EMPLOYERS BEWARE: *BURLINGTON NORTHERN V. WHITE* AND THE NEW TITLE VII ANTI-RETALIATION STANDARD

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INTRODUCTION

In 2006, anti-retaliation claims constituted nearly twenty-six percent of the overall claims brought under Title VII.[1] That percentage will likely increase after the United States Supreme Court's decision in *Burlington Northern & Santa Fe Railway Company v. White*.[2] In *Burlington*, the Court settled a circuit split with regard to employment discrimination.[3] Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of "race, color, religion, sex, or national origin."[4] The Act's anti-retaliation provision forbids an employer to "discriminate against" an employee "because he has made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.[5] The circuit split revolved around the issue of which employer actions "discriminate against" an employee under 42 U.S.C. § 2000e-3(a), the anti-retaliation provision.[6] Up to that point, the circuits had formed three different approaches to defining what actions "discriminate against" employees who have engaged in a protected activity under Title VII. Some circuits applied a strict view of what actions "discriminate against" employees by limiting the anti-retaliation provision to actions involving "ultimate employment decision[s]."[7] Other circuits, under a moderate view, required actions affecting the privileges, terms, and conditions of employment.[8] The remaining circuits, under the liberal view, only required actions that would be material to a reasonable employee.[9]

In *Burlington*, the Court made it easier for employees to make a Title VII employment discrimination claim for retaliation by holding that "discriminate against" is not limited to ultimate employment decisions, i.e., firing or refusing

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1. *See* EEOC, Charge Statistics FY 1997 Through FY 2006, www.eeoc.gov/stats/charges.html (last visited on Feb. 5, 2007).

2. 126 S. Ct. 2405 (2006).

3. *Id.*

4. 42 U.S.C. § 2000e-2(a) (2000).

5. *Id.* § 2000e-3(a).

6. *See* Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Mattern v. Eastman Kodak Co., 104 F.3d. 702, 707 (5th Cir. 1997); *see also* Irene Gamer, Comment, *The Retaliatory Harassment Claim: Expanding Employer Liability in Title VII Lawsuits*, 3 SETON HALL CIRCUIT REV. 269, 287-91 (2006) (explaining the three different approaches amongst the circuits in defining "discriminate against.").

7. *See* Gamer, *supra* note 6, at 287-89 (citing Manning v. Metro. Life Ins., 127 F.3d 686, 692 (8th Cir. 1997)).

8. *Id.* at 290-91 (citing Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999)).

9. *Id.* at 289-90.

to hire someone.[10] Rather, the Court held that in order to fall under the "discriminate against" language, an employer's actions need only be "materially adverse" to a reasonable employee or applicant.[11]

This decision, of course, did not bode well with employers. Employers complained about the difficulty in predicting future liability, citing the lack of clarity in the Court's explanation of what actions "discriminate against" employees.[12] Employers were not alone. Justice Alito filed a concurring opinion, questioning the clarity of the majority's standard and the difficulty in applying that standard.[13] The expansiveness of the *Burlington* decision, and the increase in costs of litigation to employers resulting from the decision, remain to be seen. One thing is clear: employers need to take action to prevent retaliation by supervisors against employees that have engaged in a protected activity. Avoiding liability will certainly be more difficult under this new standard as compared to claims under the main anti-retaliation provision. The first step to avoiding liability is implementing effective human resource policies to deter retaliation and effective grievance procedures to address existing retaliatory conduct.

Part I of this Note briefly discusses the elements of a Title VII anti-retaliation claim. Part II discusses the circuit split before the *Burlington* decision. Part III discusses the *Burlington* decision and how the Court resolved the circuit split. Part IV analyzes the potential problems with the standard articulated by the Court, drawing not only from Justice Alito's concerns, but also from concerns of employers. Finally, Part V argues that courts should allow employers to assert affirmative defenses to defend against the increased amount of retaliation claims. Part V also discusses possible human resource solutions to prevent employer liability.

I. ELEMENTS OF A RETALIATION CLAIM UNDER TITLE VII

Under Title VII:

> It shall be an unlawful employment practice 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, because of such individuals race, color, religion, sex, or national origin . . . .[14]

Congress enacted this provision to protect employees from discrimination by

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

11. *Id.* at 2415.

12. Russell Adler, *Employers, Beware: Supreme Court Decision Changes the Playing Field*, LEGAL INTELLIGENCER 5, Aug. 29, 2006, at 5 (discussing the potential expansiveness of the *Burlington* standard).

13. *Burlington*, 126 S. Ct. at 2421 (Alito, J., concurring).

14. 42 U.S.C. § 2000e-2(a) (2000).

their employers on the basis of sex, religion, race, or national origin.[15] Congress included the anti-retaliation provision because it recognized a need to protect employees from employer retaliation in order for Title VII to be effective.[16] Under the anti-retaliation provision, "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[17]

Retaliation claims under Title VII include a "'three-step burden-shifting analysis.'"[18] In the first step, the employee must demonstrate a "prima facie case of retaliation."[19] An employee must prove three elements to establish a prima facie case of retaliation: "'(1) participation in a protected activity that is known to the defendant, (2) an employment decision or action disadvantaging the plaintiff, and (3) a causal connection between the protected activity and the adverse decision.'"[20] After the employee demonstrates a prima facie case of retaliation, "'[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'"[21] According to the Supreme Court, employers can disprove a prima facie case of retaliation by providing a "'reasonable basis' for the employer's action against the . . . employee."[22] If the employer makes such a showing, the employee can invoke the third step in order to receive a remedy against the employer.[23] In the third step, the employee must show that the "reasonable basis" for the employer's actions "was merely a pretext to discriminate against the employee."[24] The Court in *McDonnell Douglas* noted that pretext could be proven by demonstrating "disparate treatment of minorities, mistreatment of the employee during the employment period, or a negative employer response to the plaintiff/employee's civil rights activities."[25]

Ultimately, "[t]he key to making a successful retaliation claim is that the [employee] must prove the employer took some adverse employment action

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15. *See* Christopher M. Courts, Note, *An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235, 237 (2001) (explaining the purpose of Title VII's discrimination provisions).

16. *Id.* at 237-38.

17. 42 U.S.C. § 2000e-3(a) (2000).

18. *See* Courts, *supra* note 15, at 240 (quoting Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998)).

19. *Id.* (citing *Quinn*, 159 F.3d at 768).

20. *Id.* (quoting Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 443 (2d Cir. 1999)).

21. *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

22. *Id.* (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802).

23. *Id.*

24. *Id.* (citing *Richardson*, 180 F.3d at 443 ("If the defendant meets its burden, the plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation.")).

25. *Id.* (citing *McDonnell Douglas Corp.*, 411 U.S. at 805).

against them."[26] Defining adverse employment action was, of course, at the heart of the *Burlington* decision.

