The "Disappearing" Dilemma: Why Agency Principles Should Now Take Center Stage in Retaliation Cases

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I. INTRODUCTION

In a common magic trick called "The Disappearing Woman," a magician places his assistant in a box, swirls the box around, and when the door opens, the woman has vanished. In reality, the woman drops through a trap door in the floor, only to reappear somewhere later in the act.

Retaliation law is now suffering from its own version of "The Disappearing Woman" trick. In 2006, the Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[1] interpreting the term "discrimination"[2] in Title VII's retaliation provision in a way that is favorable to plaintiffs.[3] After *Burlington*, it may appear as if one of the major hurdles for a plaintiff to prove a retaliation claim under Title VII[4] has vanished.[5] However, the decision in *Burlington* is

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1. 548 U.S. 53 (2006).

2. 42 U.S.C. § 2000e-3(a) (2000).

3. *See generally Burlington*, 548 U.S. 53 (rejecting narrow interpretations of the retaliation provision).

4. 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. V 2005).

5. *See, e.g.*, Broussard v. Wells Bloomfield, No. 3:05-CV-0532-RAM, 2007 WL 1726571, at *7 (D. Nev. June 13, 2007) (indicating that *Faragher*/*Ellerth* defense does not apply in retaliation cases); Strutz v. Total Transit, Inc., No. CV-06-2370-PHX-FJM, 2007 WL 772534, at *3 (D. Ariz. Mar. 9, 2007) (indicating that it is unclear whether the framework applies to retaliation claims); Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After* Burlington Northern & Santa Fe Ry. Co. v. White, 9 U. PA. J. LAB. & EMP. L. 533, 533–34 (2007) ("While protection for whistleblowers is of utmost importance in today's workplace, the Court went too far in *White*, implementing a vague and highly subjective standard that affords employees who complain of discrimination, whether founded or not, what in practicality amounts to near immunity from even the slightest changes in working conditions."); *id.* at 585 (suggesting that the *Faragher*/*Ellerth* defense does not apply to retaliation claims); Steven Seidenfeld, Note, *Employer Liability Under Title VII: Creating an Employer Affirmative Defense for Retaliation Claims*, 29 CARDOZO L. REV. 1319, 1343–52 (2008) (arguing that no affirmative defense

much more important for an issue that it did not address: how agency principles apply in the retaliation context.

For many reasons discussed below, the Court did not grapple with the question of agency.[6] In other words, actions taken in the workplace may constitute retaliation, but that fact does not mean the employer is automatically liable for those actions. Rather, the retaliation claims in Title VII, just like its other substantive provisions, apply only when an employer engages in the unlawful activity.[7] While the lower courts appear to recognize that agency issues come into play when retaliation is conducted by co-workers,[8] they have largely ignored the interplay of agency and retaliation when actions are taken by supervisors. This Article argues that agency will become one of the new battlegrounds in retaliation claims, posing similar dilemmas for plaintiffs as the ones that supposedly disappeared after *Burlington*.[9]

Although the Supreme Court soundly rejected the idea that the plaintiff must establish that conduct rose to the level of an adverse employment action to constitute retaliation, this issue has simply disappeared for the moment. This Article posits that, in an effort to square *Burlington* with other Title VII agency jurisprudence, the courts

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exists for employers for retaliation claims, but arguing that one should be created).

6. When this article uses the term "agency" in reference to the federal discrimination statutes, it is not referring to pure agency. Rather, it is referring to the examination of agency and vicarious liability principles under Title VII, which the Supreme Court has indicated is affected by the doctrine of avoidable consequences and an understanding that it might be preferable under Title VII to resolve workplace disputes without litigation. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763–64 (1998). Because a complete re-articulation of these limitations each time this idea is expressed would drive readers to distraction, this Article uses the shorthand of agency.

7. The full retaliation provision reads as follows:

> It shall be an unlawful employment practice *for an employer* to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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.

42 U.S.C. § 2000e-3(a) (emphasis added). *See also* 42 U.S.C. § 2000e-2(a)(1) (indicating that an employer is the proper defendant in a Title VII suit). Portions of Title VII also apply to labor organizations and employment agencies. *See* 42 U.S.C. § 2000e-2(b) to -2(c). The liability of these two types of entities is not relevant to the instant discussion and will not be discussed further. When this Article mentions liability under Title VII, it is referring to liability that the employer might face.

8. *See infra* notes 206–07.

9. At least one court that has applied a *Burlington*-like standard to retaliation claims prior to the decision in *Burlington* simply asserted, without much discussion, that retaliation claims result in broader vicarious liability for the employer. *See, e.g.*, Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 965 (9th Cir. 2004).

will be required to re-import the concept of tangible employment action into decisions regarding whether an employer is vicariously liable for actions committed by supervisors. Thus, like the disappearing woman, the concept of tangible employment action remains lurking just beneath the trap door, waiting to reappear.[10]

The Article attempts to make four key points. First, as a descriptive matter, the Article demonstrates how the facts of the *Burlington* case, as well as the way that the case was positioned legally, resulted in a decision where important agency principles appear to have been addressed, but actually were not. Next, the Article will argue that the lower courts in a post-*Burlington* world are intuitively sensing that agency concerns still lurk in retaliation claims. However, rather than addressing the agency issues, the lower courts appear to be improperly addressing concerns about employer liability through other portions of the retaliation inquiry, a practice that is not only disingenuous, but that will also result in an inconsistent development of the substantive retaliation provision.

The discussion then turns toward creating a framework to determine the types of cases in which agency will play an important role. Finally, the Article argues that unless *Burlington* is interpreted in the way suggested in this Article, the decision will result in an agency jurisprudence that is at odds with the Court's current Title VII agency decisions. Such an outcome is untenable for most types of retaliation, as there is no theoretical reason or statutory basis to treat agency principles differently in the retaliation context than in the discrimination context. Where arguments exist for departure from the traditional framework, the Article identifies those arguments, but ultimately concludes that the current structure is the best way to address agency issues in retaliation claims.

To accomplish these four tasks, the Article is organized as follows. Part II provides important background material to understanding the agency issues at play in retaliation claims. Part III articulates a framework for discussing agency principles in the retaliation context and discusses whether these principles are in conflict with agency principles in other Title VII contexts. Part IV explores whether agency issues might play out differently in the retaliation context for some types of actions, concludes that application of the current structure is appropriate,

10. This Article only considers issues of vicarious liability, and not the separate issue of the employer's direct liability.

and then explains why consistency regarding the concept of agency is important. The Article's conclusion is contained in Part V.

II. A DISCUSSION OF THE LEGAL LANDSCAPE

To fully explore the agency principles left lurking in Title VII retaliation law, it is important to situate those principles within their proper legal context. This section begins by briefly describing the differences between Title VII's discrimination provisions and its retaliation provisions, then continues with a discussion of the *Burlington* decision itself. The section concludes with a description of the Supreme Court's other agency decisions that impact this discussion.

A. An Overview of Title VII

Enacted in 1964, Title VII is the federal statute that prohibits discrimination in employment based on race, gender, color, national origin, and religion.[11] The statute also protects an individual from retaliation after engaging in certain types of protected conduct.[12]

More specifically, the operative discrimination provision of Title VII provides that it is an unlawful employment practice "for an *employer* . . . 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."[13] In contrast, the retaliation provision provides that it is unlawful for "an *employer* to discriminate against any of his employees . . . 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

11. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 253, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. V 2005)). In 1978, Congress clarified that the term "on the basis of sex" also included protection against pregnancy discrimination. *See* Pub. L. No. 95-555, sec. 1, § 701(k), 92 Stat. 2076, 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

12. 42 U.S.C. § 2000e-3(a).

13. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In the petition for writ of certiorari, the petitioner Burlington did not list the definition section for the term "employer" as one of the statutory provisions for consideration. *See* Petition for a Writ of Certiorari at 1–2, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (No. 05-259). The definitional section was referenced in the brief of petitioner. Brief of Petitioner at 1, *Burlington*, 548 U.S. 53 (No. 05-259).

manner in an investigation, proceeding, or hearing under this subchapter."[14]

A side-by-side comparison of the two provisions demonstrates three important points. First, Congress used the same term "discriminate" in Title VII's discrimination provision as it did in the subsequent retaliation provision. Second, despite the use of the same term "discriminate," the words modifying that term are different in the discrimination and retaliation provisions. Third, in both the retaliation and discrimination provisions, prohibited actions must be taken by an employer (or by a person for whose actions the employer is vicariously liable) to create liability.

As discussed in Part III below, in *Burlington* the Supreme Court only addressed the meaning of the difference in the substantive provisions, and did not discuss the agency issues left lurking by the fact the retaliation provisions require that actions must be taken by the employer to be actionable.

A brief description of the statutory text and legislative history is necessary to highlight the issues the Court focused on in *Burlington*, and to set them apart from the issue the Court did not discuss—agency. The retaliation provisions and the discrimination provisions were enacted at the same time.[15] Interestingly, even though the word "discriminate" is one of the essential terms of Title VII, Congress did not define that term within the statutory text of Title VII.

Nor is Title VII's legislative history any help in elucidating the meaning of "discriminate."[16] As one court noted, "[t]he legislative

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14. 42 U.S.C. § 2000e-3(a) (emphasis added). The term "employer" is defined under Title VII as follows:

> [A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b). Although the word "employer" is defined within the statutory text, it would remain for later courts to begin to develop a fuller agency jurisprudence. *See infra* Parts II.B–C.

15. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703(a)(1), 704(a), 78 Stat. 253, 255, 257 (codified as amended at 42 U.S.C. §§ 2000e-2(a)(1), -3(a) (2000)).

16. By mentioning the legislative history, the author is not suggesting that reference to legislative history would be appropriate. The concerns with using legislative history have been widely discussed in the literature and will not be discussed in-depth here. These critiques include (1) concerns about whether an individual legislator's expressions of intent reflect the collective will of

history of Title VII has virtually been declared judicially incomprehensible."[17] Most of the discussion about the Civil Rights Act of 1964 related to whether the bill, as a whole, should be passed.[18] There is little discussion about the specific provisions of Title VII, beyond the summaries of the provisions provided by individual legislators.[19] Surprisingly, there is little discussion in the legislative history regarding what Congress intended by Title VII's operative language. One legislator even commented on the lack of discussion regarding this important issue by indicating "[t]here is no attempt whatever in any title of the bill to define what is meant by the offense of discrimination" and "[t]hat definition is nowhere in the context, in the intent or in the purpose, or even in the preface of the bill."[20] Nor does the legislative history address why Congress chose to articulate Title VII's discrimination and retaliation provisions in different ways.[21]

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the legislature; in other words, individual legislators can change the intent of the statute through manipulative use of legislative history; (2) concerns that intentionalist judges selectively cull through legislative history for signals about intention that support the judge's reading of the statute, while ignoring other relevant portions of the legislative history; and (3) concerns that statutes are carefully crafted outcomes created after compromises between competing political interests and that relying too much on legislative history may unduly upset the intended outcome, which can only be expressed through the actual language of the statutory provisions themselves. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 362, 370–71 (2005).

17. Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136, 1138 n.7 (5th Cir. 1971). The debate over the Civil Rights Act of 1964, which also included civil rights protections in the areas of public accommodations and voting, has been coined "The Longest Debate." CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT *passim* (1985). Debate lasted nine days on the floor of the House of Representatives. *See id.* at 118. Behind-the-scenes maneuvering in the Senate lasted throughout thirteen weeks of filibustering by the bill's opponents, which represented the longest filibuster in the history of the Senate. *See id.* at 193. As one commentary indicates: "The 1964 civil rights Senate debate lasted over eighty days and took up some seven thousand pages in the Congressional Record. Well over ten million words were devoted to the subject by members of the upper house. In addition, the debate produced the longest filibuster in Senate history, as well as the first successful invocation of cloture in many years." 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1089 (Bernard Schwartz ed., 1970).

18. *See, e.g.*, H.R. REP. NO. 88-914, at 108–09 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2475–78 (discussing constitutionality of the Civil Rights Act of 1964); *id.* pt. 2 at 26–30, *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2413–17 (discussing broad economic reasons for passage of Title VII).

19. *See, e.g.*, *id.* at 107–08, *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2474–75 (summarizing provisions of Title VII).

20. 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 17, at 1148 (quoting Richard Russell (D–Ga.)).

21. *See* Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976) ("Neither in its wording nor legislative history does section 704(a) make plain how far Congress meant to immunize hostile and disruptive employee activity when it declared it unlawful for an employer to discriminate against an employee 'because he has opposed any practice made an unlawful employment practice by this subchapter . . . .' The statute says no more, and the committee reports on the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1963, which later became Title VII of the Civil Rights Act, repeat the language of 704(a) without any

Given these deficiencies in both the statutory text and the legislative history, it is not surprising that the lower courts had a difficult time consistently interpreting what it meant to retaliate against an individual in violation of Title VII.[22] The Supreme Court was asked to resolve the developing circuit split in *Burlington*.[23]

B. A Discussion of Key Portions of Burlington

In discussing the *Burlington* decision, it is important to look precisely at the issue the Supreme Court was asked to address. The question upon which the Court granted certiorari read as follows:

> *Whether an employer may be held liable* for retaliatory discrimination under Title VII for any "*materially adverse change* in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "*ultimate* employment decision" (as two other courts of appeals hold).[24]

It appears that the Supreme Court did not fully address the question upon which it granted certiorari. In describing its decision in *Burlington*, the Court indicated it was addressing the following two questions: (1) must an action affect the terms and conditions of employment to be cognizable under the retaliation provisions, and (2) how harmful must conduct be to create liability for retaliation under Title VII.[25] In Part III, below, I will explore how this leaves one important issue unanswered: the circumstances under which the employer is vicariously liable for such conduct.

A brief recitation of the facts is necessary for our further discussion of agency.[26] Sheila White was employed by Burlington Northern in its

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explanation. The proceedings and floor debates over Title VII are similarly unrevealing. Courts are thus left to develop their own interpretation of protected opposition." (citation omitted) (quoting 42 U.S.C. § 2000e-3(a) (2000))).

22. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60 (2006) (noting the various interpretations by circuit courts).

23. *Id.* at 61.

24. Petition for a Writ of Certiorari, *supra* note 13, at i (first emphasis added); Burlington N. & Santa Fe Ry. Co. v. White, 546 U.S. 1060, 1060 (2005) (granting petition for certiorari).

25. *Burlington*, 548 U.S. at 57.

