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COMMENT

TURNING TITLE VII'S PROTECTION AGAINST RETALIATION INTO A NEVER-FULFILLED PROMISE

INTRODUCTION

While on her journey through the looking glass, Alice received an interesting job offer. In exchange for her services, the White Queen promised: “jam to-morrow and jam yesterday — but never jam to-day.” At first, this offer seemed appealing. Alice would receive a treat of jam every other day in exchange for her services. But upon further consideration, Alice realized the inherent flaw in such a promise. “It must come sometimes to jam today,” Alice objected. “No, it can’t,” said the Queen.¹

The White Queen’s tricky offer was not a treat of jam every other day. This offer would never result in any jam for Alice. Unfortunately, this kind of self-defeating logic exists not only in children’s literature. A recent *per curiam* decision by a panel of the United States Court of Appeals for the Fifth Circuit would turn the protection offered by the anti-retaliation provision of Title VII of the 1964 Civil Rights Act (hereinafter “Title VII”) into this same kind of deceiving promise that will forever remain unfulfilled.²

Title VII was enacted to provide fair working environments.³ One

¹ LEWIS CARROLL *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* ch. V (1871).

² See *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 F. App’x 437 (5th Cir. 2007) (*per curiam*).

³ Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 255, codified at 42 U.S.C.A. §§ 2000e-2000h-6 (Westlaw 2007).

of the protections it offers is the right of employees to bring retaliation claims against their employers when they have been discriminated against for participating in certain protected activities.⁴ The Supreme Court's recent decision in *Burlington Northern and Santa Fe Railway Co. v. White* clarified the definition of an "adverse action" by an employer, which is one of the essential elements of an employment retaliation claim.⁵ To satisfy the adverse action element, *Burlington Northern* requires a retaliation plaintiff to show that the challenged employer action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."⁶ The courts of appeals are just beginning to apply this new definition, and many scholars have predicted the new standard will benefit plaintiffs.⁷ However, if the recent interpretation of *Burlington Northern* by the Fifth Circuit in *DeHart v. Baker Hughes Oilfield Operations*⁸ is followed, Title VII may prove to be less helpful to workers than Congress or the Supreme Court intended.

In *DeHart*, the plaintiff filed a retaliation complaint after receiving a poor performance evaluation and a disciplinary warning.⁹ The *DeHart* court found that no adverse action had occurred, because the plaintiff herself was not actually dissuaded from filing a discrimination charge: she filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC").¹⁰ But as Part I will show, lodging a retaliation complaint with the EEOC is a prerequisite for bringing a claim of retaliation under Title VII.¹¹ Therefore, *DeHart*

⁴ *Id.* at § 2000e-5(f)(1)(A).

⁵ *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

⁶ *Id.* at 68 (internal quotation marks omitted).

⁷ See, e.g., Christopher J. Eckhart, *Employers Beware: Burlington Northern v. White and the New Title VII Anti-Retaliation Standard*, 41 IND. L. REV. 479, 480 (2008) (describing the *Burlington Northern* standard as expansive and claiming that it will make it easier for employees to bring retaliation claims); Peter M. Panken, *Retaliation: A Tidal Wave of Employment Litigation – Getting Mad, Getting Even, and Getting Sued*, SN021 ALI-ABA 799, 824 (Feb. 14-16, 2008) ("[T]he clear import and impact of the *Burlington Northern* case is that many more retaliation cases will go to juries . . ."); Nicholas Villani, *A Bridge Too Far: The Supreme Court Overextends the Anti-Retaliation Provision of Title VII*, 56 CATH. U. L. REV. 715, 738 (2007) (predicting the broad standard for adverse action from *Burlington Northern* will result in an overwhelming number of retaliation claims because a "vast array of events" can now be considered retaliation).

⁸ *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 F. App'x 437 (5th Cir. 2007) (per curiam).

⁹ *Id.* at 440.

¹⁰ *Id.* at 442.

¹¹ See 42 U.S.C.A. § 2000e-5(b),(c),(e),(f) (Westlaw 2007).

A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of title VII . . . may be made by or on behalf of any person claiming to be aggrieved. . . . The person making the charge, however, must provide the Commission with the name, address and telephone number of the person on whose behalf the charge is made. During the Commission investigation, Commission personnel shall verify the authorization

would prohibit a retaliation claim if the employee engages in an activity that is a *requirement* for a retaliation claim. Like the White Queen's rule that will never result in any jam for Alice, the Fifth Circuit's rule in retaliation cases will never result in vindication for aggrieved employees.

Part I below discusses a major purpose of Title VII, which is to protect employees from employer discrimination. Moreover, Part I explains the process of bringing a retaliation claim under Title VII. To pursue a retaliation claim in court, a plaintiff must file a charge with the Equal Employment Opportunity Commission. Once in court, a plaintiff must satisfy each element of a retaliation claim, which includes proving that the employer engaged in an adverse action.

Part I also explains the varied standards that were previously used when deciding what constitutes an adverse employer action and how the Supreme Court's recent decision in *Burlington Northern* resolved a split among the circuits. In *Burlington Northern*, the Supreme Court adopted a deterrence test to define adverse employer actions, which means the employer action must be harmful to the point that it would deter a reasonable employee of complaining of discrimination.

Part II analyzes the actual effects of this decision, focusing in particular on *DeHart*. It shows how *DeHart* misapplied the deterrence standard by focusing on whether the employer action at issue deterred *that plaintiff* from complaining and not whether it would have deterred a *reasonable employee* from complaining. Part II also warns of the major problem associated with adopting a rule like the one set forth in *DeHart*: employees will be afraid to come forward with discrimination claims, which will allow employers to discriminate with impunity.