II. The Circuit Split in Defining Which Employment Actions "Discriminate Against" Employees

Before Burlington, the circuits took three different approaches with regard to defining "discriminate against" under the statutory provision: (1) a strict view, (2) a moderate view, and (3) a liberal view.[27] These views spanned from those actions involving ultimate employment decisions, such as hiring or firing, to actions materially adverse to a reasonable employee.[28]

A. The Strict-View Approach to Defining "Discriminate Against"

Under the strict-view approach, followed by the Fifth and Eighth Circuits, "discriminate against" required "an adverse employment action consist[ing] of an ultimate employment decision that produces a 'tangible change in duties or working conditions' and results in a 'material employment disadvantage.'"[29] These circuits required the employee to show an "'[u]ltimate employment decision[],'" limiting actionable conduct to "'hiring, granting leave, discharging, promoting,'" demoting, granting or denying compensation, or reassignment.[30] Under the strict-view approach, "lateral transfer[s], poor treatment by supervisors or co-workers, . . . verbal reprimand[s], and a missed pay raise" did not constitute actionable conduct under the anti-retaliation provision.[31]

B. The Moderate-View Approach to Defining "Discriminate Against"

Under the moderate-view approach, followed by the Second, Third, Fourth, and Sixth Circuits, "discriminate against" required "an ultimate employment decision or a decision materially affecting employment privileges, conditions, terms or compensation."[32] These circuits "insisted upon a close relationship between the retaliatory action and employment."[33] This standard is the same standard applied to a substantive discrimination offense under Title VII, mandating that the challenged action have an effect on the terms, conditions, or

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26. *Id.*

27. *See* Gamer, *supra* note 6, at 287-91.

28. *See id.*

29. *Id.* at 287 (quoting Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997)).

30. Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995)); *see Manning*, 127 F.3d at 692; *see also* Gamer, *supra* note 6, at 287-88.

31. *See* Gamer, *supra* note 6, at 287 (footnotes omitted).

32. *Id.* at 290 (citing Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999)).

33. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410 (2006).

benefits of employment.[34] Examples of actionable conduct included, but were not limited to, "a reduction in job responsibilities or professional status, a poor performance review, [or] a denial of salary and benefits."[35]

C. The Liberal-View Approach to Defining "Discriminate Against"

Other circuits imposed a minor limitation on the scope of the entire retaliation provision by reading the provision broadly.[36] The Seventh and the District of Columbia Circuits only required a showing that the employer's challenged action "would have been material to a reasonable employee," likely "dissuad[ing] a reasonable worker from making or supporting a charge of discrimination."[37] The Ninth Circuit required a showing of "'adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'"[38] Examples of actionable conduct "under this approach include bad references, poor performance evaluations, negative remarks about an employee[,] . . . transferring an employee to a lateral position, cutting off challenging assignments, relocating the employee from a nice office to a dingy closet and changing the work schedule."[39]

III. THE *BURLINGTON* DECISION: THE COURT ADOPTS THE BROAD VIEW

In *Burlington*, the Court attempted to clear the confusion as to what standard to apply in Title VII anti-retaliation cases.[40] The circuit split contained three different approaches to defining which employment actions "discriminate against" an employer under Title VII's anti-retaliation provision.[41] The facts underlying *Burlington* provided an excellent opportunity to witness the practical differences in the three different views of the circuits.

A. The Facts

The case involved Sheila White, a railroad worker and the only woman working in her department at Burlington's Tennessee yard.[42] In June 1997, White was approached by Burlington's roadmaster, Marvin Brown, about her

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34. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795 (3d Cir. 2004).

35. *See* Gamer, *supra* note 6, at 290.

36. *See* Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006); Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

37. *Washington*, 420 F.3d at 662; *see Rochon*, 438 F.3d at 1217-18.

38. *Ray*, 217 F.3d at 1242-43 (quoting EEOC Compliance Manual § 8, Retaliation, ¶ 8008 (1998)).

39. *See* Gamer, *supra* note 6, at 289-90.

40. Burlington N. & Sante Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).

41. 42 U.S.C. § 2000e-3(a) (2000).

42. *Burlington*, 126 S. Ct. at 2409.

interest in operating forklifts.[43] Burlington had hired her as a track laborer.[44] A co-worker who had operated the forklift assumed other responsibilities, so Brown promoted White to forklift duty.[45] Although White continued to perform some track laborer duties, "operating the forklift was [her] primary responsibility."[46]

"In September 1987, White complained to Burlington officials that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in the Maintenance of Way department."[47] According to White, Joiner "had also made insulting and inappropriate remarks . . . in front of her male colleagues."[48] An internal investigation resulted in the suspension of Joiner for ten days.[49] On September 26, Brown removed White from forklift duty and reassigned her to her former tasks as track laborer.[50] He stated "that the reassignment reflected co-workers' complaints that 'a more senior man' should have the 'less arduous and cleaner job' of forklift operator."[51] On October 10, White filed a complaint with the Equal Employment Opportunity Commission ("EEOC") "claim[ing] that the reassignment of her duties amounted to unlawful gender-based discrimination [in] retaliation for . . . having earlier complained about Joiner."[52] White later filed another charge alleging "Brown had placed her under surveillance and was monitoring her daily activities."[53] The charges were mailed to Brown on December 8.[54]

A few days later, White and her immediate supervisor disagreed about the type of transportation White should take from one location to another.[55] Later that day, White's supervisor told Brown that White had been "insubordinate," and White was suspended without pay.[56] White followed company grievance procedures, which led Burlington officials to conclude that she had not been insubordinate.[57] Burlington reinstated White, offering thirty-seven days worth of back pay for the time she had been suspended.[58] She then filed yet another charge with the EEOC because she was suspended.[59]

White filed an action in federal court against Burlington under Title VII

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* (citing White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 792 (3d Cir. 2004)).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

claiming that Burlington's actions—specifically, "changing her job responsibilities[] and . . . suspending her for [thirty-seven] days without pay"—constituted unlawful retaliation.[60] The jury found in her favor on both claims and awarded her $43,500 in compensatory damages.[61] The Sixth Circuit reversed.[62] However, the Sixth Circuit sitting en banc affirmed the district court's judgment on both retaliation claims.[63] The members of the Sixth Circuit nonetheless disagreed "as to the proper standard to apply."[64]

B. The Court's Answer to the Circuit Split and White's Claim

The fundamental issues the Supreme Court needed to address were: in a Title VII retaliation action, "whether the challenged action has to be employment or workplace related and . . . how harmful that action must be to constitute retaliation."[65] The Court reviewed and analyzed each of the circuits' different interpretations of the anti-retaliation provision.[66] The Court concluded that the anti-retaliation provision reads differently than the substantive provision.[67] The Court noted the difference in language between the anti-retaliation provision and the general discrimination provision, namely that in the anti-retaliation provision the term "discrimination" does not have the qualifiers that the same term has in the substantive provision.[68] The Court also looked at congressional intent,[69] even though legislative history of Title VII is relatively scarce.[70] The Court noted that the anti-retaliation and substantive provisions have different purposes. "The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status."[71] However, "[t]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic

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60. *Id.* at 2410.

61. *Id.*

62. White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443 (6th Cir. 2002).

63. *Burlington*, 126 S. Ct. at 1210.

64. *Id.*

65. *Id.*

66. *See id.* at 2410-11.

67. *Id.* at 2414.

68. *Id.* at 2411-12. The Court was referring to the following language in the main discrimination provision of Title VII: "or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment*[.]" 42 U.S.C. § 2000e-(2)(a) (2000) (emphasis added). This language does not appear in the anti-retaliation provision. *See* 42 U.S.C. § 2000e-(3)(a) (2000).

69. *See Burlington*, 126 S. Ct. at 2411-12.

70. *See* Eric M.D. Zion, Note, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 195-98 (2001).

