5-2013

Diminishing Retaliation Liability

Alex B. Long

DIMINISHING RETALIATION LIABILITY

ALEX B. LONG† & SANDRA F. SPERINO‡

INTRODUCTION

Over the past decade, courts have often construed statutory provisions relating to workplace retaliation liberally, interpreting them to provide protections for employees who complained about discrimination against themselves or others.[1] However, a recent decision by the Fifth Circuit Court of Appeals demonstrates that courts may begin to scale back the gains made by employees in retaliation cases by applying agency principles to limit employer liability for retaliation.

In *Hernandez v. Yellow Transportation, Inc.*, John Ketterer, a White dockworker at Yellow Transportation's Dallas terminal, alleged that the Dallas terminal was, to put it mildly, an unpleasant place to work.[2] Unhappy about what he viewed as racial discrimination directed at his coworkers, Ketterer picketed the company.[3] As a result, Ketterer claimed, other employees subjected him to retaliatory harassment. This retaliation included "name-calling, physical intimidation, false accusations, vandalization of his belongings, verbal threats, and observing violence and illegal behavior."[4]

Ketterer sued, seeking to hold Yellow Transportation liable for his coworkers' retaliatory harassment. As there was no dispute that

---

† Professor of Law, University of Tennessee College of Law.

‡ Associate Professor of Law, University of Cincinnati College of Law.

1 *See, e.g.*, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868 (2011) (interpreting Title VII of the Civil Rights Act of 1964 as prohibiting retaliation against a complainant's fiancée); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (interpreting a retaliation provision to only require action that would dissuade a reasonable employee from engaging in protected activity); *see also* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1336 (2011) (holding that oral complaints can be a basis for a retaliation claim under the Fair Labor Standards Act); CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) (construing 42 U.S.C. § 1981 as prohibiting retaliation).

2 670 F.3d 644, 649, 656 (5th Cir. 2012) (alleging that he was frequently called a "profane scatological word by other coworkers, including over the company radio"). Another coworker claims that he saw "graffiti in one location which used a racial slur in relation to Ketterer." *Id.* The Fifth Circuit found that there was substantial evidence in the record "that in this workplace, many workers treated other workers profanely, cruelly, and with hostility." *Id.* at 654.

3 *Id.* at 657.

4 *Id.*

Ketterer had engaged in protected activity by picketing, the main issues were whether the retaliatory harassment was actionable under Title VII and whether there was a causal connection between the protected activity and the retaliation. Relying on existing Fifth Circuit precedent and its application of agency principles to Title VII, the Fifth Circuit held in *Hernandez* that coworker retaliation is not attributable to an employer unless the conduct is committed "in furtherance of the employer's business."[5] As the retaliatory acts were committed by "ordinary employees" and were not in furtherance of Yellow Transportation's business, Ketterer's retaliation claim failed.[6]

In relying upon an "in furtherance of the employer's business" standard, the Fifth Circuit has added to a circuit split among federal courts about how agency principles should apply to cases of coworker retaliation. The Fifth Circuit's reasoning highlights how gains made to strengthen employee protection from retaliation will be diminished if courts develop agency principles disfavoring employer liability.

Retaliation law is at a critical juncture as the circuit courts analyze these employer liability issues. As discussed in greater detail below, social science literature and common sense suggest strongly that the threat of retaliation by one's coworkers is likely to have a particularly strong deterrent effect on the willingness of employees to engage in protected activity.[7] The fact that the threat of coworker retaliation may deter an employee from seeking redress for the discrimination he or she has faced personally is disturbing enough. But there is also the related concern that coworker retaliation may deter one employee from coming forward in support of *another* employee who has been the victim of unlawful discrimination. These twin problems pose significant obstacles to the effective enforcement of Title VII's anti-discrimination goals.

This circuit split takes on greater importance when one considers that nearly every state has its own laws prohibiting employer retaliation.[8] Although not all of these state statutes use language identical to that of Title VII's anti-retaliation provisions, most use language that is similar.[9] In many jurisdictions, courts construe the language of these

---

[5] *Id.* (quoting Long v. Eastfield Coll., 88 F.3d 300, 306 (5th Cir. 1996)) (internal quotation marks omitted).

[6] *Id.*

[7] *See infra* notes 44–54 and accompanying text (comparing fear of coworker retaliation to fear of losing one's job or being forced to retire).