Part III then stresses the importance of applying the deterrence test from *Burlington Northern* in a way that properly employs its objective standard. Courts must consider whether the employer's action would have the effect of deterring a reasonable employee from complaining, not whether the particular plaintiff was actually deterred. This will avoid results similar to *DeHart's* that can be fatal to potentially valid retaliation claims.

Finally, Part IV concludes that if courts continue to misconstrue the subjective aspect of the *Burlington Northern* standard, then Congress or the Supreme Court must either provide clarification on how to identify an adverse employer action under the deterrence test, or find a different standard: one that asks whether a reasonable employee would have considered the employer action to be adverse.

of such charge by the person on whose behalf the charge is made.

29 C.F.R. § 1601.7(a) (Westlaw 2008) (EEOC procedural regulation).

I. RETALIATION CLAIMS UNDER TITLE VII: PURPOSE AND PROCEDURE

Congress passed the Civil Rights Act of 1964 in response to the turmoil caused by racial inequalities in America.¹² Title VII of the Act protects workers from employer discrimination. Section 703(a) of Title VII contains the anti-discrimination provisions, which prohibit employer discrimination on the basis of race, color, religion, sex, or national origin.¹³ Section 704(a) contains the anti-retaliation provision.¹⁴ These two provisions work in tandem to protect workers. They make it illegal for an employer to discriminate and to retaliate against employees who invoke their right to complain about discriminatory practices prohibited by Title VII.¹⁵

The anti-discrimination provision makes it unlawful for employers to discriminate against protected individuals regarding their compensation, terms, conditions, or privileges of employment, or in any way that deprives individuals of employment opportunities or adversely affects their status as employees.¹⁶ Consequently, to give rise to a valid claim, the difference in treatment must be related to the employment relationship. There is a significant difference in the language of this substantive anti-discrimination provision of Title VII from the language of the anti-retaliation provision.¹⁷ The anti-retaliation provision does not contain the same kind of qualifying language when describing what kind

¹² See Michael J. Fellows, *Civil Rights—Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. R. 387, 397 (2004) (providing background on the compensatory purposes of the Civil Rights Act and how those purposes should guide current application of the Act); see also David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645 (1995), (describing the racial turmoil in Birmingham, Alabama, in 1963 that led to President Kennedy's decision to have a civil rights bill drafted).

¹³ 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw 2007).

¹⁴ 42 U.S.C.A. § 2000e-3(a) (Westlaw 2007).

¹⁵ See 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw 2007); see also 42 U.S.C.A. § 2000e-3(a) (Westlaw 2007).

¹⁶ 42 U.S.C. § 2000e-2(a) (Westlaw 2008).

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 individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

¹⁷ *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006) ("Title VII's substantive anti-discrimination provision protects an individual only from employment related discrimination.").

of discriminatory acts are prohibited.¹⁸ It provides that:

It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁹

Thus, the anti-retaliation provision is broader: it only commands that an employer may not “discriminate against” an employee for engaging in protected activities such as filing or supporting claims of employer discrimination; it does not specify how harmful the difference in treatment must be in order to constitute retaliation, nor does it explain whether the discrimination must be employment-related.²⁰ These differences in language have given rise to various theories on how these provisions should best be interpreted to meet the purposes of Title VII.

A. THE PURPOSE OF TITLE VII'S ANTI-RETALIATION PROVISION

The anti-retaliation provision of Title VII differs from its anti-discrimination provision not only in language, but also in purpose.²¹ Protection of the primary right of an employee—the right to be free from employer discrimination—is distinct from protection from retaliation.²² The Supreme Court’s understanding of the two provisions is that the anti-discrimination provision “seeks a workplace where individuals are not discriminated against” because of their status, while the anti-retaliation provision seeks to prevent an employer from interfering with “an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”²³ In other words, the anti-discrimination provision protects employees because of who they are, and the anti-retaliation provision protects employees because of what they do.²⁴

¹⁸ Compare 42 U.S.C.A. § 2000e-3(a) (Westlaw 2008) with 42 U.S.C.A. § 2000e-2(a) (Westlaw 2008).

¹⁹ 42 U.S.C.A. § 2000e-3(a) (Westlaw 2008) (emphasis added).

²⁰ *Id.*

²¹ *Burlington Northern*, 548 U.S. at 63 (“The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, or gender-based status. The 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 guarantees.”).

²² *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-174 (2005).

²³ *Burlington Northern*, 548 U.S. at 63.

²⁴ *Id.*

The aim of the anti-retaliation provision is to ensure that employees are not too afraid to report unlawful practices in the workplace.²⁵ If only employer discrimination were prohibited, it would not deter the many forms that retaliation can take.²⁶ Accordingly, Title VII's anti-retaliation provision is included "to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms."²⁷ "It does so by prohibiting all employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers."²⁸ Therefore, it is the right to bring a retaliation claim that serves as a protective measure to guard the "primary right" of being free from discrimination.²⁹

B. BRINGING A RETALIATION CLAIM UNDER TITLE VII

Employees turn to Title VII's protections when they feel they have been treated unlawfully by their employer. Anyone aggrieved by employment discrimination, whether it be due to retaliation for participating in a complaint of discrimination or the actual discrimination itself, must first file a complaint with the Equal Employment Opportunity Commission if he or she chooses to pursue a Title VII claim.³⁰ The EEOC is the administrative agency that has been delegated the authority to take action on matters of employment discrimination.³¹ It has the authority to investigate individual complaints of discrimination, to promote voluntary compliance with the requirements of Title VII, and to sue an employer on a claimant's behalf.³² If the EEOC does not obtain voluntary compliance from the employer and for any reason chooses not

²⁵ *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972) (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967)).

²⁶ See *Burlington Northern*, 548 U.S. at 63-64 (citing *Berry v. Stevinson Chevrolet*, 740 F.3d 980, 986 (10th Cir. 1996) (finding actionable retaliation when employer filed false criminal charges against employee who complained of discrimination, despite the fact that the retaliatory acts were not related to the workplace)).