71. *Burlington*, 126 S. Ct. at 2412 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973)).

guarantees."[72] The substantive provision prevents injury based on who employees are, while the anti-retaliation provision prevents harm based on what the employees do.[73]

The Court further noted that, in order "[t]o secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination."[74] However, the second objective cannot be secured "by focusing only upon employer actions and harm that concern employment and the workplace."[75] This is so because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."[76] Ultimately, the language and purpose of the Act supported the conclusion "that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[77]

The Solicitor General argued that it is odd to read the anti-retaliation provision broader than the discrimination provision, in effect providing "broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination."[78] In response, citing the National Labor Relations Act,[79] the Court noted that "Congress has provided similar kinds of protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions."[80] Finally, the Court reasoned that Title VII depends on employees who are willing to stand up to employers and file complaints, and that a broad interpretation of the anti-retaliation provision, which in turn gives more protection to these employees, would encourage such behavior.[81]

Ultimately, the Court held that the entire "retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace."[82] The Court then concluded, following the reasoning of the Seventh and District of Columbia Circuits,[83] that the anti-retaliation "provision covers those . . . employer actions that would have been materially adverse to a reasonable employee or job applicant. . . . [T]hat means that the employer's actions must be harmful to the point that they could well dissuade a

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (citing Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006); Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

77. *Id.* at 2412-13 (citing Wachovia Bank v. Schmidt, 546 U.S. 303, 319 (2006)).

78. *Id.* at 2414.

79. *See* 29 U.S.C. §§ 158(a)(3)-(4) (2000).

80. *Burlington*, 126 S. Ct. at 2414.

81. *Id.*

82. *Id*. at 2409.

83. *Id.* at 2410-11.

reasonable worker from making or supporting a charge of discrimination."[84] The Court reasoned that the materiality aspect of its holding "served to separate significant from trivial harms."[85] "The anti-retaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms . . . by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers."[86]

The Court implemented the "reasonable employee" element because it "believe[d] that the provision's standard for judging harm must be objective."[87] The objective standard, according to the Court, is "judicially administrable."[88] The standard is phrased "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances."[89] According to the Court, "[c]ontext matters," and an objective standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[90] However, the Court, apparently trying to alleviate some of the concerns raised in Justice Alito's concurring opinion, stated that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."[91] The Court stated that "normally petty slights, minor annoyances, and simple lack of good manners will not" be sufficient to deter an employee pursuing his or her rights under Title VII.[92]

Applying the standard, the Court held that the evidence supported the jury's verdict against Burlington Northern.[93] A reassignment of duties can constitute retaliatory discrimination even where "both the former and present duties fall within the same job description."[94] The record contained evidence that the track labor duties were less desirable than the forklift operator duties, that the forklift operator position was indicative of prestige, and that employees consistently viewed the forklift operator position as a better job.[95] The Court concluded that "a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee."[96] As for the thirty-

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84. *Id.* at 2409.

85. *Id.* at 2415.

86. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (citing 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996)).

92. *Id.*

93. *Id.* at 2416.

94. *Id.*

95. *Id.* at 2417.

96. *Id.*

seven days without pay (that was re-paid), the Court concluded that "[m]any reasonable employees would find a month without a paycheck to be a serious hardship."[97]

IV. ARGUMENTS OVER THE CLARITY OF THE *BURLINGTON* STANDARD

The Court's decision in *Burlington* raised the eyebrows of not only employers, but also of Justice Alito as demonstrated by his concurring opinion. While ultimately having different worries underlying their concerns, those raising issues with the Court's decision share one theme: the Court's standard for actionable retaliatory conduct is unclear and therefore unpredictable.

A. Justice Alito: The Majority's Standard is Unclear

One central theme in Justice Alito's concurring opinion was the uncertain application of the majority's standard that will undoubtedly occur. He specifically raised three potential problems with the application of the Court's holding in *Burlington*.[98] First, he believed that the new standard would lead to "topsy-turvy results [that] make no sense."[99] Specifically, he believed that employers, under this new standard, will have incentive to subject their employees to the most severe discrimination while not incurring liability under the anti-retaliation provision.[100] However, Justice Alito opined that employees will be more dissuaded from even filing a claim where the discrimination is of "a much milder form," and therefore, the employer again will not be liable under the anti-retaliation provision.[101]

Justice Alito's second concern was that "the majority's conception of a reasonable worker is unclear."[102] Even though the majority stated that the "reasonable worker" test is objective, "it later suggests that at least some individual characteristics of the actual retaliation victim must be taken into account."[103] He noted the majority's view that "the significance of any given act of retaliation will often depend upon the particular circumstances."[104] According to Justice Alito, "the majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim."[105] He feared that future jurors and courts may take too many individual characteristics into account when deciding if the adverse actions would have

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97. *Id.*
98. *Id.* at 2420-21 (Alito, J., concurring).
99. *Id.* at 2421.
100. *See id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* (quoting majority opinion at 2415).
105. *Id.*

dissuaded a "reasonable person."[106] Finally, Justice Alito opined that the Court inserted a new test for causation into "an area of the law in which standards of causation are already complex" and that such an insertion is unwelcome.[107]

B. Complaints from the Business World: Employers Fear the Unknown

Many people in the business world, attaching to Justice Alito's concerns for the lack of clarity in the Court's standard, have also raised concerns. Simply stated, employers believe the Court's decision in *Burlington* will lead to increased costs stemming from litigation and prevention of litigation through Human Resource ("HR") tactics.[108] According to some, the *Burlington* decision forces employers to implement more intensive HR strategies to avoid retaliation claims.[109] Implementing these policies and strategies costs employers time and money. Within a few weeks of the decision, legal analysts began instructing companies to implement new HR strategies.[110] These analysts primarily focused on proper training and documentation.[111]

Most argue that the new standard will lead to more lawsuits that are not only expensive, but also very time consuming for federal courts. Employers and employer advocates saw the "ultimate employment decision" standard as a sorting principle imperative to the efficient resolution of Title VII retaliation claims.[112] "The requirement that an employee have at least suffered some tangible harm before resorting to court action provides an important sorting principle in discrimination cases. This allows for trivial claims to be dismissed summarily, reserving the courts' and juries' time and attention for more seriously

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106. *Id.*

107. *Id.*

108. *See, e.g.*, Adler, *supra* note 12.

109. *See* Jonathan D. Wetchler, *Employers Should Do Retaliation! What the Supreme Court Said in* Burlington Northern v. White, *and What Employers Should Do About It*, METRO. CORP. COUNS., Aug. 2006, at 16.

110. *See id.*; *see also* Adler, *supra* note 12 ("As a result [of the *Burlington* decision], employers should proceed with even greater caution to ensure that routine adjustments to employee tasks and other common workplace occurrences do not result in retaliation claims, especially since these standards are likely to be applied to additional statutes and result in increased retaliation claims under other federal and state anti-discrimination laws as well."); Jathan Janove, *Retaliation Nation: A Recent U.S. Supreme Court Ruling with Stir up a New Wave of Retaliation Claims*, HRMAG., Oct. 1, 2006, at G2 (stating "HR professionals will need to take a renewed, and perhaps different, role in establishing policy and in training managers to be better practitioners of good HR" as a result of *Burlington*); Michael P. Maslanka, *Post*-Burlington Northern *Employment Procedures*, TEX. LAW., Sept. 4, 2006, at S51 (listing steps for employer's to take to avoid retaliation claims as well as questions to consider after a claim alleging discrimination has been filed).