[8] *See* Alex B. Long, Viva *State Employment Law! State Law Retaliation Claims in a Post*-Crawford/Burlington Northern *World*, 77 TENN. L. REV. 253 app. at 298–303 (2010) (listing various state anti-retaliation statutes).

[9] *Id.* at 256 ("The language of most state anti-retaliation statutes parallels, at least roughly, the language of § 704(a) of Title VII.").

state statutes in a manner identical to the federal courts' interpretation of Title VII when feasible.[10] This is consistent with state courts' treatment of the interpretations of parallel federal employment discrimination statutes more generally.[11] Therefore, a narrow view of agency under federal law is likely to limit the protection from employment retaliation under state law as well.

I
BACKGROUND

Title VII's anti-retaliation provision prohibits actions that "discriminate against" an employee because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing."[12] Prior to 2006, lower courts reached different conclusions about how serious retaliatory conduct needed to be in order to trigger employer liability.[13] Then, in *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court held that retaliation is serious enough to create potential liability when the challenged action is materially adverse.[14] An action is "materially adverse" when "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[15]

The *Burlington Northern* case is one among a series of cases that construed anti-retaliation provisions broadly.[16] However, in

---

10 *Id.* at 256–57.

11 *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) (discussing the tendency of state courts to interpret state statutes in a manner consistent with prevailing federal interpretations of parallel federal statutes); 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, 40 (2009) ("Both state and federal courts routinely apply the Supreme Court's interpretations of the federal employment discrimination statutes in their analysis of discrimination claims brought pursuant to state law.").

12 42 U.S.C. § 2000e-3(a) (2006).

13 *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60 (2006) (identifying and comparing four different approaches among the lower courts).

14 *Id.* at 67–68 (2006).

15 *Id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

16 *See* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 279 (2009) (concluding that Title VII prohibits retaliation against an employee who participates in an employer's internal investigation into unlawful discrimination); CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) (concluding that § 1981 prohibits retaliation); Gomez-Perez v. Potter, 553 U.S. 474, 488 (2008) (concluding that the federal-sector provision of the Age Discrimination in Employment Act prohibits retaliation); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005) (concluding that Title IX prohibits recipients of federal education funding from retaliating against individuals who complain about sex discrimination); Robinson v. Shell Oil Co., 519 U.S. 337, 346

Hernandez, the Fifth Circuit demonstrated how substantive gains in one area of retaliation law can be curtailed through a corollary area. The Fifth Circuit requires plaintiffs to meet a nearly impossible standard by holding that coworker retaliation is not attributable to an employer unless the conduct is committed "in furtherance of the employer's business."[17] In the days when most employers have policies that expressly prohibit discrimination and retaliation, plaintiffs will have a difficult time establishing that coworker retaliation was in furtherance of a company's business, even when supervisors or others knew about the conduct, condoned the conduct, or ignored obvious retaliation.[18] The Fifth Circuit's pointed observation in *Hernandez* that the alleged retaliation was not perpetrated "by anyone other than ordinary employees" suggests that it will be the unusual case in which coworker retaliation is conducted "in furtherance of the employer's business."[19]

Other federal appellate and district courts have articulated at least slightly different standards for determining when coworker retaliation is attributable to an employer.[20] Several circuits have adopted a negligence standard. For example, the Sixth Circuit has held that an employer is liable for retaliatory acts of a coworker when "supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior" and "have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances."[21] The Tenth Circuit has adopted a more demanding standard, which requires that an employer actually know about the harassment and acquiesce to it.[22]

This circuit split exists because the question of employer liability for coworker retaliatory harassment requires courts to anticipate how

---

(1997) (concluding that Title VII prohibits retaliation against former employees).

17 Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 657 (5th Cir. 2012) (quoting Long v. Eastfield Coll., 88 F.3d 300, 306 (5th Cir. 1996)) (internal quotation marks omitted).

18 *Cf.* Kennedy v. Coca-Cola Bottling Co. of N.Y., 170 F. Supp. 2d 294, 297–98 (D. Conn. 2001) (finding that a jury question existed as to whether coworkers were acting in furtherance of their employer's business when there was evidence that the employer encouraged the employees to harass another employee).

19 *Hernandez*, 670 F.3d at 657 (quoting *Long*, 88 F.3d at 306) (internal quotation marks omitted).

20 *See, e.g.*, Cross v. Cleaver, 142 F.3d 1059, 1071 (8th Cir. 1998) (noting confusion among courts).

