2021

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Berkeley Journal of Employment and Labor Law, Vol. 42, No. 2, 2021

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The phenomenon of the "tortification" of employment law involves the consideration and importation of common law tort principles when interpreting statutory anti-discrimination law. This Article explores the other side of the coin: the "statutification" of tort law as it applies to the workplace. State courts have only infrequently partaken in this enterprise, even in situations in which the two areas of law involve similar issues. This Article suggests that at least some limited form of statutification of tort law as it pertains to the workplace might be useful.

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INTRODUCTION

Linda was a janitorial employee whose job involved dusting and vacuuming offices, mopping and waxing floors, and similar tasks. One day, Linda was injured on the job when she slipped and fell trying to replace a water dispenser. She filed to collect workers' compensation benefits. Shortly after, she received a notice that she was being reassigned from the main company offices to "the Annex." The Annex is a twenty-thousand-square-foot facility that is isolated from the rest of the workplace, with no windows or fans. The lights are motion activated. The area contains rats, bats, pigeons, ducks, and raccoons—and their waste. Employees at the facility viewed assignment to the Annex as punishment for perceived transgressions. Employees were typically only assigned to work there a maximum of once per week; Linda was assigned to work there on a full-time basis. As part of her new assignment, Linda had to deal with and clean up after the various pests. On one occasion, Linda was chased down an aisle by a rat. There was no place to sit in the Annex, which posed a special problem for Linda as she recovered from her injury. Linda believed that her employer assigned her to

the Annex in retaliation for having filed her workers' compensation claim, so she sought the advice of a lawyer.[1]

Had Linda's employer retaliated against her for exercising her rights under a federal statute, such as the Family Medical Leave Act (FMLA)[2] or Title VII of the Civil Rights Act of 1964 (Title VII),[3] she would probably have had a claim. Retaliation is prohibited under Title VII where the action is "materially adverse," i.e., where the action "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[4] Federal courts have adopted this same standard for anti-retaliation provisions in other federal employment statutes such as the FMLA.[5] Common sense suggests that the possibility of being reassigned to a dark, vermin-infested location on a full-time basis would probably be enough to deter a reasonable employee from taking action protected under Title VII or the FMLA.

But Linda's options under state tort law would be much more limited. Liability for intentional infliction of emotional distress (IIED) is rare to begin with, and courts are particularly reluctant to recognize such claims based on employer conduct in the workplace.[6] Indeed, in the actual case on which this hypothetical is based, the court granted summary judgment to the employer, finding that the employer's conduct did not rise to the level of extreme and outrageous conduct necessary to support an IIED claim.[7] Had Linda been fired, she might have had a claim for retaliatory discharge in violation of public policy, which, as discussed in this Article, provides a tort remedy where an employee's discharge threatens an important public policy.[8] But Linda was not fired; she was "only" reassigned to an objectively less desirable position.[9] And as this Article discusses, the majority of courts to

1. The facts of this hypothetical case are taken directly from *Gibbs v. Voith Indus. Servs., Inc.,* 60 F. Supp. 3d 780, 787–801 (E.D. Mich. 2014). The only significant difference is that the plaintiff in the actual case alleged that the employer had retaliated against her for exercising her rights under the Family Medical Leave Act (FMLA). *Id.* at 798.

2. 29 U.S.C. §§ 2601–2654 (2018).

3. 42 U.S.C. § 2000e-2(a) (2018).

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

5. *See, e.g.*, Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171, 1171 n.2 (10th Cir. 2006).

6. *See* GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 613 (Tex. 1999) (stating that supervisory conduct rises to the level of extreme and outrageous conduct "only in the most unusual of circumstances").

7. Gibbs v. Voith Indus. Servs., Inc., 60 F. Supp. 3d 780, 802–03 (E D. Mich. 2014).

8. *See infra* notes 256–265 and accompanying text.

9. Another possibility would be for Linda to argue that she had been constructively discharged, which would satisfy the termination requirement for purposes of a retaliatory discharge claim. *See, e.g.*, Karch v. BayBank FSB, 794 A.2d 763, 774–75 (N.H. 2002). A constructive discharge occurs where the employer creates working conditions so intolerable that a reasonable employee under the circumstances would be compelled to quit. RESTATEMENT OF EMP'T LAW § 5.01 cmt. c (AM. LAW INST. 2015). However, in many jurisdictions, this is a demanding standard, requiring something along the lines of threats of physical harm or shocking, outrageous, coercive, or unconscionable employer conduct. *See* Swidnicki v. Brunswick Corp., 23 F. Supp. 3d 921, 937 (N.D. Ill. 2014); Reberg v. Rd. Equip., No. 2:04 CV 368 PS, 2005 WL 3320780, at *9–10 (N.D. Ind. Dec. 7, 2005); Shepherd v. Hunterdon Developmental Ctr., 803

consider the issue have declined to recognize a tort action for retaliatory *discipline* in violation of public policy.[10]

Linda's case is an example of how the law governing the workplace often fails to provide a remedy to employees who may fall through the cracks of a workplace protection statute.

"Statutification," a term I use to describe the application of statutory principles in judicial interpretations of state tort law, has the potential to address the problems Linda and similarly situated employees face. Numerous scholars have discussed the so-called "tortification" of employment law.[11] This phenomenon involves the consideration and importation of common law tort principles when interpreting statutory anti-discrimination law.[12] This Article explores the other side of the coin: the statutification of tort law as it applies to the workplace.

Like its counterpart, the statutification of tort law involves the consideration, and sometimes the importation, of principles derived from statutory law when considering related tort law issues. This Article suggests that increased statutification of workplace tort law would, in some instances, supply needed protections for workers. For example, in Linda's case, a court could recognize a tort of retaliatory discipline based on the principle—established by Title VII and further developed by courts interpreting other federal employment statutes—that adverse actions short of discharge may amount to retaliation.

Statutification is a relatively common phenomenon in tort law in general.[13] But federal employment statutes have had only a limited impact on tort law involving the workplace. Given the obvious overlap between statutory law and tort law regulating the workplace, this is somewhat surprising. As Professor Michael Harper has observed, there is the potential for a "federal-state lawmaking enterprise" in which state tort law is

A.2d 611, 628 (N.J. 2002). Some courts require a showing that the employer acted with the intention of forcing the employee to quit. *See, e.g.*, Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1080 (6th Cir. 1999); Pribil v. Archdiocese of St. Paul & Minneapolis, 533 N.W.2d 410, 412 (Minn. Ct. App. 1995).

10. *See infra* notes 267–313 and accompanying text.

11. *See, e.g.*, Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012).

12. For a representative sampling of scholarly articles on the subject, see Sandra F. Sperino, *Discrimination Law The New Franken-Tort*, 65 DEPAUL L. REV. 721 (2016); Martha Chamallas, *Two Very Different Stories Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315 (2014); W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1129 (2014); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447 (2013); Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 34 (2013); Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 519 (2002).

13. *See infra* notes 92–105 and accompanying text.

influenced by the Supreme Court's resolution of "analogous issues under the federal statutes."[14] But as this Article discusses, state courts have only infrequently partaken in this enterprise.

The relationship between statutory law and tort law is perhaps undertheorized to begin with.[15] Judges have quite different conceptions of the proper role of tort law for dealing with broad societal concerns,[16] which only makes developing a workable approach to statutification more challenging. But courts' lack of thoughtfulness about how statutory law governing the workplace could and should shape tort law in the area is particularly jarring given that statutory law now impacts virtually every aspect of the workplace.[17] This Article suggests that at least some limited form of statutification of tort law involving the workplace might be useful in ensuring that workers do not fall through the cracks of employment protection laws. Therefore, this Article attempts to offer some pragmatic suggestions as to how courts might use statutory law to assist in the development of tort law regulating the workplace.

Part I explores the judicial practice of tortification of employment law, including criticisms of this practice, to set the stage for analyzing tortification's counterpart—statutification. Part II turns to the general failure of state courts to statutify tort law governing the workplace. This Part provides several examples of situations in which one might expect statutory law to have influenced tort law where it has not done so. Part III explores why state courts might be reluctant to look to statutory law when considering common law tort issues involving the workplace and suggests that there may be instances in which tort law principles can be sharpened through an examination of decisional law involving employment discrimination statutes. Finally, Part IV focuses extensively on perhaps the clearest example of a situation that might benefit from some statutification: cases involving the largely unrecognized tort of retaliatory discipline in violation of public policy, in which an employer retaliates against an employee but stops short of actually discharging the employee.

14. Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV. 1281, 1284–85, 1337 (2015).

15. *See* Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 961 (2014) (noting "the lack of systematic analysis concerning the relation between" statutes and the common law of torts).

16. *See infra* Part III.B for a discussion of competing visions of what the role of tort law in the workplace should be.

17. *See* Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 IND. L.J. 393, 401 (2016) (noting "the proliferation of federal employment discrimination statutes"); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 97 (2003) (noting "the general proliferation of statutes regulating the workplace").

I. THE TORTIFICATION OF EMPLOYMENT LAW

To understand the potential benefits of statutification, it is important to consider the existing practice of tortification and its criticisms. Tortification of employment law refers to federal courts' practice of importing common law tort principles into the interpretation of federal statutes involving the workplace. The term is most frequently used in the employment discrimination context, in which federal courts have borrowed a great deal from tort law and have increasingly viewed Title VII and other discrimination statutes as establishing statutory torts.[18]

A. Examples of the Tortification of Employment Law

While the phenomenon of tortification has attracted significant attention in academic literature in recent years, the general practice of courts using common law principles to fill gaps found in statutory language is not new.[19] Whether a court is reviewing an older, vaguely worded "common law statute," where it is assumed courts will develop the meaning of the statute over time, or a more precisely worded second-generation statute, courts have long looked to common law to help flesh out the meaning of statutory provisions.[20]

Courts have adopted a similar approach when interpreting employment discrimination statutes. In *McDonnell Douglas Corp. v. Green*,[21] by far the most important Supreme Court decision on the subject of employment discrimination under Title VII, the Supreme Court adopted a framework that closely resembles the tort theory of res ipsa loquitur.[22] In *McDonnell Douglas*, the Court devised a burden-shifting framework for disparate

18. *See, e.g.*, Sperino, *The New Franken-Tort*, *supra* note 12, at 721–22 (describing this practice by the Supreme Court).

19. *See* William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989); Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1187 (2020) ("[M]any statutes follow on the heels of common law cases or make use of common law principles to articulate rules and standards.").

20. *See* Eskridge, *supra* note 19, at 1051 (discussing the Supreme Court's use of common law rules as a way to fill in statutory gaps); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 45–46 (2018) (discussing the different approaches to statutory interpretation with respect to common law statutes and "normal" statutes).

21. 411 U.S. 792 (1973).

22. *See* Corbett, *supra* note 12, at 454 ("[T]he *McDonnell Douglas* pretext proof structure is a thinly veiled version of res ipsa loquitur . . . ."); Ruth Gana Okediji, *Status Rules Doctrine as Discrimination in a Post-Hicks Environment*, 26 FLA. ST. U. L. REV. 49, 85 (1998) (observing that the Court's subsequent explanation of the *McDonnell Douglas* framework "strongly echoes the res ipsa loquitur procedural framework"); Robert Brookins, *Hicks, Lies, and Ideology The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 982 n.258 (1995) (noting that the *McDonnell Douglas* framework "resembles the *res ipsa loquitur* model in the law of torts").

treatment claims.[23] Once the plaintiff shows that they were rejected for a position for which they were qualified, the plaintiff has established a prima facie case of discrimination.[24] At this point, the burden of production shifts to the defendant to articulate a legitimate non-discriminatory reason for its action.[25] If the defendant articulates such a reason, the plaintiff may carry the ultimate burden of persuasion by then showing that the proffered explanation is pretextual.[26] This entire approach is based on the assumption that there is often a lack of direct evidence of discrimination. The Supreme Court has reasoned that "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration . . . ."[27] Moreover, as the employer is in the better position to identify the actual reason for the adverse action, it is fair to place the burden on the employer to identify that reason.[28] In this respect, the Supreme Court has described the *McDonnell Douglas* burden-shifting approach as a commonsense approach that reflects "common experience as it bears on the critical question of discrimination."[29]

The tort theory of res ipsa loquitur is strikingly similar. Courts often describe res ipsa as a commonsense theory that offers a likely explanation for a result in the absence of direct evidence of the defendant's negligence.[30] Res ipsa allows a plaintiff to establish a presumption or inference of negligence on the part of the defendant by virtue of the mere occurrence of an event under circumstances that common sense tells us was unlikely to have happened absent negligence.[31] As is the case in Title VII, courts applying the res ipsa theory note that this shifting presumption is justified on the grounds that the party who was in control of the instrumentality that caused the accident "is in a superior position to explain what went wrong and why."[32] Thus, although the Supreme Court in *McDonnell Douglas* did not explicitly

23. 411 U.S. at 802.

24. *Id.*

25. *Id.*

26. *Id.* at 804.

27. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

28. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 130, 147 (2000) (justifying the *McDonnell Douglas* burden-shifting approach in part on the ground that "the employer is in the best position to put forth the actual reason for its decision").

29. *Furnco*, 438 U.S. at 577.

30. *See* McDaid v. Aztec W. Condo. Ass'n, 189 A.3d 321, 328 (N.J. 2018) ("The res ipsa doctrine advances the common-sense notion that the party who maintains exclusive control over the object that goes awry and causes injury is in a superior position to explain what went wrong and why."); Barretta v. Otis Elevator Co., 698 A.2d 810, 812 (Conn. 1997) ("The doctrine of res ipsa loquitur is a rule of common sense and not a rule of law which dispenses with proof of negligence.").

31. *See* Gilmer v. S. Ry. Co., 120 S.E.2d 294, 296 (Va. 1961) (summarizing the theory).

32. *McDaid*, 189 A.3d at 328.

incorporate tort law into its Title VII jurisprudence, the Court certainly seems to have been channeling it.[33]

Courts have relied upon tort law in a number of other decisions involving employment discrimination statutes. In the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*,[34] several justices brought tort law to the fore in a debate over the appropriate standard of causation and burden of proof in Title VII cases.[35] Justice Kennedy, joined by Justice Scalia and Chief Justice Rehnquist, cited *Prosser and Keeton on Torts* in support of the position that Title VII's language prohibiting discrimination "because of" sex established a but-for causation standard.[36] In her plurality opinion, Justice O'Connor drew upon tort decisions in which the law shifted the burden from the plaintiff to the defendants to establish that their actions were not the cause of the plaintiff's injuries.[37] In the process, Justice O'Connor referred to Title VII as creating a "statutory employment 'tort'" (with the word "tort" notably in quotations).[38] Since *Price Waterhouse*, tort law has come to play an increasing role in federal employment discrimination cases.

Nearly ten years later in *Burlington Industries, Inc. v. Ellerth*,[39] the avoidable consequences doctrine from tort law played a role in the Court's decision about employer liability for supervisor harassment.[40] The issue facing the Court in *Ellerth* was if an employer should face liability when a supervisor engages in sexually harassing behavior but the employee does not suffer a tangible employment action (such as discharge, demotion, or undesirable reassignment) as a result of the harassment.[41] The Court had previously looked to common law to interpret Title VII in *Meritor Savings Bank, FSB v. Vinson*, where it relied upon principles from common law agency doctrine to help define actionable sexual harassment.[42] In *Ellerth*, the Court once again looked to the common law of torts for guidance, casually remarking that Title VII "borrows from tort law the avoidable consequences doctrine."[43] The avoidable consequences doctrine imposes upon an injured party an obligation to make reasonable efforts to minimize the damages

33. *See* Burns v. AAF-McQuay, Inc., 96 F.3d 728, 732 (4th Cir. 1996) (referring to the *McDonnell Douglas* framework as "a cousin of *res ipsa loquitur*").

34. 490 U.S. 228 (1989).

35. *See id.* at 263–64 (O'Connor, J., concurring); *Id*. at 281–82 (Kennedy, J., dissenting).

36. *Id.* at 281–82 (Kennedy, J., dissenting).

37. *See id.* at 263–64 (O'Connor, J., concurring) (citing tort cases involving multiple causation issues).

38. *Id.* at 264 (O'Connor, J., concurring).

39. 524 U.S. 742 (1998).

40. *Id.* at 764.

41. *Id.* at 747, 761.

42. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (agreeing that Congress wanted courts to look to agency principles in determining employer liability under Title VII).

43. *Ellerth*, 524 U.S. at 764.

caused by a tortfeasor.[44] Relying upon this principle, the Court concluded that where an employee has not suffered a tangible employment action resulting from sexual harassment, an employer may avoid liability by showing that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise to avoid harm.[45]

In more recent years, the Court has looked to tort law to flesh out the causation standards under different statutes. In *Gross v. FBL Financial Services, Inc.*, the Court concluded that the Age Discrimination in Employment Act (ADEA) requires a plaintiff to establish that age was a "but-for" cause of the employer's adverse action.[46] The ADEA prohibits discrimination "because of" the plaintiff's age.[47] In support of its conclusion that the statute necessarily incorporated a but-for standard of causation, the Court again cited *Prosser and Keeton on Torts*, among other sources.[48] The majority's conclusion that tort law's familiar but-for standard applied prompted Justice Breyer to write in dissent about the inappropriateness of adopting the tort standard when attempting to divine a defendant's motive.[49]

In *Staub v. Proctor Hospital*, the Court explicitly classified an employment discrimination statute as a "federal tort" and drew heavily upon tort law in devising a rule for so-called "cat's paw" scenarios.[50] *Staub* involved a claim, brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA),[51] that the plaintiff's employer should be held liable when a supervisor influenced, but did not directly take, an adverse employment action on the basis of antimilitary animus.[52] USERRA prohibits discrimination on the basis of an individual's membership in the military where the individual's membership was a "motivating factor" in the employer's adverse action.[53] The case was difficult because the ultimate decision-maker had no antimilitary animus, but his actions had allegedly been influenced by an individual who did.[54] In an attempt to construct a workable rule, Justice Scalia made the connection between tort law and

44. RESTATEMENT (SECOND) OF TORTS § 918 (AM. LAW INST. 1979) ("[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.").

