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A Response to Professor Sperino's Retaliation and the Unreasonable Judge

Alex B. Long

A RESPONSE TO PROFESSOR SPERINO'S *RETALIATION AND THE UNREASONABLE JUDGE*

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INTRODUCTION

I'm about to relate a story, and I promise it's true. I recently met with an employee who had a problem at work. The employee was thinking about raising an issue of possible discrimination with the employer. The employee was well within the employee's rights under federal law to raise the issue. But the employee feared that if the employee did so, the employer might respond by, among other things, giving the employee a negative performance review. The employee then asked me, "But that would be retaliation, right?" My first instinct was to say "of course that would be retaliation!" But in the back of my mind, I knew that might not be right, so I hedged. I think I said something like, "That definitely could be retaliation. It just depends . . . ." About eight hours later, I started reading Sandra Sperino's article, *Retaliation and the Reasonable Person*,[1] and felt somewhat relieved that I had resisted my initial instinct.

As her article demonstrates, some courts are willing to hold as a matter of law that certain employer actions—such as providing a negative performance evaluation—that one might naturally think could dissuade a reasonable employee from engaging in protected activity are not sufficiently serious to qualify as actionable retaliation under federal law.[2] In one sense, Sperino's article is somewhat reassuring. It was comforting to see the results of her survey finding that most respondents viewed certain employer actions—such as providing a negative performance evaluation—as being likely to dissuade them from reporting an instance of discrimination.[3] It was comforting in the sense that the results roughly corresponded with my own sense of what might well dissuade a reasonable employee from reporting and what types of actions ought to be protected under federal law. But the results were also somewhat horrifying in that they laid bare the reality that too many courts seem to take a view of these matters that I would argue is completely at odds with common sense and the reasons why the law

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1. Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031 (2015).

2. *Id.* at 2045–51.

3. *See id.* at 2045 (relating results of survey showing that 80% of respondents reported that they would not or might not report discrimination if faced with the threat of a negative evaluation in an employment file).

prohibits retaliation in the first place.

I think the article does a remarkable job of identifying a serious problem with retaliation law as it has developed since the Supreme Court's 2006 decision in *Burlington Northern & Santa Fe Railway v. White*.[4] What's more, for reasons I will explain in slightly more detail later, I think Professor Sperino's proposed solution—that courts define actionable retaliation in terms of an action that is more than *de minimis* in nature[5]—is not only workable, but one that I can actually envision a court adopting. Ultimately, the article raised two issues for me: (1) why are so many courts so apparently misguided when it comes to determining what might dissuade a reasonable employee from complaining about discrimination and (2) how might a court actually go about adopting Professor Sperino's proposed solution?

I. WHY ARE COURTS SO MISGUIDED?

As Professor Sperino's article demonstrates, many courts seem to drastically overestimate what it takes to deter employees from opposing unlawful discrimination or from participating in a legal process concerning unlawful discrimination. Sperino offers as one explanation for this behavior the tendency of courts to substitute reliance on prior cases for actual independent analysis.[6] Sperino (correctly, I think) suggests that many judges are not, in fact, considering what might deter a reasonable employee from opposing unlawful discrimination.[7] Instead, she argues that all too often courts "perceive[] a prior decision as determining as a matter of law that certain actions are not cognizable" even when the decisions are not truly controlling.[8] Thus, this reliance on "perceived precedent" effectively short circuits any inquiry into the actual controlling legal standard of whether a particular action was materially adverse, *i.e.*, whether it might dissuade a reasonable employee from engaging in protected activity.[9]

I think Professor Sperino is right about this. But after reading her article, I was left with an additional question: why? Why are courts so quick to rely on perceived precedent in this particular context? I think courts occasionally engage in the practice of relying on perceived precedent in other contexts as well. But this practice among courts in the employment retaliation context seems to be both prevalent and perhaps part of broader trend of limiting the reach of anti-retaliation provisions.

