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DEFINING EMPLOYER LIABILITY IN SEXUAL HARASSMENT AND TITLE VII RETALIATION CLAIMS: THE SUPREME COURT CREATES THE SAME PROBLEM TWICE

I. INTRODUCTION

One of the most influential anti-discrimination statutes enacted by Congress is Title VII of the Civil Rights Act of 1964 (Title VII),[1] which specifically addresses discrimination in the workplace.[2] Title VII contains two provisions: a substantive provision (Substantive Title VII) and an anti-retaliation provision (Anti-Retaliatory Title VII).[3] Substantive Title VII provides that employers may not treat an employee differently based on race, color, religion, sex, or national origin.[4] Anti-Retaliatory Title VII prohibits an employer from retaliating against employees who make complaints or participate in investigations concerning violations of Substantive Title VII.[5] Both provisions seek to achieve two overarching goals: 1) to

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[1] 42 U.S.C. § 2000e (2008) (creating laws to protect employees from mistreatment based on race, color, religion, sex, or national origin). Title VII was most recently amended by the Civil Rights Act of 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) (amending the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241).

[2] 42 U.S.C. § 2000e (2008) (addressing issue of workplace discrimination).

[3] 42 U.S.C. § 2000e-2 (2008) (making it unlawful for employers to discriminate against employees based on race, color, religion, sex, or national origin); *see also* 42 U.S.C. § 2000e-3 (2008) (protecting employees from retaliation from their employers for participating in claims based on substantive provision of Title VII).

[4] 42 U.S.C. § 2000e-2 (2008) (setting out unlawful employment discrimination practices). Section 703(a) of the Civil Rights Act of 1964 states:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2008).

[5] 42 U.S.C. § 2000e-3 (2008) (making it unlawful for an employer to retaliate against an employee for making claims of employment discrimination). Section 704(a) of Civil Rights Act of 1964 states:

provide remedies for employees subjected to workplace discrimination, and 2) to encourage employers to prevent discrimination and retaliation from ever occurring.[6] In order to achieve these goals Substantive Title VII provides the remedies, while Anti-Retaliatory Title VII protects an employee's access to those remedies.[7]

Recently, in *Burlington Northern & Santa Fe Railway Co. v. White*,[8] the Supreme Court expanded the definition of a retaliation claim under Anti-Retaliatory Title VII.[9] In doing so, the Court increased the scope of what constitutes a retaliation claim under Anti-Retaliatory Title VII.[10] By providing employees with greater protection under Title VII, the decision has effectuated the first purpose of Title VII.[11] The second purpose of Title VII, however, has not been promoted because by failing to address the standard of employer liability for retaliation claims under Anti-Retaliatory Title VII, the Court has failed to provide employers an incentive to prevent retaliation from occurring.[12]

The Supreme Court previously faced a similar dilemma while determining the details of sexual harassment law.[13] Sexual harassment is a

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> 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) (2008).

[6] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (discussing primary purpose of Title VII is not to provide remedy but to prevent harm from ever occurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (discussing one purpose of Title VII is to prevent discrimination from occurring in first place).

[7] Burlington N. and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412 (2006) (discussing purpose of the anti-retaliation provision of Title VII); Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (discussing primary purpose of Title VII anti-retaliation is to protect employees from adverse treatment based on their participation in Title VII activities).

[8] 126 S. Ct. 2405 (2006) (expanding employers' potential to be found liable for retaliation claims, without discussing standard of employer liability).

[9] *Id.* at 2414-15 (explaining scope of anti-retaliation provision of Title VII is greater than that of substantive provision).

[10] *See id.* (adopting broad definition of what constitutes Title VII retaliation claim).

[11] *Id.* at 2414 (explaining Court's decision would provide greater protection for employees under Title VII).

[12] *See generally* Faragher v. City of Boca Raton, 524 U.S. 775, 804 n.4 (1998) (explaining by expanding employer's potential liability under Title VII, Congress left it to courts to limit liability). *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (stating "Congress' decision to define employer to include any agent of an 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.") (internal quotations omitted).

[13] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759-64 (1998) (detailing standards of

type of sex discrimination that is prohibited under Substantive Title VII.[14] In *Meritor Savings Bank, FSB v. Vinson*,[15] the Supreme Court explained the possible basis for claims of sexual harassment under Substantive Title VII.[16] The Court, however, provided little direction on what the liability of an employer would be in those situations.[17] After circuit courts of appeals could not agree on a standard for employer liability in these cases, the Supreme Court decided the sister cases of *Faragher v. City of Boca Raton*[18] and *Burlington Industries, Inc. v. Ellerth*.[19] These two cases set the standard for employer liability in various sexual harassment claims and provided the employer with an affirmative defense in some of those claims.[20] The purpose of the affirmative defense is to provide employers with an incentive to make preventing sexual harassment in the workplace a priority.[21]

This note examines the present state of Anti-Retaliatory Title VII and discusses the applicability of sexual harassment jurisprudence to Anti-Retaliatory Title VII in order to best achieve the overarching goals of Title VII. In section II, this note explains the jurisprudence of sexual harassment law under Substantive Title VII.[22] Section II also lays out the history of how courts interpreted Anti-Retaliatory Title VII leading up to the Supreme Court's decision in *White*.[23] Section III of this note discusses the current

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employer liability for sexual harassment); *Faragher*, 524 U.S. at 807 (ruling in certain circumstances employers have affirmative defense to liability for sexual harassment); *Meritor*, 477 U.S. at 66 (discussing types of sexual harassment claims and sources for determining employer liability).

