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Striking Back against Retaliatory Discrimination: How Burlington Northern & (and) Santa Fe Railway Company v. White Expands Protections for Employees under Title VII's Participation and Opposition Clauses

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Striking Back Against Retaliatory Discrimination: How *Burlington Northern & Santa Fe Railway Company v. White* Expands Protections for Employees Under Title VII's Participation and Opposition Clauses

What happens when someone claims she has been discriminated against at work? We usually focus on two actors: the aggrieved employee and the employer. The reports, charges, and court filings, however, often reveal a wider cast of characters, including the claimant's coworkers, supervisors, and occasionally organized groups in the workplace or community. Fellow employees may assist their coworker in filing the claim or by offering to testify, or they may shun or retaliate against the claimant. Supervisors may also have a role that goes beyond simply implementing the policies of upper management. Some supervisors may refuse to comply with discriminatory or retaliatory orders, while others may engage in retaliatory behavior on their own initiative, even despite management directives to the contrary. Finally, outside organizations such as labor unions, civil rights groups and other community organizations, and local human rights and human relations boards may also become involved, simply by assisting employees with their individual claims, or by using an individual's grievance as part of a larger collective strategy to address other problems in the workplace or the community.[1] The social context of the workplace is important in investigating, settling, and resolving discrimination claims.

"Context matters," Justice Breyer stated in the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Company v.*

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1. *See, e.g.*, Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions To Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 108–10 (2004) (advocating that labor unions provide legal services in employment discrimination cases to groups of unorganized black workers); Karl E. Klare, *Toward New Strategies for Low Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 272 (1995) (explaining the use of strategic litigation by the Justice for Janitors union campaign to enforce "statutory rights," such as those under Title VII); Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 179–80 (2003) (describing how female farmworkers and their advocates have used employment laws such as Title VII to advance collective goals). For a more critical view of the benefits and limitations of individual employment lawsuits in promoting larger social justice goals, see also Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 440–45 (1995).

White,[2] clarifying the new standard for retaliation claims under Title VII of the Civil Rights Act of 1964.[3] In *Burlington Northern*, the Court held that under the anti-retaliation provision of Title VII,[4] a plaintiff must show that the employer's action was "materially adverse" and would have " 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' "[5] Instead of requiring a plaintiff to show a discrete event or an "adverse employment action," this new standard considers the alleged retaliatory action along with the " 'constellation of surrounding circumstances, expectations and relationships' " in the workplace.[6] Setting a standard for claims of retaliation that "focus[es] on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position" provides more protection to these third parties, as it would presumably be easier to deter a reasonable worker from supporting someone else's claim than her own.[7]

This Recent Development focuses on the impact of the Supreme Court's decision in *Burlington Northern* on these other actors, specifically those who participate in the process of supporting a Title VII claim or resisting a discriminatory policy in the workplace.[8] It will argue that the standard in *Burlington Northern*—defining retaliation as a practice likely to " 'dissuade[] a reasonable worker from making or supporting a charge of discrimination' "[9]—increases protection to those who may act in a supporting role in a discrimination claim. This added protection will encourage these "supporting actors" to participate in Title VII proceedings and may make it easier to use collective strategies to address discrimination in the workplace.

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2. 126 S. Ct. 2405 (2006). Throughout the remainder of this Recent Development, the Supreme Court Reporter is used for citations to *Burlington Northern* because pinpoint citations to the United States Reporter were unavailable at the time of publication.

3. *Id.* at 2415.

4. 42 U.S.C. § 2000e-3(a) (2000).

5. *Burlington Northern*, 126 S. Ct. at 2415 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

6. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998)).

7. *Id.* at 2416.

8. *See* 42 U.S.C. § 2000e-3(a) (making it illegal for "an employer to discriminate against any of his employees or applicants for employment . . . because he has *opposed any practice* made an unlawful employment practice by this title, or because he has *made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing* under this title" (emphasis added)).

9. *Burlington Northern*, 126 S. Ct. at 2415 (quoting *Rochon*, 438 F.3d at 1219).

This Recent Development will begin by summarizing the Court's holding in *Burlington Northern* and comparing it to the standard previously applied in the lower federal courts to show how *Burlington Northern* expanded the types of activities that are protected from employer retaliation. Next, it will review the prior case law under Title VII that addressed retaliation claims made by other parties who opposed an employer's discriminatory practice, testified for a plaintiff in a trial or other proceeding, or otherwise assisted with a claim. Two cases will be examined in detail to illustrate how the *Burlington Northern* analysis could be applied to claims involving retaliatory discrimination against third parties. This piece will then conclude by showing how the new *Burlington Northern* standard will make it easier for third parties to support a Title VII claimant in the workplace.