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

46. 557 U.S. 167, 176 (2009).

47. 29 U.S.C. § 623(a)(1) (2018).

48. *Gross*, 557 U.S. at 176–77.

49. *Id.* at 190–91 (Breyer, J., dissenting).

50. 562 U.S. 411, 417 (2011). In a "cat's paw" case, the plaintiff seeks to hold the employer liable "for the animus of a supervisor who was not charged with making the ultimate employment decision." *Id.* at 415.

51. 38 U.S.C. §§ 4301–4335 (2018).

52. *Staub*, 562 U.S. at 417.

53. 38 U.S.C. § 4311(c).

54. *Staub*, 562 U.S. at 417.

employment discrimination law explicit.[55] To Justice Scalia, tort law supplied the appropriate rule because "when Congress creates a federal tort it adopts the background of general tort law."[56] Therefore, USERRA's causation requirement "incorporates the traditional tort-law concept of proximate cause."[57] Ultimately, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[58]

Finally, in *University of Texas Southwestern Medical Center v. Nassar*, the Court again cited *Prosser and Keeton* and borrowed tort law's but-for causation standard for Title VII retaliation claims.[59] According to the majority opinion, it was "textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'"[60] As this but-for causation standard was the default rule for tort law in the majority's view, Congress was presumed to have incorporated that rule when it enacted Title VII.[61] In 2020, the Court in two opinions reaffirmed that the but-for causation standard remains the default rule in statutory discrimination cases.[62] And *Prosser and Keeton* once again made an appearance in support of the but-for standard being the default rule, albeit in a dissent.[63]

B. Criticisms of the Tortification Phenomenon

The tortfication phenomenon has been the subject of substantial criticism. As discussed later in this Article, some of these criticisms have relevance to the question of whether statutification—the other side of the tortification coin—is desirable.[64] There are at least three general criticisms of the tortification phenomenon.[65]

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55. *Id.*

56. *Id.*

57. *Id.* at 420.

58. *Id.* at 422.

59. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013).

60. *Id.* at 347 (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984)).

61. *See id.*

62. *See* Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020) (stating that the but-for standard remains the default rule in discrimination cases); Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739 (2020) ("Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation.") (quoting *Nassar*, 570 U.S. at 360).

63. *Babb*, 140 S. Ct. at 1179 (Thomas, J., dissenting).

64. *See infra* Part III.C.

65. It bears mentioning that not all of the criticisms of conflating tort law and employment discrimination law come from academics. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 774 (1998) (Thomas, J., dissenting) ("Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination.").

The first criticism is that it is inappropriate for courts to import tort principles into the interpretation of federal employment discrimination statutes to begin with. As Professor Sandra F. Sperino has pointed out, the language used in federal employment discrimination statutes does not track the language of tort law.[66] Yet, the Supreme Court has not only looked to tort law to help interpret such statutes but has also directly imported some of this law.[67] For example, no major employment discrimination statute uses the term "proximate cause," yet the Supreme Court has imported tort law's proximate causation standards into the interpretation of such statutes.[68] In a manner foreign to tort law, Title VII articulates a somewhat complicated causation standard that first requires a plaintiff to establish that a protected characteristic played a motivating factor in the employer's adverse decision.[69] Despite this, the Supreme Court has looked to tort law principles to flesh out causation principles for Title VII and other discrimination statutes.[70] As another example, Professor Michael J. Frank has observed that, "although there is no real textual support for an application of the avoidable consequences doctrine to Title VII, . . . the Supreme Court [has] applied a modified (and more defendant-friendly) version of this doctrine to supervisory harassment cases."[71]

At a more basic level, employment discrimination law is not drawn from tort law involving the workplace to begin with.[72] At the time Title VII was enacted in 1964, for example, the employment-at-will rule dominated state law involving the workplace, and the various tort-based incursions upon that rule had not been fully developed.[73] Nothing in Title VII's legislative history suggests that Congress intended to incorporate common law tort principles.[74] Indeed, Title VII represented a momentous change to the traditional law

66. Sperino, *Discrimination Statutes, supra* note 12, at 28.

67. *See supra* notes 21–63 and accompanying text.

68. *See* Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011).

69. *See* Sperino, *Discrimination Statutes*, *supra* note 12, at 18 (noting that the causation standard employed in Title VII does not mimic traditional tort causation standards).

70. *See id.* (discussing the Court's use of tort principles in developing a causation standard under the ADEA).

71. Frank, *supra* note 12, at 510 (footnote omitted).

72. *See* Sperino, *Discrimination Statutes*, *supra* note 12, at 29.

73. The tort of intentional infliction of emotional distress did not appear in the *Restatement (Second) of Torts* until 1965. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965). And while a few courts had recognized a tort claim of retaliatory discharge in violation of public policy, which served to limit the scope of the at-will rule, the tort was still far from fully formed at the time Title VII was enacted. *See infra* notes 257–260 and accompanying text.

74. *See* Sperino, *Discrimination Statutes*, *supra* note 12, at 31 ("There is no legislative history for Title VII that suggests its primary operative provisions derive from a common-law tradition."); Corbett, *supra* note 12, at 456 ("When Title VII of the Civil Rights Act of 1964 was enacted, neither Congress nor the Supreme Court would have characterized the federal employment discrimination law as a statutory tort.").

governing the employment relationship.[75] Thus, as Professor Sperino has observed, "it is unclear why judges would look to the common law to define terms in a statutory regime whose operative provisions are not drawn from the common law and that does not mimic the common law."[76]

The second chief criticism concerning courts' importation of tort principles into federal employment law is that courts often make a hash of the law in doing so. Oddly, the Court has imported causation standards established in negligence cases for use in disparate treatment discrimination claims, which focus on an actor's intent to discriminate.[77] As mentioned, the Court has held that tort law's strict but-for causation standard applies in the age discrimination and Title VII retaliation contexts,[78] even though tort law traditionally employs a different causation standard when there are multiple causes at work.[79] The Court's decision in *Staub* to import tort principles of proximate cause—one of the most amorphous and unpredictable concepts in tort law—into discrimination cases opens up a host of potentially difficult issues in future cases.[80] Indeed, the *Staub* Court's conception of proximate cause omits any mention of foreseeability, a concept sometimes described as the "touchstone" of proximate cause[81] and that is used by the overwhelming majority of state courts in defining the concept.[82] In addition, several authors

75. *See* Sperino, *Discrimination Statutes*, *supra* note 12, at 31 (noting that Title VII created significant exceptions to the at-will rule).

76. *Id.* at 33.

77. *See* Sullivan, *supra* note 11, at 1459 (explaining that the proximate cause concept "has been primarily utilized for negligence, and a disparate-treatment Title VII violation is more akin to an intentional tort").

78. *See supra* notes 46–49, 59–63 and accompanying text.

79. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (AM. LAW INST. 2010) ("If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.").

80. *See* Corbett, *supra* note 12, at 459 ("As troublesome as proximate cause has been in tort law, its adoption in employment discrimination law does not bode well."); Sullivan, *supra* note 11, at 1459 (suggesting that lower courts will spend years attempting to interpret *Staub*).

81. J.T. Baggerly v. CSX Transp., Inc., 635 S.E.2d 97, 101 (S.C. 2006).

82. Section 29 of the *Restatement (Third) of Torts* dispenses with the phrase "proximate cause" and explains that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010). The comments clarify that the focus will still often be on whether the plaintiff's harm was a foreseeable risk of the defendant's tortious conduct. *Id.* § 29 cmt. d & e & illus. 8. In *Staub*, the Court explained that "[p]roximate cause requires only 'some direct relation between the injury asserted and the injurious conduct alleged,' and excludes only those 'link[s] that [are] too remote, purely contingent, or indirect.'" Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011) (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010)). There are certainly some jurisdictions that, like *Staub*, focus primarily on the strength of the causal connection when defining proximate cause. *See, e.g.*, Patton v. Bickford, 529 S.W.3d 717, 731 (Ky. 2016) ("Proximate causation captures the notion that, although conduct in breach of an established duty may be an actual but-for cause of plaintiff's damages, it is nevertheless too attenuated from the damages in time, place, or foreseeability to reasonably impose liability upon the defendant."). But the majority of state courts explicitly incorporate foreseeability into the definition of proximate cause or do so through adoption of the *Restatement (Third)* approach. *See*, *e.g.*,

have argued that the vicarious liability rules developed by the Court in *Ellerth* do not reflect traditional tort and agency principles.[83] The result of this awkward grafting of tort law principles onto discrimination statutes is what Professor Sperino has referred to as "Franken-tort," a statutory employment discrimination tort whose component pieces "only vaguely resemble the component pieces from which it was drawn."[84]

The third general criticism of the tortification of employment law is that, by turning Title VII and other anti-discrimination statutes into what are effectively statutory torts, courts have improperly shifted the focus of these statutes from elimination of workplace discrimination to almost exclusively compensation.[85] While Title VII has always provided for monetary remedies, the original focus of the statute was to eliminate workplace discrimination.[86]

Westin Operator, LLC v. Groh, 347 P.3d 606, 614 n.5 (Colo. 2015) ("[F]oreseeability is the touchstone of proximate cause."); Convit v. Wilson, 980 A.2d 1104, 1125 (D.C. 2009) ("To establish proximate cause, the plaintiff must present evidence from which a reasonable juror could find that there was a direct and substantial causal relationship between the defendant's breach of the standard of care and the plaintiff's injuries and that the injuries were foreseeable."); Ruiz v. Tenet Hialeah Healthsystem, Inc., 260 So. 3d 977, 982 (Fla. 2018) ("A harm is 'proximate' in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question."); Turcios v. DeBruler Co., 32 N.E.3d 1117, 1124 (Ill. 2015) ("[L]egal cause involves an assessment of foreseeability."); Leavitt v. Brockton Hosp., Inc., 907 N.E.2d 213, 219 (Mass. 2009) (citing *Restatement (Third) of Torts* and stating that liability only exists "where the resulting injury is within the scope of the foreseeable risk arising from the negligent conduct"); Torbit v. Balt. City Police Dep't, 153 A.3d 847, 855 (Md. 2017) ("[L]egal causation most often involves a determination of whether the injuries were a foreseeable result of the negligent conduct."); Skinner v. Square D Co., 516 N.W.2d 475, 479 (Mich. 1994) ("On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences."); Mussivand v. David, 544 N.E.2d 265, 272 (Ohio 1989) ("[I]n order to establish proximate cause, foreseeability must be found."); Piazza v. Kellim, 377 P.3d 492, 499–500 (Or. 2016) (en banc) (defining proximate cause in terms of whether "the risk of harm was reasonably foreseeable"); Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie, 578 S.W.3d 506, 518 (Tex. 2019) ("Proximate cause has two components: cause in fact and foreseeability."); Interim Pers. of Cent. Va., Inc. v. Messer, 559 S.E.2d 704, 708 (Va. 2002) ("Generally, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that the injury should have been foreseen in the light of the attending circumstances.").

83. *See* Paula J. Dalley, *All in a Day's Work Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 519 (2002) (referring to the Court's decisions in *Ellerth* and *Faragher* as "bad applications of imperfectly understood legal rules"); Michael C. Harper, *Employer Liability for Harassment Under Title VII A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 55 (1999) (arguing that the Court's recognition of an affirmative defense for employers had no basis in common law decisions).

84. Sperino, *The New Franken-Tort*, *supra* note 12, at 722.

85. *See* Chamallas, *supra* note 12, at 1316 (observing that "Title VII has been reshaped from an enterprise liability scheme to a 'statutory tort,' capable of redressing a limited number of wrongs done to individual employees, but largely incapable of achieving Title VII's broad purpose of deterring and eradicating workplace discrimination").

86. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (recognizing the compensatory function of Title VII but stating that its "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm"); Corbett, *supra* note 12, at 456–57 (citing legislative history and stating that "Title VII was primarily a public policy and civil rights statute aimed

By conceptualizing Title VII as a statutory tort designed primarily to provide compensation, critics charge that courts give short shrift to the broader public policy goals of deterring and eliminating discrimination.[87] For example, Professor Michael Selmi has argued that "monetary relief is the principal, and often the sole, goal" of Title VII litigation.[88]

II. THE LACK OF STATUTIFICATION OF TORT LAW GOVERNING THE WORKPLACE

The other side of the tortification coin is the relative *lack* of influence that employment statutes have had on state tort law as it relates to the employment relationship.[89] As discussed below, statutory law has had considerable influence on common law tort principles generally. However, in the employment context, federal statutory law has had only a limited influence on the development of tort law governing the workplace. In situations in which state courts might be expected to incorporate concepts developed in disputes under federal employment discrimination statutes, federal law has often played a limited role in influencing tort law involving the same issues. This is somewhat surprising in light of the increasing statutification of state tort law more generally.

A. The Statutification of Tort Law in General

The primary source of common law rulemaking has historically been judge-made law, specifically the decisions of appellate judges.[90] Today, statutes obviously play a huge role in the work of judges, forcing them to consider how statutes fit within the preexisting body of common law.[91] Tort law is no different.

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at eradicating, in the employment setting, the most socially caustic and destructive forms of discrimination that had blighted the nation throughout its history").

87. *See* Chamallas, *supra* note 12, at 1316.

88. Michael Selmi, *The Price of Discrimination The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1251–52 (2003).

89. In contrast, federal employment statutes do influence state statutory laws governing the workplace. State courts routinely borrow from federal decisions when interpreting their own parallel anti-discrimination statutes, and some states have articulated a preference for parallel construction of these statutes. *See* Alex B. Long, *"If the Train Should Jump the Track . . ." Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 477 (2006) (noting that state courts have routinely adopted the federal courts' interpretations of parallel federal law with little or no independent analysis of the applicable state statute); Sandra F. Sperino, *Diminishing Deference Learning Lessons from Recent Congressional Rejection of the Supreme Court's Interpretation of Discrimination Statutes*, 33 RUTGERS L. REC. 40, 41 (2009) (noting that state courts routinely follow Supreme Court precedent when interpreting similar state anti-discrimination statutes).

90. *See* J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 363 (2019).

91. *See* Henry H. Drummonds, *The Dance of Statutes and the Common Law Employment, Alcohol, and Other Torts*, 36 WILLAMETTE L. REV. 939, 940 (2000).

Statutes play an increasingly central role in tort law generally. In some instances, statutes have completely changed or eliminated entire areas of tort law. For example, comparative fault statutes have almost completely replaced the traditional common law rule that contributory negligence bars a plaintiff's recovery in a negligence action.[92] So-called "anti-heart balm" statutes have eliminated the torts of criminal conversation and alienation of affections in a majority of jurisdictions.[93] In other situations, state legislatures have enacted statutes that regulate areas that were historically the domain of tort law, such as statutes immunizing shopkeepers against false imprisonment claims stemming from the detainment of suspected shoplifters.[94] Sometimes, these statutes directly involve the workplace, as is the case with statutes providing employers with a limited privilege from defamation actions when they provide employment references[95] and statutes addressing privacy in the workplace.[96]

These are all examples in which legislatures have imposed new statutory tort rules upon common law courts. But courts have also been willing to statutify tort law on their own by importing state and federal statutory and constitutional principles into preexisting tort law, even when statutes do not require them to do so.[97] The most obvious example is the theory of negligence per se, in which a standard of conduct defined in a statute articulates the standard of care for a negligence claim, replacing the more generic tort standard of reasonable care.[98] State products liability law—some of it

92. *See* David C. Sobelsohn, *"Pure" vs. "Modified" Comparative Fault Notes on the Debate*, 34 EMORY L.J. 65, 70 (1985) (noting in 1985 that "the overwhelming majority of American jurisdictions have adopted, by statute," a form of modified comparative fault).

93. Kelsey M. May, *Bachelors Beware The Current Validity and Future Feasibility of a Cause of Action for Breach of Promise to Marry*, 45 TULSA L. REV. 331, 337 (2009) (noting that causes of action that give rise to liability for "having an affair" or "procuring the affections of another's spouse" have been barred in a majority of jurisdictions, most often by statute).

94. *See, e.g.*, Barkley v. McKeever Enters., Inc., 456 S.W.3d 829, 834 (Mo. 2015) (discussing the legislature's codification of the common law privilege for shopkeepers into statute).

95. *See* Alex B. Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 FLA. L. REV. 719, 725 (2014) (noting that reference immunity statutes largely track common law rules).

96. *See, e.g.*, ARK. CODE ANN. § 11-2-124 (2019) (prohibiting employers from requiring employees to disclose passwords for their social media accounts).

97. One context in which states courts have had no choice but to incorporate constitutional law principles is defamation. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that a public official suing for defamation must, as a constitutional matter, establish actual malice on the part of the defendant).