[14] *See Meritor*, 477 U.S. at 73 (recognizing sexual harassment as type of sex discrimination); *see also* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (discussing sexual harassment as type of sex discrimination).

[15] 477 U.S. 57 (1986).

[16] *Id.* at 66 (expanding sexual harassment claims to include hostile work environment claims); *see infra* notes 40-44 and accompanying text (explaining two types of sexual harassment claims).

[17] *Meritor*, 477 U.S. at 72 (declining to rule on employer liability for sexual harassment claims).

[18] 524 U.S. 775 (1998) (deciding standards for employer liability in sexual harassment claims).

[19] 524 U.S. 742 (1998) (addressing standards for employer liability in sexual harassment suits).

[20] *See Faragher*, 524 U.S. at 807-08 (explaining employers have affirmative defense to liability for sexual harassment in certain cases); *Burlington Indus.*, 524 U.S. at 764-65 (adopting same ruling as in the case of *Faragher*); *infra* notes 54-57 and accompanying text (discussing affirmative defense available to employers in sexual harassment claims).

[21] *Burlington Indus.*, 524 U.S. at 765 (explaining purpose of affirmative defense is to protect employers).

[22] *See* discussion *infra* Part II.A and accompanying text (discussing history of sexual harassment law).

[23] 126 S. Ct. 2405 (2006); *see* discussion *infra* Part II.B and accompanying text (detailing history of Anti-Retaliatory Title VII).

state of employer liability under the new definition of Title VII retaliation claims as defined by the Supreme Court in *White*.[24] Finally, section IV explains how sexual harassment employer liability standards can be applied to Anti-Retaliatory Title VII in order to best effectuate the purposes of Title VII.[25] In doing so, this note advocates applying the standards created under sexual harassment law to limit employer liability in retaliation claims under Anti-Retaliatory Title VII, specifically making the sexual harassment affirmative defense available to employers in certain circumstances.[26]

II. HISTORY

In 1964, Congress passed the Civil Rights Act,[27] which in part created statutory protection for employees from discrimination.[28] These statutory protections are found within Title VII of the Act,[29] and were later amended by the Civil Rights Act of 1991.[30] Title VII contains two provisions: Substantive Title VII and Anti-Retaliatory Title VII.[31] Substantive Title VII makes it unlawful for an employer to treat an employee different based on race, sex, religion, color, or national origin.[32] Under Substantive Title VII, the discriminatory act must be related to the employee's compensation, terms, conditions, or privileges of employment.[33] Anti-Retaliatory Title VII provides that it is unlawful to retaliate against an employee for having made a report under Substantive Title VII, or for having partici-

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[24] 126 S. Ct. 2405; *see infra* notes 70-89 and accompanying text (explaining current state of Anti-Retaliatory Title VII resulting from Court's decision in *White*).

[25] *See* discussion *infra* Part IV and accompanying text (discussing how sexual harassment jurisprudence can help interpret Anti-Retaliatory Title VII).

[26] *See* discussion *infra* Part IV and accompanying text (arguing affirmative defense will limit employer liability in retaliation claims).

[27] 42 U.S.C. § 2000e (2006) (protecting employees from mistreatment based on race, color, religion, sex, or national origin).

[28] 42 U.S.C. § 2000e-2 (2006) (protecting employees from discrimination based on race, color, nationality, religion, and sex).

[29] *Id.*

[30] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) (amending Civil Rights Act of 1964 by allowing more expansive use of statistical evidence, as well as providing awards of punitive and compensatory damages).

[31] 42 U.S.C. § 2000e-2 (2006) (making it unlawful for employers to discriminate against employees based on race, color, religion, sex, or national origin); 42 U.S.C. § 2000e-3 (2006) (protecting employees from retaliation from their employers for participating in claims based on Substantive Title VII of Title VII); *supra* note 2 and accompanying text.

[32] 42 U.S.C. §§ 2000e-2(a)(1)-(2) (2006) (protecting employees from types of discrimination in the workplace).

[33] 42 U.S.C. § 2000e-2(a)(1) (2006) (stating discrimination must be with respect to compensation, terms, conditions, or benefits of employment).

pated in an investigation of a violation of Substantive Title VII.[34] A retaliation claim under Anti-Retaliatory Title VII does not require that there be an actual violation of Substantive Title VII, only that the employee in good faith believes that there was a violation.[35]

A. Sexual Harassment: The Path Already Taken

The history of sexual harassment law is similar to the history of Anti-Retaliatory Title VII.[36] Sexual Harassment is an actionable type of sex discrimination, prohibited by Substantive Title VII of the Civil Rights Act of 1964.[37] Sex discrimination was, however, added to Title VII just prior to the statute's enactment, therefore there is minimal legislative history to help determine what discrimination based on sex actually means.[38] As a result, there have been disagreements as to what was actionable as sex discrimination.[39] The Supreme Court did not recognize sexual harassment as a type of sex discrimination under Title VII until 1986, in *Meritor Sav. Bank, FSB v. Vinson*.[40]

In *Meritor*, the Supreme Court recognized two types of sexual harassment claims that are actionable under Substantive Title VII: quid pro quo harassment and hostile work environment harassment.[41] Quid pro quo claims involve supervisors or managers who condition employment benefits on sexual favors.[42] Hostile work environment harassment does not involve economic aspects of employment, but rather it involves harassment at the workplace that becomes so pervasive and severe as to rise to the level of a tangible employment action.[43] The greatest distinction between these

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[34] 42 U.S.C. §§ 2000e-3(a)-(b) (2006) (explaining what is unlawful retaliation in workplace).