Even though *Burlington Northern* did not involve a third-party retaliation claim, a brief examination of its facts is helpful to understand the Court's emphasis on materiality and context. Plaintiff Sheila White was hired as a forklift driver at the Burlington Northern rail yard in Memphis, Tennessee.[10] White was assigned to the job of track laborer, which included her primary duty of operating the forklift, but also involved other tasks such as replacing portions of tracks, cutting brush, and cleaning trash and spilled cargo from the right-of-way.[11] The only woman in her department, White experienced sexual harassment by superiors and coworkers who believed that women should not be working on the railroad.[12] After she reported this discriminatory conduct, responsibility for operating the forklift was given to a "more senior man" and White was left with the more physically demanding and dirtier tasks of the track laborer position.[13]

White believed that this reassignment was retaliation for her earlier report of sexual harassment, a violation of the anti-retaliation provision of Title VII.[14] A jury found in White's favor and awarded

10. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 792 (6th Cir. 2004).

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

12. White reported that her immediate supervisor had made "insulting and inappropriate remarks to her in front of her male colleagues." *Id.*; *see also White*, 364 F.3d at 792 (describing the "general anti-woman feeling" among many of the employees at the Memphis rail yard).

13. *Burlington Northern*, 126 S. Ct. at 2409; *see also White*, 364 F.3d at 792–93 (describing the role that coworkers' complaints about White's assignment to the forklift tasks may have played in her reassignment).

14. White filed a claim with the Equal Employment Opportunity Commission ("EEOC") alleging a violation of 42 U.S.C. § 2000e-3(a) (2000). She later filed two

damages. On appeal, a panel at the Sixth Circuit reversed the trial court decision, but the case was later heard en banc, and the full Sixth Circuit upheld the jury verdict in White's favor.[15] The court split over which standard to apply in order to determine which actions are retaliatory under the statute, mirroring a split among the courts of appeals themselves.[16]

When *Burlington Northern* reached the Supreme Court, the Court was left with the task of addressing the conflicting retaliation standards that had divided the Sixth Circuit and other federal appeals courts.[17] Prior to the *Burlington Northern* decision, many federal courts of appeals had taken a more restrictive approach to their interpretation of the retaliation provision, requiring an "adverse employment action," which courts defined as a "materially adverse change in the terms and conditions of employment."[18] The broader approach, favored by other circuits, asked whether the alleged retaliatory action would be "material to a reasonable employee."[19] In adopting the broader approach, the Supreme Court made it easier for plaintiffs in most circuits to assert retaliation claims that would survive summary judgment.[20] For example, this new test makes it more likely that a plaintiff who complains of retaliation but cannot

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additional retaliation charges, the first claiming that she was placed under surveillance by management, and the second after she was suspended for thirty-seven days without pay for alleged insubordination. *Burlington Northern*, 126 S. Ct. at 2409. She was later reinstated and received back pay for the period of her suspension after the insubordination incident was investigated under a union-management grievance procedure. *Id.*

15. *Id.* at 2410.

16. *Id.* at 2410–11.

17. *Id.* at 2415. The en banc decision of the Sixth Circuit resulted in a majority opinion and two concurrences, each adopting a different standard for retaliation. *See White*, 364 F.3d at 789.

18. The Third, Fourth, and Sixth Circuits had previously taken the restrictive approach. *E.g.*, *White*, 364 F.3d at 795; Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001); Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Even more limiting was the standard formerly applied by the Fifth and Eighth Circuits, which required an "ultimate employment decision" in retaliation cases. *E.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); *see also* Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (applying a similar standard). An ultimate employment decision was defined as "hiring, granting leave, discharging, promoting, and compensating." *Mattern*, 104 F.3d at 707.

19. *See* Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005).

20. The Ninth Circuit is the one exception; it had relied on the EEOC's preferred statutory interpretation of the anti-retaliation provision, which was broader than the holding in *Burlington Northern*. Previously, the Ninth Circuit had defined retaliation as conduct "based on retaliatory motive and . . . reasonably likely to deter the charging party or others." Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000).

point to an adverse employment action (such as being fired or passed over for promotion) can still get her claims before a jury.