111. Wetchler, *supra* note 109.

112. John Myers, *Supreme Headache for Employers? High Court Ruling Could Clear Way for More Employee Discrimination Suits*, PITT. POST-GAZETTE, July 18, 2006, at A14.

harmed claimants."[113] The decision in *Burlington*, although "theoretically sound," is "impractical . . . [because] there is no sorting principle that will allow pre-trial dismissal of trivial claims filed by the scarcely harmed."[114]

Employers argue that the *Burlington* standard will make it difficult if not impossible to successfully defend against non-tangible employment action at the summary judgment stage.[115] The standard focuses on those actions that would deter a reasonable employee, instead of a concrete, bright line rule requiring ultimate employment decisions or actions affecting the terms and conditions of employment.[116] Under the latter standards, district courts could easily determine whether a genuine issue of material fact existed as required under Federal Rule of Civil Procedure 56.[117] If the employee was fired, or if the employee's terms and conditions of employment were changed, the employer could not win on a summary judgment motion. "The court's decision to assess 'context' will result in more cases being filed and fewer of them being resolved on summary judgment."[118]

"[T]he number of retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) has jumped [thirty-five] percent over the past decade."[119] Employment discrimination cases now make up ten percent of the federal docket.[120] "[I]n fiscal year 2004 alone, retaliation charges resolved by the EEOC resulted in monetary payments from employers that exceeded $90 million. This figure does not include employer judgment and settlement payments through litigation."[121] Further, according to the EEOC, "punitive damages often will be appropriate in retaliation claims brought under [Title VII]."[122] It follows that future liability under Title VII's anti-retaliation provision could be drastic.

Moreover, according to at least one commentator, *Burlington*'s expansion as to what constitutes retaliation will actually encourage employees to assert claims of discrimination that lack merit to gain the protections of the anti-retaliation provision.[123] He also notes that the reasoning in *Burlington* will likely be applied to other anti-retaliation laws, which will in turn lead to even more litigation for companies.[124]

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113. *Id.*

114. *Id.*

115. *Id.*

116. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006).

117. *See* FED. R. CIV. P. 56(c).

118. Janove, *supra* note 110.

119. *Id.*

120. E.J. Graff, *Striking Back the Supreme Court Recently Handed Workers a 9-0 Victory in a Pivotal Workplace Discrimination Case. But Will the Lower Courts Turn Victory Into Defeat?*, BOSTON GLOBE, Sept. 3, 2006, at D1.

121. Janove, *supra* note 110.

122. EEOC COMPLIANCE MANUAL (1998), *available at* http://www.eeoc.gov/policy/docs/retal.html.

123. *See* Janove, *supra* note 110.

124. *Id.*

Aside from the mere increase in litigation, many believe that the lower courts will struggle with the reasonable employee standard, as stated in Justice Alito's concurring opinion.[125] "The Supreme Court may have somewhat confused matters when it called for a [sic] objective standard for judging the harm created by the allegedly retaliatory conduct."[126] Although the Court ultimately wants to decrease litigation by encouraging employers to handle retaliation claims in house, "'the standard [the Court] selected is so unclear that the employer . . . will have a very difficult time deciding when it's at risk and when it's not.'"[127] Therefore, the Court's desire to have retaliation claims dealt with by employers may not be plausible.

C. An Argument that the Burlington *Standard Is Unclear as Applied to Hostile Work Environment Claims*

In her comment, Irene Gamer analyzes the uncertainty regarding the application of the *Burlington* standard as it applies to hostile work environment ("HWE") claims and retaliatory harassment.[128] Gamer, acknowledging that the Court in *Burlington* "did not specifically mention retaliatory harassment," states that *Burlington*'s broad definition of adverse employment actions falling under the "discriminate against" language of Title VII encompasses a claim of retaliatory harassment.[129] She concludes that "employers remain unguided on their liability for retaliatory harassment" because the Court in *Burlington* did not address whether hostile work environment harassment standards under 42 U.S.C. § 2000e-2(a), the main discrimination provision, apply to retaliation claims.[130]

Gamer made a number of specific complaints about the broad standard laid out in *Burlington* if HWE law is applied to retaliatory harassment claims. First, she argues that the affirmative defense options set out in *Burlington Industries, Inc. v. Ellerth*[131] and *Faragher v. City of Boca Raton*[132] are not practical. "*Ellerth* and *Faragher* require[] employers to exercise 'reasonable care to prevent and correct' harassment."[133] However, as Gamer states, with the uncertainty after *Burlington* as to what actions constitute actionable conduct under the anti-retaliation provision, employers will not be able to know what steps need to be taken to exercise such reasonable care to prevent and correct harassment.[134] Gamer argues that, if the unclear standards of HWE claims under the anti-

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125. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2421 (2006) (Alito, J., concurring).

126. Adler, *supra* note 12.

127. Graff, *supra* note 120 (statement of Hunter R. Hughes, III).

128. *See* Gamer, *supra* note 6.

129. *Id.* at 295.

130. *Id.*

131. 524 U.S. 742 (1998).

132. 524 U.S. 775 (1998).

133. Gamer, *supra* note 6, at 295 (quoting *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807).

134. *Id.* at 296.

discrimination provision apply to anti-retaliation litigation, it will be "virtually impossible for employers to prevent liability."[135] As to the ambiguity of the *Burlington* standard, Gamer states:

> [A]n employer is left wondering whether an employee is protected for reporting conduct that is perfectly lawful; whether it can punish a disloyal employee who disrupts its business while claiming to oppose unlawful action; and whether it can have retaliatory animus imputed to it simply because it takes an adverse employment action against an employee "shortly" after she engages in protected activity.[136]

Essentially, employers are left in the dark as to how to prevent liability for workplace retaliation. Gamer explains how employers must make extended efforts to avoid litigation. First, employers should accept as protected conduct any participation in opposition activity just to be safe.[137] An employer must do this even if the conduct is lawful and even if the employee's behavior is disruptive.[138] After such conduct is noticed, "the retaliatory harassment cause of action forces the employer to monitor and regulate any subsequent offensive treatment that [the] employee encounters."[139] Gamer states that under the main discrimination provision, potentially actionable conduct is somewhat easy to spot.[140] However, under the anti-retaliation standard, Gamer argues that employers will be liable for conduct that may not involve a "retaliatory theme."[141] Examples include transferring an employee from a "'brightly lit office to a dingy closet,'" giving an employee "a bad reference or performance review," or denying an employee a raise.[142] She states that courts routinely rely on inferences in holding that an adverse employment action is motivated by retaliation.[143] According to Gamer, the *Burlington* standard as applied to retaliatory harassment will have a negative effect on blue-collar employers specifically.[144]

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135. *Id.* at 295-96 ("By applying HWE law to retaliatory harassment claims, courts combine the circuit splits from both provisions into one cause of action, making it more difficult than ever for an employer to assess and prevent Title VII liability. Such decisions leave the employer confused about how to spot protected conduct and what kind of supervisor or employee responses to the protected conduct it must regulate.").

136. *Id.* at 296.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 296-97 ("For example, sex-based HWE harassment may involve unwelcome remarks about a plaintiff's anatomy, sexually explicit jokes and photographs, or sexist comments.").

141. *Id.*

142. *Id.* (quoting Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996)).

143. *Id.* at 297.

144. *Id.* at 297-98 ("Having to monitor any offensive behavior occurring after an employee engages in protected expression is particularly troublesome for the blue-collar employer, whose workplace is permeated with vulgar expression. Under the HWE standard, a blue-collar employer may not be able to use the nature of its work environment to prove that offensive expression

Many of Gamer's arguments extend beyond HWE law's application to the anti-retaliation provision. Her arguments tend to parallel those of Justice Alito's: the new standard is unclear and will be difficult to apply by the lower courts. However, others have argued that the *Burlington* standard is clear.