98. *See* Winger v. C.M. Holdings, L.L.C , 881 N.W.2d 433, 446 (Iowa 2016) (describing the principle of negligence per se); Barry L. Johnson, *Why Negligence Per Se Should Be Abandoned*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 247, 249 (2017) ("[T]he negligence per se doctrine supplants this open-textured, case-by-case analysis of the reasonableness of the defendant's behavior under the circumstances, compelling the conclusion that an actor was negligent solely on the basis of that actor's violation of a statute or ordinance."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. a Reporters' Note (AM. LAW INST. 2010) ("The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings."). *But see* Barbara

developed through common law rulemaking—regularly deals with federal statutory and administrative standards.[99]

There are other examples. Some courts have imported large swaths of Fourth Amendment jurisprudence when developing the privacy tort of intrusion upon the seclusion.[100] Antitrust scholars have noted that the Merger Guidelines developed by the Department of Justice and the Federal Trade Commission have heavily influenced the common law regarding competition.[101] Federal aviation regulations concerning navigable airspace help define the contours of the tort of trespass to land.[102] These regulations may also help define a landowner's privacy interests with respect to the tort of intrusion upon the seclusion in the case of drones intruding upon the airspace of landowners.[103]

The tort of retaliatory discharge in violation of public policy provides another clear example. With the retaliatory discharge tort, state courts seek to determine when an employer's discharge of an employee offends public policy.[104] In order to divine the relevant public policy, courts look to positive law, typically statutes.[105] The statutes in question may have no direct connection to the workplace, but they nonetheless help define the public policy that is jeopardized by an employer's actions. Thus, external positive sources of law are baked into the tort. In each of these situations, courts have chosen to bring principles derived from external sources into existing tort law in an effort to better define its contours.

Kritchevsky, *Tort Law is State Law Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 AM. U. L. REV. 71, 72–73 (2010) (acknowledging that the majority of states treat a violation of federal statute as negligence per se but arguing against this approach).

99. *See* Donald L. Doernberg, *The Supreme Court's Cloaking Device "[C]ongressional Judgment About the Sound Division of Labor Between State and Federal Courts"*, 50 MCGEORGE L. REV. 539, 552 (2019) (discussing the application of federal standards in state products liability actions); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 (AM. LAW INST. 1997) ("[A] product's noncompliance with an applicable product safety statute . . . renders the product defective . . . .").

100. *See, e.g.*, Tagouma v. Investigative Consultant Servs., Inc., 4 A.3d 170, 176 (Pa. Super. Ct. 2010) (relying upon Fourth Amendment principles in helping to define the tort of intrusion upon the seclusion of another).

101. *See* Hillary Greene, *Guideline Institutionalization The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 772 (2006) (stating that the Merger Guidelines have "had an undue influence upon common law development").

102. *See* A. Michael Froomkin & P. Zak Colangelo, *Self-Defense Against Robots and Drones*, 48 CONN. L. REV. 1, 23–26 (2015) (discussing the impact of federal aviation law on landowners' rights).

103. *See id.* at 32–37 (discussing the tort in the context of drones).

104. *See* David C. Yamada, *Voices From the Cubicle Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 22 (1998) ("The public policy exception creates a cause of action for wrongful discharge when an employer fires a worker for reasons that violate or offend public policy.").

105. *See* John E. Lippl, *Predicting the Success of Wrongful Discharge-Public Policy Actions In Tennessee and Beyond*, 58 TENN. L. REV. 393, 402–03 (1991) (noting that statutes and regulations "are the most fertile source of public policy" in wrongful discharge claims).

B. The Relative Lack of Statutification of Tort Law Involving the Workplace: Some Preliminary Examples

With the notable exception of the retaliatory discharge tort mentioned above, there has been relatively little statutification of tort law as it involves the workplace. To be sure, federal and state decisions interpreting employment discrimination statutes have had some influence on tort law governing the workplace. For example, numerous state courts have imported the *McDonnell Douglas* burden-shifting approach originally developed in Title VII discrimination cases for use in common-law retaliatory discharge cases.[106] At the same time, however, a significant number of state courts have expressly rejected use of the *McDonnell Douglas* approach in retaliatory discharge cases or otherwise employ a more traditional tort approach in which an employer must establish that its actions were justified by legitimate business reasons.[107]

There are other situations in which one might expect concepts developed in the federal employment context to influence tort law governing the workplace. For example, it is well established in federal retaliation decisions that an individual who opposes what the individual believes to be unlawful discrimination is still protected from employer retaliation even if the employer conduct is not actually unlawful, provided the individual's belief as to the unlawfulness of the conduct was reasonable.[108] But there are several common law retaliatory discharge cases in which courts insist, in the face of these well-established federal statutory retaliation decisions, that employees

106. *See* Gen. Elec. Co. v. Gilbert, 65 S.W.3d 892, 897 (Ark. Ct. App. 2002); Nelson v. United Techs., 88 Cal. Rptr. 2d 239, 248–49 (Cal. Ct. App. 1999); Rebarchek v. Farmers Coop. Elevator, 35 P.3d 892, 898 (Kan. 2001); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571–72 (Minn. 1987); Riesen v. Irwin Indus. Tool Co., 717 N.W.2d 907, 917 (Neb. 2006); Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227–28 (S.D. 1988); Lawrence v. Chattanooga-Hamilton Cty. Hosp. Auth., No. E2016–02169–COA–R3–CV, 2017 WL 4476858, at *8–9 (Tenn. Ct. App. Oct. 6, 2017); Mellin v. Flood Brook Union Sch. Dist., 790 A.2d 408, 417–18 (Vt. 2001); King v. Cowboy Dodge, Inc., 357 P.3d 755, 760 (Wyo. 2015); *see also* Martin v. Gonzaga Univ., 425 P.3d 837, 843 (Wash. 2018) (employing a four-part test in retaliatory discharge cases with the second step tracking the *McDonnell Douglas* approach).

107. *See* Michael v. Precision All. Grp., LLC, 21 N.E.3d 1183, 1189 (Ill. 2014) (noting the court's prior rejection of the three-part federal test for discrimination for use in retaliatory discharge cases); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. 2010) (en banc) (recognizing tort action but not announcing a burden-shifting approach); Strozinsky v. Sch. Dist. of Brown Deer, 614 N.W.2d 443, 453–54 (Wis. 2000) (holding that employer may avoid liability by establishing that the discharge was for just cause); Wounaris v. W. Va. State Coll., 588 S.E.2d 406, 413 (W. Va. 2003) ("An employer may rebut an employee's prima facie case of wrongful discharge . . . by demonstrating that it had a plausible and legitimate business reason to justify the discharge.").

108. *See, e.g.*, Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C., 716 F.3d 10, 14 (2d Cir. 2013) ("An employee's complaint may qualify as protected activity . . . 'so long as the employee has' . . . 'a good faith, reasonable belief that [the employee] was opposing an employment practice made unlawful by Title VII.'") (quoting Gregory v. Daly, 243 F.3d 687, 701 (2d Cir. 2001); McMenemy v. City of Rochester, 241 F.3d 279, 285 (2d Cir. 2001)).

are only protected where the conduct they opposed was *actually* illegal.[109] And in some cases, the courts have adopted this stricter rule for tort claims even while adopting the more lenient "reasonable belief" approach for statutory retaliation claims.[110]

As another example, recent federal decisions on the appropriate causation standards under anti-discrimination statutes have had only limited influence on state tort law governing the workplace. Depending upon the statute or issue in question, federal decisions employ a host of different causation standards that plaintiffs must satisfy.[111] Beginning with its decision in *Nassar*, the Supreme Court has started referring to the but-for standard of causation as the "default rule" when interpreting federal employment discrimination statutes.[112] *Nassar* has had some influence in terms of state courts' interpretation of parallel state *statutes*.[113] But the but-for standard is certainly not the norm in analogous common law retaliatory discharge claims at the state level. The *Nassar* decision has not caused state courts to re-evaluate their preexisting causation standards in common law retaliatory discharge claims. Instead, less stringent causation standards are the norm in these claims, whether it is a "substantial factor" standard,[114] a "motivating factor" standard,[115] a "substantial motivating factor" standard,[116] a

109. *See* Callantine v. Staff Builders, Inc., 271 F.3d 1124, 1131 (8th Cir. 2001) (applying Missouri law); Wheeler v. BL Dev. Corp., 415 F.3d 399, 404 (5th Cir. 2005) (applying Mississippi law); Bereston v. UHS of Del., Inc., 180 A.3d 95, 106 (D.C. 2016); Holden v. Univ. Sys. of Md., 112 A.3d 1100, 1107 (Md. Ct. App. 2015); Kendall v. Integrated Interiors, Inc., No. 283494, 2009 WL 3321515, at *7 (Mich. Ct. App. Oct. 15, 2009). There are also decisions that adopt the federal approach and hold that a reasonable belief is all that is required. *See* Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 109 (Colo. 1992); Ellis v. City of Seattle, 13 P.3d 1065, 1071 (Wash. 2000) (en banc); Webber v. Wight & Co., 858 N.E.2d 579, 595 (Ill. App. Ct. 2006).

110. *See, e.g.*, Howard Univ. v. Green, 652 A.2d 41, 46 (D.C. 1994).

111. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013) (applying but-for standard in retaliation cases under Title VII); Egan v. Del. River Port Auth., 851 F.3d 263, 269–74 (3d Cir. 2017) (holding that the "motivating factor" test applies to FMLA retaliation claims); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 575 (5th Cir. 2004) (applying but-for standard in retaliation cases involving the Fair Labor Standards Act); Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996) (applying "substantial or motivating factor" test in First Amendment retaliation cases).

112. *Nassar*, 570 U.S. at 347; *see also* Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020).

113. *See, e.g.*, Smith v. Ohio Dep't of Pub. Safety, 997 N.E.2d 597, 614 (Ohio Ct. App. 2013) (adopting *Nassar*'s standard); Tex. Dep't of Crim. Just. v. Flores, 555 S.W.3d 656, 668 (Tex. App. 2018) (citing *Nassar* in support of but-for standard).

114. *See* Johnson v. Friends of Weymouth, 461 S.E.2d 801, 804 (N.C. 1995); Huber v. Or. Dep't of Educ., 230 P.3d 937, 946 (Or. Ct. App. 2010); Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d 528, 535 (Tenn. 2002); Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 405 (Utah 1998); Martin v. Gonzaga Univ., 425 P.3d 837, 844 (Wash. 2018).

115. *See* Dey v. Scriptpro LLC, No. 95,375, 2006 WL 3589974, at *5 (Kan. Ct. App. Dec. 8, 2006) (employing a motivating factor standard); Brandon v. Molesworth, 655 A.2d 1292, (Md. Ct. Spec. App. 1995), *aff'd, rev'd in part*, 672 A.2d 608 (Md. 1996).

116. *See* Murcott v. Best W. Int'l, Inc., 9 P.3d 1088, 1099 (Ariz. Ct. App. 2000); Roach v. Transwaste, Inc., HHDCV176074305S, 2020 WL 588934, at *4 (Conn. Super. Ct. Jan. 3, 2020); Baiton v. Carnival Cruise Lines, Inc., 661 So. 2d 313, 314 (Fla. Dist. Ct. App. 1995); First Prop. Mgmt. Corp. v. Zarebidaki, 867 S.W.2d 185, 188 (Ky. 1993); Smith v. Tidewater Inc., 918 So.2d 1, 15 (La. Ct. App.

"contributing factor" standard,[117] a "significant factor" standard,[118] a proximate cause standard,[119] or some other similarly worded standard.[120] Thus, the default causation rule in federal employment discrimination statutes is decidedly not the default causation rule in state tort law governing the workplace.[121]

One of the most noteworthy examples of the failure of state courts to statutify tort law is the tort of intentional infliction of emotional distress (IIED). To establish an IIED claim, a plaintiff must show that the defendant engaged in "extreme and outrageous" behavior.[122] This term has long defied precise definition,[123] but there are several common indicators of extreme and outrageous conduct. These include whether the defendant abused a position of authority over the plaintiff, the motivation of the defendant, and whether the conduct was repeated or prolonged.[124] On the statutory side, one way to establish a claim of unlawful harassment under Title VII is to show that the defendant's discriminatory conduct was "severe or pervasive."[125] In defining the "severe or pervasive" concept, some courts have listed considerations that

2005); *see also* Weidler v. Big J Enters., Inc., 953 P.2d 1089, 1095 (N.M. Ct. App. 1997) (approving a "substantial or motivating factor" jury instruction); Syl. Pt. 3, McClung v. Marion Cty. Comm'n, 360 S.E.2d 221, 228 (W. Va. 1987) (adopting the "substantial or motivating factor" approach).

117. *See* Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. 2010) (en banc).

118. *See* Haskenhoff v. Homeland Energy Sols., LLC, 897 N.W.2d 553, 583 (Iowa 2017) (plurality).

119. *See* Holland v. Schwan's Home Serv., Inc., 992 N.E.2d 43, 77 (Ill. App. Ct. 2013) (approving jury instruction on proximate cause and rejecting but-for standard); Shaw v. Titan Corp., 498 S.E.2d 696, 700 (Va. 1998) (recognizing a proximate cause standard).

120. *See* Cardwell v. Am. Linen Supply, 843 P.2d 596, 600 (Wyo. 1992) (requiring a showing that retaliation "significantly motivated" the discharge). *But see* Peru Daily Tribune v. Shuler, 544 N.E.2d 560, 564 (Ind. Ct. App. 1989) (stating that a but-for standard applies); Riesen v. Irwin Indus. Tool Co., 717 N.W.2d 907, 914 (Neb. 2006) (employing a but-for standard); Teachout v. Forest City Cmty. Sch. Dist., 584 N.W.2d 296, 301–02 (Iowa 1998) (applying a "determinative factor" standard); Silberstein v. Pro-Golf of Am., Inc., 750 N.W.2d 615, 622–23 (Mich. 2008) (using the "determinative factor" standard). *See generally* Tex. Dep't of Hum. Servs. v. Hinds, 904 S.W.2d 629, 633 (Tex. 1995) ("[A] plaintiff must prove that his refusal to perform an illegal act was the sole cause of his discharge before he can recover damages from his former employer.").

121. There are, of course, some states in which federal anti-discrimination statutes have directly influenced the structure of common law retaliatory discharge claims. *See* Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 433 (Alaska 2004) (applying an approach largely based on federal law). And it is worth noting that earlier Supreme Court Title VII precedent influenced some courts as they attempted to define the applicable causation standard in common law wrongful discharge cases. *See* Brandon v. Molesworth, 655 A.2d 1292, 1306 (Md. Ct. Spec. App. 1995) (adopting the plurality approach from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)), *aff'd, rev'd in part*, 672 A.2d 608 (Md. 1996).

122. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW INST. 2012).

123. *See* Russell Fraker, *Reforming Outrage A Critical Analysis of the Problematic Tort IIED*, 61 VAND. L. REV. 983, 994 (2008) (discussing the lack of clear standards).

124. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. d (AM. LAW INST. 2012).

125. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (explaining that to violate Title VII, harassing behavior must be "severe or pervasive enough to create an objectively hostile or abusive work environment").

are similar to those used in assessing whether conduct is extreme and outrageous for purposes of an IIED claim.[126] So, for example, a supervisor who repeatedly subjects an employee to racial slurs may have engaged in the type of severe or pervasive harassment necessary to support a Title VII claim.[127]

Given the fact that such behavior comes from one with authority over an employee, is motivated by animus, and is repeated, there would seem to be a good argument that such conduct would also naturally raise a jury question as to whether the conduct was extreme and outrageous for purposes of an IIED claim.[128] Indeed, the Supreme Court has observed that to qualify as "severe or pervasive" conduct, the conduct must be "extreme."[129] This would seem to strengthen the argument for connecting the two standards. Yet, there are decisions in which courts hold as a matter of law that conduct was not sufficiently extreme and outrageous for purposes of an IIED claim despite amounting to severe or pervasive conduct under Title VII.[130] Likewise, there are numerous decisions holding that sexual harassment that was actionable under Title VII did not amount to extreme and outrageous conduct.[131] This has been true regardless of whether the employees were subjected to severe or pervasive harassment or to threats concerning future employment prospects based on submission to a supervisor's demand for sexual favors.[132]

126. The Second Circuit has listed the following factors: (1) the frequency of the discriminatory conduct, (2) its severity, (3) whether it is threatening and humiliating as opposed to a mere offensive utterance, and (4) "whether it unreasonably interferes with an employee's work performance." Patane v. Clark, 508 F.3d 106, 113 (2d Cir. 2007). These factors are derived from the Supreme Court's decision in *Harris*, 510 U.S. at 23.

127. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 786–87 (1998).

128. *See* Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 217 (1970) (holding plaintiff stated an IIED claim for purposes of motion to dismiss where plaintiff was subjected to racist insults).

129. *Faragher*, 524 U.S. at 786, 788.

130. *See* Jones v. James Constr. Grp., LLC, No. CV 08-534-RET-DLD, 2009 WL 10702632, at *5, *5 n.8 (M.D. La. July 8, 2009) (stating that numerous courts have denied recovery for workplace IIED disputes that do not involve "a pattern of deliberate, repeated harassment over a sufficient period of time" and citing cases in which the harassment occurred over the course of eight months or longer); Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 153–56 (2003) (noting difficulty plaintiffs have had in establishing IIED cases in these situations, even when the conduct violates Title VII).