21 Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008); *see also* Moore v. City of Philadelphia, 461 F.3d 331, 349 (3d Cir. 2006) (adopting a similar standard); Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999) (same).

22 Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998).

and whether retaliation cases intersect with the Supreme Court's holdings regarding employer liability in the discrimination context.[23] In *Burlington Northern*, the Supreme Court held that actions taken against the plaintiff were serious enough to create potential liability under Title VII's retaliation provisions.[24] The Court did not address the separate question of whether employers would always be liable for such conduct.[25] As the Fifth Circuit decision demonstrates, lower courts are struggling with how to apply the Supreme Court's prior holdings in the discrimination context to retaliation cases, especially those involving coworker harassment.

Under federal discrimination laws, such as Title VII, the employer is the entity potentially liable to injured plaintiffs. However, even when a plaintiff can prove a violation of these statutes, the employer may not be liable for the violation in all instances. In *Burlington Industries, Inc. v. Ellerth*[26] and *Faragher v. City of Boca Raton*,[27] the Supreme Court created an agency analysis for Title VII discrimination claims that allows the employer to escape liability in certain instances. When a supervisor's actions result in a tangible employment action,[28] the Court has explained that "there is assurance the injury could not have been inflicted absent the agency relation," and the employer remains strictly liable.[29] However, if an employee can prove that a supervisor sexually harassed her, the employer may be able to avoid liability if the supervisor did not take a tangible employment action and if the employer can establish a court-created affirmative defense to liability.[30]

In these cases, the Supreme Court also held that employers will

---

23 *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (holding that an employee who was sexually harassed by her supervisor but suffered no adverse, tangible employment action can recover under Title VII provided that the employer is unable to prove the available affirmative defense); Faragher v. Boca Raton, 524 U.S. 775 (1998) (holding that an employer may be held vicariously liable for supervisory employee's discriminatory actions, but allowing an affirmative defense based on the reasonableness of both the employer's and plaintiff's actions).

24 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 70–73 (2006).

25 *See* Sandra F. Sperino, *The "Disappearing" Dilemma: Why Agency Principles Should Now Take Center Stage in Retaliation Cases*, 57 U. KAN. L. REV. 157, 163 (2008) (noting that the Court in *Burlington* left "one important issue unanswered: the circumstances under which the employer is vicariously liable" for coworker harassment).

26 524 U.S. 742 (1998).

27 524 U.S. 775 (1998).

28 Tangible employment actions include actions "such as discharge, demotion, or undesirable reassignment." *Id.* at 808.

29 *Ellerth*, 524 U.S. at 761–62.

30 *See id.* at 745 ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . ."); *Faragher*, 524 U.S. at 777–78 (same).

be directly liable for their own conduct in allowing harassment to happen. As the Court explained: "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII . . . ."[31] However, the Court has not yet considered how these agency and direct liability principles apply to retaliation cases brought under the discrimination statutes.

II
A CONFUSED EMPLOYER LIABILITY JURISPRUDENCE

It is unclear how the employer liability standards developed in the discrimination context apply in the retaliation context. However, the "in furtherance of the employer's business" standard used by the Fifth Circuit in *Hernandez* clearly sets a far higher bar for plaintiffs than does any standard used in the discrimination context, and rests on premises that the Supreme Court has explicitly rejected in the discrimination context.

In *Ellerth*[32] and *Faragher*[33] the Court considered the question of when an employer should be held liable under Title VII for sexual harassment committed by a supervisor. The Court recognized the limitations inherent in a standard that holds an employer liable only when a supervisor acts in furtherance of the employer's business. The Supreme Court not only rejected this as the sole basis for employer liability, but also cited section 219(2) of the *Restatement (Second) of Agency*, which indicates that employers can be liable when "the master was negligent or reckless."[34]

Thus, the Court expressly reaffirmed the principle that an employer may be *directly* liable for its own negligence or recklessness, regardless of whether the wrongdoing employee was acting within the scope of employment.[35] The Court stated that an employer could be liable under a negligence theory where it "knew or should have known" of the supervisor's harassing conduct and "failed to stop it."[36] *Ellerth* and *Faragher* both involved supervisor harassment. But both pre- and post-*Ellerth* and *Faragher*, lower courts have uniformly held that an employer who is negligent in discovering or remedying

---

31 *Ellerth*, 524 U.S. at 759.

32 524 U.S. 742.

33 524 U.S. 775.