26. A full recitation of the facts of the case, as well as the circuit split that lead to the Supreme Court's eventual acceptance of the case, are not necessary for the current discussion. For a more detailed examination of the case, see generally Ernest F. Lidge III, *What Types of Employer Actions are Cognizable under Title VII?*: *The Ramifications of* Burlington Northern & Santa Fe Railroad

Tennessee Yard as a track laborer, "a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way."[27] Although Ms. White performed other track laborer tasks, her primary responsibility was to drive the forklift.[28] In September of 1997, Ms. White lodged an internal complaint that her immediate supervisor repeatedly told her that women should not be working in the department.[29] The company placed the supervisor on a ten-day suspension and required him to attend sexual-harassment training.[30]

Later that month, another supervisor removed Ms. White from her forklift responsibilities, assigning her other job duties within the track laborer job description.[31] Ms. White filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that she had been discriminated against and that she was retaliated against after making the discrimination complaint.[32]

Ms. White then alleged that she had been placed under surveillance at work, and filed another Charge of Discrimination.[33] A few days later, Ms. White became involved in a disagreement with another supervisor.[34] The supervisor alleged that Ms. White had been insubordinate and placed her on an unpaid suspension.[35] After an internal grievance procedure, the company determined that Ms. White had not been insubordinate and reinstated her with backpay for the thirty-seven days of her suspension.[36] Ms. White filed retaliation claims against Burlington on two theories: she alleged that after she filed an internal complaint of discrimination, her job responsibilities were changed, and that after filing Charges of Discrimination with the EEOC, she was improperly suspended without pay.[37]

[sic] Co. v. White, 59 RUTGERS L. REV. 497 (2007); Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*, 111 PENN. ST. L. REV. 893 (2007).

27. *Burlington*, 548 U.S. at 57.

28. *Id.*

29. *Id.* at 58.

30. *Id.*

31. *Id.*

32. Petition for a Writ of Certiorari, *supra* note 13, at 5.

33. *Id.*

34. *Burlington*, 548 U.S. at 58.

35. *Id.*

36. *Id.* at 58–59.

37. Ms. White also alleged that she had been discriminated against based on her gender. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 791 (6th Cir. 2004); Petition for a Writ of Certiorari, *supra* note 13, at 6. A jury held in Ms. White's favor on the retaliation claim and awarded her compensatory damages. The jury found in favor of Burlington on the discrimination claim. A divided panel of the Sixth Circuit Court of Appeals reversed the decision below on the

The Supreme Court held that Title VII's retaliation provisions are not confined to actions "that are related to employment or occur at the workplace."[38] The Court also held that the retaliation provisions cover those "*employer actions* that would have been materially adverse to a reasonable employee or job applicant."[39] The Court further indicated that "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."[40] In so noting, the court emphasized that the harm to the employee must be material and that the *Burlington* decision is not meant to insulate employees against "normally petty slights, minor annoyances, and simple lack of good manners."[41]

In so holding, the Court noted the distinctions between the discrimination provision of Title VII and its retaliation provision:

> The antiretaliation 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. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.[42]

The Court found it difficult to fully articulate the types of actions that constitute retaliation. Rather, the court indicated that the context of each particular case would matter.[43] "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[44] The Court continued by noting that in some circumstances, changes in an employee's work schedule or a supervisor's

retaliation claim; however, the Sixth Circuit, sitting en banc, affirmed the district court's decision regarding the retaliation issues. *Burlington*, 548 U.S. at 59. The Sixth Circuit held that a retaliatory action must meet the level of an adverse employment action to be cognizable under Title VII, holding that a suspension without pay and reallocating job responsibilities constituted adverse employment actions. *See White*, 364 F.3d at 796, 803–04.

38. *Burlington*, 548 U.S. at 57.
39. *Id.* (emphasis added).
40. *Id.* (emphasis added).
41. *Id.* at 68.
42. *Id.* at 63.
43. *Id.* at 68–69.
44. *Id.* at 69 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998)).

exclusion of an employee from a weekly training lunch might be actionable.[45]

The Court did address other Title VII agency cases in the *Burlington* decision, but only to note that those cases did not relate to defining the term "discriminate" within Title VII's retaliation provision.[46]

In his concurrence, Justice Alito noted that following the majority's interpretation of the statute would mean that "a retaliation claim must go to the jury if the employee creates a genuine issue on such questions as whether the employee was given any more or less work than others, was subjected to any more or less supervision, or was treated in a somewhat less friendly manner because of his protected activity."[47]

C. Other Cases Impacting the Analysis

Given that *Burlington* did not address agency issues, it is necessary to examine other Supreme Court cases to understand the contours of these principles within the Title VII context. The key cases discussing these issues are *Burlington Industries, Inc. v. Ellerth*[48] and *Faragher v. City of Boca Raton*,[49] both issued by the Court on the same day in 1998, with the first opinion written by Justice Kennedy and the latter by Justice Souter.

1. Discussion of Framework Created by *Faragher* and *Ellerth*[50]

As discussed earlier, the discrimination provision of Title VII applies to employers.[51] Although the term "employer" is further defined within the statutory text,[52] it was unclear what type of liability this provision placed on employers for the acts of their employees. This question became more important after the Court recognized harassment as a cognizable violation under Title VII.

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45. *Id.* at 69.

46. *Id.* at 64–65.

47. *Id.* at 75 (Alito, J., concurring).

48. 524 U.S. 742 (1998).

49. 524 U.S. 775 (1998).

50. This Article uses the terms *Faragher* and *Ellerth* framework or structure to describe the entire analytical model set up in these cases. When these terms are used, the reference is not to the affirmative defense provided in these cases, but rather to the structure that determines whether the affirmative defense is available in the first place.

51. 42 U.S.C. § 2000e-2(a)(1) (2000).

52. 42 U.S.C. § 2000e(b).

In *Ellerth*, the Court considered whether an employer was liable for the conduct of a supervisor who sexually harassed an employee and who threatened to make employment decisions based on the employee's gender, but never followed through on those threats.[53] The Court emphasized that its decision related to vicarious liability,[54] not the definition of what discrimination means.[55] The Court explicitly noted it was assuming that the trial court's determination was correct—that the conduct at issue was severe and pervasive—thus constituting "discrimination . . . in the terms and conditions of employment."[56]

The Court began to form a framework to determine when an employer faced liability for the conduct of its employees, holding actions that constituted tangible employment decisions[57] would be imputed to the employer. As discussed in more detail in Part III, the Court was not indicating that an employer would only be liable for these actions, but rather, that these categories of cases would be ones in which both discrimination has been proved and the employer's liability for that discrimination had been established. The Court further indicated that "[a] tangible employment action constitutes 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."[58]

A full recitation of the connection between the concept of tangible employment action and vicarious liability is helpful. The Court articulated the following rationale:

> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. . . . Tangible employment actions fall within the special province of the

53. *Ellerth*, 524 U.S. at 746–47.

54. The Court indicated that its examination of agency principles under Title VII was affected by the doctrine of avoidable consequences and an understanding that it might be preferable under Title VII to resolve workplace disputes without litigation. *Id.* at 763–64.

55. *Id.* at 756.

56. *Id.* at 754.

57. *Id.* at 760–61.

58. *Id.* at 761. Later in *Pennsylvania State Police v. Suders*, the Court indicated that a constructive discharge may also constitute a tangible employment action. *See* 542 U.S. 129, 130 (2004).

> supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.
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> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.[59]

The decision in *Faragher*, also a sexual harassment case, indicated that the concept of a tangible employment action played an important role in understanding employer liability under Title VII.[60]

The result of *Faragher* and *Ellerth* was the creation of a framework for determining an employer's vicarious liability. When a tangible employment action is taken, the employer is liable for the conduct.[61] Although not directly considered by the Court in *Faragher* and *Ellerth*, the company is also liable for discrimination committed by an alter ego of the company.[62]

If no tangible employment action is taken, and the conduct is committed by co-workers, third parties, or even possibly by supervisors with no management responsibilities over the plaintiff, the plaintiff must establish that there is a basis for imposing liability on the company.[63]

When no tangible employment action is taken and the conduct at issue is committed by the employee's supervisor or by someone in a successive chain of authority, the employer is liable for the actions, unless the employer can establish an affirmative defense to liability.[64] As articulated by the Court, the affirmative defense has two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[65] This affirmative defense is commonly referred to as the *Faragher*/*Ellerth* defense.

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59. *Ellerth*, 524 U.S. at 761–62.

60. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788–90 (1998).

61. *See Ellerth*, 524 U.S. at 762.

62. *See Faragher*, 524 U.S. at 789 (favorably citing a lower court decision in which a court found a company liable for harassment committed by the president of the company).

63. *See id.* at 777–78.

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

65. *Id.*

Most importantly, this affirmative defense provides a complete defense to liability. In other words, even if the employee is subjected to severe and pervasive harassment in the workplace, the employer will not be held liable under Title VII, if it can establish the defense.[66]

After considering *Faragher* and *Ellerth*, it becomes important to contrast the arguments made in those cases with the arguments made in *Burlington* that related to tangible employment actions. Burlington's argument was that the tangible employment action standard developed in these cases defines cognizable claims for retaliation;[67] not the separate, but related argument, that *Faragher* and *Ellerth* define the contours of the employer's liability for retaliation. In other words, the second argument posits that there might be action that is taken within the workplace that constitutes retaliation, but for which no liability attaches, because it was not committed by the employer.[68] This is different than saying the action does not constitute potentially cognizable retaliation in the first place.

That Burlington proceeded with an argument regarding the scope of the substantive retaliation provision is not surprising for two reasons. As the Court discussed in *Faragher*, courts struggled with the scope of the discrimination provisions long before they addressed issues relating to agency.[69] Thus, it is not surprising that these issues arose in a similar order in the retaliation context. Second, given the circumstances of the case, it is unlikely that the employer could have prevailed on any defense structured similarly to the *Faragher*/*Ellerth* defense. Had defense counsel prevailed on the argument that only tangible employment actions were cognizable violations of the retaliation provisions, it would have created a better legal position for employers than winning on an agency argument.

66. *See, e.g.*, Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1293 (11th Cir. 2003); Idusuyi v. Tenn. Dept. of Children's Servs., 30 F. App'x 398, 403–04 (6th Cir. 2002).

67. Petition for a Writ of Certiorari, *supra* note 13, at 13; Brief of Petitioner, *supra* note 13, at 9 ("A supervisor's alteration of the mix of duties that an employee performs within her existing job classification simply is not an official act of the enterprise that constitutes a 'significant change in employment status,' and therefore is not an 'unlawful employment practice' under section 704.").

68. Interestingly, Burlington's Petition for Certiorari does not mention the discrimination and retaliation provisions the company has in place; nor does it mention any training provided to supervisors. *See* Petition for a Writ of Certiorari, *supra* note 13.

69. Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998).

2. Discussion of Agency Principles

One of the key arguments advanced herein is that agency principles should be consistent across all causes of action under Title VII.[70] By describing the Court's enunciation of a Title VII agency standard, the author is not expressing an endorsement of the framework set forth in the *Faragher* and *Ellerth* cases, merely the fact that this is the standard, though flawed, that has been provided by the Supreme Court.[71]

Some may argue that if the current agency framework is flawed, it should not be expanded to cover retaliation claims as well as discrimination claims.[72] While I understand the concerns expressed in such an argument, larger concerns animate this Article. Importantly, the primary argument made herein does not rely on the continued viability of the current agency structure. Rather, the principle idea is that consistency should exist regarding agency principles in the retaliation and discrimination contexts, given that the same word—"employer"—applies in both contexts.

A piecemeal approach to agency will, in the end, create a larger problem for both litigants and the courts, leading to confusion with the

70. A minor extension of this argument is that these principles should also be consistent among all three of the major federal anti-discrimination statutes: Title VII, the ADEA, and the ADA. Preferably, agency principles would be consistent across all federal statutes that govern employment in the private sector. However, as the Southern saying goes, the horse may already be out of the barn, as the Supreme Court appears to have adopted different agency principles for other federal statutes outside of the employment discrimination context. For a broader discussion of these issues, see generally Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999).

71. Criticism of the framework created by *Faragher* and *Ellerth* is widespread. For a lengthier critique of the structure see *id.* at 768–73. One of the most valid criticisms of *Faragher* and *Ellerth* is that the holding of the case does not appear to be supported by the agency principles enunciated by the Court. *See id.* at 768; Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 52, 55 (1999) ("They cited no common law cases in their cursory, formal, and rather abstract discussion of the Restatement exception on which they relied. In fact, there seem to be no common law cases that allow any kind of affirmative defense to employers.").

72. There are three compelling theoretical criticisms of the framework. First, it focuses too heavily on the concept of an independent bad actor, rather than employer responsibility. Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 359 (2008). Second, it conflicts with requirements that discrimination claims be filed promptly. *See generally* Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 995–1000 (2007). Third, reasonable individuals may refrain from complaining about conduct. *See generally* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 900–05 (2008) (discussing why employees do not complain). On a practical level, courts may be applying a stricter version of the framework than enunciated by the Supreme Court. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 21–23 (2003); Moss, *supra* at 1012.

substantive provisions themselves. Additionally, a bit of statutory sleight of hand may be required to find that the term "employer" has different meanings when applied to similar factual situations in discrimination cases versus retaliation cases.

Given that the structure provided in *Faragher* and *Ellerth* forms the primary basis for discussing agency, adopting a consistent structure using the principles enunciated in those cases is one way to achieve the goal of consistency.

The task at hand, therefore, is to consider whether this framework can appropriately be applied to retaliation claims. To undertake that discussion, a better understanding of the principles underlying the framework is necessary. The framework described in *Faragher* and *Ellerth* is based on a consideration of three ideas: agency principles, the doctrine of avoidable consequences, and an understanding that it might be preferable under Title VII to resolve workplace disputes without litigation.[73]

From a statutory perspective, the argument that the employer would be liable for the conduct of its agents begins with the statutory text itself, as Title VII defined the term employer to include "agents."[74] The Court interpreted this definitional section as an instruction by Congress for the federal courts to "interpret Title VII based on agency principles."[75] However, the definitional section provides no further guidance about how agency principles should operate in the Title VII context.[76] The Court indicated that it sought to rely on general agency principles—rather than the law of a particular state—to create a uniform and predictable standard of agency principles to govern the Title VII context.[77]

The Court then examined the vicarious liability principles expressed within the Restatement (Second) of Agency, beginning with the proposition in section 219(1) that "[a] master is subject to liability for the

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73. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763–64 (1998). Additionally, in both opinions, the Court expressed concern about keeping the enunciated principles consistent with the principles enunciated in a prior decision. *Faragher*, 524 U.S. at 791–92; *Ellerth*, 524 U.S. at 745.

74. 42 U.S.C. § 2000e(b) (2000); *Ellerth*, 524 U.S. at 754.

75. *Ellerth*, 524 U.S. at 754.

76. Professors Fisk and Chemerinsky posit that Title VII provides little guidance on agency issues, because "the kind of discrimination Congress had in mind when it enacted Title VII would, without doubt, form the basis of employer liability." Fisk & Chemerinsky, *supra* note 70, at 762.