[35] *See* Byers v. Dallas Morning News, Inc., 209 F.3d 419, 428 (5th Cir. 2000) (explaining employee must show good faith belief of violation of Substantive Title VII).

[36] *See* discussion *infra* Parts II.A, II.B (showing similar histories of sexual harassment and Anti-Retaliatory Title VII).

[37] 42 U.S.C. § 2000e (2006) (recognizing sex discrimination as unlawful employment action); *see* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (recognizing sexual harassment as type of sex discrimination); *see also* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (discussing sexual harassment as sex discrimination).

[38] 110 CONG. REC. 2577-84 (1964) (adding prohibition of sex discrimination to Title VII at last minute).

[39] *See Meritor*, 477 U.S. at 64 (discussing arguments for harassment not to be actionable as sex discrimination). The argument in opposition to sexual harassment was that Title VII was meant to deal only with economic disruptions created by discrimination. *Id.*

[40] 477 U.S. 57 (1986) (recognizing harassment as actionable form of sex discrimination).

[41] *See id.* at 66 (explaining different types of actionable claims for sexual harassment).

[42] *Id.* at 65 (explaining quid pro quo sexual harassment claims).

[43] *Id.* (describing claim of hostile work environment).

two types of harassment is that quid pro quo expressly violates Substantive Title VII, while hostile work environment constructively violates Substantive Title VII.[44]

While the Court decided what types of claims were actionable as sexual harassment in *Meritor*, it did not decide the standard for employer liability in sexual harassment cases.[45] Instead, the Court only hinted that agency law should be the source for determining liability in these situations.[46] With no Supreme Court guidance, courts of appeal created different standards of employer liability for sexual harassment.[47] Most courts agreed that an employer would be vicariously liable for quid pro quo harassment.[48] The courts, however, could not agree on what the standard for employer liability should be in hostile work environment claims.[49]

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[44] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) (explaining Title VII can be violated expressly or constructively).

[45] *See Meritor*, 477 U.S. at 72 (declining to rule on employer liability for sexual harassment claims).

[46] *Id.*

[47] *See* Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1443 (10th Cir. 1997), *vacated*, 524 U.S. 947 (1998). In *Harrison*, the court recognized four situations where the employer would be liable for hostile work environment claims. *Id.* at 1446. Based on agency principles, the court ruled that the employer would be liable where

> 1) The supervisor committed the harassment while acting in the scope of his employment . . . 2) The employer knew about, or should have known about, the harassment and failed to respond in a reasonable manner . . . 3) If the employer manifested in the supervisor the authority to act on its behalf, such manifestation resulted in harm to the plaintiff, and the plaintiff acted or relied on the apparent authority in some way . . . 4) If the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment.

Id.; *see* Gary v. Long, 59 F.3d 1391, 1395 (D.C. Cir. 1995). The D.C. Circuit standard dealt with agency principles as well. *Id.* The court held that the employer would be liable for the hostile work environment created by a supervisor unless the employer could show either that the employee knew or should have known about policies against this conduct and should have reported it to the employer, or that the employee could not have reasonably relied on the supervisor's representations that they were working on behalf of the employer. *Id.* at 1398; *see also* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994). The *Karibian* court ruled that an employer would be liable for the hostile work environment created by a supervisor if the supervisor was either aided by the employer relationship in creating the hostile environment, or used actual authority or apparent authority to effectuate the harassment. *Id.*

[48] *See Meritor*, 477 U.S. at 76 (Marshall, J., concurring) ("[E]very Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee.").

[49] *Compare Harrison*, 112 F.3d at 1446 (explaining standard of employer liability in sexual harassment), *vacated*, 524 U.S. 947 (1998), *and Gary*, 59 F.3d at 1395 (deciding standard for employer liability in sexual harassment claims for D.C. Circuit), *with Karibian*, 14 F.3d at 780 (explaining conditions that would make employer liable in sexual harassment claims).

It was not until over ten years later that the Supreme Court addressed employer liability in sexual harassment claims in the sister cases of *Burlington Industries, Inc. v. Ellerth*[50] and *Faragher v. City of Boca Raton*.[51] In *Ellerth* and *Faragher*, the Court held that where a tangible employment action is taken against the employee, the employer is vicariously liable.[52] The employer is also vicariously liable when a hostile work environment is so severe and pervasive that it amounts to a tangible employment action.[53] In situations not involving a tangible employment action, an employer is not vicariously liable, but rather can assert an affirmative defense.[54] In order to assert this affirmative defense, the employer must show: 1) that there was a policy prohibiting sexual harassment; 2) that there was a procedure in place to file complaints outside of the direct chain of command; 3) that the employer exercised reasonable care to prevent and correct the harassing behavior; and 4) that the employee unreasonably failed to utilize the preventative or corrective policies provided by the employer.[55] If the employer can prove the above four factors, it will not be liable for the sexual harassment.[56] By providing this affirmative defense, the Court's holdings in *Ellerth* and *Faragher* limited employer liability and gave employers an incentive to take preventative measures against sexual harassment.[57]

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[50] 524 U.S. at 742 (determining standard of employer liability in Title VII sexual harassment claims). In *Ellerth*, the employee alleged that sexual harassment by a supervisor forced her to quit her job. *Id.* at 747. The harassment included repeated offensive remarks and gestures, which included comments about her breasts and clothing. *Id.* at 748. The Court held that where a tangible employment action is taken against the employee, the employer is vicariously liable. *Id.* at 764. When there is no tangible employment action, the employer can assert an affirmative defense. *Id.* at 765.