In order for a third-party plaintiff[21] to make out a prima facie case for retaliation under the Title VII anti-retaliation provision, he must show three things: (1) that he engaged in a protected activity under the statute, either under the participation clause or the opposition clause;[22] (2) that his employer retaliated against him in such a way that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination' ";[23] and (3) that there was a causal connection between the protected activity and the retaliatory action.[24] The *Burlington Northern* decision has expanded the kinds of activities that will meet the second element of a claim, the retaliatory action.[25] Plaintiffs will still have to prove that they engaged in a protected activity and show the link between the protected activity and the retaliation. But with more actions qualifying as retaliation under *Burlington Northern*, more plaintiffs may get the chance to prove these elements to a jury instead of to a judge reviewing a motion for summary judgment.[26]

Before a plaintiff shows an allegedly retaliatory act of her employer, however, she must first show that she engaged in a protected activity under the statute. Actions taken by employees, whether taken by the claimant or a third party, must fall under either the participation clause or the opposition clause to be protected

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21. In this context, "third party" means a person who is not the original claimant but a person who has supported the claim or opposed the practice.

22. *See infra* notes 27–53 and accompanying text.

23. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006) (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

24. There are three ways to show a causal connection: direct admission by the employer, the "pretext" proof scheme adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 802–08 (1973), or the "mixed motive" scheme set out by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238–55 (1989). Many claims fail because they cannot establish a satisfactory causal link for reasons that are beyond the scope of this Recent Development.

25. At least the decision has broadened the definition in most circuits. The Ninth Circuit had a more expansive view prior to *Burlington Northern*, and since the Court adopted the test already employed by the Seventh and D.C. Circuits, it has stayed the same for those circuits. For all other circuits, however, *Burlington Northern* significantly expanded the range of activities that can be considered retaliation. *See supra* notes 18–20 and accompanying text.

26. Burlington Northern*'s Impact Assessed in ABA-Hosted Teleconference*, Daily Lab. Rep. (BNA) No. 158, at A-12 (Aug. 16, 2006) (predicting that "there will be fewer summary judgment decisions in favor of the employer, . . . many more cases will go to trial[, and] . . . [m]ore claims of retaliation will also be brought").

activities under Title VII.[27] The protections offered by these two clauses are directly related to the statute's purpose. Instead of establishing an inspection regime to ensure compliance, enforcement is triggered by employee complaints. In such a scheme, protecting the charging parties, as well as those who support them, is crucial.[28]

Since the testimony of others often provides essential evidence in support of a claim, the participation clause embraces nearly any kind of testimony as a protected activity.[29] Testimony that is not voluntary—or even against one's own interest—falls within the broad protective scope of Title VII's anti-retaliation provision.[30] To invoke the protections of the participation clause, a witness's testimony or participation does not even have to pass a reasonableness test.[31] In *Glover v. South Carolina Law Enforcement Division*, a witness who gave a deposition in the Title VII sex discrimination suit of a former colleague strayed from the issues in the suit and gave a freewheeling monologue on the problems with her own former superior.[32] After her current supervisor read the deposition, he decided not to extend her employment beyond a probationary period.[33] Despite her verbal

27. "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has *opposed any practice* made an unlawful employment practice by this subchapter, or because he has *made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing* under this subchapter." 42 U.S.C. § 2000e-3(a) (2000) (emphasis added); *see also* 2 PAUL N. COX, EMPLOYMENT DISCRIMINATION ¶ 18.06 (3d ed. 2005) (describing the protection given to employee actions that meet the requirements of the participation clause and the opposition clause).

28. Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 174–75 (2d Cir. 2005); *see also* CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 7.4 (2d ed. 1988) (discussing the amount of protection available under Title VII to charging employees and those who have assisted them). The language of Title VII provides even broader protection to employee "assistance and participation" in Title VII proceedings than the analogous provisions of the Fair Labor Standards Act ("FLSA") and the National Labor Relations Act ("NLRA"). Pettaway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969). Both the FLSA and the NLRA protect employees who made charges under the statutes or gave testimony about a prohibited practice. *Id.* That Title VII, passed some thirty years later, broadened the category of protected activity to include "assistance and participation" as well is an indication of Congress's intent. *Id.*

29. COX, *supra* note 27, ¶ 18.06.

30. Evans v. City of Houston, 246 F.3d 344, 352–53 (5th Cir. 2001) (finding that testimony that was compelled by subpoena at a fellow employee's grievance hearing was a protected activity under Title VII); Merritt v. Dillard Paper Co., 120 F.3d 1181, 1185–86 (11th Cir. 1997) (holding that an employee who grudgingly gave a deposition describing his own role in creating a hostile environment in a Title VII sexual harassment suit was protected from discharge on the basis of his testimony).

31. Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 413–14 (4th Cir. 1999).

32. *Id.* at 412.