77. *Ellerth*, 524 U.S. at 754. The Court further described what it was doing as "statutory interpretation pursuant to congressional direction. This is not federal common law 'in the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute . . . but, rather, to the judicial 'creation' of a special federal rule of decision.'" *Id.* at 755 (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997)).

torts of his servants committed while acting in the scope of their employment."[78] Intentional torts committed by employees are less likely to create liability for the employer because they may not fall within the scope of the employee's employment.[79] An action falls within the scope of employment when it is motivated, at least in part, by a purpose to serve the employer.[80] This is true even if the employer forbids the conduct.[81]

In *Ellerth*, the Court continued by considering whether sexual harassment was activity that an employee took within the scope of employment.[82] The Court concluded that, although in some instances sexual harassment could be conducted to further the goals of the employer, in most instances, sexual harassment did not fall within the scope of employment.[83] Strangely, *Faragher* appears to indicate that the Court's holdings on the scope of employment actually contradicted general common law agency rules.[84] Unlike in *Ellerth*, where Justice Kennedy characterizes the Court's interpretation as consistent with common law, Justice Souter in *Faragher* indicated: "An assignment to reconcile the run of the Title VII cases with those just cited would be a taxing one."[85] Thus, while the Court held that sexual harassment is outside the scope of employment and that section 219(1) of the Restatement does not provide a basis for employer vicarious liability, this portion of its holding does not appear to be well-supported.[86]

However, the Restatement does not just base vicarious liability on activities within the scope of employment.[87] The employer may also face liability for an agent's actions that fall outside of the scope of employment, if there are reasons why liability should be imputed to the employer.[88] The Court then listed the following four scenarios where such liability might be imputed:

78. *Id.* at 755–56.
79. *Id.* at 756.
80. *Id.*; Faragher v. City of Boca Raton, 524 U.S. 775, 793 (1998).
81. *Ellerth*, 524 U.S. at 756.
82. *Id.* at 756–57.
83. *Id.* at 757.
84. *Faragher*, 524 U.S. at 794–95.
85. *Id.* at 796.
86. *See id.* at 796–98; *see also* Fisk & Chemerinsky, *supra* note 70, at 768 ("This aspect of the opinion is puzzling because the bulk of the Court's analysis points to the opposite conclusion than the Court ultimately reached.").
87. *Ellerth*, 524 U.S. at 758.
88. *Id.*

> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.[89]

In discussing these four possibilities, the Court indicated that subsection (a) would apply when the person committing the action was an alter ego of the company.[90] As for subsection (b), "[n]egligence sets a minimum standard for employer liability under Title VII."[91] It is this section that is used for the portion of the agency framework that requires a plaintiff to establish negligence before an employer is liable for co-worker or third-party harassment. The Court rejected the argument that any non-delegable duties created liability under subsection (c).[92] In looking at subsection (d), the Court indicated that, in most cases, an apparent authority argument would not be appropriate.[93]

In crafting the *Faragher*/*Ellerth* defense, the Court primarily considered the second portion of subsection (d), that the employee "was aided in accomplishing the tort by the existence of the agency relation."[94] The Court rejected an interpretation that would create employer liability every time the conduct took place in the workplace.[95] This discussion then culminated in the multi-part framework described in the prior section.

In reaching its decision regarding agency principles, the Court did not rely on a pure agency analysis, but rather, made its decision in light of the doctrine of avoidable consequences and an understanding that it might be preferable under Title VII to resolve workplace disputes without litigation.[96] When this Article refers to agency principles in the *Faragher* and *Ellerth* context, it is referring to the combination of all three of these principles—not to a pure agency analysis.

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89. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958)).

90. *Id.*

91. *Id.* at 759. In a prior decision, the Court had also expressed concern about imputing liability to the employer in every instance. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (stating that "[Congress' definition of 'employer'] surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible").

92. *Ellerth*, 524 U.S. at 758.

93. *Id.* at 759.

94. *Id.*

95. *Id.* at 760.

96. *Id.* at 763–64.

As discussed in Part IV below, these same principles should guide the Court in determining agency issues within the retaliation context.

III. CREATING A FRAMEWORK FOR ANALYZING AGENCY ISSUES

Although it remains to be seen how the lower courts parse out the somewhat confusing language of the *Burlington Northern & Santa Fe Railway Co.* v. *White*[97] decision, I would argue that the decision creates four categories of retaliatory conduct. This section seeks to develop a framework for courts to use in determining when agency issues are important in the retaliation context. It also discusses why *Burlington* appears to address agency issues, but in reality, does not.

A. The Framework

The key to understanding the framework is to recognize that there is a difference between the seriousness of the conduct at issue and whether the employer is liable for such conduct.[98] While courts in the past have often confused and conflated the two inquiries,[99] this Article argues that

97. 548 U.S. 53 (2006).

98. In its prior cases, the Supreme Court has recognized that this dichotomy exists. Faragher v. City of Boca Raton, 524 U.S. 775, 788–89 (1998) ("Given the circumstances of many of the litigated cases, including some that have come to us, it is not surprising that in many of them, the issue has been joined over the sufficiency of the abusive conditions, not the standards for determining an employer's liability for them."); *Ellerth*, 524 U.S. at 752 ("The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive. The distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination.").

99. *See, e.g.*, Lutkewitte v. Gonzales, 436 F.3d 248, 254 (D.C. Cir. 2006); Donaldson v. Burlington Indus., Inc., No. 03-51362, 2004 WL 1933603, at *2 (5th Cir. Aug. 31, 2004); Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002); Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir. 2001); Bowman v. Shawnee State Univ., 220 F.3d 456, 461 n.5 (6th Cir. 2000); *see also* Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After* Burlington Northern & Santa Fe Railway Co. v. White, 9 U. PA. J. LAB. & EMP. L. 533, 541–42 (2007) ("Most significant here is the Court's 'import[ation]' of the 'tangible employment action' concept from circuit court cases defining the adverse action element of a Title VII discrimination claim to mark the dividing line between conduct for which employers are strictly liable and conduct for which an affirmative defense may be available."). It appears that this same conflation appeared during the oral argument in *Burlington*, when counsel for Burlington, Carter Phillips, argued:

> [T]here are two standards under -- under an adverse employment action. The first one is whether there's a tangible action, and that's the Ellerth standard. And then there's always the pervasive and severe standard, so that if you have -- you know, being routinely excluded rises to the level of pervasive or severe, that would still be actionable under 704 in exactly the same way that that's actionable under 703.

Transcript of Oral Argument at 10, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)

the question of seriousness and employer liability are separate inquiries. In other words, when we ask what it means to discriminate versus to retaliate against an employee, *Burlington*[100] implies that the seriousness of the conduct that will create a cognizable violation for retaliation is different, and in some cases, less severe, than that required for discrimination.[101] This does not answer the question whether the employer is liable for that conduct.

First, actions by the employer that would violate Title VII's discrimination provisions would also violate the retaliation provisions, assuming the other elements of a retaliation claim are established.[102] To present the easiest hypothetical, if an employer terminated an individual based on a protected trait or if the employer terminated an individual because he had filed a charge with the EEOC, the employer faces liability under Title VII. In this hypothetical, two important concepts are linked: the seriousness of the action and the liability of the employer. For ease of discussion, I will refer to these types of cases as Category I cases. In Category I cases, the employer's liability arises because the seriousness of the type of action taken suggests that the power of the company was used to carry out the act. Proving vicarious liability is simply not a problem for the plaintiff in these cases.[103]

On the other end of the spectrum are actions that will not create employer liability under either the discrimination or the retaliation provisions. As the Court noted in *Burlington*, the retaliation provisions do not insulate employees against "normally petty slights, minor annoyances, and simple lack of good manners."[104] The Court provided more concrete examples of the types of conduct that would fall into this category: personality conflicts, "'snubbing' by supervisors and co-workers," and the refusal by a supervisor to invite an employee to a non-training lunch.[105]

(No. 05-259).

100. 548 U.S. 53 (2006).

101. *Burlington*, 548 U.S. at 57 (2006) (indicating that conduct leading to retaliation must be conduct that a reasonable person would believe is materially adverse).

102. *But see* Lidge, *supra* note 26, at 512 (arguing that the anti-discrimination provisions might be broader in some contexts because "all the plaintiff has to show is an alteration in terms, conditions, or privileges of employment, rather than showing, as in the retaliation context, that the employment action would dissuade a reasonable employee from filing a charge with the EEOC").

103. Indeed, Category I cases are the types of cases that are most likely to be pursued, as the types of economic harms incurred are clearer and easier to establish than the harms that are often present in harassment cases or the less serious harms that might occur for actions that do not rise to the level of a tangible employment action.

104. 548 U.S. at 68.

105. *Id.* at 68–69.

These cases can be labeled as Category V cases. In Category V cases, the actions are characterized as so minimal that they do not create liability under any Title VII provision. In these instances, although courts might examine the culpability of the employer, employer liability is not the determinative inquiry. Rather, the seriousness of the conduct is.

However, in the middle are the cases that more clearly separate agency issues from the seriousness of the conduct. In Category II are cases of severe and pervasive harassment.[106] In these instances, the seriousness of the conduct is established, whether proceeding under retaliation or discrimination provisions. Although seriousness and liability do not work in tandem in this situation, the agency issues in the discrimination context would be worked through using the *Faragher*/*Ellerth* structure. This Article argues that a similar analysis should apply in a retaliation case.

The *Burlington* decision strongly suggests there are actions that might be taken against an employee that do not rise to the level of seriousness for purposes of violating the discrimination provisions,[107] but would, nonetheless, violate the retaliation provisions.[108] Two types of conduct fall within these categories: certain kinds of retaliatory harassment, which will be labeled as Category III, and other non-harassing activity that falls short of a tangible employment action, which will be labeled as Category IV.

Retaliatory harassment that is more than trivial, but which does not arise to the level of a severe and pervasive case of harassment, falls within Category III. In these retaliatory harassment cases, the plaintiff would be trying to establish that a reasonable person would be deterred from complaining based on the conduct. This would be a different legal standard than the severe and pervasive standard adopted for cases of sexual harassment.[109]

Some examples of Category IV cases might be certain types of discipline (such as placing a warning in an employee's file), certain kinds of changes in job responsibilities that do not rise to the level of a tangible

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106. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (requiring that harassment be severe and pervasive).

107. *See, e.g.*, Taylor, *supra* note 5, at 583–84 (indicating that the *Burlington* decision creates a substantive standard for adverse employment action that is less onerous for retaliation claims).

108. *But see* Lidge, *supra* note 26, at 530 (arguing that both the discrimination provisions and the retaliation provisions should reach all non-trivial conduct).

109. *See, e.g.*, Pa. State Police v. Suders, 542 U.S. 129, 131 (2004). However, some courts have applied a severe and pervasive requirement to retaliatory harassment cases after *Burlington*. *See, e.g.*, Jordan v. City of Cleveland, 464 F.3d 584, 599 (6th Cir. 2006).

employment action, lateral job transfers, or threats to take certain actions.[110]

In these Category III and IV cases, the materiality of the conduct is enough to warrant potential liability under the retaliation provisions.[111] However, this does not mean that the employer is vicariously liable for such actions. The five categories are summarized in the following chart.

Description of Categories of Retaliatory Conduct post-Burlington.

Category I	Tangible employment actions
Category II	Severe and pervasive harassment
Category III	Harassment that does not reach the level of being severe and pervasive
Category IV	Non-tangible actions taken by a supervisor that are more than de minimus
Category V	De minimus actions

Burlington may appear to suggest (largely by its silence) that once a case is placed in Category IV, the employer is liable.[112] Indeed, such interpretation is understandable for several reasons. First, the question accepted for certiorari in *Burlington* suggests that the court addressed the liability issue: "*Whether an employer may be held liable* for retaliatory discrimination under Title VII for any '*materially adverse change* in the terms of employment' . . . ."[113] Such an interpretation, though,

110. It is difficult to pinpoint the seriousness line between those cases in Category I versus those in Category IV. Problems with the Court's articulation of the materially adverse standard have been well-considered in other articles. *See, e.g.*, Lidge, *supra* note 26, at 515–20 (2007) (discussing how even though the Supreme Court appeared to adopt a test provided by the Seventh Circuit, that the standard set forth in *Burlington* appears to conflict with the standard adopted by the Seventh Circuit).

111. Categories III and IV may also need to include actions occurring outside of the workplace, which the Court suggested may be more cognizable under the retaliation provisions than under the discrimination provisions. *See Burlington*, 548 U.S. at 57, 63–69.

112. *See, e.g.*, Broussard v. Wells Bloomfield, No. 3:05-CV-0532-RAM, 2007 WL 1726571, at *7 (D. Nev. June 13, 2007) (indicating that *Faragher*/*Ellerth* defense does not apply in retaliation cases); Strutz v. Total Transit, Inc., No. CV-06-2370-PHX-FJM, 2007 WL 772534, at *3 (D. Ariz. March 9, 2007) (indicating that it is unclear whether the framework applies to retaliation claims); Taylor, *supra* note 5, at 533–34 ("While protection for whistleblowers is of utmost importance in today's workplace, the Court went too far in *White*, implementing a vague and highly subjective standard that affords employees who complain of discrimination, whether founded or not, what in practicality amounts to near immunity from even the slightest changes in working conditions."); *id.* at 585 (suggesting that the *Faragher*/*Ellerth* defense does not apply to retaliation claims); *Seidenfeld*, *supra* note 5, at 1345–52 (arguing that no affirmative defense exists for employers for retaliation claims, but arguing that one should be created).

113. Petition for a Writ of Certiorari, *supra* note 13, at i (first emphasis added); Burlington N. & Santa Fe Ry. Co. v. White, 546 U.S. 1060, 1060 (2005) (granting petition for certiorari).

incorrectly inserts the word "shall" for the word "may." In other words, the question simply posited that if the conduct reached a level of seriousness that is termed "materially adverse," there are circumstances under which the employer could be liable, assuming the proper connection is made between the conduct and the employer.

This improper conflation of the question of the concept of seriousness with that of liability is understandable, because, in the past, courts have used the words "tangible employment action" to mean both seriousness and liability.[114] However, this conflation of the two concepts is, in some cases, incorrect, and leads to improper analysis of agency issues.

A reading of *Burlington* that equates seriousness with liability does not consider the holding and facts of the case. Such an interpretation also forgets that the courts have recognized this dichotomy in the discrimination context. Scenarios exist where serious, discriminatory conduct occurs in the form of sexual or racial harassment, but the employer is not liable. This may arise where the conduct was committed by co-workers or third parties without the knowledge of the employer, where the employee failed to complain, or perhaps where the employer insulated itself from liability by providing an appropriate response to an employee's complaint.[115] In these cases, the question of the seriousness of the conduct is separate from the question of the employer's liability.[116]

This same distinction still applies in retaliation cases. In other words, once it is established that an action is materially adverse under the retaliation provision, the question still remains whether the employer faces liability for that conduct. After all, Title VII requires that the "employer" be liable for the action at issue.

B. Placing Burlington *within the Framework*

I would argue that the facts underlying *Burlington* place it within Category I.[117] I explore the retaliatory actions separately. First, Ms. White did not work for a period of time, and the employer did not pay

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114. *See, e.g.*, Ivey v. Paulson, 222 F. App'x 815, 819 (11th Cir. 2007) (indicating that a tangible employment action "is a significant change in employment status"); Wilbur v. Correctional Servs. Corp., 393 F.3d 1192, 1202 n.5 (11th Cir. 2004) (indicating that the concept of a tangible employment action relates to whether conduct is serious enough to create liability).

115. *See generally supra* Parts II.B–C (discussing negligence standard and *Faragher*/*Ellerth* defense).