[51] 524 U.S. at 775. In *Faragher*, the sexual harassment included inappropriate touching, offensive remarks, and a sexually abusive environment. *Id.* at 780. The Court reached the same holding as in *Ellerth*. *Id.* at 807.

[52] *Ellerth*, 524 U.S. at 764-65 (explaining tangible employment actions include demotion, discharge, or undesirable reassignment); *Faragher*, 524 U.S. at 807-08 (adopting same holding as *Ellerth*). The Court reasoned that "[a] tangible employment decision requires an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 762.

[53] *Ellerth*, 524 U.S. at 761 (explaining employers will be liable for actionable hostile work environment claims).

[54] *See Faragher*, 524 U.S. at 807 (explaining requirements of affirmative defense); *Ellerth*, 524 U.S. at 765 (detailing requirements of affirmative defense available to employers).

[55] *See Faragher*, 524 U.S. at 807 (explaining requirements of affirmative defense); *Ellerth*, 524 U.S. at 765 (explaining what employer must do to assert affirmative defense).

[56] *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[57] *See Faragher*, 524 U.S. at 805-06 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)) (discussing the primary purpose of Title VII is not to provide remedy but to prevent harm from ever occurring).

B. Anti-Retaliatory Title VII: Did the Court Create the Same Problem Twice?

Without Supreme Court guidance on the issue, circuit courts were split on how to define a retaliation claim under Anti-Retaliatory Title VII.[58] One group of circuit courts held that there was no difference between the actions prohibited by Substantive Title VII and Anti-Retaliatory Title VII.[59] These courts held that the only difference between the two provisions was the reason the actions were made unlawful, not what claims could be brought under the provisions.[60] Under this interpretation, an employee could bring a claim for retaliation for the same reasons that he could bring a substantive claim of employment discrimination.[61] The basis for a claim under either provision was an adverse employment action, defined as a material change in terms, conditions, or benefits of employment.[62]

A second group of circuit courts defined retaliation claims under

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[58] *Compare* Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001), *abrogated by* Burlington N. and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (holding retaliation claims under Title VII include same actions prohibited by substantive provision), *with* Mattern v. Eastman Kodak, Co., 104 F.3d 702, 707 (5th Cir. 1997), *overruled by* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (holding retaliation provision of Title VII prohibits narrower group of acts than substantive provision), *and* Washington v. Illinois Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005) (holding retaliatory provision of Title VII is more expansive than substantive provision).

[59] *See Von Gunten*, 243 F.3d at 865 (holding retaliation claim must include adverse effects on terms, benefits, or conditions); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997), *overruled by* Burlington N. and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (holding retaliatory conduct must alter terms, conditions, or compensation of employee). In substantive discrimination claims under Title VII, the Court requires some alteration of the terms, benefits, or compensation of the employee. *Id.*

[60] *Von Gunten*, 243 F.3d at 865; *Robinson*, 120 F.3d at 1300. Substantive Title VII makes actions by an employer illegal if there was a discriminatory motive. *See* 42 U.S.C. § 2000e-2 (2006) (describing substantive employment discrimination). Anti-Retaliatory Title VII makes employer actions unlawful if they were motivated by retaliation. *See* 42 U.S.C. § 2000e-3 (2006) (addressing retaliatory discrimination).

[61] *See Von Gunten*, 243 F.3d at 865 (ruling there is no distinction between retaliatory and substantive provisions of Title VII).

[62] *Id.* (explaining retaliatory provision of Title VII protects from same types of actions as substantive provision); *see also Robinson*, 120 F.3d at 1300 (holding if retaliatory conduct is not ultimate employment action then it needs to alter terms, conditions, or compensation of employment). In *Von Gunten*, the court held that a retaliation claim "includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment." *Von Gunten*, 243 F.3d at 866. The employee's claims included taking away the employee's use of state car, forced use of personal car, and lowering of the employee's evaluation ratings. *Id.* at 867. It was held that these claims were not objectively hostile and so the dismissal of claims was upheld. *Id.* at 867-69. In *Robinson*, the court held that unsubstantiated oral reprimands and derogatory comments did not alter any aspects of employment and therefore there was no actionable retaliatory conduct. *Robinson*, 120 F.3d at 1300.

Anti-Retaliatory Title VII as being different than those covered by Substantive Title VII.[63] According to these courts, retaliation claims under Anti-Retaliatory Title VII covered a much narrower group of employer actions than those under Substantive Title VII.[64] In order to bring a claim of retaliation in these circuits, the employer must have subjected the employee to an ultimate employment action.[65] An ultimate employment action would include hiring, firing, and demoting an employee.[66]

A third group of circuit courts held that Anti-Retaliatory Title VII was more expansive than Substantive Title VII. [67] These courts held that under Anti-Retaliatory Title VII, the action taken against the employee does not have to be related to terms, conditions, or benefits of employment.[68] Instead, the action simply must make a reasonable employee not

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[63] Mattern v. Eastman Kodak Co., 104 F.3d 702, 707-08 (5th Cir. 1997) (explaining retaliation claims only involve ultimate employment actions such as hiring, firing, and demoting); Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692-93 (8th Cir. 1997) (ruling retaliation claims only include ultimate employment actions, not actions such as negative references). In *Mattern*, the employee alleged that her employer retaliated against her after she made claims of sexual harassment to the employer. *Mattern*, 104 F.3d at 704. She alleged that the retaliation included theft of tools, co-worker hostility, verbal threats of termination, and placing on final warning. *Id.* at 705-06. The court held that the acts alleged did not rise to that standard because there were no resulting consequences, just verbal threats. *Id.* at 707-08. In *Manning*, the employee's claims of retaliation were of general hostility and had no specifics acts. *Manning*, 127 F.3d at 692-93. Since there were no tangible actions taken against the plaintiff, the court held that the retaliation claim was properly dismissed by the trial court. *Id.* at 692.