131. *See* Cavico, *supra* note 130, at 156 ("[T]he courts typically hold that sexual harassment, even though violating Title VII, does not necessarily equate to a finding of intentional infliction of emotional distress."); Martha Chamallas, *Discrimination and Outrage The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2127 (2007) ("[I]n most jurisdictions proof of discriminatory workplace harassment—the kind of employment discrimination that looks most like a tort—is not sufficient to guarantee tort recovery.").

132. *See* Brewer v. Petroleum Suppliers, Inc., 946 F. Supp. 926, 932, 936 (N.D. Ala. 1996) (denying summary judgment to employer on employee's quid pro quo sexual harassment claim under Title VII but stating that sexual "demands which, if refused, carry a consequence of economic loss or loss of status at employment" are not sufficient to establish extreme and outrageous conduct); Ibraheem v. Wackenhut Servs., Inc., 29 F. Supp. 3d 196, 214–15 (E.D.N.Y. 2014) (denying defendant's motion for summary

Title VII harassment law has informed IIED law in at least one sense: decisions under Title VII often establish a standard for what does *not* qualify as extreme and outrageous conduct. It is black-letter law in many jurisdictions that "mere" employment discrimination does not amount to extreme and outrageous conduct for IIED purposes,[133] and it is well established that unlawful harassment under Title VII, standing alone, does not necessarily rise to the level of extreme and outrageous conduct.[134] Instead, some courts require that an IIED plaintiff establish that the defendant engaged in sexual harassment *and* battery to meet the extreme and outrageous conduct requirement.[135] Some courts have even suggested that harassing conduct that is actionable under Title VII "occurs at a much lower threshold of inappropriate conduct than the threshold required for the tort of intentional infliction of emotional distress."[136] Therefore, conduct that does not amount to actionable harassment under Title VII, by definition, does not amount to extreme and outrageous conduct.[137]

What is frequently lacking from these sorts of decisions is any explanation of why any of this should be true. Title VII's severe or pervasive

judgment on plaintiff's hostile work environment claim but granting it with respect to plaintiff's IIED claim).

133. *See Ibraheem*, 29 F. Supp. 3d at 1215 ("Generally, ordinary workplace disputes, including the discrimination, harassment, and hostile work environment claims alleged here, do not rise to the level of extreme and outrageous conduct necessary to support a claim of IIED.").

134. *See* Piech v. Arthur Andersen & Co., S.C., 841 F. Supp. 825, 831 (N.D. Ill. 1994) (stating that allegations involving supervisor's conduct were sufficient to establish a Title VII claim but not an IIED claim); Land v. Midwest Office Tech., Inc., 114 F. Supp. 2d 1121, 1144 (D. Kan. 2000) ("The existence of a hostile work environment sufficient to support a Title VII claim does not necessarily require a finding of outrageous conduct."); Cavico, *supra* note 130, at 153 ("[M]ost courts appear very reluctant to automatically extend the tort cause of action to a discrimination case.").

135. *See Brewer*, 946 F. Supp. 2d at 936 (explaining that "when the sexual impositions are not merely verbal or economic, but become physical impositions," they amount to extreme and outrageous conduct); *Ibraheem*, 29 F. Supp. 3d at 215 ("[F]ederal courts in New York routinely dismiss claims of IIED in the employment context, with the only exception being where employment discrimination claims are accompanied by allegations of both sexual harassment and battery.").

136. Stingley v. State, 796 F. Supp. 424, 431 (D. Ariz. 1992); Coddington v. V.I. Port Auth , 911 F. Supp. 907, 916 (D.V.I. 1996) (citing *Stingley*, 769 F. Supp. at 431); *see also Piech*, 841 F. Supp. at 831 ("A claim for intentional infliction of emotional distress, however, requires more than what is required for sexual harassment."); Galloway v. GA Tech. Auth., 182 F. App'x 877, 883 (11th Cir. 2006) (per curiam) (concluding summary judgment on IIED claim was appropriate on the grounds that conduct was not extreme and outrageous since the conduct did not amount to severe or pervasive harassment); Rawls v. Garden City Hosp., No. 09-13924, 2012 WL 762616, at *8 (E.D. Mich. Feb. 16, 2012) (referring to the "severe or pervasive" standard as being lower than the "extreme and outrageous" standard).

137. *See* Rice v. James, No. CV 117-039, 2019 WL 4132681, at *22 (S.D. Ga. Aug. 29, 2019) (stating that failure to establish that conduct was extreme and outrageous precluded "a finding under the more stringent" extreme and outrageous standard); Winston v. Bank of N. S., 2017 WL 970270, at *8 (D.V.I. Mar. 13, 2017) (concluding that because plaintiff's Title VII claim did not survive summary judgment, defendant's conduct did not amount to extreme and outrageous conduct), *aff'd*, 722 F. App'x 138 (2018).

standard is notoriously difficult to satisfy.[138] For example, some courts say that for racial harassment to be actionable, the employee must be subject to a "steady barrage of opprobrious racial comments."[139] This is no easy standard to meet. Courts frequently refer to the "severe or pervasive" standard as a "demanding" standard or a "high" bar or threshold.[140] Likewise, courts routinely emphasize how demanding the "extreme and outrageous" standard is.[141] The language courts use to describe what does not qualify as actionable under either theory is also often interchangeable. The *Restatement (Second) of Torts* famously explains that the concept of extreme and outrageous conduct does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[142] These same kinds of terms regularly appear in Title VII harassment decisions explaining what conduct does not qualify as severe or pervasive harassment.[143] Numerous courts have stated some variation on the theme that a "plaintiff's status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger."[144] If that is the case, why does the demanding standard of severe or pervasive harassment under Title VII set a "much lower"[145] bar for actionable behavior than the extreme and outrageous standard? If the defendant's conduct creates a triable

138. *See* L. Camille Hebert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1345, 1364 (2013) (noting the difficulty plaintiffs have had in meeting in this standard).

139. Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997); Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994).

140. Rester v. Stephens Media, LLC, 739 F.3d 1127, 1131 (8th Cir. 2014); EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008); Mejia v. White Plains Self Storage Corp., No. 18-CV-12189 (KMK), 2020 WL 247995, at *6 (S.D.N.Y. Jan. 16, 2020); Murray v. Dutchess Cty. Exec. Branch, No. 17-CV-9121 (KMK), 2019 WL 4688602, at *10–11 (S.D.N.Y. Sept. 25, 2019); Kirkland v. McAleenan, Civil Action No. 13-194 (RDM), 2019 WL 7067046, at *26 (D.D.C. Dec. 23, 2019); Steak N Shake Inc. v. White, No. 4:18-cv-00072-SRC, 2020 WL 85172, at *15 (E.D. Mo. Jan. 7, 2020).

141. *See, e.g.*, Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 791 (Ky. 2004) (stating the court has set a "high threshold" for IIED and outrage claims) *overruled on unrelated grounds by* Toler v. Sud-Chemie, Inc., 458 S.W.3d 276 (Ky. 2014); Di Teresi v. Stamford Health Sys., Inc., 63 A.3d 1011, 1020 (Conn. App. Ct. 2013) (stating the standard establishes a "high bar for distasteful behavior"); McKee v. McCann, 102 N.E.3d 38, 45 (Ohio Ct. App. 2017) (stating that it is "rare case that reaches the very high bar of showing 'extreme and outrageous' conduct") (internal citation omitted).

142. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965).

143. *See* Colman v. Faucher, 128 F. Supp. 3d 487, 500 (D.R.I. 2015) (stating that "petty indignities" are insufficient to establish retaliation under Title VII); Richardson v. Swift Transp. Co. of Ariz., LLC, No. 17 C 4046, 2018 WL 1811332, at *3 (N.D. Ill. Apr. 17, 2018) (rejecting defendant's argument that complained-of harassment "amount[s] to nothing more than mere inconveniences, petty slights and minor annoyances"); Herman v. Coastal Corp., 791 A.2d 238, 250 (N.J. Super. Ct. App. Div. 2002) (holding that "mere insults" do not constitute discrimination).

144. White v. Monsanto Co., 585 So. 2d 1205, 1210 (La. 1991); *see also* Robel v. Roundup Corp., 59 P.3d 611, (Wash. 2002) (en banc) (pointing to the fact that the plaintiff was subjected to the conduct from a supervisor in the workplace as a consideration in assessing the defendant's conduct); Taylor v. Metzger, 706 A.2d 685, 695–96 (N.J. 1998) (citing the "power dynamics" of the workplace in concluding that statement by one in a position of authority could be deemed extreme and outrageous).

145. Stingley v. State, 796 F. Supp. 424, 431 (D. Ariz. 1992).

issue as to whether it meets the demanding "severe or pervasive" standard for purposes of Title VII, why would this also not normally create a triable issue as to whether the same conduct is extreme and outrageous?

There may be plausible answers to each of these questions. Part of the explanation may be that courts do not apply either standard in a consistent manner.[146] But this is perhaps all the more reason why courts might be inclined to look to the other body of law for clarification. Professor Camille Hebert has speculated about the possibility of conceptualizing harassment that is actionable under Title VII as a dignitary tort involving the workplace, in which unlawful harassment should also "regularly result in tort liability."[147] The similarities between these two theories of liability—severe or pervasive harassment and extreme and outrageous conduct—are obvious,[148] and it would be logical for the two theories to inform one another. But rarely is there any attempt in the decisional law to harmonize these two standards. And, in fact, courts seem to go to great lengths to keep the two standards separate without offering any explanation or justification for this approach.

The one glaring exception to this general tendency is a line of cases originating from California intermediate appellate courts declaring that, "by its very nature, sexual harassment in the workplace is outrageous conduct."[149] Therefore, a plaintiff who properly pleads a statutory claim of unlawful harassment under California's Fair Employment and Housing Act (FEHA) has, by definition, properly pled the extreme and outrageous requirement of an IIED claim.[150] This stands as perhaps the clearest example of the

146. For example, while there are cases in which courts have held that conduct was actionable under Title VII but not through the IIED tort, there have also been cases in which courts have allowed IIED claims to proceed where the defendant's conduct might be actionable under Title VII. *See* Edwards v. Hyundai Motor Mfg. Ala., LLC, 603 F. Supp. 2d 1336, 1355 (M.D. Ala. 2009) (denying summary judgment to defendant on Title VII sexual harassment and IIED claims); Brewer v. Petroleum Suppliers, Inc., 946 F. Supp. 926, 934, 936 (N.D. Ala. 1996) (holding the same); Hernandez v. Partners Warehouse Supplier Servs., LLC, 890 F. Supp. 2d 951, 963 (N.D. Ill. 2012) (concluding that plaintiffs sufficiently alleged extreme and outrageous conduct based on defendant's "repeated comments, sexual propositions and unwelcome touching of" plaintiffs); Speight v. Albano Cleaners, Inc., 21 F. Supp. 2d 560, 565 (E.D. Va. 1998) (denying employer's summary judgment motion where supervisor groped plaintiff on at least two occasions).

147. Hebert, *supra* note 138, at 1347–48 (noting the difficulty plaintiffs have had in meeting in this standard).

148. The *Restatement (Third) of Torts* actually notes the overlap between the theories. *See id.* at 1353 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. n (AM. LAW INST. 2012)).

149. Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 858 (Cal. Ct. App. 1989). Other courts have since cited *Fisher* for the same proposition. *See* Kelley v. Conco Cos., 126 Cal. Rptr. 3d 651, 672 (Cal. Ct. App. 2011). In *Kovatch v. California Casualty Management Co*., a California appellate court extended the rule to include harassment on the basis of sexual orientation. 77 Cal. Rptr. 2d 217, 231 (Cal. Ct. App. 1998).

150. *See* Wells v. Regents of the Univ. of Cal., No. 15-cv-01700-SI, 2015 WL 6746820, at *8 (N.D. Cal. Nov. 5, 2015) ("Because Wells and Cordova have sufficiently alleged harassment claims under

statutification of tort law governing the workplace.[151] But it remains the sole example of this approach in the IIED context.

III. THE CASE FOR EXPANDING THE PRACTICE OF STATUTIFICATION

This Part examines why the statutification of workplace tort law has not become a popular practice and suggests reasons why the practice should be expanded. Questions of whether and to what extent courts should be willing to look to statutes when dealing with analogous common law tort theories depend heavily on the broader question of the proper role of tort law. At a high level of generality, there are two main theories of tort law.[152] Under one theory, tort law—traditionally classified as private law—is in reality a form of public law, which advances public values and vindicates public wrongs.[153] Under the opposing view, tort law's proper role is to do justice between the parties at issue and it is poorly positioned to address broad social problems.[154] Judges who subscribe to this view of the role of tort law can logically be expected to defer to legislatures that have dealt with the social problems at issue rather than expanding or adapting tort law to deal with those problems.[155] Through the lenses of these competing conceptions of tort law, this Part explores the tendency of some courts either to ignore relevant statutory law when dealing with an analogous tort issue involving the workplace or to create a firewall between tort law and statutory law governing the workplace.

FEHA, . . . [they] have sufficiently alleged the extreme and outrageous element for an IIED claim."); Bejarano v. Int'l Paper Co., No. 1:13–cv–01859–AWI–GSA, 2015 WL 351420, at *11 (E.D. Cal. Jan. 23, 2015) (citing *Fisher* and denying defendant's summary judgment motion on plaintiff's IIED claim after also denying defendant's motion for summary judgment on statutory harassment claim); Mayfield v. Trevors Store, Inc., No. C–04–1483 MHP, 2004 WL 2806175, at *8 (N.D. Cal. Dec. 6, 2004) (stating that plaintiff satisfied the pleading requirement with respect to IIED claim because plaintiff had properly pled sexual harassment in violation of the FEHA). The converse may also be true: a plaintiff who fails to properly plead sexual harassment as defined by statute has failed to properly plead extreme and outrageous conduct in an IIED action absent some other conduct. *See* Sistena v. Genentech, Inc., No. A125555, 2010 WL 3179723, at *9 (Cal. Ct. App. Aug. 12, 2010) (holding that plaintiff "has not established a claim for discrimination and absent a proper claim for discrimination, the comments made by Sistena's supervisor are not sufficiently outrageous to support a claim for intentional infliction of emotional distress").

151. At least one court has held that this line of cases is limited to sexual harassment and does not automatically extend to other forms of harassment or retaliation. *See* Nidds v. Schindler Elevator Corp., No. C-92-2177-VRW, 1994 WL 675719, at *7 (N.D. Cal. Nov. 17, 1994) ("[T]he holding in *Fisher* is limited to sexual harassment cases.").

152. *See* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449 (1992).

153. *See* Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 438 (2011) (describing this conception of tort law).

154. *See* John C. P. Goldberg, *Unloved Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1518–19 (2002) ("[T]ort law is not well-suited to solve the large-scale social and political problems it is being asked to solve . . . .").

155. *See* Rustad, *supra* note 153, at 476 ("[J]udges following civil recourse will be more likely to defer to legislatures instead of finding creative continuity in tort law . . . .").

A. Possible Explanations for the Lack of Statutification of Tort Law Governing the Workplace

There are several possible explanations for the failure of state courts to look to federal statutory employment discrimination law when dealing with related tort law issues. Some of these explanations are fairly mundane. For example, in the case of the failure of the Supreme Court's causation decisions in the Title VII context to influence state tort law in related cases, state courts may already have well-established tort-based causation standards in place and are therefore uninterested in unsettling this law simply to bring it in line with federal standards.[156] Another possible explanation is that courts view the two areas of law as distinct to the point that it simply does not occur to them that one might influence the other. In other words, some courts may view the statutory approach to a particular problem as irrelevant to the question of how tort law should deal with a related problem.

A more sophisticated version of this explanation would be that the two bodies of law serve different purposes and incorporating statutory principles into tort law would therefore be neither helpful nor appropriate. For example, Title VII and other anti-discrimination statutes are designed specifically to combat workplace discrimination and provide compensation to the victims of such discrimination. In contrast, the tort of IIED is a dignitary tort, designed to protect individual dignity and compensate an individual who has been treated "in a way that does not respect that person's intrinsic worth."[157] One could argue that because the two bodies of law have fundamentally different goals, linking the two or looking to one to help flesh out the contours of the other would be inappropriate. This would perhaps help explain the statements from some courts that, as a matter of law, the severe or pervasive harassment that a plaintiff must establish to state a Title VII harassment claim occurs at a lower threshold than the extreme and outrageous conduct necessary to support an IIED claim.[158]

For example, when initially deciding at what point harassment becomes actionable under Title VII in *Harris v. Forklift Systems, Inc.*, one of the options the Supreme Court could have chosen was whether the harassment "seriously affected an employee's psychological well-being" or led the plaintiff to suffer injury, an approach already employed by some lower courts.[159] Under this approach, the focus is squarely on harm to an individual instead of harm to the goal of workplace equality. This approach would have

156. *See generally* Harper, *supra* note 14, at 1332–35 (noting that there are areas in which federal law is unlikely to influence state common law because the common law may already be well established and thus not open to future development or modification).

157. Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 320 (2019); *see also id.* at 335 (listing IIED as a tort commonly identified as dignitary).

158. *See supra* notes 130–132 and accompanying text.

159. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).

put Title VII law very much in line with the IIED tort, which requires that extreme and outrageous conduct results in emotional distress so severe that no reasonable person should be expected to endure it.[160] But the Court ultimately chose a standard that focused on the impact of the harassment on the workplace instead of the plaintiff's psychological well-being.[161] In settling on this standard, the Court focused heavily on Title VII's broad goal of promoting workplace equality:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.[162]

In contrast, the primary focus of the IIED tort is to compensate an individual for the emotional harm stemming from conduct that diminishes their dignity.[163] The tort certainly may deter outrageous behavior in the workplace and elsewhere,[164] but its principal purpose is to provide a remedy for the severe emotional distress caused by extreme and outrageous conduct, not to promote workplace equality. Because it is difficult to classify Title VII as a statutory dignitary tort and the IIED tort as an anti-discrimination tort,[165] judges may believe that looking to Title VII to define the concept of extreme and outrageous conduct in an IIED case involving a similar fact pattern would be of limited value.

Some courts have alluded to another possible explanation for the lack of statutification in this area. This explanation focuses less on the different purposes of the two areas of law; instead, it is grounded in courts' views of the importance of preserving both the discretion traditionally afforded to employers under the at-will rule and the prerogative of the legislature to regulate employers in this area. In retaliatory or wrongful discharge cases, for example, courts often emphasize that the tort theory is a "limited"[166] or

160. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

161. *See Harris*, 510 U.S. at 22.

162. *Id.*

163. The IIED tort is grouped under the chapter in the *Restatement* addressing liability for emotional harm. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 8 (AM. LAW INST. 2012).

164. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1288–89 (1996) (discussing the deterrent effect of the IIED tort in employment and commercial settings).

165. *See generally* Hebert, *supra* note 138, at 1363–68 (discussing the disadvantages of treating sexual harassment as a dignitary tort).

166. *See, e.g.*, Chism v. Mid-S. Milling Co., Inc., 762 S.W.2d 552, 553 (Tenn. 1988); Hansen v. Harrah's, 675 P.2d 394, 396 (Nev. 1984).

"narrow"[167] exception to the at-will rule—particularly when courts are justifying their refusal to extend the theory to a particular factual scenario.[168] Courts express the concern that by expanding the tort, they may "impair the exercise of managerial discretion or . . . foment unwarranted litigation."[169] Closely related to this rationale is concern over intruding upon the legislative domain.[170] State legislatures have chosen to place limits on the unfettered ability of employers to fire their employees in some instances but not in others. For example, a legislature may enact a statute providing an employee with a remedy when an employer has retaliated against the employee for filing a workers' compensation claim but not when an employee engages in whistleblowing activities (or vice versa). In such situations, a state court may have to decide whether to afford a common law remedy in the face of a statute that already provides a remedy in the one instance or to take the failure of the legislature to act in the other instance as a sign that the legislature has deliberately chosen not to act.[171] Under either scenario, a court is making a decision as to how best to respect a legislature's role as the primary policymaking branch of government.[172] And in most instances where state courts have not looked to federal statutory law when considering related tort cases, the outcome has been to narrow, rather than expand, potential employer liability.

These themes play out in the IIED, retaliatory discharge, and retaliatory discipline cases, albeit with little more than passing reference to the federal statutory law on point. In IIED cases involving the workplace, state courts regularly explain that such claims are disfavored due to the fear of intruding upon managerial discretion.[173] Courts express the same concern in retaliatory discipline cases, and sometimes also reference the concern over altering the

167. *See, e.g.*, Martin v. Gonzaga Univ., 425 P.3d 837, 842 (Wash. 2018); Bereston v. UHS of Del., Inc., 180 A.3d 95, 111 (D.C. 2018).

168. *See, e.g.*, Shovelin v. Cent. N.M. Elec. Co-op., Inc., 850 P.2d 996, 1010-11 (N.M. 1993).

169. Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 387–88 (Conn. 1980); *see also* Pang v. Int'l Document Servs., 356 P 3d 1190, 1197 (Utah 2015) ("[B]y cabining the scope of the public policy exception, we 'avoid unreasonably eliminating employer discretion in discharging employees.'") (quoting Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 405 (Utah 1998)); Jones v. Univ. of Iowa, 836 N.W.2d 127, 144 (Iowa 2013) (noting that the wrongful discharge tort limits employer discretion).

170. *See* Stevenson v. Superior Ct., 941 P.2d 1157, 1161 (Cal. 1997) ("[T]ethering public policy to specific constitutional or statutory provisions serves . . . to avoid judicial interference with the legislative domain.").

171. *See* Carter v. District of Columbia, 980 A.2d 1217, 1226 (D.C. 2009) (declining, out of deference to the legislature's prerogatives, to recognize new exception to at-will rule in the face of existing statute on the same subject).

172. *See generally* Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 763 (Iowa 2009) ("[T]he public-policy exception to the employment at-will doctrine is a product of the balancing by our legislature of the competing interests of the employer, employee, and society.").

173. *See, e.g.*, Wilson v. Monarch Paper Co , 939 F.2d 1138, 1143 (5th Cir. 1991) (noting the need of employers to "review, criticize, demote, transfer, and discipline employees" and stating that only in the most unusual case is an IIED claim based on such conduct actionable).

balance between the interests of employers and employees struck by an existing statute.[174]

B. Competing Conceptions of the Role of Tort Law in the Workplace

These concerns over the proper role of tort law in the workplace take place against the backdrop of competing visions of the role of tort law more generally. However, disagreements concerning the proper role of tort law are amplified in the workplace context, given the ongoing tension between increased statutory regulation of the workplace and the longstanding employment-at-will rule. As legislation has gradually chipped away at the discretion traditionally afforded to employers under the at-will rule, courts have struggled more frequently with the question of how best to strike the balance between limiting harmful employer conduct and preventing the judiciary from getting drawn into the minutiae of the workplace and acting as "super personnel departments."[175] This tension manifests not just in the interpretation of statutes regulating the workplace, but also in the interpretation and application of the corresponding tort law. Thus, how a judge views the role of tort law is likely to influence how that judge strikes this balance.

One conception of tort law focuses heavily on deterrence and views tort law as a vehicle for addressing societal problems.[176] A judge who views tort law through this lens would perhaps be more likely to look to statutes to divine public policy that a cause of action sounding in tort could vindicate. In contrast, those who adopt a corrective justice view see tort law as decidedly private law.[177] Under this view, tort law's role is to rectify losses caused by a defendant's conduct and to restore equilibrium between the parties, not to further broad public policies.[178] A judge who subscribes to this view is more likely to believe that tort law runs the greatest risk of illegitimate judicial legislating when it focuses on deterring wrongful conduct rather than

174. *See infra* notes 290–293 and accompanying text.

175. Lisdahl v. Mayo Found., 633 F.3d 712, 722 (8th Cir. 2011).

176. *See* Gary T. Schwartz, *Mixed Theories of Tort Law Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (describing the deterrence-based approach to torts).

177. *See* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 697 (2003) ("Corrective justice theory views tort law as a matter of 'private law' in an important sense . . . .").

178. *See id.* at 695 (explaining that corrective justice aims to restore the normative equilibrium between private parties); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 197 (2000) (explaining that corrective justice is concerned with rectifying wrongdoing). Professor Benjamin C. Zipursky has distinguished corrective justice from what he calls the "civil recourse" theory. Zipursky, *supra* note 177, at 739. Corrective justice is based upon the notion of a "freestanding duty of repair" that may or may be implicated by the filing of a lawsuit. *Id.* Civil recourse is instead grounded upon the idea that a plaintiff's right is "correlative to an obligation in the state to privilege and empower persons to act against those who have wronged them." *Id.*

remedying individual harm.[179] Therefore, a judge who views tort law through this lens would logically be less likely to look to statutory commands in order to help define the contours of a tort, even if the two areas of law happen to focus on the same issues in a given case.

This split in approaches is, of course, representative of broader splits concerning the proper role of judges in the common law tradition, particularly when dealing with statutes.[180] Judges who are generally willing to develop new common law approaches to deal with changing societal concerns might naturally be more inclined to look to statutory law for clues as to the proper policy approach.[181] Judges who base their identity around the idea that the legislature's view is paramount when it comes to the development of public policy may be less inclined to view tort law as the appropriate vehicle to address broader societal concerns.[182] But the fact that tort law and statutory law increasingly coexist in an uncomfortable manner within the workplace only heightens the intensity of the split.

Perhaps the clearest example of how these competing views of tort law may produce different approaches to tort issues involving the workplace is the tort of retaliatory discharge in violation of public policy. The tort of retaliatory (or wrongful) discharge in violation of public policy is recognized in nearly every jurisdiction.[183] As its name implies, the tort provides a remedy to individuals who have been discharged when the discharge contravenes a clear or well-established public policy.[184] Examples include when an employee is fired for (1) refusing to commit what the employee reasonably believes is unlawful conduct, (2) fulfilling an important public obligation (such as jury duty), (3) exercising a statutory or similar right (such as filing for workers' compensation benefits), and (4) whistleblowing.[185] In deciding

179. *See* John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 536 (2003) (discussing concerns over judicial activism).

180. *See generally* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1362–63 (2015) (noting the different judicial approaches on the issue of the relationship between statutory and common law).

181. *See generally* Judith S. Kaye, *State Courts at the Dawn of a New Century Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 6–8 (1995) (discussing the judicial approach to tort law in a time of increased statutory regulation).

182. *See generally* Robert P. Young, Jr., *A Judicial Traditionalist Confronts the Common Law*, 8 TEX. REV. L. & POL. 299, 300–02 (2004) (explaining that "it is the legislature that serves as the People's lawgiver in matters of public policy," and that the common law presents an embarrassment to traditionalist judges who take this position).

183. RESTATEMENT OF EMP'T LAW § 5.01 cmt. a. (AM. LAW INST. 2015); *id.* Reporters' Notes cmt. a ("Almost all jurisdictions recognize some form of the cause of action for wrongful discharge in violation of public policy.").

184. *See id.* § 5.01 (describing the tort); Greeley v. Miami Valley Maint. Contractors, Inc., 551 N.E.2d 981, 981 (Ohio 1990) (recognizing the tort), *overruled in part by* Tulloh v. Goodyear Atomic Corp., 584 N.E.2d 729 (Ohio 1992).

185. *See* RESTATEMENT OF EMP'T LAW § 5.02 (AM. LAW INST. 2015) (listing these exceptions to the at-will rule, among others); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (jury duty); Frampton v. Cent.

whether a clear or well-established public policy exists and is jeopardized by a firing, courts regularly look to statutes in order to discern the existence of such a policy. Thus, this tort is premised on the need for a court to look to another body of law to determine whether a cause of action should be recognized.[186]

A judge who views tort law as public law or through the lens of deterrence is likely to view the retaliatory discharge tort as a means of protecting the societal interests at stake. The employment-at-will rule gives employers the authority to unfairly or "wrongfully" fire an employee. But it is only where the firing threatens public interests that the law intervenes. Therefore, for some courts, the focus of the tort is primarily about vindicating public policy and secondarily about providing a remedy to the discharged employee.[187] Under this approach, an employee who loses a job as a result of engaging in activity that society wants to encourage (voting, for instance) has certainly suffered a wrong at the hands of an employer. The same is true for an employee who is fired after taking advantage of a statutory process designed to deal with competing policy concerns (filing for workers' compensation benefits, for instance) or for reporting or refusing to engage in illegal conduct. But the *raison d'etre* of the retaliatory discharge tort is to prevent employers from jeopardizing the public policy that underlies the employee's actions.[188] Thus, some courts speak of the retaliatory discharge tort in terms of balancing the interests of the employer, the employee, *and* the public.[189] The requirement that a plaintiff be able to point to a clear expression of public policy in a statute or some other positive law serves primarily to ensure that the public's interests are being protected by affording the plaintiff a remedy. While statutes are the most obvious place to turn in order to divine public policy, a judge that views tort law in this light might logically be expected to view tort rules themselves as articulating substantial public policy and thus serving as the source of public policy the tort seeks to protect.[190]

Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (workers' compensation claim); Murcott v. Best W. Int'l, Inc., 9 P.3d 1088, 1095–96 (Ariz. Ct. App. 2000) (internal and external whistleblowing).

186. *See* Nancy Modesitt, *Wrongful Discharge The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 625–26 (2006) (discussing the different sources of public policy to which courts look).

187. *See generally* David Kwok, *The Public Wrong of Whistleblower Retaliation*, 69 HASTINGS L.J. 1225, 1244–45 (2018) (discussing how providing protection to whistleblowers primarily serves public interests).

188. *See* Smith v. Zenith Elecs. Corp., No. 85 C 5795, 1986 WL 6910, at *4 (N.D. Ill. June 6, 1986) (referring to vindication of a violation of public policy as the *raison d'etre* of the tort).

189. *See, e.g.*, Gantt v. Sentry Ins. 824 P.2d 680, 687–88 (Cal. 1992), *overruled by* Green v. Ralee Eng'g Co., 960 P.2d 1046 (Cal. 1998); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

190. *See, e.g.*, Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 718–19 (W. Va. 2001) (recognizing the common law as a potential source of public policy).

For judges who view tort law through the corrective justice lens, the retaliatory discharge tort is at odds with their worldview. Rather than focusing on doing justice between employer and employee, the tort forces judges to focus on deterring employers from engaging in conduct that threatens broader societal goals. Therefore, a judge who takes a corrective justice view of tort law might naturally be inclined to try to limit the reach of the tort. Not surprisingly, many decisions define the retaliatory discharge tort largely in terms of remedying the harm an employee suffers when the employee is fired after being presented with a Hobson's choice by the employer, rather than in terms of the public's interest in the outcome of the choice.[191] Judges who view tort law in this manner may have no choice but to look to statutes in determining whether a clear public policy exists, but they might be expected to limit their search for a clearly articulated public policy to statutes that contain clear expressions regarding employer conduct as opposed to hortatory language concerning societal goals.[192] Given their view of tort law primarily as a means of restoring equilibrium between parties, these judges might also be unwilling to recognize common law tort rules as broader expressions of public policy for the purposes of retaliatory discharge claims.[193] In the absence of legislation clearly defining an employer's actions toward an employee as injurious, judges in this camp might also demonstrate a particular sensitivity to the rights traditionally afforded employers by courts and legislatures. Thus, they might be unwilling to permit a retaliatory discharge claim to proceed where the public policy can be vindicated through some other means that does not impinge upon the at-will rule.[194]

191. *See* Cromley v. Bd. of Educ. of Lockport Twp. High Sch. Dist. 205, 699 F. Supp. 1283, 1297 (N.D. Ill. 1988) (referring to "affording relief to otherwise remediless plaintiffs" as the *raison d'etre* of the tort). When explaining the need for a balancing of interests, courts following this approach tend to exclude any mention of the public's interest. *See, e.g.*, Antinerella v. Rioux, 642 A.2d 699, 705 (Conn. 1994).

192. Professor Benjamin C. Zipursky has analogized judges who take a corrective justice approach to tort law to those who take a textualist approach to statutory interpretation insofar as they perceive themselves as constrained in their roles. Zipursky, *supra* note 177, at 732.

193. Some courts require that the relevant public policy may only be expressed through a statute, constitutional provision, or administrative regulation. *See, e.g.*, Luethans v. Wash. Univ., 894 S.W.2d 169, 171 n.2 (Mo. 1995) (en banc).

194. For example, the Washington Supreme Court held in *Cudney v. ALSCO, Inc.* that to prevail on a retaliatory discharge claim, an employee must demonstrate that "other means of promoting the public policy are inadequate, and that the actions the plaintiff took were the 'only available adequate means' to promote the public policy." 259 P.3d 244, 247 (Wash. 2011) (en banc) (internal citation omitted). Several years later, the court overruled this holding but still required that a court consider whether any statutory remedy created was intended to be the exclusive remedy. Rose v. Anderson Hay & Grain Co., 358 P.3d 1139, 1146 (Wash. 2015).

C. The Arguments for Some Statutification of the Tort Law Involving the Workplace

Other authors, most notably Professor Martha Chamallas, have suggested that tort law could play a more robust role in the regulation of the workplace, particularly in addressing workplace discrimination.[195] Ultimately, these arguments run up against the reality that many judges view the role of tort law as limited. This is particularly true of tort law touching on the workplace, given the discretion the law has traditionally afforded to employers. The remainder of this Article serves as a gentle reminder to judges of all stripes that tort law and statutory law are now both so heavily involved in the regulation of the workplace that it is difficult to do one's job as a judge without at least considering how the two bodies of law might inform one another.

It is increasingly rare that an issue concerning employee rights involves only tort law or only statutory law. Even the most devoted proponents of a corrective justice view of tort law recognize that the statutory law concerning the workplace—with all of its attendant policy-based and deterrence concerns—shares the field with modern tort law involving the workplace. Likewise, the proponents of this approach undoubtedly recognize that the tort of retaliatory discharge in violation of public policy, however limited it may be, now forces state courts to consider the interests of the public in the resolution of tort-based claims. Proponents of a deterrence-based approach to tort law that vindicates public interests also undoubtedly realize that some consideration of statutory measures is inevitable because tort law does not develop on a blank canvas when it comes to regulation of the workplace. One does not necessarily have to choose a side in the debate over the proper function of tort law to conclude, from a purely pragmatic standpoint, that statutory law governing the workplace can offer useful insight to a court as it assesses a related tort law question.

Some amount of back and forth between the two areas of law is inevitable. As Title VII and other anti-discrimination statutes began limiting the traditional freedoms afforded to employers, tort law soon followed suit.[196] Naturally, state court judges began confronting similar interpretive issues and questions as to when tort law should fill gaps left by statutes and when the act of filling those gaps might intrude upon legislative prerogatives. These courts were required to develop the common law in the shadow of federal statutory law. Therefore, statutory law has had at least an indirect influence on the development of tort law in the employment context, even if state courts

195. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 85 (2010).