D. Arguments That the Burlington *Standard Is Actually Clear*

Two commentators, Gary Friedman and Jonathan Shiffman, question the complaints of those who contend that *Burlington* "broadens the scope of Title VII retaliation cases."[145] They contend that language in *Burlington* exemplifies the Court's intent on creating clarity "by steering clear of subjective considerations and applying an objective standard designed to weed out flimsy retaliations claims."[146] Freidman and Shiffman argue that the careful analysis of the Court's decision makes concerns raised about the clarity of the *Burlington* standard erroneous.[147]

Freidman and Shiffman argue that *Burlington* "makes it clear that there are certain types of employer actions that simply will not qualify as grounds for a retaliation claim."[148] They state that the Court in *Burlington* made it clear to the lower courts to use their powers to ensure that such claims do not reach a jury.[149] First, Freidman and Shiffman focus on the Court's intent to create a clear standard, relying on the Court expressing its interest in creating a "judicially administrable" standard.[150] Using such a standard is important "in order for judges to avoid 'uncertainties' in determining what types of actions qualify as retaliatory."[151]

Next, Freidman and Shiffman contend that the Court's insertion of a "reasonable employee" test creates clarity:

> One element of this clear standard is the Court's enunciation of the "reasonable employee" test. The Court states that in determining whether an action is retaliatory, trial courts should look to whether a reasonable employee, standing in the shoes of the plaintiff, would be dissuaded from making or supporting a charge of discrimination. This "objective" standard, which has been applied by federal courts in discrimination cases in other contexts, assures that a plaintiff cannot prevail by relying on "subjective feelings" or "personal reactions."

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following protected activity was typical rather than retaliatory." (footnote omitted)).

145. Gary D. Friedman & Jonathan A. Shiffman, Burlington*: Setting Standard to Cut Out Weak Retaliation Claims*, N.Y.L.J. 4, Aug. 4, 2006, at 4.

146. *Id.*

147. *Id.* ("Specifically, the Court stated that it expects this objective standard to be rigorously administered by the lower courts and implicitly concluded that claims which do not meet this standard should be dismissed at summary judgment.").

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

> "[H]ypersensitive" employees are not entitled to "more protection than a reasonable employee."[152]

Having such an "objective" standard saves employers from liability for frivolous claims.[153] According to Freidman and Shiffman, this standard will be particularly important at summary judgment.[154] An employee cannot survive summary judgment by simply testifying that the employer's actions would have personally dissuaded the employee from filing a charge had she known that the employer would retaliate.[155] Rather, employers can attach onto an employee's peculiar hypersensitivity and argue that a reasonable employee would not have been dissuaded.[156] In that case, the employer wins at summary judgment.[157] Further, Friedman and Shiffman note that a substantial number of retaliation claims spring from a reassignment of duties, and that the Court's statements that "a 'reassignment of job duties is not automatically actionable'" will be valuable at the summary judgment stage.[158] Friedman and Shiffman also state that the Court's "materially adverse" standard will be a useful tool for employers at the summary judgment stage in litigation.[159] The Court stated that the anti-retaliation "provision covers 'only those' . . . actions that are materially adverse."[160]

Nonetheless, one would logically assume litigation to rise given the Court's broad interpretation of Title VII's anti-retaliation provision. All of the circuits must now apply a reasonable employee standard as opposed to a more objective and straightforward ultimate employment decision test. Summary judgment will necessarily become harder to obtain by employers. Before *Burlington*, employers in ultimate employment decision circuits just needed to show that the employer did not fire the employee (or make any other ultimate employment decision). Now, an employer who changes an employee's job may be liable depending on the factual "context" of the change. Although the Court purported to avoid frivolous claims by creating an "objective" standard that requires "material adversity," the Court, as pointed out by Justice Alito, opened the door for employee advocates to survive summary judgment by stating that "context matters."[161] This language allows employees to rely on their particular facts instead of a reasonable person's status. Admittedly, the Court noted that a change in work hours could be materially adverse to one employee, but not the

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152. *Id.* (footnote omitted).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417 (2006)).

159. *Id.*

160. *Id.* ("It is essential, the Court stated, to 'separate significant from trivial harms,' because 'petty slights, minor annoyances, and simple lack of good manners are not enough.'" (quoting *Burlington*, 126 S. Ct. at 2415)).

161. *Burlington*, 126 S. Ct. at 2415-16.

next.[162]

However, the Court's decision will not make it "virtually impossible for employers to prevent liability."[163] Although employers may face more retaliation claims and more trials as a result, they could avoid liability by putting in effective anti-retaliation policies and grievance procedures. Further, the Court did specifically state that "petty slights" would not suffice for a valid retaliation claim.[164]

Ultimately, employers need to address their internal policies and grievance procedures for retaliation. Given the potential expansiveness of the *Burlington* standard, the lower courts should allow an employer to assert an affirmative defense when it has implemented adequate and effective anti-retaliation policies and grievance procedures, and the employee has failed to utilize those procedures.

V. WHY COURTS SHOULD ALLOW EMPLOYERS TO MAKE AFFIRMATIVE DEFENSES TO RETALIATION CLAIMS BASED UPON ADEQUATE HUMAN RESOURCE POLICIES AND WHAT EMPLOYERS CAN DO TO LIMIT LIABILITY

In the sexual harassment context under Title VII's main discrimination provision, employers may assert an affirmative defense against hostile work environment claims. The Supreme Court's reasoning in allowing that affirmative defense also justifies allowing a similar defense to a retaliation claim based upon non-tangible employment action. Further, regardless of the availability of such an affirmative defense, employers must implement effective HR policies against retaliation to curtail the potential liability under the *Burlington* standard.

A. Allowing Employer's an Affirmative Defense in Title VII Retaliation Claims

1. Ellerth *and* Faragher*: The Court Creates an Affirmative Defense Against Hostile Work Environment Claims*.—Under Title VII's main provision,[165] an employee can assert a claim of discrimination against an employer based on sexual harassment.[166] Two types of sexual harassment claims exist under Title VII: (1) "quid pro quo" harassment and (2) hostile environment.[167] Quid pro quo harassment occurs when an employer conditions an employee's potential "employment benefits upon unwelcome sexual conduct."[168] On the other hand, hostile work environment "means a work environment that is hostile or abusive

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162. *Id.* at 2415 ("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." (citing Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005))).

163. Gamer, *supra* note 6, at 295.

164. *Burlington*, 126 S. Ct. at 2415.

165. 42 U.S.C. § 2000e-2(a) (2000).

166. *See generally* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.14 (3d ed. 2004).

167. *Id.* at 239.

168. *Id.*

because of severe and pervasive harassment based upon gender."[169]

The Supreme Court considered the degree of employer liability for sexual harassment under Title VII in *Burlington Industries, Inc. v. Ellerth*[170]and *Faragher v. City of Boca Raton*.[171] In these cases, the Court distinguished between the two types of sexual harassment claims.[172] Prior to *Ellerth* decision, lower courts held employers vicariously liable for harassment identified as quid pro quo.[173] However, the Supreme Court in *Ellerth* did not limit an employer's vicarious liability to harassment identified as quid pro quo. Instead, the Court held that employers are liable for harassment involving a "tangible employment action."[174] "Tangible employment action" means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[175] When harassment by a supervisor leads to a tangible employment action, the employer is strictly liable.[176]

For harassment that does not lead to a tangible employment action, including hostile work environment claims, the employer is strictly liable unless it satisfies the affirmative defense standard articulated in *Ellerth*.[177]

> When [the harassment complained of] is a hostile work environment created by the supervisor, the employer is liable unless it can show as an affirmative defense that (1) it exercised reasonable care to prevent and promptly correct the harassment and (2) that the employee unreasonably failed to use the employer's remedial procedures.[178]

Therefore, employers can elude liability under Title VII for a hostile work environment claim by exercising reasonable care in creating policies to prevent such harassment, swiftly remedying such harassment when it happens, and showing that the employee failed to use the procedures set forth in the employer's policies.