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4. 548 U.S. 53, 57 (2006).
5. Sperino, *supra* note 1, at 2069.
6. *Id.* at 2057.
7. *See id.* at 2063.
8. *Id.*
9. *Id.* at 2060–61.

As Sperino's article points out, courts are limiting retaliation law in other ways. For example, in order to be protected from retaliation for opposing what the employee believes to be unlawful conduct, the employee must reasonably believe that the conduct in question is unlawful.[10] In determining what a reasonable employee might believe, some courts expect quite a bit of employees, and in some cases almost seem to require employees to be familiar with Title VII decisional law.[11] As others have noted, many retaliation plaintiffs have seen their claims fail either because they were "unreasonable" in failing to fully grasp the subtleties and complexities of employment discrimination law or because they lacked strong evidence of unlawful conduct.[12] Even where plaintiffs can establish that they engaged in protected activity, courts have also adopted stringent causation rules that often work to bar plaintiffs' claims.[13]

In short, I don't believe this is simply a case of courts being lazy or careless with establishing and applying precedent. Courts are making it more difficult for retaliation plaintiffs at every step of the process. The question to my mind is whether this is intentional and, if so, why. Why are courts constructing legal rules that make it difficult for plaintiffs with seemingly plausible theories to survive summary judgment?

One possibility might be that judges are frustrated and overburdened

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10. *See* Jordan v. Alternative Resources Corp., 458 F.3d 332, 337 (4th Cir. 2006) (stating that "[a] plaintiff bringing a claim under the opposition clause of Title VII must at a minimum have held a reasonable good faith belief at the time he opposed an employment practice that the practice was violative of Title VII").

11. *See* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 955 (2007) ("In some instances, courts appear to hold an employee to the standard of what a reasonable labor and employment attorney would believe, rather than what a reasonable employee would believe.").

12. *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, 787–95 (2014) (discussing the stringent standards imposed by courts in terms of assessing the reasonableness of an employee's belief); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII As a Rights-Claiming Statute*, 86 N.C. L. REV. 859, 913 (2008) ("Title VII retaliation doctrine posits a complainant who has solid evidentiary support for believing that discrimination occurred and a near-perfect understanding and acceptance of the limits of current discrimination law.").

13. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013) (holding that Title VII retaliation cases require "but-for" causation rather than the lessened substantial or motivating factor standards); Montgomery v. Bd. of Trustees, No. 2:12–CV–2148–WMA, 2015 WL 1893471, at *1 (N.D. Ala. Apr. 27, 2015) ("Post-*Nassar*, causation based only upon close temporal proximity has lost its sway."); *see also* Sauzek v. Exxon Cola USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000) ("Speculation based on suspicious timing alone . . . does not support a reasonable inference of retaliation."); Marx v. Elec. Data Sys. Corp., 418 S.W.3d 626, 635 (Tex. App. 2009) ("[E]ven under the but for causation standard applicable to Title VII retaliation cases, the mere temporal proximity between protected conduct and adverse action is insufficient to show a causal link.").

by the dramatic increase in the number of retaliation claims in recent years and are trying to reduce the number of such claims.[14] Another related explanation is that some judges—who enjoy life tenure and are long since removed from the kinds of workplaces most Americans find themselves in—simply tend to overestimate the willingness of the average person to stand up to discrimination and underestimate the extent to which many employees are unable or unwilling to risk adverse consequences at work, up to and including losing their jobs; perceived precedent simply provides a vehicle for effectuating these judicial attitudes. Finally, it may be that many of the retaliatory actions that, according to some courts, do not rise to the level of materially adverse actions involve the kinds of day-to-day discretionary actions on the part of employers that courts are loathe to second guess. Drafting negative evaluations, making changes to an employee's shift, and moving an employee to a different office are the types of bread-and-butter decisions employers make on a daily basis. Judges may simply be especially reluctant to intrude upon this type of employer decision making.

