and accompanying text.

202. *See supra* notes 37–39 and accompanying text.

203. Marilee L. Miller, *The Employer Strikes Back: The Case for a Broad Reading of Title VII's Bar on Retaliation*, 2006 UTAH L. REV. 505, 536 (2006).

204. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895 n.6 (1984) (employer's otherwise lawful reporting of illegal workers to Immigration and Naturalization Service constituted unlawful retaliation because the supervisor's motive was to retaliate).

205. *See* Pa. State Police v. Suders, 542 U.S. 129, 147 (2004) (establishing "reasonable person" analysis of constructive discharge claim); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (applying "reasonable person" standard for hostile work environment claims); Thaddeus-X v. Blatter, 175 F.3d 378, 396 (6th Cir. 1999) (en banc) (prohibiting conduct that "would deter a person of ordinary firmness from the exercise of [the First Amendment right to free speech]").

206. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006).

207. *Id.*

while providing less effective measures (such as the restrictive[208] and intermediate[209] approaches) to safeguard their rights under at least forty-two other congressionally enacted statutes?[210] Who is to say an employee's right to report disability discrimination[211] or age discrimination[212] is less important than the right to file a claim of sex discrimination? And it is doubtful anyone would argue the rights of employees to voice safety concerns relating to the inspection of nuclear power plants[213] or to report toxic substances in drinking water[214] should be taken lightly. Moreover, after debacles such as the collapse of Enron in 2001,[215] we should encourage whistleblowing to expose fraud against the shareholders of publicly-traded corporations.[216]

In the case of each of these statutes, and many others, Congress unmistakably and expressly intended to prohibit employers from taking retaliatory action against employees who participate in protected activity. The inclusion of such provisions suggests Congress deemed the underlying substantive law to be worthy of increased protection. It is illogical, then, to insist that certain adverse actions should be considered actionable in the context of one statute and contemporaneously "trivial" under another.

D. Early Support for Expanding the Scope of the Expansive Approach

It is unclear at this point whether the *Burlington Northern* standard will evolve into a per se rule for construing the scope of all federal anti-retaliation legislation. Within the course of a few months, however, the Court's analysis has already wielded significant influence on several lower courts' decision-making outside the realm of Title VII.

In *Foraker v. Apollo Group, Inc.*,[217] for example, the U.S. District Court for the District of Arizona applied the *Burlington Northern* standard when considering a retaliation claim under the FMLA. There, the plaintiff was a senior

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208. *See supra* notes 32–36 and accompanying text.

209. *See supra* notes 37–39 and accompanying text.

210. One possible argument against extension to all anti-retaliation provisions is that the deterrence standard was crafted to protect those who report discrimination against individuals protected by Title VII whereas many of the other statutes do not seek to protect a certain class of persons. Such an argument misses the crux of this Note, which is that the deterrence standard best accomplishes the goal of enforcing the underlying substantive laws and not necessarily insulating protected classes from discrimination.

211. *See* Americans with Disabilities Act (ADA), 42 U.S.C. § 12203(a) (2006).

212. *See* Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d) (2006).

213. 42 U.S.C. § 5851(a)(1) (2006) (nuclear whistleblower protection).

214. 42 U.S.C. § 300j-9(i)(1) (2006) (safety of public water systems).

215. *See* Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview*, N.Y. TIMES, Nov. 29, 2001, at A1.

216. Sarbanes-Oxley Act of 2002 § 807(a), 18 U.S.C. § 1514A (2006) (protecting from retaliation employees of publicly traded corporations who disclose information to the Securities and Exchange Commission, Members of Congress, federal regulatory agencies, and persons with supervisory authority over the person disclosing information).

217. No. CV-04-2614-PHX-DGC, 2006 WL 3390306 (D. Ariz. Nov. 22, 2006).

director at the University of Phoenix.[218] After taking a leave of absence under the FMLA, he was placed on administrative leave for almost a year but continued to receive full pay and benefits.[219] During this time, the university prohibited the plaintiff from entering the workplace and took away his previously increased job responsibilities and a promised pay raise.[220] In finding the evidence reasonably supported a jury's verdict in favor of the plaintiff on his retaliation claim, the court applied the exact standard set forth in *Burlington Northern*: "[T]he relevant inquiry is whether the challenged action might have dissuaded a reasonable worker from engaging in protected conduct—in this case, taking leave under the FMLA."[221] In doing so, the *Foraker* court acknowledged that *Burlington Northern* and *Ray v. Henderson*,[222] its Ninth Circuit counterpart, pertained specifically to Title VII retaliation claims, but elected to apply the standard to the plaintiff's FMLA claim because the defendant did not dispute that the definition of adverse employment action applied under the FMLA.[223]