116. This is not to suggest that the two questions are unrelated.

117. Justice Alito agreed with this characterization of the *Burlington* facts. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 79–80 (2006) (Alito, J., concurring).

her for this period. I characterize the issue in this vague way because it seems that one of the important unnoted facts in *Burlington* is that there is substantial disagreement between the plaintiff and the defendant about the actions taken. While the employer maintained that Ms. White had been suspended without pay pending an investigation, she contended that she had actually been terminated with a right under the collective bargaining agreement to appeal.[118] If the plaintiff's assertion is true, Burlington's conduct would be actionable under Title VII, whether it was taken for discriminatory reasons or retaliatory ones, both because it is serious enough to meet the substantive standard and because a termination is an action considered to be taken on behalf of the employer.[119]

However, even assuming that the action was, as the Court characterized it, a suspension without pay,[120] this conduct rises to the level of seriousness that would create potential liability under the discrimination provisions,[121] as well as being the type of conduct for which we normally hold an employer liable. Regarding the suspension without pay,[122] counsel for Burlington conceded during the oral argument this was a company action.[123]

Indeed, Burlington appears to concentrate on the fact that the suspension was, after an investigation, found to be wrongful and that Ms. White was provided with backpay for this time period. It appears that Burlington was arguing that because the conduct was corrected, it was not serious enough to result in actionable retaliation. Had the initial suspension period been much shorter and the company's reversal of the decision faster, this might have been a plausible argument. However,

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118. Brief in Opposition at 5–6, *Burlington*, 548 U.S. 53 (2006) (No. 05-259). These facts were disputed by the petitioner. *See, e.g.*, Reply Brief of Petitioner at 6 n.5, *Burlington*, 548 U.S. 53 (2006) (No. 05-259).

119. *See* 42 U.S.C. § 2000e-2(a)(1) (2000) (describing termination as actionable under the discrimination provisions); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761–62 (1998) (discussing why employer is liable for tangible employment actions committed by supervisors).

120. *See Burlington*, 548 U.S. at 55.

121. *See* Jin v. Metro. Life Ins. Co., 310 F.3d 84, 100 (2d Cir. 2002) (docking employee's pay is tangible employment action); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 223–24 (2d Cir. 2001) (same for suspension without pay for one week); Slaitane v. Sbarro, Inc., No. 03 Civ. 5503 (AJP), 03 Civ. 5504 (AJP), 2004 WL 1202315, at *15 (S.D.N.Y. June 2, 2004) (same for elimination of two days' pay); Page v. Conn. Dep't of Pub. Safety, 185 F. Supp. 2d 149, 157 (D. Conn. 2002) (same for suspension without pay for two days).

122. Even though the opinion categorizes the action taken as a suspension without pay, plaintiff's counsel said that she was terminated, and this termination would have been effective had she not appealed it through the union grievance mechanisms. Transcript of Oral Argument, *supra* note 99, at 45–46. Counsel for the defendant characterized the action as a suspension that would become a termination if fifteen days passed without an appeal. *Id.* at 58.

123. *Id.* at 24.

while a company's correction may reduce its backpay liability, reduce its liability for punitive damages, and perhaps convince a plaintiff not to file suit in the first place, these issues do not change the fact that the first action rose to the level of actionable discrimination.

Even if Burlington was making the argument that while the activity constituted retaliation, the employer could not be liable for such activity because it later corrected the problem, this argument is not consistent with any accepted Title VII agency jurisprudence. As discussed earlier, a thirty-seven-day suspension without pay is both serious enough and chargeable to the employer, so that it creates automatic liability for the employer, even using the less plaintiff-friendly discrimination provision.

However, even if we assume for purposes of argument that a thirty-seven-day suspension without pay would not constitute an official act of the company, this leads to the conclusion that the employer should still be allowed to potentially escape liability through the *Faragher*/*Ellerth* defense. So, why was Burlington's counsel not arguing for application of *Faragher*/*Ellerth*? Far from constituting a mistake, such an omission was likely based on two premises. First, it seems unlikely that Burlington could have prevailed on such an affirmative defense. And second, had defense counsel prevailed on the argument being made, employers in general would have been in a better position than had this employer simply argued for application of *Faragher*/*Ellerth*.

It is unclear whether Burlington's counsel was arguing that a *Faragher*/*Ellerth* defense should be available;[124] however, based on one exchange during the oral argument, it appears that defense might have been rejected, at least with regard to the suspension claim:

> MR. PHILLIPS: Right, but then the question still remains, Justice Scalia, for it to be a tangible employment action, is it -- is it available to the employer to cure, when the purpose of this entire statutory scheme is to avoid litigation and to provide informal mechanisms for protecting the rights of the employee.
>
> JUSTICE GINSBURG: But it didn't --

124. The following exchange took place between Burlington's counsel and Justice Ginsburg:

> JUSTICE GINSBURG: -- official action is -- is different from -- the problem with Ellerth was that if there's nothing formally that had been done, the employer – this -- Ellerth was concerned with vicarious liability, nothing official. There had been none -- the boss wouldn't know about it. But somebody who is suspended, that is an official -- that's a tangible action.
>
> MR. PHILLIPS: To be sure. And the question is, can you cure it? And that's the fundamental issue we ask you to decide.

Id. at 26.

> JUSTICE SOUTER: Yes, but if the employer --
>
> JUSTICE GINSBURG: -- it didn't cure. I mean, it was 37 days, right, that she went without pay?
>
> MR. PHILLIPS: Right.
>
> JUSTICE GINSBURG: Not just 2 weeks. And she understandably experienced much stress in that time. She worried about how she would be able to feed her children, could she get them Christmas presents. That was -- there was nothing that she got, when it was determined that she hadn't been insubordinate, that compensated her for that stress and, indeed, for the medical expense that she incurred because she had that stress.[125]

Ms. White also alleged that after she complained, her forklift duties were removed, and she was required to perform other, less desirable tasks. Here again, there is a dispute between the parties about how to characterize this change. Ms. White argued that she was hired to perform forklift duties, but was placed in the general classification "track laborer" because there was no existing job classification within the collective bargaining agreement that fully described her job.[126] In other words, Ms. White argued that she was not a "track laborer," and that when she was made to perform tasks under a completely different job description, in essence she was transferred to a different job. Further, according to the respondent, the employer's supervisors had articulated several conflicting reasons why Ms. White's job responsibilities were changed.[127] Demoting an individual to a different job would have been both serious enough and chargeable to the employer prior to the Court's decision in *Burlington*.[128]

Indeed, one can easily imagine that the result in *Burlington* would be the same whether the trial court instructed the jury using the materially adverse language or the tangible employment action language. If the jury believed Ms. White's characterization of the actions, it means that

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125. *Id.* at 24–25.

126. Brief in Opposition, *supra* note 118, at 3 ("But White's job was quite different from the work of the other employees in that classification. White spent most of her day operating the forklift; the rest of her time was devoted primarily to cleaning up in the tool building and distributing supplies.").

127. *Id.* at 4.

128. *See, e.g.*, Pa. State Police v. Suders, 542 U.S. 129, 129 (2004) ("[A]n employer is strictly liable for supervisor harassment that 'culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.'" (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998))).

she was reassigned to almost completely different job responsibilities after submitting an internal complaint, and that she was terminated pending an appeal after she filed Charges of Discrimination with the EEOC. In fact, the Sixth Circuit reached a similar conclusion.[129]

However, even if we believe the employer's version of events, that the action was a change of assignments within the same job classification, the outcome remains the same. This is because, in the end, it does not matter whether the facts of *Burlington* place it within Category I or Category IV. The employer simply did not make an agency argument as a defense to liability. In other words, the employer focused upon arguing that the conduct did not constitute retaliation, because it did not rise to an appropriate level of seriousness. This is a different argument than one based on agency, where the employer would have essentially conceded that the actions met the minimum threshold of seriousness, but argued that it could not be held responsible for those actions.[130]

The Court itself seems to recognize that agency issues did not factor in to its decision. The Court finds that liability is created when "*employer actions* . . . would have been materially adverse to a reasonable employee or job applicant."[131] The Court further indicated that "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."[132]

It appears clear from the italicized language that the Court considered the conduct of which Ms. White complained to be appropriately charged to the employer. However, this is not because the employer faces automatic liability under the retaliation provisions. This Article posits that one or more of the following reasons supports the outcome: (1) the conduct constituted tangible employment actions; (2) the employer did not argue that it was entitled to a *Faragher*/*Ellerth* defense; and (3) even if the employer had made such an argument, it would not have insulated the employer from liability, given the facts of the case.

129. White v. Burlington Northern & Santa Fe Ry. Co., 364 F.3d 789, 796, 803–04 (6th Cir. 2004).

130. As discussed earlier, this choice of argument by defense counsel was likely a good one.

131. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) (emphasis added).

132. *Id.* (emphasis added).

IV. AVOIDING CONTRADICTIONS WITH OTHER TITLE VII AGENCY JURISPRUDENCE

Reading *Burlington* as establishing a dichotomy between the seriousness of conduct and the employer's liability for such conduct is the only construction of the case that avoids serious conflicts between the case and other Supreme Court decisions relating to agency. However, as this section discusses, reading all of the cases as consistent leads to a fairly complex analysis relating to cases that fall within the first four categories of the framework. Importantly, it means the concept of tangible employment action still plays a significant role in retaliation cases.

Let us begin by assuming that once a materially adverse action has been taken against an employee in retaliation for protected activity, the employer is liable. If we make this assumption, an inconsistency develops in the concept of agency as applied in Title VII cases.

As discussed in Part II.C above, under the discrimination provisions of Title VII, an employer is vicariously liable for tangible employment actions. In other words, once an employee demonstrates that he or she has been subjected to a termination or a demotion or other tangible employment action, the employer is liable for that conduct. However, when a tangible employment action has not been taken, the employer may not be liable for the action taken. In instances where co-workers, third parties, or non-direct supervisors engage in discriminatory conduct, the employer's negligence must be established prior to liability attaching.[133] If a supervisor has taken an action, then the employee will prevail, unless the employer establishes the elements of the *Faragher*/*Ellerth* affirmative defense.

If we read *Burlington* as conflating the issues of seriousness with agency, we end up with a scenario in which the agency relationship is defined more broadly for retaliation than it is for underlying discrimination claims. For example, all non-trivial, retaliatory harassment would result in liability for the employer, even though in discrimination cases the employer's liability would depend on the establishment of negligence or some other fault by the employer or upon the employer's failure to prove an affirmative defense. As there is

133. These general claims about liability for the actions of co-workers and non-direct supervisors should not be read to mean that a different standard might not apply if a cat's paw theory of liability applies. *See, e.g.*, Poland v. Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007) (indicating that negligence may not be the appropriate standard where a supervisory employee rubber stamps the decision of a subordinate).

nothing specific about retaliation that would suggest such an expansion of agency is warranted in that context, the better path is to believe that the same general agency principles govern both the retaliation and discrimination provisions. To do this, one must assume that *Burlington* left the distinction between seriousness and agency intact.

While this solution is consistent, it is also complex—at least for certain types of retaliation claims. If reference is made to the framework developed earlier, the simple cases fall within Category V. In Category V cases, the issue of agency is not considered because the conduct itself is not serious enough to trigger liability.

However, to make retaliation agency principles consistent with the rest of Title VII agency principles, it becomes necessary to import the concept of tangible employment action back into retaliation jurisprudence.[134] In other words, once a plaintiff has established all of the elements of a retaliation claim, including that the action taken was materially adverse, a court must consider whether the employer is liable for that conduct.

For cases in which the action constitutes a tangible employment action (Category I cases), as used in discrimination cases, the employer faces liability.[135] Thus, the tangible employment concept that the employer fought so hard to be incorporated into the substantive definition of retaliation in *Burlington*, reappears in relation to the agency issue.

For Category II cases, the courts should follow the general agency principles already enunciated for harassment cases. Although, as discussed below, application of an agency theory developed with discrimination in mind may be problematic. In other words, if an employee is subjected to severe and pervasive retaliatory harassment, the structure enunciated in the *Faragher*/*Ellerth* framework determines how the court should address agency issues.

A discussion of the Category III and IV cases remains. In these cases, the complained-of conduct is serious enough to result in substantive liability under the retaliation provision, but the conduct does not result in a tangible employment action. In order to keep agency principles consistent throughout Title VII, the *Faragher*/*Ellerth* structure

134. Another possible argument is that the *Faragher*/*Ellerth* affirmative defense only applies to harassment claims and that some other standard of liability would apply for actions that fall within Category IV. Such an outcome is possible, but creates unnecessary complexity in the law. *See infra* Part IV.A.4.

135. The author expresses no opinion regarding which party would bear the burdens of production and persuasion on this element.

should be applied. Therefore, when the action is taken by co-workers, third parties, or supervisors without direct supervision over the plaintiff, the plaintiff must establish that there is a basis to hold the employer liable to prevail. In cases where a supervisor engages in conduct that does not rise to the level of a tangible employment action, the courts may have options regarding how to structure the agency relationship; however, this Article argues the employer should be allowed to attempt to establish an affirmative defense to liability.

A. Considering Faragher/Ellerth *in the Retaliation Context*

What the above discussion highlights is that the *Faragher*/*Ellerth* affirmative defense may be appropriately applied to retaliation claims, in which a plaintiff establishes that a supervisor has taken a materially adverse action, but where that action does not arise to the level of a tangible employment action. This raises the issue whether an affirmative defense developed in the discrimination context should be applied in the retaliation context.

When no tangible employment action is taken and the conduct at issue is committed by the employee's supervisor or by someone in a successive chain of authority, the employer is liable for the actions, unless the employer can establish an affirmative defense to liability.[136] As discussed earlier, the *Faragher*/*Ellerth* affirmative defense has two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[137]

Two important points from the earlier discussion deserve reiteration here. First, the *Burlington* decision does not address agency issues. Second, the types of conduct at issue in that case, especially when considered in the context of the facts as presented to the lower courts (and not as re-characterized by the Supreme Court), fit within the already established framework.

The agency structure discussed in *Faragher*/*Ellerth* is derived from the Court's interpretation of the term "employer" under Title VII.[138] A core principle of statutory construction holds that when Congress used

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

137. *Id.*

138. *See generally supra* Part II.C.1 (discussing how employers are liable for tangible employment actions).

the same term ("employer") in different parts of the same statute, that the interpretation of that term should remain consistent, despite differences in the remaining wording of the discrimination and retaliation provisions. Fealty to this statutory construction principle strongly supports the conclusion that the *Faragher*/*Ellerth* structure applies in retaliation cases.

The question then remains whether retaliation cases fit both theoretically and practically within the *Faragher*/*Ellerth* structure. A discussion of these issues follows.

1. Defining the Discussion

Before applying the *Faragher*/*Ellerth* structure to retaliation cases, it is important to examine whether the theories underlying retaliation and discrimination differ in ways that affect application of the existing structure to retaliation.

Some may argue that if the Supreme Court believes it necessary to adopt different substantive standards for retaliation and discrimination under Title VII, then it naturally follows that the Court should feel unconstrained in adopting different agency principles for the two causes of action. While this argument has some surface appeal, I hope to dispel it through the following discussion.

It is helpful to think of agency principles under Title VII in a concrete way. It is easy to imagine a circle. Inside the circle are all of the acts for which an employer may potentially be held to be either vicariously liable or liable because of its own direct acts. Outside of the circle are acts which, under agency principles, will not be imputed to the employer.

My argument asserts that the contours of the circle should remain relatively fixed, at least in relation to claims brought under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. This does not mean that the employer will be held liable for all activities that fall within the circle—only that the circle represents the maximum possible extent of liability.

