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Viva State Employment Law - State Law Retaliation Claims in a Post-Crawford/Burlington Northern World

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VIVA STATE EMPLOYMENT LAW! STATE LAW RETALIATION CLAIMS IN A POST-*CRAWFORD/BURLINGTON NORTHERN* WORLD

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TABLE OF CONTENTS

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INTRODUCTION

Retaliation in the workplace has been a subject of great interest to the Supreme Court in recent years. The Court's 2009 decision in *Crawford v. Metropolitan Government of Nashville*[1] continued the favorable trend for employees bringing employment retaliation claims under Title VII and other federal statutes.[2] In *Crawford*, the Court held that an employee who voluntarily participates in an employer's internal investigation of a coworker's sexual harassment claim has engaged in protected opposition conduct for purposes of Title VII's anti-retaliation provision.[3] This decision comes on the heels of *Burlington Northern & Santa Fe Railway v. White*, another plaintiff-friendly retaliation decision from the Court, establishing that employer retaliation need not relate to the plaintiff's employment to be actionable.[4] These decisions have any number of potential implications for federal employment discrimination law and will undoubtedly continue to be the subject of considerable scholarly debate over Title VII's proper role in prohibiting retaliation and discrimination.

But federal law is not the only source of protection for employees. In addition to prohibiting discrimination on the basis of race, sex, and other protected characteristics, nearly every jurisdiction prohibits employers from

1. Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846 (2009).

2. The Court's other recent decisions that are favorable for employee retaliation claims are *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008); *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006); and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).

3. *Crawford*, 129 S. Ct. at 853.

4. *Burlington N.*, 548 U.S. at 61.

retaliating against employees who have made or supported a charge of employment discrimination.[5] Similarly, most states provide at least some protection to employees who engage in protected whistleblower activity regarding other forms of illegal or unethical workplace conduct.[6]

The desirability of having separate state employment laws has increasingly emerged as the subject of debate.[7] To be sure, the debate over the relative benefits of federalism as applied to the workplace is a long one and, in some sense, is simply part of a larger federalism debate.[8] However, in an era in which Congress and the federal courts have failed to adequately protect individual rights in the workplace, calls have increased for employees to turn more frequently to state courts and legislatures to vindicate their rights.[9]

In contrast, other commentators—while certainly critical of the federal courts' interpretation of federal employment law—have argued that having entirely separate state and local employment laws dealing with the same subject matter as covered by federal law injects unnecessary complexity into an already

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5. *See infra* app. (categorizing the anti-retaliation statutes in existence at the state level).

6. Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 983–85 (2008).

7. *See* Henry H. Drummonds, *Beyond the Employee Free Choice Act Debate: Unleashing the States in Labor-Management Relations Policy by Reforming Labor Law Preemption Doctrines Crafted by Judges a Half Century Ago*, 19 CORNELL J.L. & PUB. POL'Y (forthcoming 2009) (manuscript at 9–17, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374995) (arguing in favor of increased discussion of federalism issues in labor law); Paul M. Secunda & Jeffrey M. Hirsch, Debate, *Workplace Federalism*, 157 U. PA. L. REV. PENNUMBRA 28 (2008), http://pennumbra.com/debates/pdfs/WorkplaceFederalism.pdf (debating what role, if any, states should play in regulating the workplace).

8. *See* Kirsten Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006) (discussing federalism issues in the context of global warming); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459 (1996) (criticizing state constitutionalism).