[64] *See Mattern*, 104 F.3d at 707 (explaining actionable retaliation claim requires more than substantive claims); *Manning*, 127 F.3d at 692 (ruling few things short of termination can constitute retaliation claim).

[65] *See Mattern*, 104 F.3d at 707 (following jurisdictional case law that requires ultimate employment action for retaliation claims); *Manning*, 127 F.3d at 692 (deciding court infers materially adverse employment action from actionable retaliation claim).

[66] *See* Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995) ("Title VII was designed to address ultimate employment decisions. . . .").

[67] *See* Washington v. Illinois Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) (holding retaliatory action must dissuade reasonable worker from making or supporting charges of discrimination); Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (explaining for actions to be actionable as retaliation they must dissuade reasonable employee from engaging in protected activity). In *Washington*, the employee claimed that the removal of her flex-time schedule was done in retaliation for filing a race discrimination complaint. 420 F.3d at 659. The court decided that the retaliation standard included a subjective objectivity. *Id* at 660. The court stated that because the employee had a sick son and needed the flex-time, a jury could have found that the employer was exploiting a known weakness. *Id.* at 662-63. In *Rochon*, an FBI agent claimed that the FBI retaliated against him for having made a complaint of racial discrimination. 438 F.3d at 1213. The plaintiff alleged that the FBI retaliated against him by not investigating death threats made against the plaintiff and his family. *Id.* at 1214. The court ruled that by not addressing the threats, a reasonable FBI agent would be dissuaded from engaging in a protected activity. *Id.* at 1219.

[68] *See Rochon*, 438 F.3d at 1219 (ruling retaliation not limited to employment relationship); *Washington*, 420 F.3d at 660 (holding retaliation does not need to affect employment relation-

want to file a complaint under Substantive Title VII.[69]

In the recent case of *Burlington Northern & Santa Fey Railway Co. v. White*, the Supreme Court settled the circuit split over the definition of a retaliation claim under Anti-Retaliatory Title VII.[70] The Supreme Court held that Anti-Retaliatory Title VII must cover a larger range of activity than Substantive Title VII.[71] The basis for a retaliation claim now includes anything that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[72]

III. THE SITUATION TODAY

With its decision in *White*, the Supreme Court has created the same problem that it created by its decision in *Meritor Savings Bank, FSB v. Vinson*.[73] Prior to *White*, courts struggled when determining the standard of employer liability in Title VII retaliation cases.[74] The Supreme Court's decision in *White* has done nothing to even address this particular problem.[75] Rather than reconciling the various standards, the Supreme Court left it up to district courts to create new standards of employer liability for the broadened definition of retaliation claims.[76] In many cases, this new definition of retaliation claims will cause more confusion when courts try to

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ship).

[69] *See Rochon*, 438 F.3d at 1219 (explaining retaliation must simply discourage reasonable employee from making complaint); *Washington*, 420 F.3d at 660 (holding retaliation occurs if reasonable employee would not want to file discrimination claims).

[70] 126 S. Ct. at 2408-09 (2006) (resolving circuit splits on defining retaliation claim). In *White*, the plaintiff brought a claim of retaliation against her employer after she had alleged sex discrimination. *Id.* at 2409. She claimed that after she made complaints, her employer retaliated by giving her different work assignments, placing her under surveillance, and then suspending her without pay. *Id.* The District Court found for the plaintiff, and the decision was upheld by the Sixth Circuit Court of Appeals. *Id.* at 2410.

[71] *White*, 126 S. Ct. at 2410.

[72] *Id.* (internal citations omitted) (expanding definition of retaliation claims under Title VII).

[73] *Compare White*, 126 S. Ct. at 2415 (2006) (solidifying definition of retaliation under Title VII while not providing standard of employer liability), *with Meritor*, 477 U.S. at 72 (1986) (defining sexual harassment while at same time refusing to establish standard of employer liability).

[74] *See* Coleman v. Potomac Elec. Power Co., 422 F. Supp. 2d 209, 212-13 (D.C. Cir. 2006) (explaining standard for employer liability in retaliatory harassment claims); Cross v. Cleaver, 142 F.3d 1059, 1073-74 (8th Cir. 1998) (examining standard of employer liability in Title VII retaliation claims); Davis v. Palmer Dodge W., Inc., 977 F. Supp. 917, 924 (S.D. Ind. 1997) (discussing standard of employer liability in Title VII retaliation action).

[75] *See White*, 126 S. Ct. at 2415 (neglecting to decide on standard of employer liability under new Title VII retaliation claim definition).