By creating this affirmative defense, the Court desired to effectuate congressional intent as well as EEOC policy. Specifically, the Court noted Title VII's purpose of encouraging employers to create anti-harassment policies and

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169. *Id.*

170. 524 U.S. 742 (1998).

171. 524 U.S. 775 (1998).

172. *Ellerth*, 524 U.S. at 752; *Faragher*, 524 U.S. at 787-92; *see* ROTHSTEIN ET AL., *supra* note 166, at 249-50; *see also* Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 203-06 (2004) (discussing the Court's analysis in *Ellerth* and *Faragher*).

173. *See* Lawton, *supra* note 172, at 204-05.

174. *Ellerth*, 524 U.S. at 753; *see* Lawton, *supra* note 172, at 203-06.

175. *Ellerth*, 524 U.S. at 761; *see* Lawton, *supra* note 172, at 204.

176. *Ellerth*, 524 U.S. at 762; *see* Lawton, *supra* note 172, at 204.

177. *Ellerth*, 524 U.S. at 765; *see* Lawton, *supra* note 172, at 204-05.

178. ROTHSTEIN ET AL., *supra* note 166, at 250.

effective grievance procedures.[179] The Court reasoned that, in judging an employer's liability based upon an employer's effort to create effective policies and procedures, the affirmative defense would effectuate "Congress'[s] intention to promote conciliation rather than litigation in the Title VII context."[180] The Court also concluded that the affirmative defense system would effectuate the EEOC's policy of encouraging employers to create grievance procedures.[181] Moreover, "[t]o the extent limiting employer liability [encourages] employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."[182] In short, allowing the affirmative defense forces employers to either implement effective anti-harassment policies and grievance procedures or face liability under Title VII. The implementation of these policies and grievance procedures would result in more protection of employees against harassment and less litigation for employers.

The Court put this affirmative defense in context in *Faragher*. *Faragher* involved a claim brought by a female lifeguard alleging that her supervisors had harassed her.[183] She worked summers as a lifeguard for Boca Raton's Parks and Recreation Department.[184] She never reported her claim to the higher management.[185] The City first heard of the supervisors' conduct through a separate complaint filed by a former lifeguard.[186] The Court found that the harassment did involve a tangible employment action and, therefore, applied the affirmative defense test.[187]

Instead of remanding the case to the district court to allow the City to present evidence on the affirmative defense, the Court held that the City could not satisfy the test regardless of evidence it would try to produce because the City could not satisfy the first prong of the affirmative defense.[188] First, "the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and . . . made no attempt to keep track of the conduct of supervisors."[189] Second, the employer's policy in essence required employees to confront the harassing supervisor in order to file a complaint by not providing an employee with a means to bypass the supervisor.[190] These two factors led the Court to conclude "that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct."[191] Therefore, the affirmative

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179. *Ellerth*, 524 U.S. at 764.
180. *Id.* (citing EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984)).
181. *Id.* (citing 29 C.F.R. § 1604.11(f) (1997)).
182. *Id.* (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995)).
183. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).
184. *Id.*
185. *Id.* at 782.
186. *Id.* at 782-83.
187. *Id.* at 808.
188. *Id.* at 808-09.
189. *Id.* at 808.
190. *Id.*
191. *Id.*

defense failed.

In short, the Supreme Court gave employees more protection against harassment involving a tangible employment action than a hostile work environment claim. Employers could now assert an affirmative defense to harassment not involving, among other things, hiring, firing, failure to promote, and a change in benefits. The Supreme Court in *Burlington* did, however, consider and ultimately reject the distinction between tangible and non-tangible employment actions in defining actions that "discriminate against" employees who have engaged in a protected activity under Title VII's anti-retaliation provision.[192]

2. The Court's Analysis of Ellerth *in* Burlington.—One does not need to be a Supreme Court Justice to notice the Court's differing approaches to non-tangible employment actions in *Ellerth* and *Burlington*. In *Ellerth*, the Court essentially protected employers from liability by allowing them to assert an affirmative defense that they made reasonable efforts to prevent harassment and that the employee did not take advantage of procedures in place.[193] However, in *Burlington*, the Court held that employers are liable for retaliatory conduct including non-tangible employment action if such conduct would deter a reasonable employee from filing a claim under Title VII.[194]

Nonetheless, the Court did not use the language from *Ellerth*. The Court stated that *Ellerth* used the tangible employment action language only to "'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors."[195] Further, "*Ellerth* did not mention Title VII's anti-retaliation provision at all."[196]

It is not entirely clear, however, whether courts could allow an employer to make an affirmative defense to a Title VII retaliation claim. On first sight, the absence of any discussion regarding an affirmative defense in the *Burlington* decision cuts against the likelihood that the Court would accept such a defense to a retaliation claim. It seems that the Court could have easily made such a decision. For example, the Court could have articulated a standard similar to the standard articulated in *Ellerth*: for non-tangible employment actions that would deter a reasonable person from filing a claim or charge under Title VII, an employer is liable subject to an affirmative defense.[197] Under the affirmative defense, the employer must show that (1) it exercised reasonable care to prevent and promptly correct the retaliatory conduct and (2) that the employee unreasonably failed to use the employer's remedial procedures.[198] For tangible

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192. 42 U.S.C. § 2000e-(3)(a) (2000); Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2413 (2006).

193. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

194. *Burlington*, 126 S. Ct. at 2415.

195. *Id.* at 2413 (quoting *Ellerth*, 524 U.S. at 760) (alteration in original).

196. *Id.*

197. *Ellerth*, 524 U.S. at 765.

198. *Id.*

employment actions, the affirmative defense option disappears.[199] The Court, however, did not enunciate such a rule in *Burlington* even though, arguably, it could have.

However, the parties, and the Court for that matter, were focused on defining retaliatory actions that "discriminate against" an employee under Title VII. The issue did not involve possible defenses to a retaliation claim; it involved defining the proper scope of liability under Title VII's anti-retaliation provision. Further, Justice Breyer, the author the *Burlington* decision, reminded the lower courts and the parties of the importance of "*material* adversity."[200] He stated:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.[201]

Certainly, Justice Breyer was trying to alleviate some of Justice Alito's concerns voiced in his concurring opinion. In supporting this assertion that insignificant claims, presumably stemming from non-tangible employment actions, should be dismissed, Justice Breyer cites *Faragher v. City of Boca Raton*.[202] Arguably, claims without material adversity would be dismissed under the affirmative defense applied in *Faragher*.[203] Further, just as the Court could have easily articulated an affirmative defense to retaliation claims in its opinion, it could just as easily expressly held that employers could not assert an affirmative defense.

Nonetheless, the language in the opinion, and the Court's differing treatment of non-tangible employment actions, suggest the Court's unwillingness to allow for an affirmative defense. However, employers and their attorneys would be wise to argue for such an affirmative defense. Further, the lower courts, given the potential liability for employers under the reasonableness standard articulated in *Burlington*, should allow for the defense.