9. *See* Drummonds, *supra* note 7, at 57–59 (citing state experimentation in the area of preventing status discrimination as an argument in favor of increased state involvement in labor law matters); Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 193 (2008) (stating that after a series of Supreme Court decisions interpreting the Americans with Disabilities Act's definition of disability in a restrictive fashion, the focus of disability rights advocates shifted to "trying to change the definition of disability in state laws"); Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. POCKET PART 225, 225 (2008), http://www.yalelawjournal.org/images/pdfs/659.pdf [hereinafter Hirsch, *Taking States*] (noting the "recent movement to . . . increas[e] states' power to regulate the workplace"). *See generally* 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) (arguing that "blind adherence to federal interpretations of discrimination principles on state employment discrimination claims is not only often inappropriate, but also has seriously impacted the development of employment discrimination law").

complicated area.[10] As a result, courts, employers, and employees are forced to navigate their way through the "[l]iterally hundreds of federal, state, and local laws [that] may apply to a given workplace."[11] Critics are skeptical of the idea that state experimentation with new approaches to old problems can lead to national reform, and argue that there is little meaningful experimentation taking place.[12] Instead, states simply adopt modest variations on well-established themes, adding little to the federal approach but confusion.[13] Indeed, critics have charged that the benefits of a federal system are championed most loudly when federal law is perceived to provide inadequate protection for individual rights. But when federal law eventually changes course and provides greater protection for individual rights, the benefits of having multiple and possibly competing state standards pale in comparison to the resulting costs.[14]

On its face, the Supreme Court's recent string of retaliation decisions, culminating with *Crawford*, would seem to add ammunition to those who see "little advantage to this cacophony of rules" and little role for states to play in protecting individual rights in the workplace.[15] Unlike many of the Supreme Court's employment discrimination decisions over the past two decades, its recent retaliation decisions have produced victories for employees and, consequently, broadened the reach of federal employment discrimination statutes.[16] In light of this trend, proponents of individual rights in the workplace might well ask whether the benefits, if any, associated with having separate state and federal approaches to employment retaliation outweigh the resulting costs.

The language of most state anti-retaliation statutes parallels, at least roughly, the language of § 704(a) of Title VII.[17] In many jurisdictions, courts have announced a policy of construing the language of these statutes in a manner identical to the federal courts' interpretation of § 704(a) when

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10. Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. (forthcoming 2009) (manuscript at 17–32, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329522) [hereinafter Hirsch, *Revolution in Pragmatist Clothing*]; Secunda & Hirsch, *supra* note 7, at 35–40.

11. Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 89 (2008) [hereinafter Hirsch, *The Law of Termination*].

12. *See* Hirsch, *Taking States*, *supra* note 9, at 228–29 ("With a few exceptions, however, states are not experimenting with new workplace policies.").

13. *See id.* at 229 ("[States] are instead picking from a menu of well-known options, and there is little evidence that state regulation has or will result in more effective workplace policies.").

14. *See id.* at 227 (arguing that increased reliance on state law in response to perceived shortcomings of federal law is short-sighted in light of the fact that federal law may shift in employees' favor). *See generally* Kahn, *supra* note 8, at 464 (stating that state constitutionalism has been fueled by forum shopping).

15. Hirsch, *Revolution in Pragmatist Clothing*, *supra* note 10, at 19.

16. *See infra* Part II.

17. *See infra* app., tbls.I–III.

feasible.[18] Not surprisingly, some of these jurisdictions have already relied on *Crawford* and *Burlington Northern* to bring their interpretations of their own statutes in line with federal law.[19] This has also been the general tendency of state courts when dealing with other state employment discrimination statutes that parallel federal law.[20] Therefore, one might argue that the only likely implication of the pro-employee outcomes in *Crawford* and other recent Supreme Court retaliation decisions is the increased irrelevance of state employment law in this area.

However, I submit that a closer examination of the implications of *Crawford*, *Burlington Northern*, and other recent Supreme Court retaliation decisions actually highlights some of the potential benefits of having separate state and federal laws in place to govern the workplace. Specifically, when one explores the issues that remain unresolved after *Crawford* and *Burlington Northern*, one can see the potential for complementary state anti-retaliation statutes to serve as a safety net to protect employees who are unfairly left without protection from retaliation under federal law. Moreover, the optimist in me would like to believe that the Court's recent retaliation decisions have the potential to inspire state courts and legislatures to better recognize the benefits of internal whistleblowing and, thus, expand the protection provided by the common law theory of retaliatory discharge in violation of public policy and corresponding whistleblower protection statutes.