34 *Ellerth*, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958)).

35 *Id.* at 759.

36 *Id.* at 759.

coworker harassment is directly liable to the victim under Title VII.[37]

Supervisor sexual harassment and coworker retaliation are different theories of employer liability under Title VII. However, in relying upon the "in furtherance of the employer's business" standard, the Fifth Circuit's decision in *Hernandez* disregards not only the Court's statements on employer liability in Title VII discrimination cases but also the special considerations posed by coworker retaliation.

III
THE CASE FOR BROAD EMPLOYER LIABILITY FOR COWORKER HARASSMENT

The Fifth Circuit's demanding "in furtherance of the employer's business" standard frustrates the policies underlying Title VII's retaliation provisions. Employees are frequently the best source of information regarding whether discrimination is occurring in the workplace. Their willingness to complain about discriminatory actions and to participate in formal proceedings and in-house investigations into alleged discrimination is essential to furthering the goal of eliminating workplace discrimination.[38]

Likewise, an employee's opposition to unlawful discrimination—whether it takes the form of speaking out about a supervisor's discriminatory treatment of a coworker[39] or expressing support for a coworker who has been subject to discrimination[40]—is an important component of Title VII's remedial framework.[41] Ketterer's act of picketing his employer because of what he believed to be the employer's discriminatory conduct toward other employees is a perfect example. By opposing what she believes to be unlawful discrimination, an employee may help to put the employer on notice of the pos-

---

37 *See, e.g.*, *Faragher*, 524 U.S. at 799–800 (citing earlier decisions from lower courts); Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998) ("[E]mployers are liable for a co-employee's harassment only 'when they have been negligent either in discovering or remedying the harassment.'" (quoting Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997))).

38 *See* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 278–79 (2009) (discussing how coworkers are involved in helping to "ferret out" discriminatory activity in the workplace).

39 *See id.* at 273 (concluding that the opposition clause of Title VII protects an employee who speaks out about discrimination against another employee).

40 *See* Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (stating that opposition conduct includes "expressing support of co-workers who have filed formal charges").

41 *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 78 (2005) (arguing that protection for engaging in opposition conduct "is essential to support Title VII policies").

sibility of a violation of the law, thus enabling the employer to investigate and address the problem before it escalates. Similarly, an employee's decision to stand up for his or her rights—or the rights of coworkers—may have its own salutary effect. Discrimination is often "a product of an organization's existing climate and structures."[42] Therefore, "discrimination is even more likely to flourish where rank-and-file employees remain silent in the face of the mistreatment and marginalization of coworkers."[43]

There are, however, numerous disincentives that employees face when deciding whether to oppose or otherwise report unlawful practices. As the Supreme Court has noted, "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."[44] These fears are often well-founded. Studies indicate that losing one's job or suffering some other type of tangible employment action is not uncommon for employees who report or oppose unlawful behavior.[45]

Beyond the fears an employee may have concerning job security, there are other disincentives to engaging in protected conduct. Opposing unlawful workplace conduct is frequently viewed by employers and coworkers alike as an act of disloyalty. Indeed, studies indicate that employees who report illegal behavior tend first to attempt to resolve matters internally rather than externally, because internal reporting is more consistent with employees' own sense of loyalty to the organization and colleagues.[46] Thus, employees who

---

[42] *Id.* at 41.

[43] Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 967 (2007).

[44] *Crawford*, 555 U.S. at 279 (quoting Brake, *supra* note 41, at 20) (internal quotation marks omitted).

[45] *See* Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 113–14 (citing studies of the prevalence of retributive actions taken against whistleblowers, including being fired, sued, and blacklisted); Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK & OCCUPATIONS 107, 120 (1999) (reporting results of a study finding that approximately sixty-nine percent of employees who made internal reports of illegal conduct lost their jobs or were forced to retire).