There may be many, non-agency reasons regarding why conduct within the possible realm of employer liability produces no liability. For example, using federal discrimination law as a model, the employer may have too few employees, the employer may not be an employer who falls within the requirements of Title VII, or the action taken by the employer may not rise to the level of an actionable violation. To further expound on this latter point, if the president of the company sends a mean e-mail to employees each morning in an effort to spur action, the company is

not liable for this conduct under federal law. However, this outcome relates not to the contours of the agency relationship, but rather, to the fact that sending a mean e-mail is not otherwise cognizable. If sending mean, work-related e-mail was actionable, the company would likely be held liable for the president's conduct, because he is acting as an alter ego of the corporation.

Likewise, activities might fall outside of the circle because the action of the person conducting them cannot be imputed to the employer and the employer exercised due care. For example, if a stranger enters a reasonably secure workplace and without notice murders an employee, it is unlikely that this action will be imputed to the employer for purposes of liability. Using agency principles, this activity simply falls outside of the circle.

Thus, if *Burlington* can be read as creating different substantive standards with respect to some discrimination and retaliation claims, it does not mean the Court redefined the contours of the agency circle for purposes of each of these causes of action.

Such a reading comports with the practical realities of the workplace, as well as the Supreme Court's articulation of the purpose behind the retaliation provision. The Supreme Court recognized this when it outlined federal common law agency principles in *Faragher* and *Ellerth*. In doing so, it defined the contours of agency principles in the context of federal employment claims, with consideration of the doctrine of avoidable consequences and a need for an attempt at informal resolution. Those contours should remain untouched by *Burlington*. Although I am skeptical of the two-part affirmative defense articulated in *Faragher*/*Ellerth*, the general agency contours the cases provide strike a proper balance.[139]

In *Faragher* and *Ellerth*, the Supreme Court engaged in a multi-step analysis.[140] First, the Court rejected holding employers automatically liable for all actions taken by supervisors, reasoning that actions such as harassment are not usually undertaken for the employer's purposes, and thus, falls outside the scope of employment.[141] However, the employer will bear responsibility for tangible employment actions because those types of actions are ones in which the individual was certainly aided in

139. The ideas expressed in this Article do not rely on the continued viability of *Faragher*/*Ellerth*. Nor is this Article suggesting that exploration of agency issues in the employment context should remain fixed in time. Rather, the Article makes a different argument, that no matter how the law of agency develops, it should develop consistently in retaliation and discrimination cases.

140. *See Ellerth*, 524 U.S. 742; Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

141. *See* cases cited *supra* note 140.

accomplishing the action by the existence of the agency relation. Short of such tangible employment actions, supervisor conduct will still impute liability because of the aiding theory; however, the employer is allowed an affirmative defense, given the policies of avoidable consequences and voluntary conciliation. Co-workers and others whose actions are less clearly imputed to the employer fall under a negligence or other standard.

The question then becomes whether retaliation changes the analysis. In undertaking such a question, three different areas must be studied. First, does retaliation somehow change the scope of employment issue? Second, is an employee more aided in accomplishing retaliation than harassment? Third, do the concepts of avoidable consequences and voluntary conciliation change in the retaliation context?

2. Considering the Scope of Employment

The scope of employment issue will be taken up first. This analysis is undertaken through the same analytical lens the Supreme Court used in *Faragher* and *Ellerth*.[142] The Court concluded that, although in some instances sexual harassment could be conducted to further the goals of the employer, in most instances, sexual harassment did not fall within the scope of employment.[143]

Retaliation shares similar characteristics to harassment in that it is often undertaken for the personal motivations of the retaliator. The retaliator may be upset that a complaint was made against him or her and fear that the retaliator's own job has been compromised and may strike back based on these personal motivations. The retaliator may believe that he or she has been falsely accused of discrimination. Likewise, other employees in the workplace may respond negatively when a co-worker or supervisor has been accused of improper conduct. In other situations, the alleged retaliator may simply be uncomfortable after the

142. *See* cases cited *supra* note 140. This analytical structure is used for two reasons. First, as a predictive matter, the *Faragher*/*Ellerth* model is the analytical structure most likely to be used by both the lower courts and the Supreme Court in examining future agency issues. *See generally* Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) (applying similar analysis relating to vicarious liability for punitive damages). Second, if the courts value adherence to precedent and consistency related to the definition of "employer," they will be compelled either to follow the *Faragher*/*Ellerth* structure in subsequent cases or distinguish it. For example, it might be possible to argue that while the employee's motivation for taking or not taking a particular action is not motivated by the interests of the employer, conduct outside of harassment does fall within the scope of the employment. However, this analysis seems to be implicitly rejected in *Faragher* and *Ellerth*, when the Court did not find employers liable for tangible employment actions under the scope of employment prong of its agency analysis. *See* cases cited *supra* note 140.

143. *Ellerth*, 524 U.S. at 757.

protected activity has been undertaken and treat the complaining employee differently based on the personal discomfort.

Just like with harassment, it is also possible that retaliation is taken for the purposes of the employer—a desire to squelch dissent and to keep employees from raising issues related to discrimination or assisting others in doing so. Thus, the same ambiguity that exists for harassing activity exists for retaliatory activity.[144] Applying the same type of analysis used in *Faragher* and *Ellerth*, it is unlikely that courts will find that all retaliation or even all retaliation committed by supervisors falls within the scope of employment.[145]

3. Aided in Retaliation: Examining Categories I, II, and III[146]

In *Faragher* and *Ellerth*, the primary question the Court considered in imposing liability on the employer was whether the employee's conduct was aided by the employer. The Court relied heavily on the status of the actor and the actions taken to determine vicarious liability. Tangible employment actions are aided by the employer, and other actions taken by supervisors may or may not be so aided.

The simplest hypothetical for demonstrating that the same agency principles carry over from the discrimination context to the retaliation context is one of retaliatory sexual and racial harassment. In cases of retaliatory sexual or racial harassment, the harasser is performing the same types of activities that might be discriminatory harassment, but for

144. One argument might be that retaliation is more likely to be taken in the interest of the employer, rather than out of a purely personal motivation, and that, therefore, the scope of employment analysis comes out differently in the retaliation context. However, it is unlikely, given the range of possible retaliatory conduct, that the Supreme Court will hold, as a matter of law, that all retaliation committed by a supervisor is within the scope of employment. Relying on such an argument may, therefore, prove problematic for plaintiffs because they may bear the burdens of production and persuasion regarding whether the retaliator was acting within the scope of his or her employment. Whereas, under the current analysis, which relies on a different portion of the Restatement, employer liability is assumed, subject to an affirmative defense. It remains to be seen whether the courts would apply an affirmative defense on a scope of employment analysis.

145. *See* Susan Grover, *After* Ellerth: *The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 837–38 (2002) (arguing that the Court did not rely on scope of employment analysis because "(1) agency law is not consistent on the issue of whether harassment is or is not within the scope of employment, so would give no answer anyway; and (2) if harassment (which certainly appears in no job descriptions!) is within the scope of supervisor authority, it would also be within the scope of co-worker authority, and yet employers have never been vicariously liable for co-worker harassment in the absence of employer negligence"). Similar arguments can be made regarding retaliatory harassment claims.

146. A further examination of Category V cases is not warranted, because these are cases in which the Court has determined that agency principles would never be reached, because the action is simply not cognizable.

a different motivation. For example, the supervisor might engage in demeaning name-calling or otherwise try to embarrass the employee who engaged in protected conduct.

After *Burlington*, it remains possible that a claim for retaliatory harassment will be cognizable, even when the conduct is less severe and pervasive than it would need to be to lead to a discrimination claim.[147] It seems anomalous that a less severe pattern of behavior would result in vicarious liability for the employer under the retaliation provisions and potentially no liability under the discrimination provisions (if the employer can prove the affirmative defense).[148]

Even more compelling is the case of actions taken by co-workers. For example, assume that an employee is subjected to racial harassment at the hands of a co-worker. The employee then complains. After the co-worker finds out about the complaint, the same co-worker retaliates against the employee by engaging in further harassment. In the first scenario, it is clear that the employer will be held liable for the conduct only if agency principles establish such liability. The employer liability for the same conduct taken with a retaliatory motive should be the same as its liability for discriminatory conduct, as the co-worker is no more or less aided by the employer in the first scenario than he or she is in the second.

4. Aided in Retaliation: Examining Category IV

More difficult questions appear when the conduct falls within Category IV. Are actions taken by supervisors, short of tangible employment actions—like moving a plaintiff to a different office, modifying job responsibilities, or placing a warning in an employee's file—more like tangible employment actions or more like harassment?

In defining tangible employment actions, the Supreme Court has looked at several factors: (1) whether there is an infliction of economic harm; (2) whether only a person with authority can impose the type of

147. It should be noted that some courts have continued to require retaliatory harassment to be severe and pervasive to be actionable. *See, e.g.*, Juarez v. Utah, 263 F. App'x 726, 737 (10th Cir. 2008) ("A jury would not reasonably find the actions Juarez alleges, even in totality, would have dissuaded a reasonable employee from making a complaint."); Deters v. Rock-Tenn Co., 245 F. App'x 516, 528 (6th Cir. 2007) ("Deters must show . . . severe or pervasive retaliatory harassment . . . .").

148. Of course, using the employee-viewpoint arguments set forth in Part IV.A below, it is possible to argue that no affirmative defense is allowable for retaliatory harassment. Such a conclusion, however, would require the courts to substantially modify *Faragher* and *Ellerth*. My guess is that courts that are inclined to assess liability against the employer will simply fail to address the larger questions about whether agency law should remain consistent across Title VII.

injury; (3) whether the decision is documented in official company records; (4) whether the decision may be subject to review by higher level supervisors; and (5) whether the action represents an official company act.[149] The seriousness of the conduct also appears to factor into the Court's analysis regarding whether the employee is aided by the employer.[150]

In one sense, Category IV conduct is more like a tangible employment action—only individuals with some authority from the company are going to be able to make these types of decisions, like changing a person's job responsibilities or moving them to a different work station. Some of the decisions may be documented in company records and may be subject to review by higher level supervisors. For example, a negative performance review that does not affect pay may fall into this category. To the individual employee, especially one who has already complained about discriminatory conduct, it may appear as though the company is countenancing such behavior or at least failing to stop it.

On the other hand, none of the activity falling within Category IV will, by definition, have a direct economic impact on the plaintiff. Many of the decisions may not be documented in company records and may not be subject to review by higher level supervisors. Indeed, some "actions" falling within Category IV may not be actions at all, but rather failures to act—not allowing an employee to attend a meeting, not giving the plaintiff additional job responsibilities.

There seem to be three ways to resolve the agency relationship question in the Category IV context. *Burlington* informs us that the key question in a retaliation case is the perception of the objectively reasonable employee.[151] The Court indicated that the core provisions of Title VII could not be carried out without the protections found in the retaliation provisions. By way of example, the Court noted that in some circumstances, changes in an employee's work schedule or a supervisor's exclusion of an employee from a weekly training lunch might be actionable.[152]

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149. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761–62. *See also* Grover, *supra* note 145, at 840 (discussing and criticizing the tangible employment action criteria).

150. Pa. State Police v. Suders, 542 U.S. 129, 144 (2004) ("A tangible employment action . . . 'constitutes a significant change in employment status . . . .'").

151. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) ("We refer to reactions of a reasonable employee because we believe that the provision's standard for judging harm must be objective.").

152. *Id.* at 69.

Actionable retaliatory conduct is thus defined from the viewpoint of the reasonable employee. Applying this same viewpoint to agency, courts might determine that to an employee, Category IV decisions look like employer-approved acts. This may be especially true in cases where an employee has already used the company's complaint procedure to complain of harassment and the employee then faces retaliation. In many cases, the employee has no way of knowing whether the company is aiding the supervisor in making these choices or whether the supervisor is making them surreptitiously, and perhaps even in direct contravention of company policy.

Adopting such an approach, however, raises several potential problems. First, it adds another layer of complication to an already complicated proof structure. Second, as discussed below, while the *Faragher* and *Ellerth* affirmative defense has been applied by the Supreme Court in the harassment context, the overarching structure created by the cases and the reasoning underlying these decisions are more consistent with allowing the affirmative defense in Category IV cases.

Third, if the affirmative defense is maintained for retaliatory harassment by supervisors, but not for Category IV actions, courts may have a difficult time drawing distinctions between those actions that constitute harassment and those that do not. Further, many cases involve conduct that is both harassing and conduct that falls within Category IV. It may be difficult for courts to assert a theoretical justification for determining the types of actions for which the employer is liable and those for which it is not.

Such line-drawing may be made more difficult by the courts' application of the affirmative defense to Category IV conduct that is motivated by discrimination. In other words, the types of conduct that fall within Category IV are often considered under a harassment rubric in the discrimination context. For example, in the substantive discrimination context, a plaintiff may claim that a supervisor modified her job responsibilities (but not to a significant enough degree to be considered a demotion or adverse employment action) or moved her office based on a protected trait. Even though these actions do not constitute what would be traditionally thought of as sexual harassment, a plaintiff is forced to raise these allegations under a harassment rubric, because they are otherwise not independently cognizable.[153]

153. This is because many lower courts require a threshold level of severity for an action to be cognizable under Title VII's discrimination provisions. Although the standards vary by circuit, a common variation is to require an adverse employment action or severe and pervasive harassment.

In the discrimination context, the employer could argue that even though these actions when combined are severe and pervasive enough to constitute actionable harassment, the employer is not liable for these actions, because it can establish an affirmative defense under *Faragher*/*Ellerth*.

It would be strange if an employer could argue that it does not bear responsibility for these actions in the discrimination context, but then be unable to raise these same agency issues in the retaliation context. This is especially true because the expansion of the substantive standard for retaliation means that single instances of non-tangible actions may result in cognizable claims of retaliation. In other words, the employer would face greater potential liability for less severe actions.[154]

For these reasons, disallowing an affirmative defense for Category IV conduct undertaken by a supervisor is not persuasive.

Another solution would be to say that when an employee alleges that discrimination falls within Category IV, the court must make an individual determination whether the action is like a tangible employment action (with no available affirmative action) or more like harassment, in which case an affirmative defense would be available. While this solution may be more theoretically consistent with current agency law, it is not an elegant solution to the problem because it does not provide plaintiffs or employers with any concrete direction on how to proceed prior to litigation and may make settlement of such claims difficult prior to a court's determination of the agency issue. Additionally, such a solution weighs heavily on court resources, as courts will be required to characterize an endless array of employment decisions.

The third solution would rely on the agency theory promulgated in *Faragher* and *Ellerth* and allow an affirmative defense for all Category IV behavior. The analysis is fairly simple. Category IV conduct is conduct that, by its very definition, does not constitute a tangible employment action; therefore, an affirmative defense is available. In other words, there is an assumption that when supervisors take such actions, they have been aided by the agency relationship, but because this is not always the case and because of the practical dynamics of the

See, e.g., Heno v. Sprint/United Mgmt. Co., 208 F.3d 847, 857 (10th Cir. 2000) ("These facts do not rise to the level of an adverse employment action."); Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 787 (3d Cir. 1998) ("[M]inor or trivial actions that merely make an employee 'unhappy' are not sufficient to qualify as retaliation under the ADA . . . .").