Part I of this article briefly explains the situations where having separate state and federal employment laws are beneficial. Part II briefly discusses the Court's recent Title VII retaliation decisions. Part III then analyzes some of the unresolved legal issues surrounding federal retaliation claims after *Crawford* and *Burlington Northern*, the implications of those decisions for the interpretation of state anti-retaliation statutes, and the extent to which state law might provide either an alternative remedy for employees or a model for federal reform. Finally, Part IV discusses the potential for *Crawford* and the Court's other retaliation decisions to inspire state courts and legislatures to expand protection for internal whistleblowers.

I. THE ARGUMENT, BRIEFLY SUMMARIZED

Stated as briefly as possible, my argument is that the benefits of having separate state and federal employment discrimination laws outweigh the resultant costs, a point illustrated by the current issues surrounding employment retaliation claims. This does not mean, however, that the development of

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18. *See, e.g.*, Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 802 (Ky. 2004); Kletschka v. Abbott-Nw. Hosp., Inc., 417 N.W.2d 752, 754 (Minn. Ct. App. 1988); Allen v. McPhee, 240 S.W.3d 803, 812 (Tenn. 2007); Hanlon v. Chambers, 464 S.E.2d 741, 754 (W. Va. 1995).

19. *See infra* notes 87, 111 and accompanying text.

20. 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).

multiple legal standards through state and federal judicial decisions is desirable. My argument proceeds from the assumption that uniformity between state and federal employment law is, in general, a good thing for all of the reasons previously suggested. Therefore, state courts should, where feasible, interpret parallel state statutes in a manner consistent with established federal law.

With this condition in place, I argue that there are several benefits to having separate state and federal workplace discrimination laws. One benefit concerns the role state courts may play in shaping the ongoing dialogue concerning individual rights in the workplace. Where a state court is interpreting and applying state statutory language that is essentially identical or at least similar to that of a federal statute, the state court's independent review can contribute to the overall quality of analysis concerning the proper interpretation and application of the relevant statutory language. Admittedly, state law decisions have, to date, had little influence on federal courts' interpretations of parallel federal employment discrimination statutes. However, there is at least some reason to think that state court retaliation decisions could influence federal court decision-making if state courts were willing to view themselves as equal participants in the debates surrounding the interpretation of anti-retaliation statutes.

For one thing, there has been a dramatic rise in the number of retaliation charges to the Equal Employment Opportunity Commission (EEOC) in recent years.[21] Given the fact that most states have anti-retaliation statutes that at least roughly parallel federal law, there will almost certainly be a concomitant rise in state retaliation claims—assuming one has not already taken place. As a result, federal courts sitting in diversity will increasingly be required to apply state decisional law interpreting parallel state anti-retaliation provisions. Thus, state court decisions have the potential to influence federal courts, not just within the narrow confines of the instant case but with regard to retaliation law more generally.

Traditionally, state courts have deferred not only to the federal courts' interpretation of statutes governing the workplace, but also to the gloss or application that has been adopted as well. For example, as decisional law developed around the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), federal courts frequently stated that the statutes were designed to protect only the "truly disabled" and that allowing individuals with "minor impairments" to claim coverage would debase the noble purposes of these laws.[22] In concluding that an individual did not have a disability under the Acts, federal courts have far too often substituted this interpretive gloss for an in-depth analysis of whether an individual's physical or mental impairment substantially limited the individual in a major life activity. In fact, the Supreme Court eventually adopted this interpretive gloss when it announced that the

21. Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 658 (2005).

22. *See, e.g.*, Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986).

terms of the ADA's definition of disability "need[ed] to be interpreted strictly to create a demanding standard for qualifying as disabled."[23]

In applying their states' own similarly- or identically-worded statutes, state courts soon began repeating the "truly disabled" and "demanding standard" mantras in their opinions, and, likewise, often substituted the mantras in place of any meaningful analysis of whether a plaintiff actually met the statutory definition of disability.[24] One notable exception to this trend was Massachusetts's rejection of the Supreme Court's interpretation of the ADA for use in its virtually identical state disability discrimination statute.[25] In a 2001 decision, the Massachusetts Supreme Judicial Court directly confronted some of the Supreme Court's more debatable conclusions about the ADA's language.[26] However, in the absence of similar decisions challenging the federal orthodoxy, federal courts have never truly been forced to reexamine some of their underlying conclusions about the purpose and language of the ADA.