²⁷ *Burlington Northern*, 548 U.S. at 68 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

²⁸ *Id.*

²⁹ *NLRB v. Scrivener*, 405 U.S. at 189.

³⁰ See 29 C.F.R. § 1614.105 (Westlaw 2008). Before filing a complaint, individuals who believe they have been discriminated against or retaliated against due to their membership in a protected class in violation of Title VII must first consult an EEOC counselor to try to resolve the matter informally. 29 C.F.R. § 1614.105(a) (Westlaw 2008). After the EEOC counselor informs the individuals of their rights and provides counseling, the counselor then issues a right-to-sue if the matter has not been resolved. 29 C.F.R. § 1614.105(b)-(d) (Westlaw 2008).

³¹ See 42 U.S.C.A. §§ 20003-4, 2003-5 (Westlaw 2008).

³² *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

to sue on a claimant's behalf, the claimant may, after a certain period of time has expired, demand a right-to-sue letter and institute a Title VII action.³³ Whether the EEOC or the employee ultimately pursues the claim in court, a potential retaliation plaintiff must always file a charge with the EEOC and seek a right-to-sue letter before going to court to pursue the retaliation claim.³⁴

Once an employee obtains the right to sue, that employee must then satisfy all the required elements of the claim. Although Title VII does not spell out which party bears the burden of proof in a retaliation case,³⁵ the Supreme Court articulated a burden-shifting approach in *McDonnell Douglas Corp. v. Green*.³⁶ The burden-shifting mechanism from *McDonnell* starts with the employee making out a prima facie case.³⁷ To satisfy the elements of a prima facie case of retaliation under Title VII, an employee must demonstrate a) that the employee engaged in an activity protected by the provisions of Title VII, such as opposing unlawful employment practices, complaining about discrimination covered by Title VII, or participating in a proceeding that does so; b) that the employee suffered an adverse employment action; and c) that a causal link exists between the employee's protected activity and the adverse employment action.³⁸

After a plaintiff establishes this prima facie case, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its actions.³⁹ If the employer is able to supply such a reason, the burden shifts back to the employee to show that the employer's stated reason is merely a pretext.⁴⁰ Of the three elements of a retaliation claim – protected activity, adverse action, and causation – defining what

³³ *Johnson v. R. Express Agency, Inc.*, 421 U.S. 454, 458 (1975). The statutory period generally is 180 days from the filing of the complaint with the EEOC. 42 U.S.C.A. § 20003-5(f)(1) (Westlaw 2008).

³⁴ 42 U.S.C.A. § 2000e-5 (Westlaw 2007).

³⁵ See John Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 AM. J. TRIAL ADVOC. 539, 543 (2007) (arguing that recent Supreme Court decisions regarding Title VII and the First Amendment will make it harder for plaintiffs to succeed in retaliation claims).

³⁶ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

³⁷ *Id.* at 802.

³⁸ *Boyd v. Brookstone Corp. of N.H., Inc.*, 857 F. Supp. 1568, 1571 (S.D. Fla.1994) (citing *Jordan v. Wilson*, 851 F.2d 1290 (11th Cir. 1988)); see 42 U.S.C. § 2000e-3(a) (Westlaw 2008) (listing protected activities); *Ray v. Henderson* 217 F.3d 1234, 1240 n. 3 (9th Cir. 2000) ("Filing a complaint with the EEOC is a protected activity."); see also *Yartsoff v. Thomas* 809 F.2d 1371, 1376 (9th Cir. 1987) ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision."); see generally 45A AM. JUR. 2D *Job Discrimination* § 240.

³⁹ *Ray v. Henderson*, 217 F.3d at 1240.

⁴⁰ *Id.*

constitutes an “adverse action” has proven to be the most difficult. This is evidenced by the variety of tests circuits were using to define “adverse action” before the Supreme Court finally decided which one should control.⁴¹

C. PREVIOUS STANDARDS FOR “ADVERSE ACTION” IN THE VARIOUS CIRCUITS

Prior to *Burlington Northern*, the circuits were divided on the issue of how “adverse” an action must be to constitute adverse employment action.⁴² This was due to differing interpretations of the scope of Title VII’s anti-retaliation provision’s phrase “discriminate against.”⁴³ The circuits used tests ranging from a restrictive approach that limited adverse actions only to very extreme employment decisions, such as hiring and firing, to a permissive objective approach that required courts to consider how a reasonable employee would react if faced with the discriminatory treatment.⁴⁴

The “ultimate employment decision” standard takes the lack of qualifying language in the anti-retaliation section of Title VII as evidence that more severe employer action is required for retaliation claims than for discrimination claims. The Fifth and Eighth Circuits used this restrictive approach, which recognized retaliation claims only for acts “such as hiring, granting leave, discharging, promoting, and compensating.”⁴⁵ The Fifth Circuit explained its reason for using this

⁴¹ *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (“[D]ifferent Circuits have come to different conclusions about whether the action has to be employment or workplace related and how harmful that action must be to constitute retaliation.”); see generally Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*, 111 PENN ST. L. REV. 893 (2007) (discussing the pre-*Burlington Northern* split among the circuits regarding the definition of an adverse action).

⁴² See generally Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*, 111 PENN ST. L. REV. 893 (2007) (discussing the pre-*Burlington Northern* split among the circuits regarding the definition of an adverse action).

⁴³ *Burlington Northern*, 548 U.S. at 57.

⁴⁴ For a discussion of the pre-*Burlington Northern* circuit split over what constitutes an adverse employment action, see 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, 507 (2006).