[46] *See* MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 26 (1992) (noting that internal opposition implicates notions of organizational loyalty and that "nearly all whistle-blowers who use external channels also reported problems internally"); Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 463 (2009) ("Recent empirical research confirms that whistleblowers indeed prefer internal speech to immediate outside reporting."); Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1143 (stating that an employee's sense of loyalty may discourage external reporting); Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 10 (1985) (noting that "[t]he great majority"

engage in protected activity may experience their own internal moral conflict when it comes to reporting or opposing unlawful conduct.[47]

Coworkers often respond negatively toward another employee's opposition to unlawful conduct, perhaps because the individual accused of discrimination is a popular figure within the group,[48] or because coworkers fear that the employee's actions will have adverse consequences for them.[49] Not surprisingly, research suggests that coworker retaliation is fairly common.[50] Undoubtedly, many instances of coworker retaliation fall into the category of "petty slights" that the courts have recognized as not being actionable and that the lower courts have had little difficulty identifying and excluding from coverage.[51] However, the case law in the area is also replete with examples of more severe forms of coworker retaliation.[52]

The threat of coworker retaliation is especially salient given the sense of interconnectedness and loyalty that often results from working as part of a group. In the modern work environment, workers often spend a significant portion of their time with coworkers.[53] To the employee considering whether to oppose unlawful workplace conduct, the risk of being ostracized and subjected to scorn and abuse

---

of whistleblowers "considered themselves to be very loyal employees").

47 *See* Wim Vandekerckhove & Eva E. Tsahuridu, *Risky Rescues and the Duty to Blow the Whistle*, 97 J. BUS. ETHICS 365, 370 (2010) (noting the "moral conflict" brought about by internal reporting, given "[t]he realities of collegiate loyalty and team spirit").

48 *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 82 (1st Cir. 2005) (concluding that a jury could rationally find that the plaintiff was "subjected to a hostile work environment arising out of retaliation for her complaint against a popular coworker").

49 *See* Janet P. Near, Terry Morehead Dworkin & Marcia P. Miceli, *Explaining the Whistle-Blowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORG. SCI. 393, 403 (1993) (explaining that coworker retaliation may occur because coworkers fear that whistleblowing may harm the members of the organization at issue).

50 *See* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 121 (2007) ("[R]esearchers have found that the social ostracism of whistleblowers is a more common retaliatory technique than adverse employment action."); Rothschild & Miethe, *supra* note 45, at 120 (reporting results of a study finding that sixty-nine percent of employees who made internal reports of illegal conduct were criticized or avoided by coworkers).

51 *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (stating that "petty slights" are not actionable); Williams v. City of Kansas City, 223 F.3d 749, 754 (8th Cir. 2000) (concluding that a supervisor's "silent treatment is at most ostracism, which does not rise to the level of an actionable adverse employment action").

52 *See, e.g.*, Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 326 (6th Cir. 2008) (describing how a coworker set plaintiff's car on fire and threatened to "kill the bitch"); *Noviello*, 398 F.3d at 82–83, 94 (describing a systematic and sustained effort on the part of coworkers to ostracize plaintiff, resulting in a hostile work environment).

53 *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9 (2000) ("[E]mployed adults spend a high proportion of their waking hours . . . at work.").

poses a considerable disincentive. In light of these realities, studies indicating that employees who oppose unlawful conduct suffer much greater instances of depression and other psychological problems are not surprising.[54]

Ultimately, an employer's response (or lack thereof) to coworker discrimination and retaliation plays a large role in the willingness of employees to engage in protected activity. As stated by one author,

> institutions retain a great degree of control over the extent to which fears of retaliation silence potential claims of discrimination. The organizational climate, including institutional norms and the organization's tolerance for discrimination and retaliation, has a profound influence on how persons choose to respond to perceived discrimination. If a target believes, based on past observations, that confronting or reporting discrimination is likely to trigger retaliation, she will be much less inclined to engage in such a response.[55] The Fifth Circuit's standard fails to give due weight to these realities. By adopting a standard of employer liability for coworker retaliation that few employees will be able to meet, the Fifth Circuit gives employers less reason to promote a culture of nondiscrimination and tolerance.

CONCLUSION

Anti-retaliation provisions further the anti-discrimination goals of Title VII and related laws by preserving the right of employees to be free from retaliation for engaging in protected activity. The Fifth Circuit's current approach demonstrates how pro-employee decisions in substantive retaliation law can be undercut when courts narrowly construe employer liability. Reducing employer liability for retaliation gives employers less incentive to address coworker retaliation. This leaves employees more vulnerable to such retaliation, thereby reducing the overall effectiveness of Title VII.

---

[54] *See* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1053 (2004) (reporting that many whistleblowers develop serious mental illness, such as depression); Rothschild & Miethe, *supra* note 45, at 121 (reporting findings of a study that eighty-four percent of respondents reported suffering severe depression or anxiety and sixty-nine percent reported declining physical health).

[55] Brake, *supra* note 41, at 38–39 (citations omitted).