This is unfortunate. Where no clear federal standard has emerged on an issue or where the debate as to the proper application of a settled standard is ongoing, state courts can play a beneficial role in shaping the debate. Rather than engaging in the type of "Pavlovian response" to federal opinions that has sometimes characterized state court decision making,[27] state courts should be willing to conduct a rigorous analysis of the pertinent issues. Such an approach can only contribute to the overall analytical quality of interpretation among state and federal courts. As this article argues, employment retaliation law is one field in which the federal courts could benefit from additional sources of analysis.

Consistent with traditional federalism arguments, states can also serve as role models for federal reform. State legislatures have only infrequently experimented in the field of employment discrimination law; however, they have actually been ahead of Congress in terms of addressing employment discrimination and its attendant problems in several instances, such as prohibiting discrimination on the basis of sexual orientation.[28] As another

23. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

24. *See, e.g.*, Shangri-La Ltd. P'ship v. Meade, 955 A.2d 834, 839 (Md. Ct. Spec. App. 2008) (referencing the Supreme Court's "demanding standard" language in support of its conclusion that a child with a latex allergy did not have a disability); Chiles v. Mach. Shop, Inc., 606 N.W.2d 398, 409 (Mich. Ct. App. 2000) (stating that allowing individuals with common ailments to claim coverage "would undermine the purpose of the act itself, which was to assure that the 'truly disabled' will not face discrimination because of stereotypes"); Morrison v. Pinkerton Inc., 7 S.W.3d 851, 857 (Tex. App. 1999) ("Finding [plaintiff's] obesity to be a disability would thus trivialize the impairments of those who are truly disabled and suffering discrimination.").

25. Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963–64 (Mass. 2001).

26. *Id.*

27. Stone v. St. Joseph's Hosp., 538 S.E.2d 389, 410 (W. Va. 2000) (McGraw, J., concurring in part and dissenting in part).

28. Drummonds, *supra* note 7, at 58.

example, some disability rights advocates who were involved in the process of amending the ADA in 2008 to include a broader definition of disability supported their cause by pointing to state statutes containing similarly broad definitions.[29] Indeed, as this article attempts to demonstrate, numerous gaps exist in the coverage of Title VII's anti-retaliation provision that leave deserving individuals unprotected. Thus, this is an area in which states can and should experiment with new approaches to the problem of workplace retaliation.

A final benefit of having separate state and federal regulations pertaining to the workplace is that Supreme Court decisions can indirectly influence state courts in areas traditionally left to state regulation. Thus far, Congress has been unwilling to craft expanded legislation to provide protection for whistleblowers in the private workplace. Where Congress has provided whistleblower protection, it has done so in something of a piecemeal fashion, providing safeguards only in certain occupations or areas.[30] Hence, states have generally been left to adopt broader whistleblower protection standards, both in the form of statutes and common law claims of retaliatory discharge in violation of public policy. The Supreme Court's recent decisions involving Title VII are not whistleblower cases in the way one ordinarily thinks of these cases. Nevertheless, employment retaliation cases and traditional whistleblower cases both involve a similar set of operative facts: an employee faces reprisal after complaining about or calling attention to the employer's allegedly unlawful behavior. To the extent the Supreme Court's recent Title VII decisions address the benefits of protecting individuals who raise internal concerns about unlawful employer behavior, they may prove instructive as state courts consider their own whistleblower statutes or decisional law involving retaliatory discharge. Thus, this article argues that the Supreme Court's recent retaliation decisions help illustrate the potential for federal law to positively influence state law in an area Congress has traditionally left the states to address.