Several circuits require[d] claimants to show that they suffered an ultimate employment action or decision, such as suspension, discharge, or demotion. Other circuits consider[ed] an adverse employment action to include happenings that are material to the terms and conditions of employment, even if they fall short of an ultimate employment action or decision. Finally, the U.S. Court of Appeals for the Ninth Circuit [was] willing to consider adverse those acts that are reasonably likely to deter employees from engaging in activity protected under Title VII.

Id.

⁴⁵ *Burlington Northern*, 548 U.S. at 60 (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 100, 104 (9th Cir. 1997)).

narrow definition of an adverse action in *Mattern v. Eastman Kodak Co.*⁴⁶ That case pointed to the difference in language between Title VII's anti-discrimination and anti-retaliation provisions, reasoning that Congress must have intended the "ultimate employment decision" to be the standard because the anti-retaliation provision does not mention the vague harms listed in the anti-discrimination provision.⁴⁷

The Second, Third, Fourth, and Sixth Circuits held an intermediate position that defined an adverse action for retaliation cases with the same standard used for the underlying discrimination offense that brought about the complaint.⁴⁸ This "materially adverse" test required "a close relationship between the retaliatory action and employment."⁴⁹ Under this test, the allegedly retaliatory employer action "must result in an adverse effect on the terms, conditions, or benefits of employment."⁵⁰ Although this test included actions other than ultimate employment decisions, it still required the adverse employer action to be employment-related.

Other circuits used a less restrictive view than either the "ultimate employment decision" or "materially adverse" tests when defining an adverse action.⁵¹ For example, the Seventh and District of Columbia Circuits required that a plaintiff show that the "employer's challenged action would have been material to a reasonable employee," meaning it would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."⁵² The Ninth Circuit used a similar "deterrence" test, relying on the definition provided by the EEOC to find an adverse action.⁵³ "The EEOC has interpreted 'adverse employment action' to mean 'any adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'"⁵⁴

702, 709 (5th Cir. 1997)).

⁴⁶ *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).

⁴⁷ *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 709 (5th Cir. 1997) (citing U.S.C. § 2000e-2(a)(2)).

⁴⁸ *Burlington Northern*, 548 U.S. at 60; see *Ray v. Henderson*, 217 F.3d 1234, 1242 (9th Cir. 2000) (citing *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) and *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997)). These courts of appeals would "apply the same standard for retaliation that they apply to a substantive discrimination offense." *Burlington Northern*, 548 U.S. at 60.

⁴⁹ *Burlington Northern*, 548 U.S. at 60.

⁵⁰ *Id.* (internal citations omitted).

⁵¹ *Burlington Northern*, 548 U.S. at 60-61.

⁵² *Id.* at 60 (citing *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005), and *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006)).

⁵³ *Ray v. Henderson*, 217 F.3d at 1241.

⁵⁴ *Ray v. Henderson*, 217 F.3d at 1242 (quoting 2 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 8 p. 8-13 (1998)). "Although EEOC guidelines are not

D. THE SUPREME COURT RESOLVES THE SPLIT WITH *BURLINGTON NORTHERN*

Burlington Northern resolved the disagreement among the circuits by answering the question of how harmful the employer's adverse action must be to fall within the scope of Title VII's anti-retaliation provision.⁵⁵ The Supreme Court adopted the deterrence test of the Ninth, Seventh, and D.C. Circuits as the proper method for finding an adverse employer action in a Title VII retaliation claim.⁵⁶ It also held that employer actions need not be employment-related to be considered "adverse" for purposes of a retaliation claim.⁵⁷

In June 1997, Burlington Northern and Santa Fe Railway Company hired Sheila White as a track laborer.⁵⁸ Burlington's roadmaster, Marvin Brown, assigned White to the position of forklift operator shortly after she arrived on the job.⁵⁹ In September 1997, White complained to Burlington officials that one of her supervisors had repeatedly made sexist remarks to her.⁶⁰ Shortly thereafter, Brown removed White from forklift duty and reassigned her to the less prestigious job of standard railroad track laborer.⁶¹

On October 10, 1997, White filed a complaint with the EEOC, claiming that the reassignment of her duties constituted unlawful discrimination and retaliation for having complained about her supervisor.⁶² She filed a second EEOC complaint in early December, "claiming that Brown had placed her under surveillance and was monitoring her daily activities."⁶³ Notification of that second complaint

binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Ray v. Henderson*, 217 F.3d at 1243 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986)).

⁵⁵ *Burlington Northern*, 548 U.S. at 61.

⁵⁶ *Id.* at 68.

⁵⁷ *Id.* at 67.

⁵⁸ *Id.* at 57 (stating that the job of "'track laborer' . . . involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way.").

⁵⁹ *Id.*

⁶⁰ *Id.* at 58. White was the only female employee in her department at Burlington's Tennessee Yard. She complained that her supervisor, Bill Joiner, had repeatedly told her women should not be working in that department, and that he had made other insulting remarks to her in front of male colleagues. *Id.*

⁶¹ *Id.* Burlington suspended Joiner for 10 days and ordered him to attend a sexual-harassment training session. On September 26, Brown told White about Joiner's discipline and, at the same time, told her about her reassignment. *Id.*

⁶² *Id.*

⁶³ *Id.*

was mailed to Brown on December 8.⁶⁴ A few days later, Brown suspended White without pay after one of her supervisors told Brown that White had been insubordinate.⁶⁵ After concluding that White had *not* been insubordinate,⁶⁶ Burlington reinstated her and compensated her with backpay for the thirty-seven days she was suspended.⁶⁷ Because of the suspension, White filed an additional retaliation charge with the EEOC.⁶⁸