[76] *See id.* (defining Title VII retaliation claims without giving District Courts any direction on its ramifications).

determine when an employer should be held liable.[77]

One standard for employer liability in Anti-Retaliatory Title VII was created by the D.C. Circuit, the same circuit that formulated the definition of a retaliation claim that was adopted in *White*.[78] Under the D.C. Circuit standard, in order for the employer to be liable for the retaliation, the employee must show that he suffered some tangible harm.[79] In order to establish tangible harm, the retaliation or harm must have affected the terms, conditions, or privileges of employment.[80]

The Eighth Circuit adopted a different standard of employer liability with regard to Anti-Retaliatory Title VII.[81] This circuit held that the employer is vicariously liable for retaliation when the person retaliating was a supervisor who used his authority to hire, fire, or demote to retaliate against an employee.[82] Still other factors may affect the employer's liability, including the status of the retaliator and the nature of the conduct.[83]

The United States District Court for the Southern District of Indiana applied yet another standard for employer liability in *Davis v. Palmer Dodge West, Inc.*[84] This court held that when the retaliation was in the form of harassment, the employer would be held to a heightened negligence standard.[85] This standard means that an employer has a heightened duty of care to provide adequate means for employees to make complaints and to investigate these complaints.[86]

The standard for employer liability in Anti-Retaliatory Title VII is

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[77] *See id.*

[78] 126 S. Ct. at 2409 (adopting definition of Title VII retaliation claim from D.C. Circuit); *Coleman*, 422 F. Supp. 2d 209 (creating definition of Title VII retaliation claim that Supreme Court adopted in *White*).

[79] *Coleman*, 422 F. Supp. 2d at 213.

[80] *Id.* The *Coleman* court stated that "[t]o hold defendant liable, plaintiff must show that defendant's actions resulted in . . . 'some . . . materially adverse consequences affecting the terms, conditions, or privileges of her employment . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.'" *Id.* (quoting Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999)).

[81] Cross v. Cleaver, 142 F.3d 1059, 1066 (8th Cir. 1998).

[82] *Id.* at 1073 (reasoning employer is liable in these situations because supervisor is acting as employer). The court further ruled that it did not matter whether or not the employer had any knowledge of the actions of the supervisor. *Id.* at 1074.

[83] *Cross*, 142 F.3d at 1074 (postulating there are certain situations where supervisor's actions could not be reasonably imputed to employer).

[84] 977 F. Supp. 917, 924 (S.D. Ind. 1997).

[85] *Id.* (explaining employer in retaliatory harassment suit is held to heightened negligence standard). The court further explained that if the claim is for non-retaliatory harassment, the employer is held strictly liable. *Id.*

[86] *Id.* (explaining heightened negligence standard creates heightened duty owed to employee).

still in a state of confusion.[87] This issue must be resolved by the Supreme Court, because by not doing so in *White*, the Court created the same problem with Anti-Retaliatory Title VII claims that it created in its decision in *Meritor* for sexual harassment cases under Substantive Title VII.[88] As a result, under current Anti-Retaliatory Title VII law, employers have little incentive to prevent retaliation from occurring.[89]

IV. HOW TO BEST FINISH THE JOB STARTED BY THE *WHITE* COURT

Now that the Court has provided a clear definition of what constitutes a claim of retaliation under Anti-Retaliatory Title VII, it must determine a clear standard for employer liability in these cases.[90] The lack of a clear standard of employer liability for newly defined retaliation claims will likely lead to a circuit split, as it did in sexual harassment law.[91] Furthermore, in deciding what the standard of employer liability in Anti-Retaliatory Title VII should be, courts should provide employers with an incentive to prevent retaliation from occurring in the workplace.[92] By providing such an incentive, the Court would prevent harm from occurring and it would effectuate the core purposes of Title VII, preventing harm from ever occurring.[93]

Anti-Retaliatory Title VII has developed a similar history and case precedent to sexual harassment law.[94] As a result, sexual harassment juris-

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[87] *Supra* notes 78-86 and accompanying text (discussing different existing views of employer liability standards in Title VII retaliation).

[88] *Cf. Meritor*, 477 U.S. at 72 (1986) (creating same situation in Anti-Retaliatory Title VII as was created in sexual harassment law by not defining a standard of employer liability). *Compare White*, 126 S. Ct. at 2415 (2006) (solidifying definition of retaliation under Title VII while not providing standard of employer liability), *with Meritor*, 477 U.S. at 79 (defining sexual harassment while at same time refusing to establish standard of employer liability).

[89] *Supra* note 6 and accompanying text (discussing dual purposes of Title VII).

[90] *See* Margery Corbin Eddy, Note, *Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms*, 63 ALB. L. REV. 361 (1999) (noting without clear definition of retaliation claim, a clear standard of employer liability cannot be decided).

[91] *See supra* notes 45-49 and accompanying text (discussing decision in *Meritor* and resulting circuit splits).

[92] *See supra* notes 6-12 and accompanying text (discussing dual purposes of Title VII and how *White* only addressed one of those purposes).

[93] *See supra* notes 54-57 and accompanying text (explaining affirmative defense in sexual harassment and how it provides employer incentive to prevent harm).