154. Further, if retaliatory harassment continues to be subject to the affirmative defense and non-tangible, non-harassing acts do not, it may be difficult for courts to draw lines between the two categories of cases.

workplace, as well as the concepts of avoidable consequences and voluntary conciliation, an affirmative defense is allowed.

This solution remains consistent with the already existing doctrine. As the Court noted in *Pennsylvania State Police v. Suders*, an "'aided-by-the-agency-relation' standard . . . was insufficiently developed to press into service as the standard governing cases in which no tangible employment action is in the picture."[155] Applying this same reasoning to Category IV cases leads to the conclusion that an affirmative defense should be available.

Second, application of the affirmative defense provides incentives for employees to use available complaint mechanisms, hopefully avoiding at least some later litigation. As discussed in the following section, the availability of the affirmative defense should not unduly hinder plaintiffs, because in many retaliation cases the very existence of retaliation will make the defense unavailable.

Third, this solution provides greater consistency for agency doctrine. As discussed above, under a traditional substantive discrimination analysis, conduct that does not rise to the level of an adverse employment action, but that also was not sexual or racial harassment, is often lumped together under the rubric of harassment, because the actions otherwise would not be cognizable. Given that the employer is provided an affirmative defense in these instances in discrimination cases, a similar defense should be available in retaliation cases, especially considering that the cognizable conduct may be less severe in the retaliation context.

It might be argued that the employer has notice of the employee's protected activity, and therefore, that the doctrines of avoidable consequences and private reconciliation do not merit applicability of an affirmative defense in the retaliation context. Such an argument ignores that the dynamics of retaliation can be as complex as those underlying discrimination. Those dynamics are discussed in the following section.

Of course, it is also possible to argue that the Supreme Court erred in articulating the boundaries of vicarious liability in *Faragher* and *Ellerth*.

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155. 542 U.S. at 145. In *Suders*, the plaintiff alleged a series of sexually harassing comments and that a supervisor wrongly accused her of theft, and then later that she was arrested. *Id.* at 134–36. The Court held that the affirmative defense might be available in this situation because there were genuine questions about whether an official act of the employer occurred. *Id.* at 152 & n.11. The Court appears to indicate that the accusation of theft by a supervisor and her later arrest would not be tangible employment actions. *See id.* This point is unclear. In footnote 11, the Court indicates that the events "surrounding her computer-skills exams" might be official. *Id.* at 152 n.11. It is unclear whether the Court is referring to the theft and arrest or the fact that the supervisors hid her exams and never turned them in to be graded.

By arguing for consistency in the application of agency principles, this Article does not mean to suggest that a re-shaping of agency doctrine does not represent another way of accomplishing this same objective.[156] Rather, the Article argues that however the lines are drawn, they should be drawn consistently.

5. Availability of the Affirmative Defense

Several practical questions remain regarding how the affirmative defense would apply in the retaliation context. One common way for an employer to prevail on the affirmative defense is to establish that it had a published, effective complaint procedure of which the plaintiff was aware, but that the plaintiff unreasonably failed to use the procedure to make a complaint. Using this same defense in the retaliation context raises interesting issues.

The first issue to consider will be whether the courts require the employee to make a separate complaint about retaliation. In the administrative exhaustion context, the plaintiff's failure to allege retaliation in an administrative charge results in that claim being subject to dismissal for failure to exhaust administrative remedies.[157] This is because the courts consider retaliation to be analytically distinct from discrimination claims.[158] Based on this line of thinking, it seems plausible that employers will argue that a plaintiff's failure to complain about retaliation should result in a complete defense to liability. Such an argument comports with the voluntary conciliation and avoidable consequences underpinnings of *Faragher* and *Ellerth.*

This analysis is best applied in situations in which retaliation exists, but no prior complaint of discrimination has occurred. Take for example, situations where individuals within the company have appeared

156. For example, by narrowly reading *Faragher* and *Ellerth* to apply to only cases of true sexual or racial harassment, and by re-contextualizing the Court's demarcation of the concept of a tangible employment action, it may be possible to argue that the Court's analysis did not consider actions that are not harassment, but that fall short of a tangible employment action. This would allow a different application of agency principles to these types of actions. However, such a step would not only require a major re-working of the principles enunciated in *Faragher* and *Ellerth*, but also would create new problems for courts (at least in the retaliation context) in trying to distinguish between harassment and a pattern of non-tangible employment actions.

157. *See, e.g.*, Miles v. Dell, Inc., 429 F.3d 480, 492 (4th Cir. 2005) (indicating that a plaintiff failed to properly exhaust her administrative remedies when she notified EEOC of discrimination claims, but not a retaliation claim).

158. *See, e.g.*, Wallin v. Minn. Dep't. of Corr., 153 F.3d 681, 688 (8th Cir. 1998) (stating that "it is well established that retaliation claims are not reasonably related to underlying discrimination claims").

as witnesses in court or administrative proceedings related to a claim of discrimination or have filed a charge of discrimination. Retaliation against these individuals is prohibited under Title VII. If retaliation is taken against these individuals, short of tangible employment actions, the employer may not know about this activity and have a chance to remedy such retaliation, unless the affected employee complains about the alleged conduct.

Additionally, in some situations the employer has investigated discrimination, reiterated its non-retaliation policy, informed employees not to engage in retaliation, and retaliation occurs despite the employer's best efforts. In cases where a tangible employment action has been taken, the employer is liable, because it unreasonably allowed its authority to be used, even when the supervisor is motivated by purely personal reasons. The underlying theory, although not completely borne out in practice, is that these types of actions are ones which someone else in the company is able or likely to find out about. These actions are serious enough and discoverable enough[159] that we do not require an additional complaint by the employee.

However, outside of tangible employment actions, the calculus changes. In some instances, only the supervisor and the affected employee may know about retaliation, and it is not reasonable for the employer to monitor every decision that every supervisor makes relating to every employee or even every employee who engages in protected activity. Indeed, such double supervision itself could result in different treatment.[160] The doctrines of voluntary conciliation and avoidable consequences thus favor the availability of the defense—at least in some cases of retaliation.[161]

More difficult questions appear when the plaintiff is alleging discrimination and then after reporting that discrimination, the person

159. *See* Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 66–67, 75 (1999) (arguing that the availability of the decision for higher level review and the inference of acquiescence by higher-level management are the hallmarks of a tangible employment action).

160. *See, e.g.*, Tapia v. City of Albuquerque, 170 F. App'x 529, 534 (10th Cir. 2006) (agreeing that "monitoring of an employee could create an adverse employment action"); Hussain v. Nicholson, 435 F.3d 359, 366 (D.C. Cir. 2006) (alleging that heightened monitoring constituted retaliation).

161. Some have characterized this calculus in terms of economic efficiency. *See, e.g.*, Harper, *supra* note 159, at 59 (noting "it should be stressed that making employers liable for the harm caused by any discriminatory act of their employees would induce employers to continue to expend more funds in the prevention of further discrimination until further expenditures would exceed the marginal costs of any further discrimination that these expenditures could eliminate"); *id.* at 64–65 (describing how requiring a complaint may be more efficient than the additional monitoring or procedures that would be required to stop prohibited conduct).

alleges that he or she has been retaliated against. In other words, the plaintiff has faced retaliation after participating in the very process required by *Faragher* and *Ellerth*. Although (as discussed in more detail below) the employer may be entitled to the *Faragher*/*Ellerth* defense less often (or not at all) in these situations, the framework is still appropriate.

In many instances, the employer will simply not be able to support the affirmative defense. For example, assume that an employee complains about sexual harassment by a supervisor and that, following the initial complaint, the same supervisor retaliates against the plaintiff. It seems likely that in some circumstances, a court will find that a plaintiff does not need to engage in an endless procession of complaints before seeking relief from outside of the company. Likewise, a plaintiff who has already suffered retaliation may be able to effectively argue that she legitimately feared that a further complaint would lead to additional retaliation. This argument is already accepted as part of the framework established in *Faragher* and *Ellerth*.[162]

Further, the employer's ability to establish that its complaint procedure is effective may be different in the retaliation context. In some cases, plaintiffs will be able to successfully demonstrate that a complaint procedure that results in its users being subjected to retaliation is not effective. All of these potential factual issues may reduce the court's ability to grant summary judgment in favor of the employer based on a *Faragher*/*Ellerth* affirmative defense.[163]

This discussion shows that courts may face facts that alter the *Faragher*/*Ellerth* calculus in retaliation cases. However, just because the dynamics of the *Faragher*/*Ellerth* affirmative defense may play out differently in the retaliation context, does not mean that application of the structure is not appropriate.

B. The Importance of a Consistent Agency Doctrine

The importance of creating a consistent agency doctrine under Title VII cannot be overstated. First, Title VII is the preeminent federal statute dealing with discrimination and retaliation. Both state and federal

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162. *See* Leopold v. Baccarat, Inc., 239 F.3d 243, 246 (2d Cir. 2001) ("'[F]or that reluctance [to report harassment] to preclude the employer's affirmative defense, it must be based on apprehension of what the employer might do . . . .'" (quoting Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 295 (1999))).

163. *See* Johnson v. West, 218 F.3d 725, 731–32 (7th Cir. 2000) (holding that factual issues related to reasonableness of using complaint procedure should be resolved by jury); *see also* Moss, *supra* note 72, at 1011 (arguing that few lower courts apply the type of analysis used by the Seventh Circuit in *West*).

courts refer to and rely on Title VII jurisprudence when analyzing claims under other federal discrimination statutes, other employment-related federal statutes, state discrimination statutes, and other state employment-related statutes.

Second, the importance of retaliation claims continues to grow as more and more retaliation-based claims are filed against employers. These claims are often filed in tandem with discrimination claims. As discussed in more detail below, creating a different agency doctrine for retaliation and discrimination law will result in practical chaos in the analysis of such claims and in jury instructions.

Third, and perhaps most importantly, failure to maintain a consistent agency analysis will lead to inconsistencies regarding the substantive provisions of the retaliation provisions.

Finally, maintaining a consistent agency analysis furthers one of the goals the Court has articulated for Title VII—encouraging employers and employees to work together to prevent and remedy discrimination and retaliation outside of the litigation process.[164]

1. Title VII is Often the Standard Bearer for Employment-Related Principles

For better or worse, Title VII decisions have a broad impact on employment-based litigation.[165]

The federal government, through statutes such as the Americans with Disabilities Act (ADA)[166] and the Age Discrimination in Employment Act (ADEA)[167] prohibit certain types of employers from engaging in discrimination against employees on the basis of the statutorily-defined traits of disability and age. Both the ADA and the ADEA contain retaliation provisions,[168] and it is likely that courts interpreting agency

164. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763–64 (1998).

165. *See generally* Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349 (2007) (arguing that the interpretation of federal employment discrimination standards often plays too great a role when courts consider state law causes of action).

166. 42 U.S.C. §§ 12101–12213 (2000 & Supp. V 2005).

167. 29 U.S.C. §§ 621–634 (2000 & Supp. V 2005).

168. The ADEA's retaliation provision is similar to the one provided in Title VII. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2000) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted,

issues relating to these statutes will reference, if not rely on, agency principles adopted in the Title VII context.[169] At a minimum, the federal courts should place emphasis on creating a uniform agency jurisprudence among the ADA, the ADEA, and Title VII. My hope is that, if the Title VII agency doctrine remains unfractured, this consistency will begin to develop.

Additionally, courts also rely on Title VII cases when examining other federal employment statutes. States have also enacted statutes that prohibit discrimination in the workplace,[170] and these states often look to

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or participated in any manner in an investigation, proceeding, or litigation under this chapter.") However, the retaliation provision of the ADA is articulated differently. That provision reads as follows:

> (a) Retaliation
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) Interference, coercion, or intimidation
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a)–(b) (2000).

169. Courts have applied the Title VII analysis to both ADA and ADEA retaliation claims. *See, e.g.*, Grubic v. City of Waco, 262 F. App'x 665, 666–67 (5th Cir. 2008) (indicating that same analysis applies for retaliation claims under ADA and Title VII); Satterfield v. Consol Pa. Coal Co., No. 06-1262, 2007 WL 2728541, at *6 (W.D. Pa. Sept. 17, 2007) (noting the similarity between the retaliation provisions of the ADEA and Title VII and applying both in a similar manner). Likewise, courts have applied the *Faragher*/*Ellerth* defense in ADA and ADEA cases. *See, e.g.*, Wallin v. Minn. Dep't of Corrs., 153 F.3d 681, 687–88 (8th Cir. 1998) (applying *Faragher* to harassment claim under the ADA); Oleyar v. County of Durham, 336 F. Supp. 2d 512, 519 & n.5 (M.D.N.C. 2004) (same for ADEA).

170. *See, e.g.*, ALA. CODE §§ 25-1-20 to -1-29 (2007); ALASKA STAT. §§ 18.80.010–.295 (West 2007); ARIZ. REV. STAT. ANN. §§ 41-1401 to -1492.11 (2004 & Supp. 2007); ARK. CODE ANN. §§ 16-123-101 to -108 (West 2004 & Supp. 2008); CAL. GOV'T CODE (West 2005 & Supp. 2008) §§ 12900–12996; COLO. REV. STAT. ANN. §§ 24-34-301 to -804 (West 2008); CONN. GEN. STAT. ANN. §§ 46a-51 to -104 (West 2004 & Supp. 2008); DEL. CODE ANN. tit. 19, §§ 710–726 (West 2006 & Supp. 2008); FLA. STAT. ANN. 760.01–.11 (West 2005 & Supp. 2008); GA. CODE ANN. §§ 45-19-20 to -46 (West 2003 & Supp. 2007); HAW. REV. STAT. ANN. §§ 378-1 to -69 (West 2008); IDAHO CODE ANN. §§ 67-5901 to -5912 (West 2006 & Supp. 2008); 775 ILL. COMP. STAT. ANN. 5/1-101 to 5/9-102 (West 2007 & Supp. 2008); IND. CODE ANN. §§ 22-9-1-1 to -8-3 (West 2005 & Supp. 2008); IOWA CODE ANN. §§ 216.1–.20 (West 2000 & Supp. 2008); KAN. STAT. ANN. §§ 44-1001 to -1132 (2000 & Supp. 2007); KY. REV. STAT. ANN. §§ 344.010–.990 (West 2006 & Supp. 2007); LA. REV. STAT. ANN. §§ 23:301–369 (1998 & Supp. 2008); ME. REV. STAT. ANN. tit. 5, §§ 4551–4634 (2002 & Supp. 2007); MD. ANN. CODE art. 49B, §§ 1–43 (2002 & Supp. 2007); MASS. GEN. LAWS ANN. ch. 151B, §§ 1–10 (West 2004 & Supp. 2008); MICH. COMP. LAWS ANN. §§ 37.2101–.2804 (West 2001 & Supp. 2008); MINN. STAT. ANN. §§ 363A.01–A.41 (West 2004 & Supp. 2008); MISS. CODE ANN. §§ 25-9-101 to -149 (West 2003 & Supp. 2007); MO. ANN. STAT. §§ 213.010–.137 (West 2004 & Supp. 2008); MONT. CODE ANN. §§ 49-1-101 to -4-217 (2005); NEB. REV. STAT. §§ 48-1101 to -1132 (2004 & Supp. 2007); NEV. REV. STAT. ANN. §§ 613.310–.435 (West 2000 & Supp. 2008); N.H. REV. STAT. ANN. §§ 354-A:1 to :26 (1995 & Supp. 2007); N.J. STAT. ANN. §§

federal court interpretations of Title VII to interpret their statutes.[171] More specifically, many state courts have referenced federal cases related to how agency principles should apply for state law claims.[172] If *Burlington* is read as creating different agency principles for retaliation and discrimination claims, it is likely that such a reading would impact the interpretation of other federal and state employment statutes.