33. *Id.* at 413.

detours, Glover's statements in the deposition were found to be protected by the participation clause.[34] Citing the need for unfiltered witness testimony, the Fourth Circuit stated that "[r]eading a reasonableness test into [the] participation clause would do violence to the text of that provision and would undermine the objectives of Title VII."[35] Witnesses who may have an improper motivation to testify are similarly protected. An employee's participation in an investigation of sexual harassment by a manager was held to be protected under the participation clause, despite the employer's contention that the charges were "fabricated" and motivated by the testifying employee's vendetta against the manager.[36]

A simple offer to testify may also qualify for protection under the participation clause, even if the testimony is never given.[37] In *Jute v. Hamilton Sundstrand Corp.*, an employee's agreement to testify in a coworker's Title VII hostile work environment claim and her listing as a favorable witness in the case was sufficient to qualify her for protection under the participation clause.[38] The plaintiff in *Jute* agreed to give a deposition and saved her vacation days for that purpose.[39] However, before she could testify, her coworker's case settled.[40] Despite the fact that she never gave her scheduled testimony, the Second Circuit found that

> [i]t would be destructive of [the statute's] purpose to leave an employee who is poised to support a co-worker's discrimination claim wholly unprotected. . . . [F]or example . . . an employer could freely retaliate against a Title VII whistleblower, as long as it did so before the employee actually testified. Placing a voluntary witness into this kind of legal limbo would impede remedial mechanisms by denying interested parties "access to the unchilled testimony of witnesses."[41]

Protection for employees under the opposition clause is nearly as expansive as that under the participation clause.[42] Employees who

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34. *Id.* at 414.
35. *Id.*
36. Kubico v. Ogden Logistics Servs., 181 F.3d 544, 549–50 (4th Cir. 1999).
37. Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 174 (2d Cir. 2005).
38. *Id.* at 175.
39. *Id.* at 169.
40. *Id.*
41. *Id.* at 175 (quoting Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999)).
42. SULLIVAN ET AL., *supra* note 28, § 7.5. However, cases under the opposition clause that raise issues of employee disloyalty or disruption of the employer's business are subject to a more critical inquiry than cases under the participation clause. *Id.*; *see also*

oppose an illegal practice in the workplace that affects their coworkers or refuse to carry out discriminatory acts against other employees are generally protected under the anti-retaliation provision of Title VII.[43] A court may inquire into the methods used in the opposition, but most reasonable forms of opposition do merit protection.[44] One such protected form of opposition to a practice that violates Title VII is the reporting of discrimination against other employees to a superior or a government agency like the Equal Employment Opportunity Commission ("EEOC"). For example, in a recent case,[45] the Third Circuit found the actions of white police officers to be protected under the opposition clause when they reported their sergeant for repeatedly using derogatory language to refer to black officers in their unit and discriminating against the black officers in assigning shifts.[46] As long as the white officers had a reasonable belief that such conduct did indeed violate Title VII, they were justified in opposing it spontaneously, when it occurred.[47] The *Moore* court explained, "As soon as a witness of such conduct reasonably believes unlawful discrimination has occurred, the anti-retaliatory provisions will protect their opposition to it. They are not required to collect enough evidence of discrimination to put the discrimination case before a jury before they blow the whistle."[48]

The opposition clause also protects employees who refuse to participate in an action that they reasonably believe violates Title VII. Many of these cases involve management-level employees who refuse to implement a discriminatory order regarding promotion,

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McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–06 (1973) (involving a black civil rights activist who engaged in activities that were illegal and disruptive of the employer's business as a way of protesting the employer's racially discriminatory employment practices).

43. The precise limits of protected activities under the opposition clause are beyond the scope of this Recent Development, but plaintiffs engaged in opposing an employer practice generally have to meet a reasonableness or good faith test. *See* SULLIVAN ET AL., *supra* note 28, § 7.5.

44. *See* Laughlin v. Metro. Wash. Airport Auth., 149 F.3d 253, 258–60 (4th Cir. 1998) (holding that an employee's removal of key documents from her supervisor's desk was not a protected activity under the opposition clause). *But see* Kempcke v. Monsanto Co., 132 F.3d 442, 445–47 (8th Cir. 1998) (finding that an employee who found documents on his work computer detailing planned layoffs and turned them over to his lawyer engaged in protected activity under the opposition clause as long as he held a good faith belief that his employer was engaged in unlawful discrimination).

45. Moore v. City of Phila., 461 F.3d 331 (3d Cir. 2006).

46. *Id.* at 344–45.

47. *Id.* at 344.