White eventually sued Burlington in federal court, claiming that both the change of her job responsibilities and the thirty-seven-day suspension amounted to unlawful retaliation in violation of Title VII.⁶⁹ A jury found for White on both of her retaliation claims.⁷⁰ The Sixth Circuit later reviewed the matter en banc.⁷¹ Although the members of the appellate court unanimously agreed to uphold the district court's judgment in White's favor, they themselves disagreed on the proper standard to apply in determining how harmful the challenged action of the employer must be to constitute retaliation.⁷² A majority defined "adverse employment action" as "a materially adverse change in terms of employment."⁷³ It looked to the Supreme Court's decision in *Burlington Industries, Inc. v. Ellerth* for guidance.⁷⁴ In that case, the Supreme Court defined an adverse employment action as "a significant change in employment status."⁷⁵ Swayed by this definition, the court of appeals rejected the EEOC's deterrence standard and reasoned that the "materially adverse" standard would sufficiently further the purpose of Title VII without straying too far from the statutory language.⁷⁶ The court of appeals then found the defendant railroad's conduct did

⁶⁴ *Id.*

⁶⁵ *Id.* Peter Sharkey was White's immediate supervisor at the time. Although the specific facts of the disagreement were in dispute, the two of them disagreed about which truck should transport White from one location to another. *Id.*

⁶⁶ *Id.* White invoked internal grievance procedures that resulted in Burlington concluding that she had not been insubordinate. *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 59.

⁶⁹ *Id.* at 59. White brought the Title VII action after exhausting administrative remedies. *Id.*

⁷⁰ *Id.* The jury awarded White \$43,500 in compensatory damages, including \$3,250 in medical expenses. *Id.*

⁷¹ *Id.* A divided Sixth Circuit panel had initially reversed the district court's judgment and found in Burlington's favor, but the full court of appeals vacated that decision and heard the matter en banc. *Id.*

⁷² *Id.*

⁷³ *White v. Burlington Northern and Santa Fe Ry. Co.*, 364 F.3d 789, 800 (6th Cir. 2005).

⁷⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁷⁵ *Id.* at 761.

⁷⁶ *White v. Burlington Northern & Santa Fe Ry. Co.*, 364 F.3d 789, 795-800 (6th Cir. 2005)

(en banc).

constitute an adverse action under the “materially adverse” standard.⁷⁷ This set the stage for the Supreme Court to resolve the circuit split over what constitutes an adverse employer action.⁷⁸

Noting the distinction in statutory language between Title VII’s anti-discrimination provisions and its anti-retaliation provision, the Supreme Court held in *Burlington Northern* that the anti-retaliation provision of Title VII is not limited to actions affecting the terms and conditions of employment, or even to actions that are related to employment or occur at the workplace.⁷⁹ This new standard also explicitly rejected the previous standards of the courts of appeals that had limited actionable retaliation to so-called “ultimate employment decisions.”⁸⁰ Instead, Justice Breyer’s majority opinion articulated the new standard as one that prohibits retaliatory actions that would have been materially adverse to a reasonable employee or job applicant.⁸¹

Justice Breyer then explained that “materially adverse” means “the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”⁸² This test has both objective and subjective components.⁸³ It is objective because it considers the hypothetical “reasonable employee.”⁸⁴ Justice Breyer explained that the Court referred to the reasonable employee because such an objective standard avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.⁸⁵ He then explained that the standard should be phrased in general terms because the significance of any given act of retaliation will often depend on the particular circumstances.⁸⁶ Yet at the same time, the test is also

⁷⁷ *Id.* at 803.

⁷⁸ *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006) (“We granted certiorari to resolve this disagreement.”).

⁷⁹ *Id.* at 64-67. Unlike section 703(a) of Title VII (42 U.S.C.A. § 2000e-2(a) (Westlaw 2008), the anti-discrimination provision), section 704 (42 U.S.C.A. § 2000e-3 (Westlaw 2008), the anti-retaliation provision), is broader in that it is not limited to discrimination in regard to hiring or firing, much less as to the terms, conditions or privileges of employment. Section 704 (a) (42 U.S.C.A. § 2000e-3(a) (Westlaw 2008)) only requires that the employer “discriminate against” the plaintiff.

⁸⁰ *Burlington Northern*, 548 U.S. at 67.

⁸¹ *Id.* at 68.

⁸² *Id.*

⁸³ *Id.* at 68-69.

⁸⁴ *Id.* at 68 (“We refer to reactions of a *reasonable* employee because we believe that the provision’s standard for judging harm must be objective.”).

⁸⁵ *Id.* at 68-69.

⁸⁶ *Id.* at 69. The Court gave an example of when the context of an employer’s actions might make a difference in determining whether the action should be considered retaliatory: “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter

partly subjective because “context matters” when applying the standard.⁸⁷ Justice Breyer gave an example of when the subjective context matters: “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.”⁸⁸

After resolving the issue of what standard to use to find an adverse action, the Court then applied the new test. Justice Breyer pointed out that the reassignment of job duties is not always actionable.⁸⁹ Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case and “should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”⁹⁰ Considerable evidence showed that working as a track laborer was dirtier and more arduous than operating the forklift. The Supreme Court found there was sufficient evidence to support the jury’s verdict for White on her retaliation claim, because a jury could reasonably conclude that a reassignment of responsibilities would have been materially adverse to a reasonable employee.⁹¹

II. *DEHART’S* ILLOGICAL HOLDING AND HOW TO AVOID THIS MISAPPLICATION

The standard from *Burlington Northern* appears to be beneficial to potential plaintiffs in employment cases because the adverse action no longer has to be work-related.⁹² But in reality, this standard risks misapplication in a way that could instead *worsen* a retaliation plaintiff’s situation. This misapplication would be contrary to the purposes of Title VII protections by failing to protect employees from certain retaliatory employer actions. *DeHart v. Baker Hughes Oilfield Operations, Inc.*,⁹³ a Fifth Circuit case, presents one example of how the *Burlington Northern* standard can be misapplied in a way that will prevent retaliation plaintiffs from ever establishing a *prima facie* case.

enormously to a young mother with school age children.” *Id.*

⁸⁷ *Id.* at 69.