The Second Circuit, which previously subscribed to the intermediate approach requiring a plaintiff to show "a materially adverse change in the terms and conditions of employment,"[224] recently applied the *Burlington Northern* standard when considering a retaliation claim under the ADEA and Title VII. In *Kessler v. Westchester County Department of Social Services*,[225] a white male employee of a county's social services agency sued the agency and the county, alleging the defendants retaliated against him by transferring him to a less desirable position and changing his job responsibilities after he filed complaints with the EEOC and the New York State Division of Human Rights.[226] The district court granted summary judgment for the defendants, finding the plaintiff failed to produce evidence of an adverse employment action sufficient to raise a question of fact.[227] In light of the intervening decision in *Burlington Northern*, however, the court of appeals vacated the district court's holding, finding the plaintiff's reassignment "could well have dissuaded a reasonable employee in his position from complaining of unlawful discrimination [under the ADEA and Title VII]."[228]

Critics of the *Burlington Northern* decision should not read the foregoing examples as evidence that applying the expanded approach to other federal anti-retaliation legislation will result in nearly *all* retaliation claims making it to trial, even if their underlying discrimination claims do not.[229] Although the new

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218. *Foraker*, 2006 WL 3390306, at *1.
219. *Id.*
220. *Id.*
221. *Id.* at *2.
222. 217 F.3d 1234 (9th Cir. 2000).
223. *Foraker*, 2006 WL 3390306, at *2.
224. Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997) (Requests by university officials that employee drop EEOC charge of racial and sexual harassment did not constitute retaliation after employee refused requests, absent evidence of "a materially adverse change in the terms and conditions of employment.").
225. 461 F.3d 199 (2d Cir. 2006).
226. *Id.* at 201–02.
227. *Id.* at 200.
228. *Id.* at 209.
229. *See supra* notes 100–101 and accompanying text.

standard undoubtedly makes it easier for plaintiffs to prevail on retaliation claims absent evidence of dismissal or altered terms or conditions of employment, plaintiffs must nonetheless fulfill other requirements in order to prevail: The plaintiff also must show she engaged in a protected activity and that there was a causal connection between the protected activity and the defendant's course of action.[230] Only the adverse employment action element of a plaintiff's claim is affected by the *Burlington Northern* standard; therefore, these additional elements remain obstacles to unwarranted plaintiffs' verdicts.

Furthermore, even assuming a plaintiff is successful in proving the activity in which she participated was protected under a particular statute and that there was a causal connection between that activity and her employer's actions, the *Burlington Northern* standard will nonetheless screen out "nonactionable petty slight[s]."[231] This contention has already been demonstrated outside the sphere of Title VII litigation.[232]

CONCLUSION

Reflecting on her long journey from a Memphis rail yard to the United States Supreme Court, Sheila White commented, "[p]ersonally, I think I was strong to go on as long as I did with all of this."[233] For White, the *Burlington Northern* decision represented a long-awaited acknowledgment of the emotional and financial suffering she was forced to endure for exercising her right to report unlawful sex discrimination. For millions of other people across the country, the decision may someday represent another victory—the recognition that employers should not be permitted to use their authority to suppress employees' rights to participate in protected activity.

If unrestrained, retaliation has the potential to seriously undermine a large, diverse group of federal statutes. In order to prevent this possibility and bring about a large-scale vindication of employee rights, the federal courts are urged to adopt *Burlington Northern*'s deterrence standard as a per se approach to construing the full gamut of anti-retaliation legislation. This standard is consistent with the Court's historical attitude toward retaliatory conduct, and it most

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230. Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).

231. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006).

232. For example, in *Morgan v. Masterfoods USA, Inc.*, No. 2:04-CV-907, 2006 WL 3331780 (S.D. Ohio Nov. 14, 2006), the plaintiff claimed he was discriminated against on the basis of his mental disability after he informed his employer that he had a history of depression and was at the time taking medication and attending counseling sessions. *Morgan*, 2006 WL 3331780, at *1. The plaintiff filed a charge under the ADA with the EEOC and later took an approved leave of absence to deal with his depression. *Id.* at *2. After returning to work, the plaintiff alleged, *inter alia*, that his supervisor threatened to give him a formal reprimand for absenteeism, gave him a low performance evaluation, and launched a retaliatory investigation into an accident in which the plaintiff was involved. *Id.* at *2–3. The court applied the *Burlington Northern* standard in considering the plaintiff's retaliation claim under the ADA, finding that the charged actions were "simply insufficient to 'dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at *12 (quoting *Burlington Northern*, 126 S. Ct. at 2409).