48. *Id.* at 345.

retention or discipline. In *Thomas v. City of Beaverton*,[49] an employee involved in the hiring process refused to exclude a qualified applicant due to her involvement in a prior discrimination suit.[50] The employee was put on probation and later terminated for refusing to discriminate against the applicant.[51] Similarly, a personnel director's refusal to fire an African-American employee because of his race was also a protected activity under the opposition clause.[52] Refusing to believe a pretextual reason for firing the employee, the personnel director told his superiors he would not fire the employee for what he believed was a solely racially motivated reason.[53]

Cases interpreting the participation and opposition clauses, in keeping with Title VII's statutory purpose, offer broad protection to the types of activities that third parties can engage in to support a claim of discrimination or oppose an unlawful practice. The courts' analysis in this area reflects the realities of the workplace by applying a reasonableness test, instead of requiring a third party to come forward with absolute proof that Title VII is being violated at work. The application of *Burlington Northern* to third-party claims also reflects the realities of life at work. A standard based on material adversity from the perspective of a reasonable employee will cover many retaliatory actions that are common, yet do not reach the level of an adverse employment action. The *Burlington Northern* standard is also easily adapted to the cases of third-party claimants who, because they act altruistically, may find more attempts at retaliation to be material. Finally, the *Burlington Northern* standard is realistic when viewed in the context of the social pressures that discourage individuals from opposing discrimination.

The new standard under *Burlington Northern* is more realistic in the sense that it may more accurately reflect the kinds of retaliatory activity that third parties are likely to face. Rather than one discrete adverse employment action, third parties may instead be subjected to a pattern of retaliatory activity to discourage their participation or opposition. The *Jute* case is illustrative of the many forms of pressure that an employer can bring to bear on an employee who participates

49. 379 F.3d 802 (9th Cir. 2004).

50. *Id.* at 806–07.

51. *Id.* at 807. The applicant in question had filed suit against the city previously for failure to promote based on race discrimination. *Id.* at 806.

52. EEOC v. HBE Corp., 135 F.3d 543, 544 (8th Cir. 1998).

53. *Id.* at 550.

in a Title VII proceeding.[54] The plaintiff in the case, Donna Jute, had been named as a favorable witness and had offered to testify in her coworker's sex discrimination lawsuit.[55] Before she found out that she had been named as a favorable witness, or even that her colleague's case had settled, Jute was removed from a work team that had "offered [her] a unique opportunity for career advancement."[56] When she inquired about the reason for her removal, the human resources manager told her to "find another job," and that harassment at work was "never going to stop."[57]

Jute did not find another job, and the retaliatory actions continued. On their own, these actions would not have reached the threshold for retaliation that many circuits would have applied prior to *Burlington Northern*.[58] Taken together, however, these actions placed significant pressure on Jute for having volunteered to assist her coworker. To earn extra money, Jute had taught a company-sponsored aerobics class for employees, but after being named as a witness, her class was cancelled.[59] She did not receive a promotion she had been promised.[60] Later, she was told that could not be promoted unless she worked night hours, despite the fact that she had no child care for her daughter during the night shift.[61] Jute was not allowed to attend business trips with the salaried employees in her work team, which cut her off from valuable experience and training needed for a promotion.[62] Finally, she fared poorly during a corporate restructuring, which she believed was due, in part, to her participation in the Title VII process.[63]

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54. Jute v. Hamilton Sunstrand Corp., 420 F.3d 166 (2d Cir. 2005). The facts described in *Jute* and *Moore*, derived from an appellate court opinion, reflect the procedural posture of the case (appeal of summary judgment disposition in favor of the defendant). As such, the facts are construed in favor of the plaintiffs. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). While not completely objective, these facts are illustrative in showing the kinds of actions that the plaintiffs themselves considered to be part of the retaliation.

55. *Jute*, 420 F.3d at 169–70.

56. *Id.*

57. *Id.*

58. *See supra* notes 18–20.

59. *Jute*, 420 F.3d at 170.

60. *Id.*

61. *Id.* at 170 n.2. Jute's situation is similar to that of the plaintiff in *Washington v. Illinois Department of Revenue*, 420 F.3d 658 (7th Cir. 2005), where the Seventh Circuit found a change in an employee's work hours was materially adverse due to her child care responsibilities. *Id.* at 662.

62. *Jute*, 420 F.3d at 170.