196. *See* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 837–38 (Wis. 1983) (citing Title VII and other statutory modifications to the at-will rule in support of recognizing the retaliatory discharge tort).

have been reluctant to directly import its principles. And as discussed above, tort law has clearly influenced the development of statutory anti-discrimination law.[197]

This type of back and forth is completely appropriate in the abstract. Unless one believes that a practice of willful blindness is a proper approach to judging, it would seem appropriate to at least look to this other body of law to see what lessons, if any, it might offer. The question is to what extent is it appropriate to look to another area of law for guidance and what influence that other area of law should have. State courts do not necessarily have to articulate a lockstep approach in which tort law involving the workplace tracks the analogous statutory law in a given situation, as California appellate courts have done with respect to IIED claims.[198] Instead, under either of the two dominant views of tort law, judges can appropriately look to statutory law in attempting to define the contours of the common law involving the workplace and vice versa.

Of course, one of the chief criticisms of the tortification phenomenon is that the borrowing of tort law principles for use in anti-discrimination statutes is often inappropriate or, at a minimum, produces awkward results.[199] Indeed, it may not always make sense to borrow substance from another body of law, and sometimes other bodies of law have little to offer on the particular point at all. Professor Deborah Brake has generally been critical of federal courts importing substantive tort rules into the interpretation and application of federal anti-discrimination statutes.[200] Nonetheless, she acknowledges that there may be instances in which the other body of law may provide useful guidance. For example, Brake argues that "tort law might be mined" in some instances for principles that could help guide Title VII retaliation law in a more logical direction.[201] Importantly, Brake does not necessarily recommend importing black-letter tort rules for use in the statutory discrimination context. Instead, Brake suggests courts could look to tort law's traditional focus on defendant fault "to direct attention to employer fault and strengthen" employee protections.[202]

As another example, Brake suggests that tort law's focus on wrongfulness might help define the scope of protected activity for purposes of a Title VII retaliation claim and explain why taking retaliatory action against an employee should be deemed wrongful.[203] Brake cites the situation

197. *See supra* notes 19–63 and accompanying text.

198. *See supra* notes 149–150 and accompanying text.

199. *See supra* notes 66–84 and accompanying text.

200. Deborah L. Brake, *Tortifying Retaliation Protected Activity at the Intersection of Fault, Duty, and Causation*, 75 OHIO ST. L.J. 1375, 1397–99 (2014).

201. *Id.* at 1402.

202. *Id.* at 1407.

203. *Id.* at 1404.

in which an employer encourages employees to take advantage of internal processes to address unlawful discrimination and then takes action against the employee who does so.[204] The Supreme Court's Title VII precedent strongly incentivizes employers to develop such internal processes by affording them an affirmative defense to claims involving supervisor harassment where the employer has exercised reasonable care to prevent and promptly correct such harassment.[205] At the same time, Title VII retaliation law also removes an employee's protection from retaliation for having taken advantage of such a process if the employee lacks a "reasonable belief" that the conduct complained of was unlawful.[206] Courts have somewhat famously held non-lawyer employees to a demanding standard in terms of what qualifies as a reasonable belief.[207] Brake notes that retaliation against an employee who utilizes an employer-provided process could easily be classified as "wrongful" from a corrective justice viewpoint. Not only does such retaliation interfere with an employee's work life, but it also allows the employer "to have its cake and eat it too."[208] The employer receives the benefits of engendering employee trust and being able to utilize the affirmative defense, but it is still able to harm a "disloyal" employee who supposedly lacks a reasonable belief as to whether unlawful discrimination has occurred.[209] By looking to tort law's focus on the wrongfulness of a defendant's conduct, courts may similarly be more inclined to focus on the wrongfulness of the employer's conduct when assessing a statutory retaliation claim.[210]

Of course, it may be that a state court looks to decisions interpreting and applying an employment statute and finds little of persuasive value. For example, a court might find Title VII harassment cases to shed little light on the meaning of "extreme and outrageous" conduct for purposes of an IIED claim, given the different goals of these two theories of liability.[211] Similarly, a court might take note of the Supreme Court's Title VII decisions involving causation and conclude that there is no particularly compelling reason to upset long-settled tort law by adopting the approach to issues of causation that federal courts have adopted in interpreting discrimination statutes.[212]

204. *Id.* at 1405.

205. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

206. Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001).

207. *See* Matthew W. Green Jr., *What's So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 794 (2014) (discussing the demanding standard to which courts often hold retaliation plaintiffs).

208. Brake, *supra* note 200, at 1405.

209. *Id.*

210. *See id.* at 1407–11.

211. *See supra* notes 156–165 and accompanying text.

212. *See supra* notes 47–63 and accompanying text.

Nonetheless, considering principles imported from other bodies of law could lead to stronger analysis and could, consistent with the common law tradition, guide future courts wrestling with the same issues. For example, rather than blithely continuing to assert that Title VII's "severe or pervasive" standard establishes a much lower threshold than IIED's "extreme and outrageous" standard,[213] courts could actually consider why this should be the case. Regardless of their conclusions, such consideration might enable courts to flesh out the meaning of both standards in a way that provides clearer guidance for future litigants.

IV. THE SPECIAL CASE OF RETALIATION AND THE TORT OF RETALIATORY DISCIPLINE IN VIOLATION OF PUBLIC POLICY

By engaging in the inquiry described in this Article, state courts may develop better-reasoned and more robust tort rules for use in the workplace even if they choose not to import rules from statutory law. But sometimes courts may find that rules developed in the statutory context have a place within the common law tort regime. One example of how statutory principles should inform the development of tort law governing the workplace is the tort of retaliatory discipline (as opposed to discharge) in violation of public policy. This Part explores the general failure of state courts to look to federal retaliation law when deciding whether to recognize the tort of retaliatory discipline and suggests that this is a situation in which courts should engage in statutification.

A. Statutory Protection from Retaliation in Federal Anti-discrimination Statutes

The ability of Title VII and other anti-discrimination statutes to combat discrimination depends in large part on the willingness of employees to come forward when they are subject to or observe discrimination.[214] As a result, Title VII contains an anti-retaliation provision in addition to its prohibition on discrimination. Title VII contains two distinct prohibitions on employer retaliation. First, section 704(a) contains an "opposition clause," which prohibits an employer from retaliating against an employee because the employee has opposed an employment practice that is unlawful under Title VII.[215] Second, this section also contains a "participation clause," which prohibits an employer from retaliating against an employee because the

213. *See supra* notes 136–137 and accompanying text.

214. *See* Deborah Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005) (stating that the effectiveness of discrimination law "turns on people's ability to raise concerns about discrimination without fear of retaliation").

215. 42 U.S.C. § 2000e-3(a) (2018).

employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."[216]

In order to establish a prima facie case of retaliation, a plaintiff must establish that they engaged in one of these two forms of protected activity. In addition, the plaintiff must show that there was a causal connection between the protected activity and the retaliatory conduct and that the retaliatory conduct was actionable.[217] This same framework applies to claims brought pursuant to other federal anti-discrimination statutes, such as the Americans with Disabilities Act (ADA).[218]

B. The Material Adversity Standard

1. Burlington Northern & Santa Fe Railway v. White *and the Material Adversity Standard*

In order to establish a prima facie case of retaliation, a plaintiff must show that the employer's allegedly retaliatory action was actionable to begin with. For years, courts were split as to the standard for determining when employer retaliation was actionable under Title VII. Some courts took the position that the standards for actionable discrimination and retaliation were the same, so that employer retaliation must have been significant enough to result in a material change to the terms and conditions of employment.[219] Others required that the retaliation resulted in an "ultimate employment decision," such as discharge.[220] In *Burlington Northern & Santa Fe Railway v. White*, the Supreme Court rejected the argument that the discrimination and retaliation standards were coterminous, holding that employer retaliation need only be "materially adverse to a reasonable employee or job applicant" in order to be actionable.[221] An action is materially adverse if it "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[222]

The Court's decision was based on both the plain language of section 704(a) and the purposes that underly anti-retaliation provisions more generally. Unlike Title VII's anti-discrimination provision, which speaks of discrimination impacting "compensation, terms, conditions, or privileges of

216. *Id.*

217. *See* Willis v. Cleco Corp., 749 F.3d 314, 317 (5th Cir. 2014) (describing the showing required to make out a prima facie case for retaliation under Title VII).

218. *See id.* (noting that the same framework applies to claims brought pursuant to 42 U.S.C. § 1981); Smothers v. Solvay Chems., Inc., 740 F.3d 530, 544 (10th Cir. 2014) (describing the framework that governs ADA retaliation claims).

219. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60 (2006) (citing cases).

220. *See id.* (citing cases).

221. *Id.* at 57.

222. *Id.*

employment,"[223] the anti-retaliation provision contains no such limitations.[224] In addition, the Court noted that Title VII's anti-retaliation provision advances the statute's anti-discrimination mandate "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[225] Because the anti-retaliation provision seeks to prevent employers from interfering with employees' "'unfettered access' to Title VII's remedial mechanisms," the Court settled on a standard that focused on the deterrent effect retaliation was likely to have an employee: whether a reasonable employee would have found the retaliation to be materially adverse.[226]

In fleshing out the meaning of its material adversity standard, the Court emphasized that the standard excluded "trivial harms," "simple lack of good manners," and "those petty slights or minor annoyances that often take place at work and that all employees experience."[227] But the Court was also careful to emphasize that "[c]ontext matters."[228] As the Court explained, "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children."[229] Likewise, excluding an employee from a lunch invitation might ordinarily be a petty slight, but excluding that same employee from a weekly training lunch that might advance the employee's career could dissuade a reasonable worker from making or supporting a charge of discrimination.[230]

In *Burlington Northern*, the employer retaliated against an employee who had registered an internal complaint concerning her supervisor's sexist behavior by reassigning the employee from forklift duty to a track laborer job.[231] The track laborer and forklift positions were in the same category, but the track laborer job was generally considered to be more arduous and less prestigious.[232] Applying the material adversity standard to these facts, the Court observed that a reassignment of job duties might not be actionable in some instances, but that "one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."[233] Judged from the perspective of a reasonable

223. 42 U.S.C. § 2002e-2(a) (2018).
224. *See Burlington N.*, 548 U.S. at 62–63 (discussing differences in statutory language).
225. *Id.* at 63.
226. *Id.* at 68 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
227. *Id.*
228. *Id.* at 69.
229. *Id.*
230. *Id.*
231. *Id.* at 58.
232. *Id.* at 71.
233. *Id.* at 70–71.

person in the employee's position, the Court held that reassignment of job duties in *Burlington Northern* could be materially adverse.[234]

2. The Battle Over the Meaning of the Material Adversity Standard

On its face, the material adversity standard represents a substantial victory for employees.[235] Because employees need not establish that they suffered an ultimate employment action before bringing a retaliation claim under the material adversity standard, the *Burlington Northern* decision potentially makes numerous forms of employer retaliation actionable, including written reprimands and warnings,[236] threats of discharge,[237] schedule changes,[238] placing an employee on disciplinary or administrative leave,[239] physically isolating an employee from coworkers,[240] and instructing subordinates to shun an employee who engages in protected activity.[241] The decision is also significant because lower courts have adopted the standard for use in a host of other federal statutes that prohibit employment retaliation, such as the ADA, the FMLA, and the Fair Labor Standards Act (FLSA).[242]

Many of the managerial decisions that are now subject to challenge as unlawful retaliation are also decisions that courts, citing the employment-at-will rule, have traditionally protected from judicial oversight. In many of these instances, a plaintiff will not have experienced tangible economic harm as a result of the employer's actions.[243] So, perhaps it is not surprising that

234. *Id.* at 71.

235. *See* Lawrence D. Rosenthal, *Timing Isn't Everything Establishing a Title VII Retaliation Prima Facie Case After* University of Texas Southwestern Medical Center v. Nassar, 69 SMU L. REV. 143, 151 (2016) (stating the Court took a "relatively pro-employee" approach).

236. *See* Bhatti v. Trs. of Bos. Univ., 659 F.3d 64, 72 (1st Cir. 2011).

237. *See* Hellman v. Weisberg, 360 F. App'x 776, 779 (9th Cir. 2009).

238. *See* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2036, 2036 n.18 (2015) (listing cases); Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 831–32, 832 n.59 (2019) (same).

239. *See* McKneely v. Zachary Police Dep't, No. CIV.A. 12-354-SDD-RLB, 2013 WL 4585160, at *10–11 (M.D. La. Aug. 28, 2013).

240. *See* Olonovich v. FMR-LLC Fid. Invs., No. CV 15-599 SCY/WPL, 2016 WL 9777193, at *7 (D.N.M. June 21, 2016).

241. *See id.*

242. *See* Adams v. Anne Arundel Cty. Pub. Schs., 789 F.3d 422, 431 (4th Cir. 2015) (applying material adversity standard to retaliation claims involving the ADA); Baloch v. Kempthorne, 550 F.3d 1191, 1198 (D.C. Cir. 2008) (applying material adversity standard to ADEA retaliation claim); Freelain v. Village of Oak Park, 888 F.3d 895, 901 (7th Cir. 2018) (applying material adversity standard to retaliation claims involving FMLA); Tooker v. Alief Indep. Sch. Dist., 522 S.W.3d 545, 562–63 (Tex. App. 2017) (applying material adversity standard to retaliation claims involving FLSA).

243. In briefs filed with the Court in *Burlington Northern*, employers emphasized this fact. *See* Reply Brief of Petitioner at 8, Burlington N. Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (No. 05-259), 2006 WL 937535, at *8 ("Most significantly, decisions at the very core of daily supervisory responsibility - such as where employees will work, when lunch breaks will be taken, and which employee will do what tasks - will always be actionable under White's theory even though they cause no economic harm and are neither severe nor pervasive."); Brief of Amicus Curiae the Association of American Railroads in Support

some courts have been reluctant to extend the *Burlington Northern* holding to its intended reach.[244] In applying *Burlington Northern*, some courts emphasize the portion of the opinion stating that the material adversity standard does not include "trivial harms" and "minor annoyances," while giving short shrift to the actual holding that retaliation is actionable when it might dissuade a reasonable worker from making or supporting a charge of discrimination. These courts tend to issue broad holdings that come close to announcing bright-line rules that particular forms of retaliatory conduct are categorically not actionable.[245] For example, in *Burlington Northern*, the Court made clear that actionable retaliation may include actions that do not result in loss of employment or compensation, citing the example of a schedule change in the case of a parent with school-age children.[246] Despite this, some courts appear to have come precariously close to adopting a bright-line rule that a schedule change that has no effect on compensation or total hours worked is, as a matter of law, not materially adverse.[247]

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of Petitioner Burlington Northern Santa Fe Railway Co. at 8–9, Burlington N. Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (No. 05-259), 2006 WL 219564, at *8–9 (arguing that federal law requires an injury in the form of tangible harm before federal anti-discrimination law provides a remedy).

244. *See* Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 757–58 (2018) (discussing the strict approach some courts take on the issue of material adversity in terms of judicial reluctance to interfere with managerial discretion).

245. *See* Sperino, *supra* note 238, at 2035 ("When judges write opinions advocating a high harm threshold, they often issue broad opinions that appear to hold, as a matter of law, that a particular action is never serious enough to create liability."); *see also* Wilkins v. Sessions, No. CV 8:17-403-TMC-KDW, 2018 WL 3131027, at *13 (D.S.C. June 8, 2018) (observing that plaintiff did not establish that shift change resulted in loss of pay or chances for promotion and that an "[e]mployer's decisions about schedule changes do not typically establish materially adverse actions"); Emami v. Bolden, 241 F. Supp. 3d 673, 685 (E.D. Va. 2017) (stating that a negative performance review, standing alone, does not constitute a materially adverse action); Hellman v. Weisberg, 360 F. App'x 776, 779 (9th Cir. 2009) ("[T]he mere threat of termination does not constitute an adverse employment action."); Gomez-Perez v. Potter, 452 F. App'x 3, 8 (1st Cir. 2011) (holding that "[n]either extreme supervision and snubbing, nor increased criticism, will satisfy" the material adversity standard); Butler v. Exxon Mobil Corp., 838 F. Supp. 2d 473, 496 (M.D. La. 2012) (stating that supervisor chastisement does not rise to the level of material adversity).

246. *See supra* note 229 and accompanying text.

247. *See* Lushute v. La., Dep't of Soc. Servs., 479 F. App'x 553, 555 (5th Cir. 2012) (holding that shift change from four days a week to five days a week with no change in compensation or total hours worked was not materially adverse); Rodriguez v. Webb Hosp. Corp., 234 F. Supp. 3d 834, 841 (S.D. Tex. 2017) (stating that a shift change without an increase in weekly work hours "is not a materially adverse employment action"); Schilling v. La. Dep't of Transp. & Dev., No. CIV.A. 12-00661-SDD-SCR, 2014 WL 3721959, at *18 (M.D. La. July 18, 2014) (stating that plaintiff failed to introduce evidence that her shift change resulted in a change in compensation or total hours worked, "[h]ence . . . this change in schedule did not amount to an adverse employment action"); *see also* Morales-Vallellanes v. Potter, 605 F.3d 27, 39 (1st Cir. 2010) (finding that scheduling change resulting in employee getting Sundays and Mondays off instead of Saturdays and Sundays off was not materially adverse absent a showing of "undue hardship" caused by the change); Wilkins v. Sessions, No. CV 8:17-403-TMC-KDW, 2018 WL 3131027, at *13 (D.S.C. June 8, 2018) (observing that plaintiff did not establish that shift change resulted in loss of pay or chances for promotion and that an "[e]mployer's decisions about schedule changes do not typically establish materially adverse actions").