3. An Argument for Allowing an Affirmative Defense Against Title VII Anti-Retaliation Claims.—After *Burlington*, employers will be fighting an uphill battle at the summary judgment stage of litigation. Before the *Burlington* decision, employers defending against a retaliation claim in circuits utilizing the "ultimate employment decision" standard or those circuits requiring tangible employment actions could succeed at the summary judgment stage by simply showing that the supervisor's actions did not involve "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change

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199. *Id.*

200. *Burlington*, 126 S. Ct. at 2415.

201. *Id.* (citations omitted).

202. *Id.* (citing Faragher v. City of Boca Raton, 524 U.S. 775 (1998)).

203. *See Faragher*, 524 U.S. at 808-09.

in benefits."[204] After *Burlington*, for claims alleging non-tangible employment action, an employer's fate at the summary judgment stage will be difficult if not impossible to predict. District judges' interpretations of which non-tangible employment action would dissuade a reasonable employee from asserting a claim under Title VII will arguably differ to a large degree, such that different plaintiffs with identical facts will achieve opposite results. As previously discussed, the difficulty in predicting liability for retaliatory conduct has employers concerned. Given the potential for liability under the anti-retaliation provision, employers should assert an affirmative defense, virtually identical to an *Ellerth* affirmative defense, to an employee's retaliation claim. Furthermore, the lower courts should recognize such an affirmative defense.

The reasoning used by the Court in explaining its introduction of an affirmative defense for hostile work environment claims in *Ellerth* and *Faragher* also justifies the use of an affirmative defense for Title VII retaliation claims.[205] By allowing for an affirmative defense to an anti-retaliation claim, employers will be charged with taking action to avoid supervisors' retaliatory conduct against employees who have engaged in a protected activity. In turn, employees will ideally be more protected from retaliation, without having to resort to litigation, and under the Court's reasoning in *Burlington*, will be more likely to make claims under the main discrimination provision of Title VII. As in *Ellerth*, by judging an employer's liability for its supervisors' retaliatory conduct based upon an employer's effort to create effective policies and grievance procedures, the affirmative defense against a retaliation claim would effectuate "Congress'[s] intention to promote conciliation rather than litigation in the Title VII context."[206]

An affirmative defense system would force employers to either implement effective anti-retaliation policies and grievance procedures or face liability under Title VII. Ultimately, the implementation of these policies and grievance procedures would result in more protection of employees against harassment and potentially less litigation for employers.

However, at least one commentator argues that the policy reasons discussed by the Court in *Ellerth* have not in practice come to fruition.[207] In reality, lower courts just require an employer to show a policy and grievance procedure and do not actually litigate the reasonableness of the procedures.[208] Thus, employees are not further protected after *Ellerth* because employers do not actually do anything to prevent or correct sexual harassment.[209] Simply having a policy, it is argued, is good enough to obtain summary judgment.[210] The lower courts apply the test broadly such that employer's avoid liability without effectuating the Court's stated reasons for creating the affirmative defense, namely prevention of

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204. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

205. *Id.* at 764 (citing EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984)).

206. *Id.* (citing *EEOC*, 466 U.S. at 77).

207. Lawton, *supra* note 172, at 212-15.

208. *Id.*

209. *Id.*

210. *Id.*

workplace harassment.[211] Instead, employers survive liability simply for "file cabinet compliance."[212] Under the current system, "[t]here is little incentive for an employer to keep records of harassment complaints, to implement post-complaint follow-up procedures, to periodically assess and revise the firm's anti-harassment policies and procedures, or to evaluate supervisory personnel on their compliance with and implementation of the employer's policies and procedures."[213]

This is where the Court's distinguishing between Title VII's main discrimination provision and retaliation provision aids employers. The Court clearly broadened the standard under the anti-retaliation provision more than that of the main discrimination provision. It gave it a broader reading and thus gave employees more protection under the retaliation provision than under the main discrimination provision. It follows that, given the broader protection under the anti-retaliation provision, employers should therefore be required to prove more for the affirmative defense, particularly in the first part: showing a reasonable policy against retaliation and grievance procedures for employees who are retaliated against. Courts should then require more than just a showing of an existing policy and grievance procedures. The employers should show how the process works currently, how it has worked in the past, and how often the policy and procedures are implemented and explained to supervisors and employees alike. By forcing this extra hurdle as compared to typical *Ellerth* affirmative defenses, employers will actually have to follow through with their policies (and will have to show to the court that they indeed do follow through), and thus employees will actually benefit from the policies, unlike under *Ellerth*. A more demanding affirmative defense will protect more employees than does the *Ellerth* affirmative defense. It will also give employers the opportunity to avoid liability by explicitly showing it made affirmative efforts to prevent future and remedy existing retaliation against employees engaging in a protected activity.

4. Employers Need to Implement Effective Anti-Retaliation Policies and Grievance Procedures Regardless of the Availability of an Affirmative Defense.—Although allowing employers to assert an affirmative defense to Title VII retaliation claims would be a large step in the direction of avoiding liability, employers should effectuate policies and grievance procedures regardless of the availability of an affirmative defense. These policies would decrease liability by preventing retaliation by supervisors against employees who have engaged in a protected activity. Almost immediately following the *Burlington* decision, employer advocates flooded legal periodicals with HR advice to avoid liability under the new broad standard for defining actions that discriminate against employees.[214] This advice is outlined below.

After the Court's decision in *Burlington*, employers absolutely must

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211. *Id.*

212. *Id.* at 212-15, 260-61.

213. *Id.*

214. Burlington N. & Sante Fe Ry. Co. v. White, 126 S. Ct. 2405, 2413 (2006) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998)).

implement a specific anti-retaliation policy. Preventing liability for Title VII retaliation claims starts with an effective policy against employer retaliation. The company must take a firm stance against retaliatory conduct.[215] The company must distribute the policy to supervisors and employees alike.[216] The company must stress that retaliating against an employee for engaging in a protected activity (i.e., filing a complaint with the EEOC for discrimination) is not only illegal, but also strictly against company policy.[217] This anti-retaliation policy should be inserted into the employee handbook.[218] Employers might require signed receipts from each employee acknowledging they have read and understood the company's policy against retaliatory conduct.[219]

Employers must also have effective grievance procedures. These procedures must specifically lay out a process in which an aggrieved employee can file a complaint against a supervisor or colleague.[220] Employers should maintain a policy of promptly investigating and resolving such complaints.[221] Employers should also assure complainants that the complaints and facts asserted therein will remain confidential, as long as practicable "given the need to investigate and resolve issues."[222] The grievance procedures must effectively separate alleged victims from alleged harassers.[223] The ability of an alleged victim of sexual harassment to bypass the harassing supervisor was critical in the Court's affirmative defense analysis in *Faragher*.[224] If employers argue for an affirmative defense, they must make sure that the grievance procedure for employees who have allegedly been retaliated against allow the employee to bypass the supervisor who allegedly retaliated against that employee. After an employee files a complaint, and through the duration of the investigation incident to such complaint, employers should make available HR personnel to the employee to ensure a smooth day-to-day working environment.[225]

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215. *See* Allan H. Weitzman & Heather G. Magier, *The Dark Clouds of* Burlington Northern*: Is There a Silver Lining?*, HR ADVISOR: LEGAL & PRAC. GUIDANCE, Sept.-Oct. 2006, at 2 (listing the top five tips for employers in dealing with retaliation situations). These tips include having an anti-retaliation provision, maintaining restraint from "responding emotionally" after being accused of discrimination, keeping "written and verbal statements in check," receiving a second opinion before taking adverse action against an employee, and working hand-in-hand with HR professionals when addressing employee complaints. *Id.*

216. *See id.*

217. *See id.*

218. *See* Louis R. Lessig, Commentary, *Why Employers Must Pay Close Attention to Title VII Retaliation Claims*, ANDREWS EMP. LITIG. REP., Aug. 1, 2006, at 13 (discussing steps employers should take to prevent liability under the new Title VII anti-retaliation standard).