⁸⁸ *Id.*

⁸⁹ *Id.* at 71.

⁹⁰ *Id.*

⁹¹ *Id.* at 70-71.

⁹² *Id.* at 64-67.

⁹³ *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 F. App’x 437 (5th Cir. 2007) (per curiam).

A. *DEHART* EFFECTIVELY DELETES TITLE VII'S ANTI-RETALIATION PROVISION

Juanita DeHart, an African-American, began employment as a Design Drafter for Baker Hughes Oilfield Operations, Inc. (hereinafter "Baker Hughes") on April 10, 2000.⁹⁴ In October 2000, she began complaining of air quality problems.⁹⁵ To help her breathing, she requested to be moved to a different area, and Baker Hughes complied.⁹⁶ Even so, DeHart took two leaves of absence due to breathing problems and was diagnosed with a respiratory disease.⁹⁷ DeHart continued to make complaints concerning air quality problems until her eventual termination on April 19, 2004.⁹⁸ Despite her time away from work and frequent complaints, DeHart received favorable performance reviews in both 2001 and 2002.⁹⁹

DeHart alleged that she met with her supervisor's boss in July 2002 to complain of racial discrimination against herself and an African-American coworker, Ron Sinnette.¹⁰⁰ While DeHart was on her second leave of absence in May 2003,¹⁰¹ Baker Hughes terminated Sinnette. Sinnette later filed an EEOC charge alleging discrimination.¹⁰² Shortly after DeHart returned to work from her second leave of absence and just before leaving again due to air quality problems,¹⁰³ she was told on June 8, 2003, that she would not receive a pay raise that year.¹⁰⁴

DeHart's 2003 annual review came just after her return to work at the beginning of July 2003.¹⁰⁵ Unlike her previous reviews, this time her ratings were not favorable.¹⁰⁶ She was rated "Development Needed" in every category in which she was evaluated.¹⁰⁷ In addition to giving DeHart her first poor ratings, Baker Hughes wrote a memorandum accompanying the review, criticizing DeHart as having a bad attitude and

⁹⁴ *Id.* at 438-39.

⁹⁵ *Id.* at 439.

⁹⁶ *Id.* Baker Hughes also complied for DeHart's request for an air filter in March 2003 when diesel fumes were bothering her. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 440.

⁹⁹ *Id.* at 439.

¹⁰⁰ *Id.* Baker Hughes claimed this conversation never took place. Nothing ever came of the complaint. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* She returned to work on May 28, 2003, and left again on June 9, 2003. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

poor attendance.¹⁰⁸ Her situation continued to worsen in late July 2003 when Baker Hughes denied DeHart's subsequent requests to have her workstation moved to a different area, despite physicians' recommendations.¹⁰⁹

DeHart alleged that on August 15, 2003, an EEOC investigator called her and questioned her about Sinnette's racial discrimination claim.¹¹⁰ She claimed she told her supervisor's boss about the call when she got to work that day.¹¹¹ Later that day, DeHart received a written warning from Baker Hughes for insubordination, for being argumentative, and for excessive absenteeism.¹¹²

DeHart filed an EEOC claim on September 2, 2003, alleging that her poor 2003 performance review and the written warning of August 15 were retaliatory actions by Baker Hughes for her participation in the EEOC investigation of Sinnette's claim.¹¹³ Baker Hughes terminated her on April 19, 2004. DeHart sued Baker Hughes and her boss in state court shortly thereafter.¹¹⁴ Baker Hughes removed the action to federal court, and the district court granted summary judgment for defendants.¹¹⁵ DeHart then appealed the district court's dismissal of her retaliation claims.¹¹⁶

DeHart claimed three *prima facie* cases of retaliation. The district court ruled that all three failed as a matter of law.¹¹⁷ In her second claim, DeHart alleged that the written warning of August 15, 2003, and the denial of a pay raise on June 8, 2003, were adverse actions in retaliation for DeHart's participation in Sinnette's EEOC investigation.¹¹⁸ The appellate court did not find the written warning to be an adverse

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 439-40.

¹¹⁰ *Id.* at 440. The court did not reach the factual issue of whether this call took place. *Id.*

¹¹¹ *Id.* Baker Hughes denied this. *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* Her first claim argued that Baker Hughes' denial of her request for sick leave and the opening of an investigative file against her were in retaliation for Sinnette's protected activity of filing an EEOC charge. *Id.* at 441. This claim failed because, not having participated in the charge, DeHart could not claim Sinnette's protected activity as her own. *Id.* In her third claim, DeHart argued that her EEOC charge was a protected activity causally linked to her termination. *Id.* at 442. The court, when considering her past disciplinary record and the lack of temporal proximity between her charge and the date of her termination, held this claim failed because DeHart failed to establish a causal link. *Id.* at 443.

¹¹⁸ *Id.* at 442. The court concluded that denial of her pay raise was not an adverse action because a causal link could not be shown: DeHart found out about the denial of a pay raise two months before filing a charge of discrimination with the EEOC.

action.¹¹⁹ Such a finding would have allowed DeHart to go forward with her claim, but the court found that the performance warning did not satisfy this element because an adverse action is an action that deters an employee from filing a complaint, and DeHart was not deterred from complaining.¹²⁰

The court first restated the *Burlington Northern* definition, which describes an adverse action as one that a reasonable employee would have found materially adverse, meaning it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.¹²¹ Then the court gave two reasons why the written warning did not constitute an adverse action:¹²²

Under the facts before us, we conclude that the written warning to DeHart would not ‘have dissuaded a reasonable worker from making or supporting a charge of discrimination.’ In the first place, there were colorable grounds for the warning and a reasonable employee under the circumstances would have understood a warning under these circumstances was not necessarily indicative of a retaliatory mind-set. Furthermore, the August 15 written warning did not in fact dissuade a charge of discrimination, given that several weeks later on September 2, a charge was filed.¹²³