In contrast, other courts apply the *Burlington Northern* standard the way it was meant to be applied, with reference to the need for context-specific consideration.[248] In *Burlington Northern*, the Supreme Court noted the need for "broad protection from retaliation" in order to further the goals of Title VII.[249] Some courts have emphasized this language in their decisions and noted that the anti-retaliation provision "forbids a wide range of employer action."[250] The Eleventh Circuit has stated that the *Burlington Northern* decision "strongly suggests that it is for a jury to decide whether anything more than the most petty and trivial actions should be considered 'materially adverse,'"[251] a theme picked up by several other courts.[252] Other courts have likewise stated that the question of whether a challenged action is materially adverse is generally a question of fact for the jury.[253] In short, early Supreme Court retaliation decisions caused many courts to reevaluate their past approaches and at least some to acknowledge the important role that fear of retaliation has on the willingness of employees to come forward in the face of possibly unlawful discrimination.[254]

248. *See* Tolar v. Marion Bank & Tr., Co., 378 F. Supp. 3d 1103, 1123 (N.D. Ala. 2019) ("[T]he significance of a retaliatory act depends on the context of the act, and a specific action may be materially adverse in some situations but immaterial in others.") (internal citation omitted); Harris v. Fla. Agency for Health Care Admin., 611 F. App'x 949, 952 (11th Cir. 2015) (adopting the same rule); *see, e.g.*, Hallmon v. Advance Auto Parts, Inc., 921 F. Supp. 2d 1110, 1118 (D. Colo. 2013) (stating that repeated threats to issue a written warning, even if not acted upon, may qualify as materially adverse); Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1080 (6th Cir. 1999) (holding that instructing the other employees "not to talk to [plaintiff], go into his area or otherwise interact with him" constituted actionable retaliation).

249. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

250. Lin v. Rohm & Haas Co., No. CIV.A. 11–3158, 2015 WL 273035, at *3 (E.D. Pa. Jan. 20, 2015); *see also Tolar*, 378 F. Supp. 3d at 1120 (noting the Supreme Court's observation about the need for broad protection against retaliation).

251. Crawford v. Carroll, 529 F.3d 961, 973 n.13 (11th Cir. 2008).

252. Briscella v. Univ. of Pa. Health Sys., No. 16-614, 2018 WL 6413305, at *9 (E.D. Pa. Dec. 4, 2018); Estate of Olivia v. New Jersey, 589 F. Supp. 2d 539, 543 n.7 (D.N.J. 2008).

253. *See* McArdle v. Dell Prods., L.P., 293 F. App'x 331, 337 (5th Cir. 2008) ("Whether a reasonable employee would view the challenged action as materially adverse involves questions of fact generally left for a jury to decide."); Boyd v. State, Dep't of Soc. & Health Servs., 349 P.3d 864, 870 (Wash. Ct. App. 2015) ("[W]hether a particular action would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury.").

254. *See* Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 283 (4th Cir. 2015) (explaining that an earlier decision was inconsistent with a subsequent Supreme Court decision and noting that "fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination") (quoting Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn., 555 U.S. 271, 279 (2009)).

C. The Tort of Retaliatory Discharge in Violation of Public Policy

States have their own statutes prohibiting employment retaliation, many of which track federal statutes.[255] But states have also developed common law theories that may provide compensation for the victims of workplace retaliation while also addressing the societal harms caused by such retaliation. As discussed above, the tort of retaliatory discharge in violation of public policy is a tort-based exception to the employment-at-will rule that seeks to strike a balance "between an employer's interests in efficiently and profitably operating a business, society's interest in assuring its public policies are followed, and an employee's interest in earning a livelihood."[256]

The history of retaliatory discharge as a tort demonstrates the complexities that arise when tort and statutory law cover similar disputes. The retaliatory discharge tort rose to prominence in the 1980s at a time when lawyers for employees were trying to devise new ways around the traditional employment-at-will rule.[257] In some instances, a retaliatory discharge claim may overlap with anti-discrimination statutes and thus serve as a supplement or alternative to a more traditional statutory discrimination claim. For example, in *Lucas v. Brown & Root, Inc.*,[258] the plaintiff's Title VII quid pro quo sexual harassment claim was dismissed as untimely, but the plaintiff also brought a common law retaliatory discharge claim against the employer after she was allegedly fired for refusing to accede to her supervisor's sexual advances.[259] The Eighth Circuit Court of Appeals, applying Arkansas law, held that the discharge as alleged offended public policy and that Title VII did not preempt the plaintiff's retaliatory discharge claim.[260]

While the retaliatory discharge tort is widely recognized, courts have been reluctant to expand the tort beyond its present contours.[261] Common law

255. *See* Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-*Crawford/Burlington Northern *World*, 77 TENN. L. REV. 253, 254–56 (discussing state statutes containing anti-retaliation provisions).

256. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981); *see supra* notes 106–107 and accompanying text (discussing the tort of retaliatory discharge); *see also* Batteries Plus, LLC v. Mohr, 628 N.W.2d 364, 369 (Wis. 2001) (noting that the retaliatory discharge exception to the at-will rule "properly balances the need to protect employees from terminations that contradict public policy with the employer's historical discretion to discharge employees under the freedom to contract embodied in the at-will doctrine") (quoting Strozinsky v. Sch. Dist. of Brown Deer, 614 N.W.2d 443, 453 (Wis. 2000)).

257. *See* David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 657 (1996) ("The most rapid growth in the number of jurisdictions recognizing the public policy exception occurred in the 1984–86 period, when almost five states per year issued rulings recognizing the doctrine."); *see generally* Corbett, *supra* note 12, at 466 (noting that it is "notoriously hard for plaintiffs to recover under the tort theory" of retaliatory discharge).

258. 736 F.2d 1202 (8th Cir. 1984).

259. *Id.* at 1203.

260. *Id.* at 1205-06.

261. *See, e.g.*, Zimmerman v. Buchheit of Sparta, Inc., 645 N.E.2d 877, 881 (Ill. 1994) (plurality opinion) (noting disinclination to expand retaliatory discharge tort).

retaliatory discharge claims exist against a backdrop of state statutes providing employees with protection from retaliation for engaging in whistleblowing, applying for workers' compensation, and other similar actions.[262] Therefore, an issue sometimes arises as to whether these statutes should provide the exclusive remedy for affected employees.[263] Courts frequently emphasize that the retaliatory discharge tort represents a narrow exception to the traditional employment-at-will rule and that the tort should not be expanded to the point that it unduly impacts employer discretion.[264] Thus, if a court believes that the public policy that is jeopardized by a discharge can still be preserved without providing an employee the right to sue over the discharge, the court is unlikely to recognize a retaliatory discharge claim.[265]

D. The Special Case of Retaliatory Discipline in Violation of Public Policy

As the Supreme Court's decision in *Burlington Northern* illustrates, employers may retaliate against employees in a manner that falls short of outright discharge. As a result, some courts have grappled with the question of whether tort law should provide a right to recover when an employer demotes, transfers, or otherwise disciplines an employee in retaliation for the employee having engaged in some form of protected conduct.

The 2019 New Hampshire Supreme Court decision in *Clark v. New Hampshire Department of Employment Security* illustrates how such a claim might arise.[266] In *Clark*, a supervisory public employee was allegedly retaliated against after having reported concerns internally and externally about various problems with interns within her organization, including nepotism and wage theft.[267] The alleged retaliation included receiving a negative work evaluation after having just recently received an excellent evaluation, not receiving a promised promotion, and being laid off but then offered a demotion to a non-supervisory position with a significant reduction

262. *See, e.g.*, FLA. STAT. § 448.101–.105 (2020) (providing protection for private-sector whistleblowers); W. VA. CODE § 23-5A-1 (2020) (providing protection for employees who receive or attempt to receive workers' compensation benefits).

263. *See* Rose v. Anderson Hay & Grain Co., 358 P.3d 1139, 1147 (Wash. 2015) (discussing the issue of exclusivity).

264. *See, e.g.*, Stein v. Davidson Hotel Co., 945 S.W.2d 714, 717 n.3 (Tenn. 1997) ("[T]his Court has emphasized that the exception to the employment at-will doctrine must be narrowly applied and not be permitted to consume the general rule.").

265. *See* Balla v. Gambro, 584 N.E.2d 104, 108 (Ill. 1991) (declining to recognize cause of action for whistleblowing in-house counsel because "the public policy to be protected, that of protecting the lives and property of citizens, is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel").

266. Clark v. N.H. Dep't of Emp't Sec., 201 A.3d 652 (N.H. 2019).

267. *Id.* at 656. According to the employee, fifteen of the eighteen interns hired were related to upper management. Appellant's Brief at 6, *Clark*, 201 A.3d 652 (No. 2017-0658), 2018 WL 7815413, at *6.

in pay.[268] The plaintiff also alleged that she was harassed at work and at home: her car was egged, her home mailbox was smashed, she was prevented from attending educational seminars and work meetings, and information was withheld from her that made it difficult or impossible to perform her job.[269] She brought several claims against the employer, including a statutory whistleblower claim and what she classified as a wrongful demotion claim.[270] While acknowledging that the tort of retaliatory discharge may provide a remedy for an employee who was fired for performing an act that public policy would encourage or for refusing to do something that public policy would condemn, the New Hampshire Supreme Court declined to recognize a new cause of action based on wrongful demotion.[271]

Cases like *Clark* would seem to provide courts with a perfect opportunity to look to Title VII retaliation decisions for guidance. But despite the similarities in purpose and structure, *Burlington Northern*'s material adversity standard has done little to spur courts to recognize the tort of retaliatory discipline in violation of public policy. [272] Numerous state courts have adopted the material adversity standard when analyzing the anti-retaliation provisions contained in their own similarly worded human rights acts, whistleblower acts, and related statutes.[273] Few courts have considered whether to recognize the tort of retaliatory discipline in violation of public policy, and only a few of those have even referenced the Supreme Court's decision in *Burlington Northern*, let alone adopted it.[274] But those that have

268. *Clark*, 201 A.3d at 656–57.

269. *Id.*; Appellant's Brief at 10–11, *Clark*, 201 A.3d 652 (No. 2017-0658), 2018 WL 7815413, at *10–11. The employee's unit was subjected to a reduction in force, which the employee alleged was in retaliation for her actions. *Clark*, 201 A.3d at 656. The employee subsequently accepted a demotion in lieu of being laid off. *Id*. Other alleged instances of retaliatory harassment from coworkers included being taunted, being micromanaged, "being physically brushed or touched by other employees passing her, being called names ('ignorant' and 'witch'), being yelled at, having a printer temporarily taken away (which had been given to her as an accommodation for a disability), which caused her increased pain while she was without it, and having things thrown at her." Appellant's Brief at 10–11, *Clark*, 201 A.3d 652 (No. 2017-0658), 2018 WL 7815413, at *10–11.

270. *Clark*, 201 A.3d at 656.

271. *Id.* at 662.

272. The retaliatory discipline situation should also be distinguished from a constructive discharge situation, in which conditions become so intolerable that a reasonable employee would feel compelled to quit. Such action may be actionable under a retaliatory discharge claim. *See* Strozinsky v. Sch. Dist. of Brown Deer, 614 N.W.2d 443, 464 (Wis. 2000).

273. *See, e.g.*, Bereston v. UHS of Del., Inc., 180 A.3d 95, 110 (D.C. 2018); Moore v. City of New Brighton, 932 N.W.2d 317, 326 (Minn. Ct. App. 2019). *But see* Franklin v. Pitts, 826 S.E.2d 427, 435 (Ga. Ct. App. 2019) (declining to adopt the standard based on differences in statutory text).

274. *See infra* notes 295–307 and accompanying text. An early draft of the *Restatement of Employment Law* recognized the tort theory of retaliatory discipline in violation of public policy and expressly relied upon *Burlington Northern*'s material adversity standard. *See* Harper, *supra* note 14, at 1331; Ann C. McGinley and Nicole Buonocore Porter, *Public Policy and Workers' Rights Wrongful Discipline Actions and Good-Faith Beliefs*, 21 EMP. RTS. & EMP. POL'Y J. 511, 518 (2017). Perhaps given the lack of decisions recognizing the theory and the overall scarcity of decisions on the topic at all, the

considered the issue are split, with a majority declining to recognize the cause of action.[275] In many ways, the split parallels the split at the federal level concerning the application of *Burlington Northern*'s material adversity standard, with some courts reading the holding of *Burlington Northern* narrowly and others applying it as it was intended—to provide employees with broad protection against retaliation.[276]

1. Decisions Recognizing the Tort of Retaliatory Discipline

For the courts that have been willing to recognize the cause of action, providing for a remedy in the case of a retaliatory demotion, suspension, or other adverse action is a "necessary and logical extension of the cause of action for retaliatory discharge."[277] The threat to public policy resulting from the coercive effect of retaliation is effectively the same regardless of whether an employee is fired or demoted or suffers some similar form of discipline.[278] In addition, these courts have suggested that not recognizing a claim of retaliatory discipline in violation of public policy incentivizes employers to

final version of the *Restatement* was non-committal on the issue. *See* RESTATEMENT OF EMP'T LAW § 5.01 cmt. a (AM. LAW INST. 2015).

275. RESTATEMENT OF EMP'T LAW § 5.01 cmt. a (AM. LAW INST. 2015). For decisions recognizing the cause of action, see Brigham v. Dillon Cos., 935 P.2d 1054, 1059–60 (Kan. 1997) (involving demotion); Hill v. State, 448 P.3d 457, 469 (Kan. 2019) (recognizing claim where retaliatory action is materially adverse); Trosper v. Bag 'N Save, 734 N.W.2d 704, 706 (Neb. 2007) (involving demotion); Garcia v. Rockwell Int'l Corp., 232 Cal. Rptr. 490, 493 (Cal. Ct. App. 1986) (involving suspension without pay and demotion); Powers v. Springfield City Schs., No. 98-CA-10, 1998 WL 336782, at *7 (Ohio Ct. App. June 26, 1998) (involving failure to promote). For decisions declining to recognize the cause of action, see Clark v. N.H. Dep't of Emp't Sec., 201 A.3d 652 (N.H. 2019) (involving demotion); Zimmerman v. Buchheit of Sparta, Inc., 645 N.E.2d 877 (Ill. 1994) (plurality) (involving demotion); White v. State, 929 P.2d 396 (Wash. 1997) (en banc) (involving undesirable transfer); *see also* Turner v. Liberty Nat. Life Ins. Co., 488 F. Supp. 2d 672, 677 (M.D. Tenn. 2007) (declining to extend Tennessee tort of retaliatory discharge in violation of public policy to include employer action not involving actual or constructive discharge); Freeman v. United Airlines, 52 F. App'x 95, 103 (10th Cir. 2002) (applying Colorado law and declining to extend the retaliatory discharge cause of action to actions less severe than actual or constructive discharge); Gallo v. Eaton Corp., 122 F. Supp. 2d 293, 307 (D. Conn. 2000) (holding that Connecticut would not recognize the tort of wrongful demotion in violation of public policy); *Bereston*, 180 A.3d at 111 (expressing wariness of recognizing such a claim but deciding that even if such a cause of action existed, plaintiff failed to show that employer's actions were materially adverse); Mintz v. Bell Atl. Sys. Leasing Int'l, Inc., 905 P.2d 559 (Ariz. Ct. App. 1995) (stating that the "tort of wrongful failure-to-promote does not presently exist"). A third option taken by some courts is to decline to rule on the specific issue and instead conclude that the retaliatory conduct is actionable under the retaliatory discharge tort as a constructive discharge. *See* Hurst v. IHC Health Servs., Inc., 817 F. Supp. 2d 1202, 1207 (D. Idaho 2011) (declining to decide whether the Idaho Supreme Court would recognize the tort).

276. *See supra* notes 236–254 and accompanying text.

277. *Brigham*, 935 P.2d at 1059–60.