219. *See id.*

220. *See* Janove, *supra* note 110.

221. *See id.*

222. *See id*.

223. *See* Lessig, *supra* note 218.

224. Faragher v. City of Boca Raton, 524 U.S. 775, 808-09 (1998).

225. *See* Janove, *supra* note 110.

Employers must take action to train supervisors and employees regarding the new anti-retaliation standard. Supervisors need to realize that their actions will be more heavily scrutinized, that employees have more protection now than before, and that some actions that would not normally be thought of as retaliatory conduct may be found by a court to be just that. Employees, of course, need to be notified of their rights. Full disclosure of the rights of employees and responsibilities of supervisors should ultimately lead to less retaliation litigation. Proper training would include hypothetical situations to illustrate to supervisors what constitutes and what does not constitute retaliatory conduct.[226] The EEOC provides the following three examples in its compliance manual that employers might choose to use:

> Example 1—[An employee] filed a charge alleging that he was racially harassed by his supervisor and co-workers. After learning about the charge, [the employee's] manager asked two employees to keep [the employee] under surveillance and report back about his activities. The surveillance constitutes an "adverse action" that is likely to deter protected activity, and is unlawful if it was conducted because of [the employee's] protected activity.
>
> Example 2—[An employee] filed a charge alleging that she was denied a promotion because of her gender. One week later, her supervisor invited a few employees out to lunch. [The employee] believed that the reason he excluded her was because of her EEOC charge. Even if the supervisor chose not to invite [the employee] because of her charge, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity.
>
> Example 3—Same as Example 2, except that [the employee's] supervisor invites all employees in [the employee's] unit to regular weekly lunches. The supervisor excluded [the employee] from these lunches after she filed the sex discrimination charge. If [the employee] was excluded because of her charge, this would constitute unlawful retaliation since it could reasonably deter [the employee] or others from engaging in protected activity.[227]

The lunch hypothetical from examples two and three draws from Justice Breyer's opinion in *Burlington*.[228] The training should include HR personnel as well as equal employment opportunity officers.[229] Furthermore, employers should train recruiters and interviewers as well because Title VII protection extends to job applicants as well as existing employees.[230]

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226. *See id.*

227. *See* EEOC COMPLIANCE MANUAL, *supra* note 122.

228. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415-16 (2006).

229. *See* Lessig, *supra* note 218.

230. *See* 42 U.S.C. § 2000e-3(a) (2000) (providing that "[i]t shall be an unlawful employment

Proper documentation will prove critical in defending against retaliation claims.[231] After *Burlington*, employees must still prove the causal connection between the protected activity and the alleged retaliatory conduct.[232] Proper documentation allows an employer to show a court the valid, non-discriminatory (i.e. non-retaliatory) reasons for taking actions against an employee.[233] However, an employer should hesitate when considering whether to create a written file in response to an employee's complaint.[234] Employers could also consider requiring job applicants and existing employees to arbitrate claims relating to employment.[235]

It is also advisable for an employer to consider creating an independent office, separate from HR offices, as a safe house for employees to seek advice after being retaliated against.[236] This office could provide employees with an informal and confidential resource to raise issues and concerns.[237] Such offices could avoid litigation for the employer by offering a place for employees to seek redress for retaliation against them before filing an EEOC complaint.[238] The office personnel, being trained on the applicable law and options for the employee, including available grievance procedures in both the EEOC and the company itself, can give the employee a full picture of the options available to him or her.[239] Given all of the options, employees might not choose to make a federal case out of their situation.[240]

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practice for an employer to discriminate against any of his employees or *applicants for employment* . . . .") (emphasis added).

231. *See* Wetchler, *supra* note 109.

232. *See* Courts, *supra* note 15, at 240.

233. *See* Lessig, *supra* note 218. Lessig, by way of example, states "if there are issues with an employee's performance that go undocumented and then a retaliation claim is brought by this individual over a job transfer that was purely performance-based, the employee could have a valid claim." *Id.*

234. *See* Weitzman & Magier, *supra* note 215 ("While documentation is a good idea and can prevent future disputes over who said what, a file should not be built as a response to the employee's complaint. Supervisors must treat all employees in a consistent manner."); *see also* Maslanka, *supra* note 110 ("[I]t is imperative that managers understand that they keep the filing of a claim of discrimination separate from any memo on performance. Never mention the filing of a charge with the EEOC . . . in a memo regarding employee performance. . . . It doesn't belong there.").

235. *See* Wetchler, *supra* note 109.

236. *See* Michael Eisner, *Creation of an Ombuds Office Can Prevent Retaliation Claims*, MEDIATE.COM, Jan. 2007, http://www.mediate.com/articles/eisnerM1.cfm (discussing the use of "Ombuds" offices to prevent retaliation claims).

237. *Id.*

238. *See id.*

239. *Id.*

240. *Id.* ("[M]any people who believe they are victims of harassment or discrimination simply want the behavior to stop. . . . [F]iling a formal complaint is not always the best way to accomplish that goal.").

CONCLUSION

Last year, the United States Supreme Court broadened the scope of actionable conduct under Title VII's anti-retaliation provision. Prior to the decision, employees in some circuits could only recover under the anti-retaliation provisions for suffering an ultimate employment decision, such as being fired, or employment actions affecting the employees terms and conditions of employment. After the Court's decision, employees can recover under Title VII's anti-retaliation provision for any employment action that would deter a reasonable employee from engaging in a protected activity. In effect, the Court opened the door to recover for non-tangible employment actions. For example, purposely not inviting an employee to a lunch training session could constitute actionable retaliatory conduct if the lunch would contribute significantly to the employee's professional development and advancement. The Court's standard encourages a case-by-case approach for determining what employer actions constitute actionable wrongs under Title VII. Context matters according to the Court, and therefore, more anti-retaliation claims will be decided by juries instead of judges on summary judgment motions.

In the sexual harassment context, the Supreme Court has allowed employers to assert an affirmative defense to non-tangible sexual harassment claims. If the employer can prove it maintains an efficient and reasonable policy against sexual harassment that includes adequate grievance procedures, the employer is not vicariously liable for a supervisor's harassing behavior. The same affirmative defense system should apply to Title VII anti-retaliation claims stemming from alleged non-tangible employment actions. By having an affirmative defense available, employers will be required to create effective policies and grievance procedures to prevent retaliation in the workplace. These policies and procedures, supplemented by proper training, will deter retaliatory conduct in the workplace.

The broadened scope of actionable conduct under Title VII's anti-retaliation provision should concern employers. Having fewer claims decided by summary judgment equates to increased costs from more litigation. Therefore, regardless of the availability of an affirmative defense, employers should immediately implement anti-retaliation policies and grievance procedures. These policies should be distributed and explained to every employee and supervisor. Ultimately, with an effective system in place, employers will hopefully deter most retaliation in the workplace while avoiding the increased costs involved with litigating Title VII anti-retaliation claims.