63. *Id.*

The police officer plaintiffs in *Moore* faced a similar pattern of retaliation.[64] These white officers were friendly with the black officers in their unit and opposed discriminatory treatment against them. Because of this, the white officers were subjected to some of the same treatment as their black colleagues, including being assigned less desirable shifts, being assigned to more difficult or dangerous duties, and being denied break time.[65] Their superiors discussed the officers' personal affairs in front of others and monitored their locations more closely.[66] One officer reported that a captain told him he would "make [the officer's] life a living nightmare" if he reported his sergeant's discrimination against black officers to the EEOC.[67] Several officers were threatened with being transferred to the district farthest from their homes.[68]

The retaliatory activities against the white officers who had opposed discrimination in the squad took more menacing forms as well. When two of the white officers were shot while on duty, they felt that they did not receive the proper followup after the incident. One of them stated, "[B]ecause of our association with the black officers, we weren't getting the backup, like, we would have . . . if . . . we didn't associate with them."[69] One officer was assaulted by a fellow officer following an incident that he believed was precipitated by his criticism of the racism in the squad.[70] Following the filing of the officers' Title VII lawsuit, one officer was subjected to multiple "sick checks" at his home.[71] The police department performed thirty sick checks for one of the officers in a two-month period.[72] Another officer reported that a police captain intervened in his child custody case.[73]

The *Jute* and *Moore* cases show the variety of forms that retaliatory action can take in the workplace. They also show how

64. *See* Moore v. City of Phila., 461 F.3d 331, 338–40 (3d Cir. 2006). *Moore* reached the court of appeals after *Burlington Northern* was decided by the Supreme Court and follows that case's analysis of what constitutes retaliation. *Id.* at 341–42.

65. *Id.* at 335, 337. For example, one of the white officers questioned why a black coworker was ordered to stand outside in the cold and the rain and, as a result, was ordered to stand outside with her. *Id.* at 335.

66. *Id.* at 338.

67. *Id.* at 337.

68. *Id.* at 337–38.

69. *Id.* at 336.

70. *Id.* at 339.

71. *Id.* at 338. "Sick checks" are performed occasionally to make sure that officers on medical leave are at home and have a legitimate medical excuse. *Id.*

72. *Id.*

73. *Id.* at 340.

some retaliatory acts may have a significant impact on an employee's life, even if they did not meet the pre-*Burlington Northern* standards of an adverse employment action or an ultimate employment decision. The loss of an additional source of income from teaching a class, or having to choose between the possibility of promotion and adequate child care, can have a significant impact on an employee's life and her decision to support a coworker's charge or oppose an employer's discriminatory practice. In the words of the Supreme Court, these actions are "materially adverse."[74] Other retaliatory actions that did not meet the more restrictive standards could put an employee in serious danger, such as when a police officer does not receive backup following a shooting or when officers are assigned to a more dangerous beat.

The impact of these actions may be even more significant because they are not directed toward the person or persons who are the object of discrimination, but instead toward third parties who call discriminatory practices into question or attempt to remediate them. For this reason, the *Burlington Northern* standard, which draws the line at conduct that "would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination,' " is particularly important.[75] These third parties do not act in their own direct interest, so they may be more vulnerable to pressures that stop short of ultimate employment actions. They may be the weak link in the chain of evidence and inferences that a plaintiff needs to prevail on a discrimination claim.[76]

Viewing retaliation from the experience of third parties who participate in Title VII proceedings or oppose discriminatory practices suggests that *Burlington Northern*'s contextual reading of the anti-retaliation provision of Title VII may be more appropriate than the alternatives. This perspective addresses some of the concerns in response to the Court's "reasonable employee" standard. In his concurrence, Justice Alito criticized the Court's majority for creating a sort of sliding scale for retaliation, suggesting that plaintiffs with less serious claims would be more easily dissuaded, while those

74. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006); *see also* Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) (applying the material adversity standard in a case where a mother was denied the flexible schedule she had relied on to care for her disabled son).

75. *Burlington Northern*, 126 S. Ct. at 2411 (quoting *Washington*, 420 F.3d at 662).

76. *See id.* at 2412–14 ("Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.").

with more serious claims would be able to withstand more severe retaliation.[77] The result, Alito suggested, could be that the same employer action could be considered retaliatory in some contexts and not in others under the "reasonable employee" standard.[78]

Justice Alito was correct to point out that some of the victims of unlawful discrimination in the workplace may have incentives to continue with their claims despite relatively minor retaliatory actions. However, such personal incentives do not apply to third-party participants in a Title VII proceeding. The threat of being transferred to a faraway precinct or the pressure to work the night shift may not dissuade some workers from supporting their own Title VII claims, from which they stand to benefit and possibly win money damages. To a reasonable worker who acts to support a colleague, or to remedy a practice that he finds objectionable but that does not affect him personally, such acts may be enough. To borrow an example from the Seventh Circuit, "petty bureaucratic nastiness" in retaliation for filing a "self-interested" discrimination charge may not rise to the level of materiality required under Title VII.[79] The court pointed out, however, that "it takes less to deter an altruistic act than to deter a self-interested one," and suggested that slights such as a moving an "altruistic" third-party claimant to a smaller cubicle or subjecting him to annoying music throughout the workday may be material and therefore discriminatory.[80]