Whatever the full explanation may be, I think we are experiencing a judicial backlash to the increase in retaliation claims. The issue that Professor Sperino's article identifies is just one example of that problem. And it is a problem that I hope to explore in more detail in the future.

II. ADOPTING PROFESSOR SPERINO'S SOLUTION

Professor Sperino suggests that courts define actionable retaliation in terms of an action that is more than *de minimis* in nature.[15] The second issue that the article raises for me is how, as a practical matter, a court might adopt the *de minimis* standard that Professor Sperino suggests.

In *Burlington Northern & Santa Fe Railway v. White,* the Supreme Court held that Title VII's anti-retaliation provision only covers employer action that "would have been materially adverse to a reasonable employee or job applicant."[16] The Court elaborated on this standard by explaining that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[17] While most of the subsequent focus has been on the "reasonable worker" portion of the

14. In 1997, there were a little over 18,000 individual charges of retaliation in violation of federal statutes filed with the Equal Employment Opportunity Commission (EEOC). By 2015, that number had grown to just under 40,000. *See Charge Statistics*, U.S. EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited June 18, 2016).

15. *See supra* note 5 and accompanying text.

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

17. *Id.*

opinion, the actual substantive standard that emerges from the decision is the "materially adverse" standard.

The Court's explanation that a retaliatory action is "materially adverse" when it "could well dissuade a reasonable worker from making or supporting a charge of discrimination"[18] roughly tracks the standard of materiality found throughout the law. For example, *Black's Law Dictionary* defines the word "material" in this sense to mean "[o]f such a nature that knowledge of the item would affect a person's decision-making."[19] This same idea appears in thousands of decisions involving all sorts of legal issues.[20] But there are also decisions outside of the employment context that reference a *de minimis* standard when attempting to further define the concept of materiality. For example, one court has said that to show entitlement to attorney fees in a particular case, the party must show that it "advance[d] significant factual or legal theories adopted by the court, thereby providing a *material* non de minimis contribution to its judgment . . . ."[21] Occasionally, courts define materiality and things of a *de minimis* nature as roughly two sides of the same coin; a fact is material where it is not of a *de minimis* nature and vice versa.[22] Thus, it would not be a particular stretch for courts to reference a *de minimis* standard, as Professor Sperino suggests, as they attempt to flesh out what is meant by a "materially adverse" retaliatory action. In short, this seems like a fairly easy fix.

CONCLUSION

Retaliation and the Reasonable Person provides courts with potentially valuable insight into the proper way to interpret and apply the Supreme Court's decision in *Burlington Northern & Santa Fe Railway v. White*. In addition to providing courts with evidence as to might might deter a reasonable employee from opposing unlawful discrimination, Professor Sperino offers a logical and practical way of

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18. *Id.*

19. BLACK'S LAW DICTIONARY (10th ed. 2014).

20. *See, e.g.*, State v. Goodwin, 129 A.3d 316, 322 (N.J. 2016) (quoting Black's Law definition).

21. Comm. to Defend Reprod. Rights v. A Free Pregnancy Ctr., 229 Cal. App. 3d 633, 642 (Cal. Ct. App. 1991) (emphasis added).

22. *See* Summers v. Fortner, 267 S.W.3d 1, 7 (Tenn. Crim. App. 2008) ("[T]he presence of a relatively de minimis, or non-material, void component in the plea agreement may not justify availing the petitioner an opportunity to withdraw his plea agreement."); DeMarie v. Neff, No. Civ.A.2077-S, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005) ("[A]lthough a material breach excuses performance of a contract, a nonmaterial - or *de minimis* - breach will not allow the non-breaching party to avoid its obligations under the contract."); Curt Ogden Equip. Co. v. Murphy Leasing Co., 895 S.W.2d 604, 609 (Mo. Ct. App. 1995) ("If the breach . . . is *de minimis*, the trial court may determine that the breach does not destroy the purpose or the value of the contract and is not material as a matter of law.").

defining what should qualify as actionable retaliation.