278. *See id.* at 1059 ("The employers' violation of public policy and the resulting coercive effect on the employee is the same in both situations."); *Trosper*, 734 N.W.2d at 711 (stating that to refuse to recognize a tort action in such instances "would compromise the [Nebraska's Workers' Compensation Act] and would render illusory the cause of action for retaliatory discharge"); *Powers*, 1998 WL 336782, at *7 ("To disallow a civil remedy under such circumstances would still 'frustrate the policy and purposes' of the law.") (internal citation omitted).

take forms of retaliatory action short of discharge in order to avoid liability, thereby still thwarting the underlying public policy.[279]

In 2019, the Kansas Supreme Court expressly relied upon the U.S. Supreme Court decision in *Burlington Northern* in recognizing a tort claim based on an allegedly retaliatory involuntary job transfer.[280] In *Hill v. State*, the plaintiff—a public employee—was transferred to a unit on the other side of the state, allegedly in retaliation for having appealed his suspension in another workplace matter to the Kansas Civil Service Board.[281] The Kansas Supreme Court had previously recognized the tort of retaliatory demotion,[282] but in this case, it was being asked to recognize a claim not involving any loss of job status, pay, or benefits.[283] This time, the court looked to *Burlington Northern* to explain how an involuntary transfer could have the same coercive effect as a retaliatory demotion or discharge.[284] Ultimately, the court expressly adopted *Burlington Northern*'s material adversity standard in holding that a tort action "may be premised on any employment action that is materially adverse to a reasonable employee, *i.e.*, 'harmful to the point that [it] could well dissuade a reasonable worker from' exercising" the employee's statutory rights.[285]

2. Decisions Refusing to Recognize the Tort of Retaliatory Discipline

The courts that have declined to extend the reasoning behind the retaliatory discharge tort to include non-discharge situations have offered several justifications for their decisions. Perhaps the overarching concern expressed is that recognizing such claims would, in the words of the New Hampshire Supreme Court in *Clark*, unduly impede an employer's ability to "operate his business efficiently and profitably."[286] Adopting a cause of action based on something less than a retaliatory discharge "would interfere with the employer's right to manage its workplace, including its decisions relating to the duties, responsibilities, and pay of its employees."[287] According to these courts, recognition of the tort of retaliatory discipline

279. *See Brigham*, 935 P.2d at 1060 (stating that to refuse to recognize such a claim would be to send such a message to employers, thereby repudiating the court's recognition of a cause of action for retaliatory discharge); *Trosper*, 734 N.W.2d at 711 ("If we fail to recognize a claim for retaliatory demotion, it would create an incentive for employers to merely demote, rather than discharge, employees who exercise their rights."); *Garcia*, 232 Cal. Rptr. at 493 (stating that refusing to permit recovery in the context of an allegedly retaliatory suspension "would encourage employers to offer reinstatement after the imposition of retaliatory punitive measures to avoid a plaintiff's legitimate legal action").

280. Hill v. State, 448 P.3d 457, 468–69 (Kan. 2019).

281. *Id*. at 462.

282. *Brigham*, 935 P.2d at 1055 (Kan. 1997).

283. *Hill*, 448 P.3d at 463.

284. *Id.* at 469.

285. *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006)).

286. Clark v. N.H. Dep't of Emp't Sec., 201 A.3d 652, 661 (N.H. 2019).

287. *Id.* at 662.

carries with it the risk that courts would "become increasingly involved in the resolution of [all manner of] workplace disputes,"[288] becoming "super personnel agencies."[289] Recognizing these claims would drag courts into workplace disputes that "center on employer conduct that heretofore has not been actionable." [290]

Closely related to concerns about encroaching upon the employer prerogative is the concern that recognizing claims for forms of retaliation falling short of discharge would open up a host of potentially complicated and fact-specific questions. For example, in considering whether to recognize a claim based on allegedly retaliatory demotion and reduction in hours, the Illinois Supreme Court highlighted some of its definitional concerns:

> Although the term "demotion" may appear amenable to clear definition, many questions arise: Is a demotion in title or status, but not salary, actionable? Could a transfer from one department to another be considered a demotion? Would it be fair to characterize as a demotion a significant increase in an employee's duties without an increase in salary?[291]

In addition to concerns about how to define actionable retaliation, some courts have expressed the fear that recognizing a cause of action based on employer action short of discharge might also lead to an influx of frivolous claims.[292]

Some courts have also suggested that permitting retaliatory discipline claims where statutes or collective bargaining agreements already constrain employer behavior may upset the balance between the competing interests struck by the legislature.[293] Others have declined to recognize a cause of action where the retaliatory discipline does not result in a loss of job status, pay, or benefits, reasoning that in such cases the employee has not suffered a compensable injury.[294]

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288. Bereston v. UHS of Del., Inc., 180 A.3d 95, 111 (D.C. 2018).

289. White v. State, 929 P.2d 396, 408 (Wash. 1997).

290. Zimmerman v. Buchheit of Sparta, Inc., 645 N.E.2d 877, 882 (Ill. 1994).

291. *Id.*

292. *See White*, 929 P.2d at 408 (noting this concern); Mintz v. Bell Atl. Sys. Leasing Int'l, Inc., 905 P.2d 559, 562 (Ariz. Ct. App. 1995) ("Recognizing a retaliation tort for actions short of termination could subject employers to torrents of unwarranted and vexatious suits filed by disgruntled employees at every juncture in the employment process.").

293. *See White*, 929 P.2d at 408 (stating that recognizing this cause of action would not strike the appropriate balance and that "[t]his is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes"); *see also* Clark v. N.H. Dep't of Emp't Sec., 201 A 3d 652, 661–62 (N.H. 2019) (noting the existence of state statutory forms of protection in support of decision not to recognize cause of action).

294. *See* Sage Hill v. State, 388 P.3d 122, 148 (Kan. Ct. App. 2016), *aff'd in part, rev'd in part*, 448 P.3d 457 (Kan. 2019).

3. The Failure to Statutify the Tort of Retaliatory Discipline in Violation of Public Policy

One of the most noteworthy aspects of the decisions ruling on whether to extend the tort of retaliatory discharge to retaliatory discipline is how little influence the Supreme Court's decision in *Burlington Northern* has had on the development of the common law. The *Hill* decision from Kansas—coming some thirteen years after *Burlington Northern*—appears to be the first time that a majority opinion from a state appellate court expressly considered the reasoning and holding from *Burlington Northern* in deciding to recognize the theory.[295] The courts that have refused to recognize the tort of retaliatory discipline in violation of public policy have largely ignored the decision. To be fair, some of the initial decisions on the subject came before *Burlington Northern*. But, as new cases have come before courts and courts have revisited past decisions, discussion of the *Burlington Northern* decision is still infrequent at best.

To the extent that courts acknowledge the existence of the material adversity standard, the standard has had little influence. For example, the D.C. Court of Appeals had previously adopted the material adversity standard for use in retaliation claims brought pursuant to the District's Human Rights Act.[296] Therefore, one might expect the court to have been predisposed to adopt this standard for use in the analogous tort context. Instead, the court avoided the issue and expressed a wariness of "attempting to resolve [the] competing policy considerations by judicial fiat"[297] by recognizing a common law claim of wrongful or retaliatory discipline.

The failure of state courts to look to federal law on the issue of whether to recognize a common law claim of retaliatory discipline when an identical or similar standard is already in effect seems particularly surprising in light of the tendency of state courts to adopt federal courts' interpretations of parallel federal statutes. Indeed, many state courts have adopted the material adversity standard when interpreting their own state anti-discrimination statutes[298] and in First Amendment retaliation cases.[299] Numerous state

295. The case had been cited previously in a concurring opinion. Trosper v. Bag 'N Save, 734 N.W.2d 704, 715 (Neb. 2007) (Gerrard, J., concurring).

296. Bereston v. UHS of Del., Inc., 180 A.3d 95, 112 (D.C. 2018).

297. *Id.* at 111.

298. *See* Chen v. Wayne State Univ., 771 N.W.2d 820, 839 (Mich. Ct. App. 2009) (explaining that an employer's action must be materially adverse to qualify as actionable retaliation under Michigan's Civil Rights Act); *Bereston*, 180 A.3d at 112 n.49 (explaining that retaliation is actionable where it would have been materially adverse to a reasonable employee) (citing Burlington N. & Santa Fe Ry. Co. v. White*,* 548 U.S. 53, 57 (2006)).

299. *See* Nairn v. Killeen Indep. Sch. Dist., 366 S.W.3d 229, 244 (Tex. App. 2012) (employing *Burlington Northern*'s material adversity standard in public employee's First Amendment retaliation case); Montgomery Cty. v. Park, 246 S.W.3d 610, 617 (Tex. 2007) (employing *Burlington Northern*'s material adversity standard in claim brought under the Whistleblower Act). Minnesota appears to have amended its whistleblower statutes to track *Burlington Northern*'s material adversity standard. *See* Minn.

whistleblower statutes and similar statutes also prohibit employer retaliation short of discharge.[300] Some whistleblower statutes specifically list employer actions such as transfers, reprimands, substandard performance reviews—or even the threat of such actions—as sufficient to constitute unlawful retaliation.[301]

Aside from the fact that the two situations are strikingly similar, this failure to consider *Burlington Northern* is particularly surprising given that the decision speaks to the same issues state courts confront when deciding whether to recognize retaliatory discipline claims. For example, *Burlington Northern* addresses concerns over permitting recovery for the sorts of non-material employer decisions that take place every day in the workplace,[302] and there are dozens of lower court opinions that pick up on this theme and address it in varying ways.[303] The Supreme Court's decision and those of lower courts also address the concern over the supposed lack of harm in such cases. The *Burlington Northern* opinion makes clear that an employee may suffer compensable harm even in the absence of financial injury.[304] Indeed, as the facts of the case illustrate, some materially adverse retaliation may produce serious emotional distress.[305] And, post-*Burlington Northern*, where employees have been unable to identify specific economic injury or emotional distress resulting from unlawful retaliation, lower courts have been willing to award nominal damages[306]—a form of compensation that is often

Stat. §§ 181.932, 181.931, subd. 5 (2018) (prohibiting an employer from penalizing an employee by engaging in "conduct that might dissuade a reasonable employee from making or supporting a report"). Minnesota's statute was amended in 2013, seven years after the *Burlington Northern* decision. *See id.*

300. *See, e.g.*, ALA. CODE § 36-26A-3 (2016) (prohibiting a supervisor from discharging, demoting, transferring, or otherwise discriminating against a state employee who reports a violation of law); 50 ILL. COMP. STAT. 725/7 (2018) (prohibiting police officers from being "discharged, disciplined, demoted, denied promotion or seniority, transferred, reassigned or otherwise discriminated against in regard to his or her employment, or be[ing] threatened with any such treatment as retaliation for or by reason of his or her exercise of the rights granted by this Act").

301. *See* ALA. CODE § 36-26A-3 (listing transfer); COLO. REV. STAT. ANN. § 24-50.5-102 (2017) (listing "reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty); 5 ILL. COMP. STAT. 395/.01 (2018) (listing transfer).

302. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006) (reiterating that Title VII does not set forth a "general civility code for the American workplace" and discussing the need to focus on objectively material actions).

303. *See supra* notes 236–254 and accompanying text.

304. *Burlington N.*, 548 U.S. at 67, 72.

305. The plaintiff was suspended without pay for thirty-seven days. Even though she was reinstated and given back pay, she claimed to have suffered emotional distress as a result of the suspension. *Id.* at 72. The Supreme Court affirmed the jury's compensatory damages award, which also included an award for medical treatment the plaintiff sought as a result of the distress she suffered. *Id.* at 73.

306. *See, e.g.*, Hale v. Emporia State Univ., 2019 WL 6700367, at *1 (D. Kan. Dec. 9, 2019) (awarding punitive damages where plaintiff failed to introduce evidence sufficient to justify an award of compensatory damages); Benton v. U.S. Envtl. Prot. Agency, Nos. 3:06–cv–1591–D & 3:07–cv–144–D, 2014 WL 2862309, at *8 (N.D. Tex. June 24, 2014) ("A plaintiff who establishes a violation of Title VII but fails to prove emotional distress or other actual damages can recover nominal damages."); *see also*

available in intentional tort cases.[307] Courts have also recognized a plaintiff's right to recover under Title VII for such non-pecuniary harm as damage to reputation and lost future earnings, which are common law remedies that should similarly be available under a common law retaliatory discipline claim.[308]

4. Why Courts Should Statutify the Tort of Retaliatory Discipline in Violation of Public Policy

The Supreme Court's decision in *Burlington Northern* adopting a material adversity standard in the case of employer retaliation is unassailable in terms of its text-based analysis and its policy-based reasoning. The question is what influence, if any, this statutory rule should have on tort law involving the workplace. A judge who focuses heavily on the deterrent functions of tort law might be inclined to recognize the retaliatory discipline tort based on the strong policy concerns identified by the Court in *Burlington Northern*. But these concerns could be expected to carry less weight for judges who take a narrower view of the proper role of tort law and are concerned about the impact that the material adversity rule would have on employer discretion. Regardless of what view of tort law a judge takes, an inquiry into the *Burlington Northern* standard and its role within the broader framework of statutory retaliation should lead a court to recognize the tort theory of retaliatory discipline in violation of public policy.

The current landscape of statutory retaliation law provides guidance to judges as they wrestle with the concern that recognizing the tort might intrude upon the traditional discretion afforded to employers. Courts that have refused to recognize tort claims based on employer actions short of discharge often cite the concern that doing so "would interfere with the employer's right to manage its workplace, including its decisions relating to the duties, responsibilities, and pay of its employees."[309] But *Burlington Northern*'s material adversity standard has already spread through judicial decisions involving federal statutes and many state statues to the point that employers

McCoy v. City of Shreveport, 492 F.3d 551, 561 (5th Cir. 2007) (noting that "placement on administrative leave may carry with it both the stigma of the suspicion of wrongdoing and possibly significant emotional distress"); Baird v. Snowbarger, 744 F. Supp. 2d 279, 292 (D.D.C. 2010) (recognizing emotional distress caused by retaliatory action to be a form of injury or harm); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1091 n.8 (10th Cir. 2007) (stating that even if a plaintiff must prove emotional distress or financial injury in order to establish the existence of a materially adverse action, the fact that plaintiff suffered such distress would be sufficient). *See generally* Elmore v. Wash. Metro. Area Transit Auth., 183 F. Supp. 3d 58, 66 (D.D.C. 2016) (recognizing that an act that puts an employee at risk of physical injury qualifies as a materially adverse action).

307. *See, e.g.*, Biglane v. Under The Hill Corp., 949 So. 2d 9, 17 (Miss. 2007) (noting that nominal damages can be awarded for trespass and battery).

308. *See* Williams v. Pharmacia, Inc., 137 F.3d 944, 952 (7th Cir. 1998).

309. *See* Clark v. N.H. Dep't of Emp't Sec., 201 A.3d 652, 662 (N.H. 2019); *supra* notes 286–290 and accompanying text.

are already prohibited from engaging in retaliatory actions short of discharge in a wide variety of scenarios. Federal courts have held that employers are not permitted to take materially adverse retaliatory actions against employees who oppose unlawful employer conduct on the basis of, inter alia, race, color, sex, religion, national origin, disability, age, the exercise of rights related to medical leave or overtime pay, and the filing of health-and-safety-related complaints.[310] In interpreting similarly worded state employment statutes, state courts have regularly adopted this standard and have also applied it to state whistleblower statutes.[311]

In short, even a cursory review of statutory retaliation law on the part of a state court leads to the conclusion that the material adversity standard has now essentially replaced the at-will rule as the default rule in statutory workplace retaliation cases, applying to a host of discretionary activities on the part of employers that were traditionally unregulated. This fact alone dramatically undercuts the argument that recognizing the retaliatory discipline tort would encroach upon employer discretion or legislative prerogative. If common law evolves over time to reflect changing realities, the reality is that under statutory law, employers enjoy considerably less freedom to retaliate against employees who engage in protected activities than they once did.[312] Recognizing the tort of retaliatory discipline is but a natural step in the evolution of common law regarding the workplace, and it is a step that is fully supported by the state of statutory law.[313]

310. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60–62 (2006) (citing cases); Adams v. Anne Arundel Cty. Pub. Schs., 789 F.3d 422, 430–31 (4th Cir. 2015) (applying material adversity standard to retaliation claims involving the ADA); Baloch v. Kempthorne, 550 F.3d 1191, 1198 (D.C. Cir. 2008) (applying material adversity standard to ADEA retaliation claim); Freelain v. Village of Oak Park, 888 F.3d 895, 900 (7th Cir. 2018) (applying material adversity standard to retaliation claims involving FMLA); Tooker v. Alief Indep. Sch. Dist., 522 S.W.3d 545, 562–63 (Tex. App. 2017) (applying material adversity standard to retaliation claims involving the FLSA); Perez v. E. Awning Sys., Inc., 2018 WL 4926447, at *7 (D. Conn. Oct. 9, 2018) (applying material adversity standard to OSHA retaliation claim).

311. *See supra* note 273 and accompanying text.

312. Courts advanced similar arguments when first beginning to recognize the tort of retaliatory discharge in violation of public policy. *See* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 842 (Wis. 1983) ("Given the expanding role of the government in labor relations, it is entirely appropriate that the common law now recognize established constitutional and statutory policies in employment relationships.").

313. The judge who has reservations about recognizing a retaliatory discipline tort might also find potential solace in the fact that numerous courts—incorrectly, in my opinion—have adopted a narrow interpretation of the material adversity standard that guarantees that courts will not become super-personnel departments. *See supra* note 274 and accompanying text.

CONCLUSION

Tort law and statutory law can complement and inform each other as legislatures and courts attempt to address wrongful conduct.[314] There should be nothing terribly surprising about this idea. What is surprising is how poorly this interactive process has played out in the context of employment law. Federal courts interpreting employment discrimination statutes have sometimes imported tort principles in clunky or arguably inappropriate ways. Conversely, state courts have often overlooked or consciously ignored statutory law involving the workplace that could shed light on analogous tort law issues.

It would be a mistake for state courts to engage in wholesale statutification of tort law involving the workplace in the same way that federal courts have engaged in the tortification of employment discrimination law. But there is still potentially something to be gained by looking to the law decided under employment statutes when considering clearly analogous tort issues. In some instances, this process may simply allow courts to develop better-reasoned tort rules for use in the workplace. In others, such as the case of the tort of retaliatory discipline in violation of public policy, the law that has developed under analogous workplace statutes may prove applicable for use in tort law. As a result, tort law may provide an additional source of protection for employees, filling in the gaps when statutory law offers no remedy.

314. *See* Brady, *supra* note 19, at 1187 (discussing the "iterative process" that courts and legislatures undertake to address shortcomings in the law).