[94] *Compare* discussion *supra* Part IV (discussing how sexual harassment jurisprudence can help interpret Anti-Retaliatory Title VII), *with* discussion *supra* Part II.B (comparing history of sexual harassment interpretation with history of Title VII retaliation history).

prudence provides a good model for determining the standard of employer liability in Anti-Retaliatory Title VII.[95] In *Meritor*, the Supreme Court provided a clear definition of what constituted substantive sexual harassment by recognizing two categories of sexual harassment.[96] This decision, however, did not explain what the standard for employer liability would be for those categories, and this resulted in each circuit court trying to decide what the standard of employer liability should be.[97] The Supreme Court eventually decided the standard of employer liability in sexual harassment law, just as it must do with Anti-Retaliatory Title VII.[98]

The definition for actionable retaliation decided in *White* essentially created three categories of retaliation in Anti-Retaliatory Title VII.[99] These new categories have exposed employers to more liability without providing any clear way to limit that exposure.[100] Each of these categories should require a separate standard of employer liability, similar to how sexual harassment law is treated, in order to provide some limit to employer liability for retaliation.[101]

A. Tangible Employment Actions and Retaliatory Harassment

The first category of retaliation claims relates to an employee's compensation, conditions, terms, and benefits of employment.[102] Within this category are two subcategories of claims: Tangible Employment Actions and Retaliatory Harassment.[103] These types of claims are also recog-

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[95] *See* discussion *supra* Part II.A (discussing history of sexual harassment jurisprudence); *see also* Eddy, *supra* note 90 (discussing applicability of sexual harassment liability standards to retaliation).

[96] *See supra* notes 40-45 and accompanying text (detailing decision in *Meritor*).

[97] *See supra* notes 46-49 and accompanying text (discussing aftermath of *Meritor*).

[98] *See supra* notes 50-57 and accompanying text (explaining effects of *Faragher* and *Ellerth*).

[99] *See* Irene Gamer, *The Retaliatory Harassment Claim: Expanding Employer Liability in Title VII Lawsuits*, 3 SETON HALL CIR. REV. 269, 271 (2006) (discussing how *White* has created new types of actionable retaliation such as retaliatory harassment).

[100] *See generally* Gina Cook, *U.S. Supreme Court Expands Extent of Employer Liability for Retaliation Claims*, 43 TENN. BAR J. 30 (January 2007) (explaining how Supreme Court's decision in *White* has broadened employer liability).

[101] *See supra* notes 52-57 and accompanying text (discussing how sexual harassment law treats employer liability for different claims); *see also* Gamer, *supra* note 99, at 299-300 (explaining similarities of hostile work environment and retaliatory harassment and need for similar treatment of each).

[102] *See supra* note 33 and accompanying text (explaining what can be substantive Title VII claim); *White*, 126 S. Ct. at 2414 (explaining Title VII retaliation covers what substantive provision does and more).

[103] *Supra* note 52 (defining tangible employment action); *see* Gamer, *supra* note 99, at 271

nized under Substantive Title VII, but only when the harassment is motivated by discrimination instead of retaliation.[104] As such, these categories of retaliation should provide a similar standard of employer liability as is available under sexual harassment law.[105]

When an action taken against the employee is a Tangible Employment Action, the employer should be held vicariously liable, because the employer knows the action has been taken.[106] Tangible Employment Actions include firing, demotion, or undesirable reassignment.[107] When these actions occur, the supervisor has directly used the employer's power to affect a term or condition of one's employment.[108] A court should, therefore, hold the employer vicariously liable for this type of retaliation just as in sexual harassment.[109]

Retaliatory harassment is similar to a hostile work environment claim under sexual harassment law, as the two claims have the same requirements.[110] Retaliatory Harassment Claims should be actionable as retaliation claims when they are caused by a supervisor and are so severe and pervasive that they amount to a tangible employment action.[111] In these cases, although there is no actual tangible employment action, the change in the employee's work environment becomes so severe that it causes serious problems similar to tangible employment actions.[112] Here, a court should hold the employer vicariously liable as in hostile work environment claims because the harassment is so severe that the employer is likely aware of it.[113]

(discussing how *White* has made retaliatory harassment an actionable form of retaliation).

[104] *See supra* notes 41-44 and accompanying text (explaining quid pro quo and hostile work environment harassment as actionable under Title VII's substantive provision).

[105] *See* Eddy, *supra* note 90 (discussing applicability of sexual harassment liability standards to retaliation); Karyn A. Doi, *Title VII's Retaliation Jurisprudence: Litigation Despite Faragher and Ellerth*, 68 DEF. COUNS. J. 83 (2001) (arguing when claim of retaliation does not amount to tangible employment action, it should be analyzed as hostile work environment).

[106] *See supra* notes 52-53 and accompanying text (explaining that where sexual harassment includes tangible employment action, employer is vicariously liable).

[107] *Supra* note 52 (defining tangible employment action).

[108] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762-63 (1998) (explaining reasons for making employers vicariously liable for tangible employment actions).

[109] *See supra* note 52 and accompanying text (explaining employer liability for tangible employment action in sexual harassment).

[110] *See supra* notes 43-44 and accompanying text (describing hostile work environment claims).

[111] *See* Gamer, *supra* note 99, at 270 (explaining retaliatory harassment occurs when employee faces hostile work environment in retaliation for making substantive complaint).

[112] *Id.*

[113] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (explaining employer will be vicariously liable when hostile work environment is actionable and created by supervisor).