2. As the Importance of Retaliation Grows, Inconsistency in Agency Principles Could Lead to Chaos

There is no question that over the past decade, the EEOC has seen a rapid increase in the total number of retaliation claims filed. In 1992, 72,302 individuals filed discrimination charges with the EEOC, and 10,499 individuals alleged retaliation under Title VII.[173] Fourteen years later, the total number of individual claims of discrimination rose to

10:5-1 to -49 (West 2002 & Supp. 2008); N.M. STAT. ANN. §§ 28-1-1 to -15 (West 2003 & Supp. 2007); N.Y. EXEC. LAW §§ 290–301 (McKinney 2005 & Supp. 2008); N.C. GEN. STAT. ANN. §§ 143-422.1 to .3 (West 2000); N.D. CENT. CODE ANN. §§ 14-02.4-01 to -23 (West 2008); OHIO REV. CODE ANN. §§ 4112.01–.99 (West 2007 & Supp. 2008); OKLA. STAT. ANN. tit. 25, §§ 1101–1901 (West 2008); OR. REV. STAT. ANN. §§ 659A.001–.990 (West 2003 & Supp. 2008); PA. CONS. STAT. ANN. 43, §§ 951–963 (West 1991 & Supp. 2008); R.I. GEN. LAWS ANN. §§ 42-112-1 to -2 (West 2006 & Supp. 2008); S.C. CODE ANN. §§ 1-13-10 to -110 (1986 & Supp. 2007); S.D. CODIFIED LAWS §§ 20-13-1 to -56 (2004 & Supp. 2008); TENN. CODE ANN. §§ 4-21-101 to -1004 (West 2007 & Supp. 2008); TEX. LAB. CODE ANN. §§ 21.001–.556 (Vernon 2006 & Supp. 2008); UTAH CODE ANN. §§ 34A-5-101 to -108 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 21, §§ 494–497 (2007); WASH. REV. CODE ANN. §§ 49.60.010–.390 (West 2008); W. VA. CODE ANN. §§ 5-11-1 to -21 (West 2002 & Supp. 2008); WIS. STAT. ANN. §§ 111.31–.395 (West 2002 & Supp. 2007); WYO. STAT. ANN. §§ 27-9-101 to -106 (West 2007).

171. *See, e.g.*, Gamboa v. Am. Airlines, 170 F. App'x 610, 612 (11th Cir. 2006) (applying Title VII standard to claims asserted under a Florida anti-discrimination statute); Gentry v. Ga.-Pac. Corp., 250 F.3d 646, 650 (8th Cir. 2001) (same under Arkansas law); Perry v. Woodward, 199 F.3d 1126, 1141–42 (10th Cir. 1999) (New Mexico); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (New York); Carpenter v. Fed. Nat'l Mortgage Ass'n, 165 F.3d 69, 72 (D.C. Cir. 1999) (District of Columbia); Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999) (Massachusetts), *overruled on other grounds*, Smith v. City of Jackson, 544 U.S. 288 (2005); King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 198 (4th Cir. 1998) (West Virginia); Lee v. Minn. Dep't of Commerce, 157 F.3d 1130, 1133 (8th Cir. 1998) (Minnesota); Nichols v. Lewis Grocer, 138 F.3d 563, 565–66 (5th Cir. 1998) (Louisiana); Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 956 (3d Cir. 1996) (New Jersey); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 n.8 (6th Cir. 1994) (Kentucky). *But see* Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 (Mo. 2007) (en banc) ("Missouri employment discrimination law in a post-MAI 31.24 environment should more closely reflect the plain language of the MHRA and the standards set forth in MAI 31.24 and rely less on analysis developed through federal caselaw.").

172. *See, e.g.*, Smith v. City of Chattanooga, No. E2006-00635-COA-R3-CV, 2007 WL 4374039, at *4 (Tenn. Ct. App. Dec. 17, 2007) (applying *Faragher*/*Ellerth* defense to claims brought under Tennessee state law).

173. The U.S. Equal Employment Opportunity Commission Website, *Charge Statistics: FY 1992 Through FY 1996*, http://www.eeoc.gov/stats/charges-a.html (last visited Oct. 11, 2008).

75,768, while the number of retaliation claims ballooned to 19,560.[174] Over the past decade, the number of retaliation charges filed with the EEOC has doubled.[175] Even the EEOC itself is placing emphasis on retaliation claims. From 2002 until 2005, over thirty percent of suits filed by the EEOC against employers involved retaliation claims.[176]

Burlington cited the rapid growth in the number of retaliation cases as one of the reasons that the Supreme Court should accept the case for consideration.[177] Given the plaintiff-friendly substantive standard adopted in *Burlington*, it is likely that retaliation claims will continue to comprise a significant, if not an increased, presence within Title VII lawsuits.

If Title VII agency principles do not remain consistent for both discrimination and retaliation claims, another layer of complexity will be added to an already complex scheme. This is because retaliation claims are often filed in tandem with discrimination claims. The following hypothetical should be helpful in illustrating that point: Sally works for an employer and alleges that she has been subjected to discrimination in the workplace based on her disability and her gender. She then complains about that conduct and alleges that she thereafter suffers retaliation. Sally files suit against the employer, bringing claims of gender and disability discrimination under both federal and state law.

If federal agency principles are not held to be consistent across federal statutes and among the various causes of action, the courts potentially face a set of jury instructions that must take into account eight instructions regarding substantive liability and numerous instructions regarding agency principles. On the substantive issues, the jury may need to be instructed regarding the elements for a discrimination claim

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174. The U.S. Equal Employment Opportunity Commission Website, *Charge Statistics: FY 1997 Through FY 2007*, http://www.eeoc.gov/stats/charges.html (last visited Oct. 11, 2008).

175. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 969 (2007).

176. Equal Employment Opportunity Commission Website, *FY 2005 Annual Report on the Operations and Accomplishments of the Office of the General Counsel*, at III(C), http://www.eeoc.gov/litigation/05annrpt/index.html (last visited Oct. 11, 2008).

177. Petition for a Writ of Certiorari, *supra* note 13, at 17. Burlington argued:

> Were that not apparent from the fact that every regional court of appeals has weighed in on the issue, it is confirmed by even the briefest review of the annotated United States Code, which lists hundreds of cases related to 42 U.S.C. § 2000e-3(a) under the heading of "retaliatory acts." Indeed, in fiscal year 2004 alone, more than 20,000 charges of retaliatory discrimination under Title VII were filed with the EEOC, and the trend is strongly upward—this is twice as many retaliation charges as were filed in 1992. The volume of these cases provides a compelling reason for this Court to intervene . . . .

Id. (citation omitted).

under the ADA,[178] a discrimination claim under Title VII,[179] a discrimination claim for gender discrimination under state law, and a disability discrimination claim under state law.[180] Likewise, the jury may need to be instructed on four different retaliation standards.[181]

If agency principles change according to the cause of action, it appears possible that the court might also have to instruct the jury with an equal number of separate agency instructions. It is likely that agency principles will be held to be consistent for discrimination provisions under the ADA and Title VII. Also, the state agency law may be consistent for gender and disability discrimination claims. However, even under this scenario, it is still possible that the jury would need to be provided four separate instructions regarding agency: one for the federal discrimination claims, a second for the federal retaliation claims, a third for the state discrimination claims, and a fourth for the state retaliation claims.

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178. For example, under the ADA only a qualified individual with a disability or a person associated with such an individual is a proper plaintiff under the discrimination provisions. *See* 42 U.S.C. §§ 12111(8), 12112(a), 12112(b)(4) (2000).

179. Even ignoring the definitional differences, there is not absolute uniformity regarding the elements of a cause of action for discrimination among the federal anti-discrimination statutes. *See, e.g.*, Baqir v. Principi, 434 F.3d 733, 745 (4th Cir. 2006) (indicating that *Desert Palace* analysis does not apply to claims under the ADEA); Aquino v. Honda of Am., Inc., No. 04-4274, 2005 WL 3078627, at *7 (6th Cir. Nov. 18, 2005) (refusing to apply *Desert Palace* standard to claims brought under 42 U.S.C. § 1981, because Congress chose not to amend this statute); Bolander v. BP Oil Co., No. 3:02CV7341, 2003 WL 22060351, at *3 (N.D. Ohio Aug. 6, 2003) (indicating *Desert Palace* does not apply to ADEA).

180. Although many states have modeled their discrimination statutes after the federal statutes, there are many instances in which the elements for a federal discrimination claim are different than those required under state law. *See, e.g.*, CAL. GOV'T CODE § 12926(k)(1)(B) (West 2005); EEOC v. United Parcel Serv., Inc., 424 F.3d 1060, 1068–69 (9th Cir. 2005) (discussing differences between ADA definition of disability and California statute's definition of that term); CONN. GEN. STAT. § 46a-60(a)(1) (West 2004); Beason v. United Tech. Corp., 337 F.3d 271, 277 (2d Cir. 2003) (discussing how Connecticut statute's definition of "disability" is broader than the definition provided by the ADA). Again, even ignoring these threshold inquiries, the substantive elements of the cause of action might also be articulated differently. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 992 (D. Minn. 2003) (explaining that Minnesota did not amend its state statute to reflect amendments made to Title VII); *see also* Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 (Mo. 2007) (stating that Missouri's safeguards "are not identical to the federal standards and can offer greater discrimination protection"); Plagmann v. Square D Co., No. 03-0465, 2004 WL 2809521, at *2 (Iowa Ct. App. Dec. 8, 2004) ("*Desert Palace* did not decide whether the 1991 amendment to the Federal Civil Rights Act applied outside the mixed-motive context to cases such as this . . . ."). For a broader discussion of these issues, see generally Sperino, *supra* note 165.

181. It remains to be seen whether the retaliation provisions of the ADEA and ADA are read in tandem with Title VII's retaliation provision. Likewise, some state courts have read the retaliation provisions in state discrimination laws to be different than the federal standard. *See, e.g.*, Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123, 1137 (Cal. 2005) (indicating standard under California retaliation provision was whether conduct materially affected terms and conditions of employment).

Courts would confront similar complexity when trying to determine whether summary judgment in the employer's favor is appropriate. Even the cases that do not reach trial or summary judgment may be affected by complexity with agency analysis, as it may be difficult to place a settlement value on a case when the employer's underlying liability is either completely in doubt or varies from claim to claim.

It could be argued that while a more complex agency analysis does lead to increased litigation costs and outcome uncertainty, such costs might be worth paying because a different agency analysis for retaliation will lead to increased supervision by employers to prevent retaliation from happening in the first place. While it may be true that in some cases holding employers automatically liable will result in better prevention, it is not clear that this will happen in the majority of the cases, or even in enough of the cases to warrant the cost. This is the implicit conclusion the Supreme Court reached in *Faragher* and *Ellerth* when it rejected automatic liability for the employer.

Further, it is not reasonable for the employer to monitor every activity that happens within the workplace by co-workers, non-direct supervisors, supervisors, and third parties to ensure that no retaliation is occurring. Even if automatic employer liability for co-worker, non-direct supervisor, and third-party retaliation is rejected in the retaliation context, it is not reasonable for the employer to monitor every decision that every supervisor makes relating to every employee—or even for that to be the standard against which the employer is judged for the purposes of imposing vicarious liability.

Such monitoring would be required because of the dynamics of retaliation—because internal complaints are protected activity under the statute.[182] It is not always clear at the time the activity is happening that the employee has even engaged in the protected activity. Sometimes, even when it is clear, one internal complaint has been made to a supervisor and that supervisor (without involvement from anyone else in the company) engages in the alleged retaliatory behavior. To completely prevent retaliation, the company would need to engage in a near-constant analysis of what comments had been made by employees that might

182. 42 U.S.C. § 2000e-3(a) (2000); *see also* Rollins v. Fla. Dep't of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989) (indicating that informal complaints constitute protected activity); Butler v. Ala. Dep't of Transp., 512 F. Supp. 2d 1209, 1226 (M.D. Ala. 2007) (finding protected activity where plaintiff tried to complain to supervisor of co-worker's racial slur); Burroughs v. Smurfit Stone Container Corp., 506 F. Supp. 2d 1002, 1017 (S.D. Ala. 2007) (plaintiff satisfied protected activity element by speaking to supervisor regarding alleged sexually harassing activity); Beaumont v. Tex. Dep't of Criminal Justice, 468 F. Supp. 2d 907, 923 (E.D. Tex. 2006) (indicating that employee engages in protected activity when providing a formal statement to employer).

constitute protected activity and what decisions were made related to those employees, as well as monitor every decision related to employees who were interviewed as part of internal investigations. As discussed above, such supervision itself could result in different treatment of the employee that may lead to a claim of retaliation.

Allowing for an affirmative defense for non-tangible employment actions taken by supervisors makes even more sense in the retaliation context, given *Burlington*'s reduction of the seriousness of the action that will trigger potential liability. This is because in some situations, the employer will not be able to identify whether a particular action could result in liability or not. Unlike most tangible employment actions, many of the actions that fall within Category IV may not be objectively identifiable as either positive or negative changes to an employee's work situation.

For example, assume that an employer needs to require some, but not all, employees in a particular unit to begin work two hours earlier. Some employees will view such a change as positive (because it allows them to leave work earlier), while other employees would consider this to be a negative (because it interferes with sleeping in or other personal obligations the employee might have). This problem plays out in a number of scenarios relating to non-tangible actions that might constitute retaliation—even the training lunch hypothetical provided by the Supreme Court. Some employees may resent not being included in the training lunch, while others might rejoice at not being required to spend their lunch break in this manner. Given this dynamic, an affirmative defense that requires employees to reasonably take advantage of complaint procedures serves the additional function of alerting the employer to the fact that the employee considers the change to be negative, and thus, potentially retaliatory.

In contrast, most tangible employment actions are ones that employees would consider to be negative (e.g., a termination or a demotion). While employer liability for such decisions makes sense for tangible employment actions, the *Faragher* and *Ellerth* structure provides a more sensible cost-benefit ratio for non-tangible actions.

3. Failing to Resolve the Underlying Agency Issues Will Impact the Substantive Retaliation Provisions

Additionally, reading *Burlington* as creating a separate set of agency principles will have repercussions for the substantive retaliation standard. The retaliation cases decided by lower courts after *Burlington* provide an interesting window into the agency issues now facing the courts.

Although it is difficult to pinpoint the motivation of a court, these cases strongly suggest that lower courts may mask concerns about agency by considering those concerns under the rubric of whether an action is materially adverse.