Because the appellate court did not find the written warning to be an adverse action, DeHart’s second claim of retaliation failed.¹²⁴

Although the court in *DeHart* gave two reasons why the employer’s written warning did not constitute an adverse action, neither reason is appropriate. The first reason the written warning was not considered an adverse action is problematic in that it strays from the *Burlington* standard.¹²⁵ Nothing in the *Burlington Northern* deterrence test requires

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 441. Before the Supreme Court decision in *Burlington Northern* in June 2006, the Fifth Circuit used the “ultimate employment decision” standard in determining whether an employer’s actions constituted adverse employment actions. See, e.g., *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000); *Webb v. Cardiothoracic Surgery Assocs. of N. Tex., P.A.*, 139 F.3d 532, 540 (5th Cir. 1998).

¹²² *DeHart*, 214 F. App’x at 441.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ The court stated “[i]n the first place, there were colorable grounds for the warning and a reasonable employee under the circumstances would have understood a warning under these circumstances was not necessarily indicative of a retaliatory mind-set.” *DeHart*, 214 F. App’x at 441. The language regarding a “retaliatory mindset” appears to incorporate language from the EEOC *Compliance Manual*, which describes Title VII’s anti-retaliation provision as “prohibit[ing] any adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.” *Burlington Northern & Santa Fe Ry.*

an inquiry into whether there were appropriate grounds for the employer action or whether a reasonable employee in the plaintiff's situation would have thought the employer action showed a retaliatory mindset. These questions are irrelevant in deciding whether an adverse employer action exists. The test for the adverse action element of a retaliation claim instead asks whether the employer action was materially adverse: whether the employer's actions were harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.¹²⁶

The second reason the court provided is *DeHart's* major flaw.¹²⁷ The court's reliance on *DeHart's* failure to be actually dissuaded from filing a complaint is what makes its application of the deterrence standard illogical. It shows that the *DeHart* court misinterpreted *Burlington Northern's* standard for what types of employer behavior constitute an adverse action in a way that effectively removes Title VII's protection against retaliation.

B. TO AVOID THE RISKS OF THIS MISAPPLICATION, COURTS MUST PROPERLY INCORPORATE THE OBJECTIVE ASPECT OF *BURLINGTON NORTHERN'S* STANDARD

The *DeHart* court held that the very fact a discrimination claim was filed shows that the employer's action failed to dissuade a discrimination charge.¹²⁸ The problem with this ruling is that its circular reasoning acts as a "Catch-22" for plaintiffs. It would prevent a retaliation claim from succeeding if, after the allegedly retaliatory act, the plaintiff complained of retaliation or discrimination to the EEOC; but filing such a complaint is a prerequisite for a retaliation claim.¹²⁹ The inherent illogic of

Co. v. White, 548 U.S. 53, 66 (quoting 2 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 8, p. 8-13 (1998)). However, this is not the current test for finding an adverse action.

Besides straying from the current standard for an adverse action, another problem with this reasoning is that whether there were "grounds for the warning" is better analyzed under the element of causation. Furthermore, the court's statement shows that it would assume an absurd (and incorrect) burden of proof by requiring the employer actions to be "necessarily indicative of a retaliatory mind-set." Although beyond the scope of this paper, it is improper to require a showing of 100% certainty that the employer's actions were based on retaliation when, in actuality, the plaintiff need only show that retaliation was a "motivating factor" for the treatment. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

¹²⁶ *Burlington Northern*, 548 U.S. at 57.

¹²⁷ "Furthermore, the August 15 written warning did not in fact dissuade a charge of discrimination, given that several weeks later on September 2, a charge was filed." *DeHart*, 214 F. App'x at 441.

¹²⁸ *DeHart*, 214 F. App'x at 442.

¹²⁹ See 42 U.S.C.A. § 2000e-4 (Westlaw 2007); see also 29 C.F.R. § 1614.105 (Westlaw

employing this self-cancelling rule would have the effect of barring any plaintiff from ever going forward with a retaliation claim.

Perhaps the reason the *DeHart* court got it so wrong is that the deterrence test is simply hard to put into practice. The Supreme Court noted that the test is an objective one because it requires a look into whether a *reasonable* employee would be deterred from complaining if faced with the action.¹³⁰ But the test also includes a subjective aspect that requires considering the context of the particular employee.¹³¹ By including both objective and subjective components, the *Burlington Northern* standard can be difficult for lower courts to apply.

Incorrectly mixing subjective elements into the objective part of the test, the Fifth Circuit approached the adverse action issue too literally. The court in *DeHart* did not consider what deterrent effect this employer action might have on *other reasonable employees*; it only focused on what effect it actually had on the particular employee filing the lawsuit.¹³² But when Justice Breyer articulated the standard for identifying adverse actions, he said they are actions that *well might* dissuade a reasonable worker from complaining of discrimination.¹³³ He did not say they are actions that *actually do* dissuade a reasonable worker from complaining of discrimination. The test is not an inquiry into what actions any particular employee actually took; rather, it inquires into how a reasonable worker would react under the circumstances. To properly apply the *Burlington Northern* standard, courts must correctly apply the objective part of the test by allowing a jury to consider the potential deterrent effects on a *reasonable* employee.

DeHart's ruling and others like it, that the filing of a complaint with the EEOC leads to the conclusion there has been no adverse employer action that would support a retaliation claim,¹³⁴ will have the effect of discouraging plaintiffs from coming forward with valid complaints of discrimination. If employees know that filing a discrimination or retaliation complaint will automatically make a retaliation claim fail, then they will be less likely to bring such complaints because they will know that they have no protection from subsequent retaliatory action by

2008).