B. The Expanded Scope of Title VII Retaliation

The decision in *White* created two new types of actionable retaliation claims.[114] The first type pertains to actions that do not affect the compensation, conditions, terms, or benefits of employment, yet would still stop a reasonable employee from filing a claim for employment discrimination.[115] If the retaliatory action does not concern itself with the employee's relationship to the employer, there is little chance that the employer would know that there was a problem.[116] Due to the lack of employer's ability to control these types of situations, employers should, at the very least, be afforded an affirmative defense similar to the one available in sexual harassment cases.[117]

The second type of new actionable claim is retaliatory harassment that is not severe or pervasive enough to rise to the level of a tangible employment action.[118] These claims are not actionable under Substantive Title VII, but they are actionable under Anti-Retaliatory Title VII if they would prevent a reasonable employee from filing a substantive Title VII claim.[119] Under the current retaliation law, the employer would be found liable for these actions with no affirmative defense available.[120] Just as in sexual harassment law, an affirmative defense should be afforded to the employer in these instances, because the employer may not be aware of the problem if the actions have not risen to a level that would reasonably draw the attention of the employer.[121]

In order to promote the dual purpose of Title VII, the affirmative defense that should be made available in certain retaliation cases should mirror the affirmative defense available in certain substantive sexual har-

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[114] *See* Burlington N. and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006) (expanding definition of retaliation claims, which allows new claims to be brought).

[115] *See id.* at 2414 ("[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.").

[116] *See supra* note 52 (explaining employers are vicariously liable for tangible employment actions because it is done through their authority).

[117] *See supra* note 54 and accompanying text (explaining where there is no tangible employment action, affirmative defense should be available).

[118] *See* Garner, *supra* note 99, at 299-300 (explaining decision in *White* allows defendants with weak retaliatory harassment claims to make employer's liable).

[119] *See supra* note 72 and accompanying text (explaining new definition of Title VII retaliation action).

[120] *See supra* note 54 and accompanying text (explaining when actions do not arise to tangible employment action, affirmative defense is available to employer for liability).

[121] *See supra* note 54 and accompanying text (explaining when actions do not arise to tangible employment action, employer can assert affirmative defense).

assment cases.[122] This affirmative defense would provide employers with an incentive to prevent Title VII retaliation from occurring.[123] Similar to the affirmative defense available in sexual harassment cases, this retaliation defense would have several requirements that the employer must prove.[124] The first requirement would be to have a policy that prohibits retaliation against employees who make complaints under Title VII.[125] The second requirement would be that this policy provides an adequate way of dealing with retaliation problems within the company.[126] This policy must provide an outlet for employees to make allegations outside of their direct supervisory chain.[127] The third requirement would be that the employee had no legitimate reason to not take advantage of this outlet.[128]

Applying these limits on employer liability in certain retaliation actions would help to best effectuate the purposes of Title VII.[129] Without these limitations on employer liability, employers will have no incentive to prevent retaliation against employees as they would be liable for the retaliation regardless of whether or not they made a good faith effort to prevent or correct the situation.[130] By setting clear standards of employer liability under the Title VII retaliation provision, employers will better understand what they can do to prevent retaliation from occurring.[131]

V. CONCLUSION

By not creating a standard for employer liability in its recent decision in *White*, the Supreme Court created a tenuous situation in Anti-Retaliatory Title VII. This situation, however, is not an unfamiliar one.

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[122] *See supra* notes 55-56 and accompanying text (detailing affirmative defense available in sexual harassment).

[123] *See supra* note 57 and accompanying text (explaining reasoning behind allowing employers an affirmative defense).

[124] *See supra* notes 55-56 and accompanying text (describing requirements of sexual harassment affirmative defense).

[125] *Supra* note 55 (explaining first requirement of sexual harassment affirmative defense).

[126] *Supra* note 55 (describing second requirement of sexual harassment affirmative defense).

[127] *Supra* note 55 (clarifying details of second requirement of sexual harassment affirmative defense).

[128] *See supra* note 56 and accompanying text (detailing third requirement of raising sexual harassment affirmative defense).

[129] *See supra* note 57 and accompanying text (explaining purpose of limiting employer liability is to provide employer with incentive to prevent harm).

[130] Discussion *supra* Part III (illustrating current problem existing in Title VII retaliation law).

[131] Discussion *supra* Part III (discussing Supreme Court needs to provide clear standard of employer liability); *see supra* notes 55-56 (discussing how Supreme Court has provided employer liability limitations in certain sexual harassment actions).

Sexual harassment jurisprudence developed through similar case precedent and provides an example of how to best fix the current situation in Anti-Retaliatory Title VII. As sexual harassment and retaliation are both contained within Title VII of the Civil Rights Act, they have similar purposes for remedying harm done to employees and preventing that harm from occurring. By applying the standard of employer liability used in sexual harassment law, Anti-Retaliatory Title VII can best achieve both purposes of Title VII.

The standard for employer liability under Anti-Retaliatory Title VII should be the same as it is in Substantive Title VII sexual harassment law. Although Anti-Retaliatory Title VII now encompasses a broader group of actionable claims under sexual harassment law, the same standards of employer liability should apply. As is the case in sexual harassment law, the employer should be held vicariously liable for retaliatory treatment of an employee if the employer should have known about that treatment. If there is a reason, however, to believe that the employer may not have known about the treatment, the employer should be afforded an affirmative defense to its liability. This defense should be the same as was created in *Faragher* and *Ellerth* for sexual harassment claims. The affirmative defense provides the employer with an incentive to prevent harm from being done to employees by limiting their liability if they meet certain requirements.

Currently, Anti-Retaliatory Title VII does not promote both purposes of Title VII because it creates no incentive for employers to prevent retaliation from being done to their employees. To best remedy this problem, the Court should look to its decisions in *Faragher* and *Ellerth* which created the standard of employer liability in sexual harassment cases. By applying these same standards to Anti-Retaliatory Title VII, the court can best promote the dual purposes of Title VII of the Civil Rights Act of 1964.

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