In *Reis v. Universal City Development Partners*, the plaintiff worked in a guest services position, which required her to work outdoors.[183] The plaintiff requested that she be allowed to transfer to a position inside a lobby, and the employer denied this request.[184] The trial court indicated that the denial of the transfer request was not an action that a reasonable person would find to be materially adverse.[185]

In making its decision, the district court indicated that the three differences between the positions were: "(1) the requested position is indoors where there is heat and air conditioning, (2) the requested position begins work earlier in the day than Plaintiff's position; and (3) the requested position handles customer complaints."[186] The court indicated that a reasonable person would not find these differences to be materially adverse because the two positions had the same pay scale, the same level of prestige, and provided the same opportunities for advancement.[187]

It seems quite apparent that anyone who has been to central Florida during the summer would recognize that an employee might not complain about discrimination if the employee believed that, as a result, the employee would be required to work outside without air conditioning. It appears that what the court is really concerned about is the fact that a low-level supervisor could make this decision without anyone else in the company being aware of it. Indeed, this is the kind of decision that is unlikely to be reflected in a written record or to require review by higher levels of supervision. However, because a misreading of *Burlington* suggests that an examination of agency principles is not appropriate, lower courts must funnel their agency concerns into other parts of the analysis.

In another case, a lower court found that a plaintiff could not establish that a materially adverse action had taken place after a supervisor "isolated her into a small room and threatened [her] with

183. 442 F. Supp. 2d 1238, 1253 (M.D. Fla. 2006). The retaliation claim was brought under the ADA; however, the case is relevant to the current discussion because the court applied a Title VII analysis to the retaliation issue.

184. *Id.*

185. *Id.* at 1254.

186. *Id.* at 1253.

187. *Id.* at 1253–54.

being fired if she came out onto the workroom floor, told her that she was 'worthless,' and told her not to talk to coworkers."[188] Again, although it is difficult to pinpoint the concerns of the district court, it seems plausible that the court was concerned that the employer should not be automatically liable for such conduct. After all, this is the same type of conduct that might be at issue in a harassment case, and the employer has an affirmative defense to liability in that case.

In another exemplar case, the court appears to be concerned about agency issues; unsure how to handle those issues, it first masks agency concerns under the rubric of cognizability. In *Bozeman v. Per-Se Technologies, Inc.*,[189] the plaintiff complained that after he engaged in protected activity, he was ostracized by co-workers and supervisors. He also alleged that he was threatened on several occasions by a manager within the company, who did not have direct supervisory authority over the plaintiff.[190]

The plaintiff alleged that at one meeting, the non-direct supervisor was irate, screaming to "shut your GD mouth" and "mind your own business."[191] The plaintiff also alleged that after a business conference, this same individual approached the plaintiff and "said words to the effect of 'that he needed to be careful and keep his mouth shut,' 'the plaintiff could ruin his career or that [the manager] could ruin the plaintiff's career, that he needed to be quiet or he would regret it,' and something about 'whipping his ass.'"[192]

In determining whether these claims constituted retaliation, the court first focused on whether these actions were severe enough. Although recognizing the material adversity standard enunciated in *Burlington*, the district court applied a severe and pervasive requirement to claims of retaliatory harassment, finding the alleged actions not severe and pervasive enough to constitute actionable retaliation.[193]

Without addressing agency issues related to the alleged harassment by co-workers, the court did appear to engage in an agency analysis related to the manager, who was not plaintiff's direct supervisor. The court indicated that "there is no evidence that Moore possessed the

188. Gilmore v. Potter, No. 4:04-CV-1264 GTE, 2006 WL 3235088, at *10 (E.D. Ark. Nov. 7, 2006).

189. 456 F. Supp. 2d 1282, 1344–45 (N.D. Ga. 2006).

190. *Id.*

191. *Id.* at 1344.

192. *Id.* at 1345.

193. *Id.* at 1345–46. The court also asserted, without much support, that plaintiff failed to establish a causal connection between the alleged wrongful conduct and his protected activity. *Id*. at 1346. Strangely, the court then later asserts that it was not addressing causation. *Id*. at 1346 n.151.

authority or apparent authority during the period in which these events transpired to affect the terms of the Plaintiff's employment."[194] Although trying to apply agency concepts to the problem, the district court fails to recognize the interplay of agency doctrine across Title VII.

As these cases demonstrate, the failure to apply a consistent agency analysis may lead courts to bend and stretch the concept of material adversity in circumstances where the court does not believe an employer should be held liable for the actions. In many of these cases, though, the concern should be squarely addressed through agency. The *Faragher* and *Ellerth* structure may alleviate concerns that the employer is being held liable under circumstances where it was acting in good faith or where it should not, as a matter of public policy, be held vicariously liable.

While this Article is largely concerned about maintaining a consistent line of legal thought, it is also possible that a failure to focus on agency principles will have other consequences. Lower courts' agency concerns may result in these courts more often invading the province of the jury in deciding whether actions would be materially adverse; placing greater emphasis on causation, and considering retaliatory incidents singularly, rather than in their totality, to determine whether material adversity is present.

At least one case appears to properly consider concerns about agency within the agency context. In *Ferguson v. Associated Wholesale Grocers, Inc.*,[195] the plaintiff alleged that she had been sexually harassed by a supervisor.[196] After she complained, the plaintiff alleged that she was retaliated against by unknown co-workers who slashed the tires on her car, made threatening telephone calls to her workplace and home, and threw two soda cans at her.[197] She also alleged that non-supervisory co-workers called her derogatory names.[198] The district court granted summary judgment in the employer's favor because there was no evidence that "supervisory or management personnel either (1) orchestrate[d] the harassment or (2) [knew] about the harassment and acquiesce[d] in it so as to condone and encourage the co-workers' actions."[199]

194. *Id.* at 1346.
195. 469 F. Supp. 2d 961 (D. Kan. 2007).
196. *Id.* at 966.
197. *Id.* at 967.
198. *Id.*
199. *Id.* at 971 (citing Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998)).

Notably, the employer also made the argument that it could not be liable for retaliation because the actions taken were not "materially adverse."[200] The district court noted that given its finding on the agency issue, it did not need to reach the question of material adversity, but also noted that the employer's argument in this regard was "facially untenable."[201]

Indeed, very few courts have applied an agency framework to retaliation issues when the underlying conduct is taken by supervisors.[202] Even courts that recognize that an agency analysis applies to discrimination claims often do not conduct the agency analysis when dealing with retaliation claims.[203] Many of the courts that have recognized that agency principles were at play in the supervisor context have done so when retaliatory harassment was the underlying claim.[204] Even fewer courts have recognized that agency issues in the retaliation context, but falling outside the retaliatory harassment context, might require an analysis under the *Faragher* and *Ellerth* framework.[205]

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200. *Id.*

201. *Id.*

202. *See, e.g.*, Brammer v. Winter, No. 3:06-cv-16-J-32MCR, 2007 WL 4365643, at *8 (M.D. Fla. Dec. 12, 2007) (indicating that a basis for employer liability must be established in retaliation cases, but then finding discussion of such issues irrelevant because plaintiff was not otherwise able to establish cognizable harassment); Muraj v. UPS Freight Servs., No. 04-CV-6563CJS, 2006 WL 2528538, at *3 (W.D.N.Y. Aug. 31, 2006) (indicating that vicarious liability exists when supervisor takes tangible employment action in the retaliation context); *see also* Hillig v. Rumsfeld, 381 F.3d 1028, 1029 (10th Cir. 2004) (upholding jury verdict in favor of plaintiff who alleged that a supervisor gave her a negative job reference in response to her EEO complaint, without discussing whether employer should be liable for those actions); Bragg v. Orthopaedic Assocs. of Va., Ltd., No. 2:06cv347, 2007 WL 702786, at *9 (E.D. Va. Mar. 2, 2007) (indicating that a plaintiff who does not make a complaint of retaliation cannot proceed on such a claim; however, given the facts of the case, it is unclear who took alleged retaliatory action); Stouffer v. Kroneke Sports Enters., LLC, No. Civ.A.03WM471WM(MJW), 2005 WL 2240725, at *2 n.3 (D. Colo. Sept. 8, 2005) (indicating, in dicta, that *Faragher*/*Ellerth* defense might apply to retaliation claims, but not deciding the issue because tangible employment action was taken); *see also infra* note 206 (citing cases relating to retaliatory harassment).

203. Howington v. Quality Rest. Concepts, LLC, No. 2:07-CV-055, 2008 WL 53704, at *6–7 (E.D. Tenn. Jan. 3, 2008) (applying respondeat superior analysis to discrimination claims, but not addressing whether same analysis applies to retaliation claims).

204. *See, e.g.*, Jordan v. City of Cleveland, 464 F.3d 584, 600 (6th Cir. 2006) (noting that the district court instructed the jury regarding the *Faragher*/*Ellerth* defense for a claim of retaliatory discharge); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000) (indicating that *Faragher* and *Ellerth* framework apply in retaliatory harassment case); Hunter v. Green, No. 07-14490, 2008 WL 1925065, at *8 (E.D. Mich. May 1, 2008) (applying *Faragher*/*Ellerth* defense to claim for retaliatory discharge; however, case also appears to be applying pre-*Burlington* framework to claims).

205. *See* McInnis v. Fairfield Cmtys., Inc., 458 F.3d 1129, 1141 (10th Cir. 2006) (recognizing in dicta that *Faragher*/*Ellerth* might apply when the action taken does not rise to the level of a tangible employment action). Such an omission is not surprising in many circuits because, prior to *Burlington*, in most circuits an action that did not constitute an adverse employment action or an ultimate employment action would not rise to the level of actionable retaliation. *See, e.g.*, Petition

Courts have more directly applied agency principles when the retaliatory acts were committed by co-workers.[206] However, few of these courts have tied their analysis into a broader discussion of how agency issues in the retaliation context connect with the framework set forth in the *Faragher* and *Ellerth* cases.[207]

4. Consistency Will Encourage Employees and Employers to Work Together to Resolve Claims

In *Burlington*, the Court indicated that the primary purpose of Title VII's retaliation provision is to "prevent[] an employer from interfering . . . with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[208] The Court failed to mention that one of the overarching themes in Title VII jurisprudence is the concern that courts do not provide the best mechanism for resolving work-related grievances. In the past, the Court has expressed that the statutory framework should encourage employers to develop policies to

for a Writ of Certiorari, *supra* note 13, at 10–11; Burlington N. & Santa Fe Ry. Co. v. White, 546 U.S. 1060, 1060 (2005) (granting petition for certiorari). Thus, the courts in these circuits would not have any reason to address agency issues.

206. *See, e.g.*, Watson v. Las Vegas Valley Water Dist., 268 F. App'x 624, 627 (9th Cir. 2008) (applying vicarious liability principles to cases of co-worker harassment); Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008) (same); Loudermilk v. Stillwater Milling Co., No. 07-CV-118-TCK-FHM, 2008 WL 687469, at *11 (N.D. Okla. Mar. 10, 2008) (same); Moore v. City of Philadelphia, 461 F.3d 331, 349 (3d Cir. 2006) (same); Noviello v. City of Boston, 398 F.3d 76, 96–97 (1st Cir. 2005) (applying structure developed in *Faragher* and *Ellerth* to co-worker retaliatory harassment); Swanson v. Livingston Cty., 121 F. App'x 80, 85 (6th Cir. 2005) (same); Garone v. United Parcel Serv., Inc., 436 F. Supp. 2d 448, 472 (E.D.N.Y. 2006) (same).

207. *See, e.g.*, *Watson*, 268 F. App'x at 627 (indicating that the employer is liable for retaliation conducted by co-workers where the employer encouraged or condoned the conduct, but not otherwise tying test into negligence standard that would apply under *Faragher* and *Ellerth*); *Hawkins*, 517 F.3d at 347 (holding that employer will be liable for co-worker retaliation when "supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and . . . supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances"); Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 619 (8th Cir. 2007) (finding that the employer would only be liable if its failure to take sufficient remedial action was motivated by the fact that the plaintiff engaged in protected activity); *Swanson*, 121 F. App'x at 85 (indicating that liability for co-worker harassment attaches when employer condoned and encouraged the behavior); Hamera v. County of Berks, No. 05-2050, 2006 WL 1985791, at *6 (E.D. Pa. July 11, 2006) (employer liable for harassment if it knew or should have known of co-worker harassment). The author is not suggesting that these cases are necessarily at odds with the framework established in *Faragher* and *Ellerth*, only that the cases do not make an explicit connection between their articulation of agency principles and their holdings. It may be that these courts are further defining the contours of what employer negligence would look like in the context of co-worker retaliation. *See also* Moore v. City of Philadelphia, 461 F.3d 331, 349 (3d Cir. 2006) (appearing to apply a negligence standard for employer liability for co-worker retaliation).

208. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).

prevent Title VII violations and to create mechanisms to promptly remedy any violations that do occur.[209] Likewise, the Court has indicated that employees should, in many instances, be required to take advantage of these employer-implemented policies.[210]

If *Burlington* is read as rejecting a *Faragher*/*Ellerth* structure, employees will be encouraged to take their complaints of retaliation straight to the EEOC or comparable state agency without first seeking recourse through the employer. When conducted appropriately, employer-mediated responses to retaliation provide a good mechanism for resolving retaliation claims. Such programs on an individual basis have lower costs related to litigation, have the potential for providing an immediate response, and possess the ability to tailor a remedy to the particular facts at hand. The fact that, at times, these internal mechanisms are ineffective, does not lead to the conclusion that internal resolution should not be the preferred choice. Emphasizing internal employer procedures provides the possibility that many instances of retaliation will be resolved in the most economically efficient way possible, without the interference of state and federal agencies, and without the costs (both financial and emotional) of litigation.

V. CONCLUSION

As discussed earlier, the question accepted for certiorari in *Burlington* suggests that the case resolved the scope of the substantive retaliation provision and employer liability for such actions.[211] While it is clear from the opinion that the Court is trying to draw a distinction between the types of conduct that might violate Title VII's retaliation provision versus the statute's discrimination prohibition, the Court did not answer the secondary question of employer liability. This is because the facts of *Burlington* did not call for such a resolution, and the defense counsel did not argue for one.

Reading *Burlington* as deciding agency principles is problematic, because it places agency principles in the retaliation context on a different course than those enunciated for Title VII's discrimination provisions. This Article argues that such a dichotomy is unwarranted

209. Burlington Industr., Inc. v. Ellerth, 524 U.S. 742, 763–64 (1998); *see also* Taylor, *supra* note 5, at 581 (discussing the informal conciliation and other goals of Title VII).

210. *Ellerth*, 524 U.S. at 763–64 ("Title VII borrows from tort law the avoidable consequences doctrine . . . .").

211. *See* Petition for Writ of Certiorari, *supra* note 13, at i; Burlington N. & Santa Fe Ry. Co. v. White, 546 U.S. 1060, 1060 (granting petition for certiorari).

and will lead to significant problems in Title VII agency jurisprudence and with the appropriate development of the substantive retaliation provisions. The Article also provides a framework for assisting courts in deconstructing the difference between the seriousness of the offense committed and the secondary question of whether the employer is liable for that conduct.

In the end, what is most interesting about the *Burlington* decision is how much pressure it places on agency principles. Hopefully, clear identification of these pressures will lead to awareness of their existence and then to a consistent resolution of agency principles.