Protecting "altruistic" claimants from the types of retaliation that are likely to discourage their claims also acknowledges the difficulty involved in opposing discrimination. Social science research indicates that when individuals identify conduct as discriminatory, they often refrain from confronting such behavior due to a perception that the costs of doing so outweigh the benefits.[81] The mere potential for retaliation serves to maintain the status quo.[82] When retaliatory activity occurs, it deters not only the opponent, but also sends a message to other employees that such confrontational activities are futile. This message can be particularly harmful in organizations that have a history of tolerating discrimination and discouraging opposition to it, making these workplaces even more resistant to

77. *Id.* at 2418–22 (Alito, J., concurring in the judgment).
78. *Id.*
79. *See Washington*, 420 F.3d at 661–62.
80. *Id.*
81. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 36–39 (2005).
82. *See id.*

change.[83] If employees see that a coworker who speaks up about discrimination in the workplace is later denied an expected promotion or refused backup in a dangerous situation, the lesson is learned. Knowing that they have the possibility of legal redress may not encourage all employees, but it at least removes the impression that an employer can mistreat those who speak up with impunity. Since "past outcomes of responses to [discrimination] influence expectancies for future outcomes," additional protection for employees who oppose unfair practices may help to create the kind of positive feedback that is necessary to challenge institutional discrimination.[84]

The new standard in *Burlington Northern* as applied to the participation and opposition clauses also creates incentives for employers to remedy discrimination in the workplace because it opens them up to greater potential liability.[85] Employers who take the initiative to train management and develop internal grievance procedures to address employee complaints will find it easier to successfully defend against retaliation claims in the future.[86] In order to prevent liability, however, such policies will have to be put into practice, not just added to an employee handbook and then ignored in day-to-day interactions.[87] Additionally, some employers may adapt to the ruling by requiring approval by upper management or an attorney before carrying out disciplinary actions.[88]

Employers may want to pay special attention to the needs of employees with caregiving responsibilities. Under the older standards, denying flexibility in the work day to attend to family needs did not rise to the level of an adverse employment action and was not actionable as retaliation. These accommodations, however, are certainly material; their impact is felt by employees as much as a

83. *Id.* at 36–39, 39 n.61. Other workplace protections may make some workers more likely to challenge discrimination. One example is *Burlington Northern* plaintiff Sheila White, who was protected by a union at her workplace, giving her more protection from a retaliatory firing than a non-union at-will employee. *Attorneys Predict Wide-Ranging Impact of* White *Decision on Title VII, Other Cases*, Daily Lab. Rep. (BNA) No. 224, at C-1 (Nov. 21, 2006).

84. Brake, *supra* note 81, at 39 n.61 (citing Deborah Erdos Knopp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 699–700 (1997)).

85. Burlington Northern*'s Impact Assessed in ABA-Hosted Teleconference*, *supra* note 26, at A-11 to A-12.

86. *Id.*

87. *See Attorneys Predict Wide-Ranging Impact of* White *Decision on Title VII, Other Cases*, *supra* note 83, at C-1 to C-2.

88. *Id.*

denied promotion or salary increase. The case of *Washington v. Illinois Department of Revenue*[89] is instructive for employers, particularly since the Supreme Court seems to have relied on it in *Burlington Northern*.[90] In *Washington*, an employee who had worked a different schedule, which allowed her to leave work early to care for her disabled son, was moved back to a regular nine-to-five shift after filing a civil rights complaint. The Seventh Circuit noted that the change "would not be materially adverse for a normal employee—but Washington was *not* a normal employee .... Working 9-to-5 was a materially adverse change *for her*, even though it would not have been for 99% of the staff."[91] While the *Washington* court was correct in pointing out how inflexible scheduling may have the power to deter a discrimination claimant, it appears to have understated the need for such accommodations. Many "normal employees" must balance work and family responsibilities.[92] There are some indications that courts are beginning to view discrimination claims that involve family and caregiving responsibilities more favorably.[93] Given this trend, employers should take special care to avoid creating material adversity for employees who may depend on policies such as flexible scheduling or leave.

An expanded definition of retaliatory activity may also make it easier for employees to act collectively and address problems in the workplace. Because the broader protections against retaliation "extend[] protection beyond the immediate targets of discrimination to include protection for any person who opposes it," confronting inequality at work can become everyone's business.[94] In this way, "discrimination law allows the mobilization of collective strategies for opposing inequality instead of seeing discrimination as only the problem of the targeted individual."[95] Knowing that the law affords them protection against a wider variety of potential employer

89. 420 F. 3d 658 (7th Cir. 2005).

90. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410–16 (2006).

91. *Washington*, 420 F.3d at 662.

92. *See* JOAN C. WILLIAMS, CTR. FOR WORKLIFE LAW, UNIV. OF CAL. HASTINGS COLL. OF THE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION 3–7 (2006), http://www.uchastings.edu/site_files/WLL/onesickchild.pdf (relying on a study of union arbitrations involving work/family conflicts).

93. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 124–30 (2003).

94. Brake, *supra* note 81, at 74–75.

95. *Id.*

retaliation may make employees more likely to oppose a discriminatory practice, even if they are not its direct victims.

This broader view also recognizes that a discriminatory or hostile atmosphere at work harms more workers than just those who are the target of the discrimination. This is particularly important in certain jobs—such as those of police officers—where the ability to work together with one's coworkers is essential.[96] Two cases illustrate the ripple effect that discrimination may have on those who are not its victims. In *Childress v. City of Richmond*[97] and *Walker v. Mueller Industries*,[98] white male police officers and a white union steward, respectively, alleged a derivative cause of action under Title VII.[99] Essentially, the plaintiffs in these two cases claimed that they suffered when working relationships with women and blacks in the workplace were impaired due to a hostile work environment.[100] While neither derivative claim was successful,[101] the lawsuits demonstrate that discrimination against certain employees can have a ripple effect that extends beyond those personally affected by discriminatory activity.

The legislative history of Title VII indicates that Congress anticipated the possibility that employees may be intimidated and may feel pressure not to participate in the process or oppose discriminatory practices. For this reason, Congress allowed some claims to be brought on behalf of individuals by organized groups, such as civil rights organizations and labor unions.[102] This change reflects both the practical difficulties of being a lone voice of dissent in a hostile workplace, as well as the history of the civil rights movement that led to the passage of Title VII.[103]

The civil rights movement pursued a strategy of collective action to address discrimination against individuals in the workplace and other areas of life. The expanded protection from retaliatory acts

96. *See* Moore v. City of Phila., 461 F.3d 331, 335–36 (3d Cir. 2006).

97. 134 F.3d 1205 (4th Cir. 1998).

98. 408 F.3d 328 (7th Cir. 2005).

99. *See Walker*, 408 F.3d at 329–30; *Childress*, 134 F.3d at 1206–07.

100. *See Walker*, 408 F.3d at 329–30; *Childress*, 134 F.3d at 1206–07.

101. *See Walker*, 408 F.3d at 334–35 (affirming district court's order granting summary judgment for defendants); *Childress*, 134 F.3d at 1207 (dismissal of plaintiff's claim affirmed by an equally divided court).

102. *See* SULLIVAN ET AL., *supra* note 28, § 11.8.2 (suggesting that the 1972 amendments to Title VII were added for the purpose of allowing such organizations to sue on behalf of victims of discrimination who feared retaliation if they sued themselves); *see also* 118 CONG. REC. 7563, 7564 (1972) (explaining how the 1972 amendments would "enable aggrieved persons to have charges processed under circumstances where they are unwilling to come forward publicly for fear of economic or physical reprisals").

103. *See* SULLIVAN ET AL., *supra* note 28, § 11.8.2.

provided by *Burlington Northern* may make these collective strategies more feasible. Greater protection from retaliation may make it easier to organize one's fellow employees to support a coworker's claim or oppose an employer's discriminatory practice. Increased participation in support of opposition activities could lead to the success of individual claims in litigation. Participation by coworkers could also drive changes in the workplace without going through the courtroom.[104] The more that employees are protected when they assist one another and resist discriminatory practices, the more pressure they may bring to bear on their employer to change these conditions. An employer that can no longer rely on retaliation and intimidation without the fear of being sued may be more easily persuaded to end such practices and train supervisory personnel to help prevent them.

While many third parties who support a claim or oppose a discriminatory practice in Title VII discrimination claims do not take center stage, their role is nonetheless vital in securing the freedom from discrimination that Congress intended. The Court's new standard for retaliation in *Burlington Northern* ensures that their voices will not be silenced and that they will continue to play an increasingly important supporting role in resolving conflicts over discrimination in the nation's workplaces.

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104. Burlington Northern*'s Impact Assessed in ABA-Hosted Teleconference, supra* note 26, at A-11 to A-12 (suggesting that management training to respond to allegations of discrimination in the workplace could be essential in addressing the expected increase in claims under the new retaliation standard).