¹³⁰ *Burlington Northern*, 548 U.S. at 68-69.

¹³¹ *Burlington Northern*, 548 U.S. at 69 ("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.").

¹³² "Furthermore, the August 15 written warning did not in fact dissuade a charge of discrimination, given that several weeks later on September 2, a charge was filed." *DeHart*, 214 F. App'x at 441.

¹³³ *Burlington Northern*, 548 U.S. at 68.

¹³⁴ *DeHart*, 214 F. App'x at 442.

their employer.¹³⁵ Yet, the prohibition of discrimination within Title VII can only be enforced with the cooperation of employees who are willing to file complaints and act as witnesses.¹³⁶

Consequently, if employers know that employees are not likely to file discrimination complaints because they no longer have protection from retaliation, then they would have less incentive to avoid discrimination; further, they could retaliate endlessly and without consequences against employees who do file discrimination complaints. In turn, if potential defendants were permitted to retaliate freely, individuals who witness discrimination would be afraid to report it and many violations might go unremedied as a result.¹³⁷ A rule like *DeHart's* that prevents employees from coming forward with complaints would therefore result in ineffective enforcement of Title VII's basic protections against discrimination.

Unfortunately for Juanita DeHart, the simple fact that she properly followed the administrative procedures when engaging in protected activity precluded her from going forward with a retaliation charge. This case illustrates an important point: the *Burlington Northern* standard is proving itself not to be as beneficial to plaintiffs as many believed it would. "[T]his case is an example of a situation in which the broadened standard set out in *Burlington* actually assisted the employer in overcoming DeHart's retaliation claim."¹³⁸ This is contrary to predictions by critics of the new *Burlington Northern* standard who characterized its rule as too permissive.

Another reason the *DeHart* holding is significant is that this same error in logic is affecting more plaintiffs than just Juanita DeHart.¹³⁹

¹³⁵ Despite fewer claims and therefore less use of judicial resources, this result is inequitable in addition to being contrary to the purposes of Title VII. "Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge." 2 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 8-1 (1998), available at <http://www.eeoc.gov/policy/docs/retal.pdf>.

¹³⁶ *Burlington Northern*, 548 U.S. at 67 ("Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960))).

¹³⁷ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

¹³⁸ Maria Greco Danaher, *Adverse Action Must Deter Discrimination Claims*, 9 No. 5 LAWYERS J. 2 (Mar. 2, 2007). But see *id.* ("Employers should not interpret this case to mean that every time an employee files a subsequent charge of discrimination, a retaliation claim is precluded."). Even if it is not the case that a retaliation claim will be precluded every time a subsequent charge is filed, it is still inappropriate if this consideration results in even one claim being prevented from going forward. To say it will not happen every time is little consolation for the many employees whose claims will be rejected under such a rule.

¹³⁹ A Comment in the *Harvard Journal of Law and Gender* points out a similar absurd result in another case. "Without considering the specifics, the court declared that [the plaintiff's] claim did not meet the *Burlington* test: 'These actions, whether characterized as major or minor, did not deter [the plaintiff's] pursuit of new and expanded allegations of discrimination, either internally or

This interpretation must be stopped before the right to be free from retaliation becomes completely hollow.

III. CONCLUSION

DeHart says that anytime an employee files a complaint of discrimination or retaliation, no previous act by the employer can be an adverse action that will support a retaliation claim. Jam yesterday, jam tomorrow, but never jam today. In holding that there could be no adverse action if *DeHart* was not, in fact, dissuaded from filing a complaint, the Fifth Circuit used self-contradictory, circular logic that would prevent anyone from ever bringing a retaliation claim. It makes no sense to hold that filing a discrimination charge with the EEOC defeats a required element of a retaliation claim when engaging in this protected activity is a prerequisite for a retaliation claim to ever exist. Furthermore, it is pointless to have statutory protection if it will never result in any relief.

“Fair employment is too vital for haphazard enforcement.”¹⁴⁰ Misapplying the deterrence standard in the manner *DeHart* has done is a huge step backwards in the progress that has been made toward ending discrimination in the workplace. To properly apply the standard from *Burlington Northern*, courts must consider whether a reasonable employee in the plaintiff’s circumstances would have been deterred from complaining, not whether a plaintiff was actually deterred.

Within its confusing definition of “materially adverse,” it appears that what the Supreme Court attempted to articulate in *Burlington Northern* was a test that considers whether a reasonable employee would consider the employer action to be adverse. It should have simply made this the new standard instead of the deterrence test it adopted. If it had done so, the problem associated with a rule like the one set forth in *DeHart* would not occur.

If courts continue to apply a rule barring a retaliation claim for the mere fact that a prerequisite of bringing the claim is present, then either Congress or the Supreme Court must provide further clarification on how to detect an adverse employer action. It is not too soon for the Supreme Court to hear this issue again by granting certiorari on a case where it

administratively.” Mary Newman, Comment, *Burlington Northern and Santa Fe Railway Co. v. White: The Scope of Retaliatory Actions and a Legal Catch-22*, 30 HARV. J. L. & GENDER 519, 527 (2007) (quoting *Sykes v. Pa. State Police*, No. 05-1389, 2007 WL 141064, at *6 (W.D. Pa. Jan. 17, 2007)). This is another example of improper focus on whether a particular plaintiff was deterred from pursuing discrimination claims, rather than on what deterrent effect the employer’s action might have on a reasonable employee.

¹⁴⁰ Exec. Order No. 12,106 (Feb. 23, 1978).

appears the lower court struggled to properly interpret the deterrence test.¹⁴¹ Every moment the Court delays could result in another injured plaintiff who has no recourse.

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¹⁴¹ Just two years after the decision, *Burlington Northern* has already been cited over 6,000 times; over 30 of these are negative cases that either called into doubt, declined to extend, or distinguished *Burlington Northern*.

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