233. Dewan, *supra* note 45.

effectively promotes the functions of the underlying laws and the basic rights of employees who demand compliance with such legislation. Perhaps most significantly, the deterrence standard will benefit employers by preventing trivial claims from reaching trial, while allowing meritorious ones, in their countless forms, the opportunity for consideration by the trier of fact.

APPENDIX

Federal Statutes Containing Anti-Retaliation Provisions[234]

2 U.S.C. § 1317(a) (2006)	(various rights of congressional employees)
3 U.S.C. § 417(a) (2006)	(various rights of employees in the office of the President)
5 U.S.C. § 7116 (2006)	(unfair labor practices by federal agencies)
10 U.S.C. § 2409(a) (2006)	(reporting violations of the law by federal contractors)
12 U.S.C. § 1441a(q)(1) (2006)	(reporting violations of the law to the Thrift Depositor Protection Oversight Board)
12 U.S.C. § 1790b (2006)	(reporting violations of the law by credit unions or supervising federal officials)
12 U.S.C. § 1831j (2006)	(reporting violations of the law or gross mismanagement by banks or federal agencies overseeing banks)
15 U.S.C. § 2622 (2006)	(control of toxic substances)
15 U.S.C. § 2651(a) (2006)	(asbestos hazard)
18 U.S.C. § 1514A (2006)	(Sarbanes-Oxley Act)
20 U.S.C. § 3608 (2006)	(disclosure of asbestos hazard in school)
20 U.S.C. § 4018 (2006)	(disclosure of asbestos hazard in school)
22 U.S.C. § 4115 (2006)	(rights of Department of State employees to join, or refrain from joining, union)
29 U.S.C. § 158(a)(3)-(a)(4) (2006)	(National Labor Relations Act)
29 U.S.C. § 215(a)(3) (2006)	(Fair Labor Standards Act)
29 U.S.C. § 623(d) (2006)	(Age Discrimination in Employment Act)
29 U.S.C. § 660(c)(1) (2006)	(Occupational Safety and Health Act)
29 U.S.C. § 1140 (2006)	(Employee Retirement Income Security Act)
29 U.S.C. § 1855(a) (2006)	(Migrant and Seasonal Agricultural Worker Protection Act)
29 U.S.C. § 2002 (2006)	(Employee Polygraph Protection Act)
29 U.S.C. § 2615(a) (2006)	(Family and Medical Leave Act)
30 U.S.C. § 815(c)(1) (2006)	(mine safety)
30 U.S.C. § 1293(a) (2006)	(surface mining control and reclamation)
31 U.S.C. § 3730(h) (2006)	(false claims against the United States)

234. Brief for Respondent, *supra* note 18, at 21 app.1a.

31 U.S.C. § 5328(a) (2006)	(disclosure to federal officials of violations of laws regarding reports of monetary transactions)
33 U.S.C. § 948a (2006)	(longshore and harbor workers' compensation)
33 U.S.C. § 1367(a) (2006)	(water pollution prevention and control)
38 U.S.C. § 4311(b) (2006)	(Uniformed Services Employment and Reemployment Rights Act)
41 U.S.C. § 265(a) (2006)	(violations of the law by federal contractors)
42 U.S.C. § 300j-9(i)(1) (2006)	(safety of public water systems)
42 U.S.C. § 2000e-3(a) (2006)	(Title VII of the Civil Rights Act of 1964)
42 U.S.C. § 5851(a)(1) (2006)	(nuclear whistleblower protection)
42 U.S.C. § 6971(a) (2006)	(solid waste disposal)
42 U.S.C. § 7622(a) (2006)	(air pollution)
42 U.S.C. § 9610(a) (2006)	(Comprehensive Environmental Response, Compensation, & Liability Act)
42 U.S.C. § 12203(a) (2006)	(Americans with Disabilities Act)
46 U.S.C. § 2114(a) (2006)	(maritime safety)
46 U.S.C. App. § 1506(a) (2006)	(unsafe cargo containers)
49 U.S.C. § 20109(a) (2006)	(railway safety)
49 U.S.C. § 31105(a) (2006)	(commercial motor vehicle safety)
49 U.S.C. § 42121(a) (2006)	(employees of air carriers or contractors or subcontractors of air carriers)
49 U.S.C. § 60129(a) (2006)	(pipeline safety)
50 U.S.C. § 2702(a) (2006)	(military atomic energy facilities)