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29. *See* Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 335–42 (2003). Andrew Imparato is president and CEO of the American Association of People with Disabilities, "one of the organizations that worked to get the [ADA Amendments Act] passed." Allison Torres Burtka, *ADA Amendments Take Effect, Broadening Disability Protections*, TRIAL, Jan. 2009, at 14.

30. *See, e.g.*, 42 U.S.C. § 7622 (2006) (providing whistleblower protection under the Clean Air Act).

II. THE SUPREME COURT'S RECENT RETALIATION DECISIONS AND THE CURRENT STATE OF EMPLOYMENT RETALIATION CLAIMS AT THE FEDERAL LEVEL

A. Burlington Northern & Santa Fe Railway v. White

In *Burlington Northern & Santa Fe Railway v. White*, the Court held that Title VII's anti-retaliation provision prohibits not just adverse employment-related actions, but any action that might "dissuade a reasonable worker from making or supporting a charge of discrimination."[31] The case involved an employee who, after complaining internally about alleged sex discrimination, was transferred to a less desirable position, albeit one that did not amount to a demotion.[32] The Court faced the questions of "whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace" and how substantial those harms must be in order to be actionable.[33]

In reaching its decision, the Court had to choose between several standards in use among the federal circuits. Some circuits required that the retaliation must "'resul[t] in an adverse effect on the "terms, conditions, or benefits" of employment'" to be actionable.[34] Other circuits went further and adopted an "ultimate employment decisio[n] standard, which limits actionable retaliatory conduct to acts such as hiring, granting leave, discharging, promoting, and compensating."[35] In the end, the Court rejected these standards, instead holding that, to be actionable, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[36] However, the challenged action need not affect the employee's job.[37]

The Court relied on both Title VII's statutory text and underlying policy values to support its conclusion. Title VII's anti-discrimination provision, § 703(a), defines actionable conduct with reference to hiring, firing, or other forms of discrimination "with respect to [the] compensation, terms, conditions, or privileges of [an individual's] employment."[38] In contrast, § 704(a), Title

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

32. *Id.* at 80 (Alito, J., concurring).

33. *Id.* at 61 (majority opinion).

34. *Id.* at 60 (alteration in original) (setting out the standard followed by the Third, Fourth, and Sixth Circuit Courts of Appeals).

35. *Id.* (alteration in original) (internal quotation marks omitted).

36. *Id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (some internal quotation marks omitted).

37. *Id.* at 63 ("An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.").

38. *Id.* at 62. Pertaining to employers, the anti-discrimination provision provides, in full, the following:

VII's anti-retaliation provision, omits any reference to hiring, firing, or "the compensation, terms, conditions, or privileges of employment[,]" and, instead, simply makes it unlawful for an employer to "*discriminate* against any of his employees or applicants for employment" because they have engaged in protected activity.[39] The Court found Congress's omission of language speaking directly to the impact of the employer's actions on employment as significant for purposes of determining whether § 704(a) should be read to prohibit retaliation that does not affect an employee's job.[40]

The Court also believed that, in light of the purposes of § 704(a), it would make sense for Congress to prohibit non-employment related forms of retaliation.[41] Title VII's anti-retaliation provision, the Court explained, "seeks to . . . prevent[] an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees" of a workplace free from discrimination.[42] Retaliation that impacts an employee outside the confines of work, such as filing false criminal charges against the employee,[43] may be just as effective in deterring employees from making or supporting a charge of discrimination as work-related reprisal.[44] Therefore, the Court concluded that defining actionable retaliation in terms of the likelihood that the retaliation would deter a reasonable employee from making or supporting a charge of discrimination would be in keeping with Title VII's statutory language and overarching purposes.[45]

B. Crawford v. Metropolitan Government of Nashville

In *Crawford v. Metropolitan Government of Nashville*, the Court held that Title VII's anti-retaliation provision extends not just to an employee who speaks out about discrimination on her own initiative, but also to one who "answer[s] questions during an employer's internal investigation" of unlawful discrimination.[46] Section 704(a) provides that it is unlawful for an "employer to

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It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2006).

39. *Id.* § 2000e-3(a) (emphasis added).

40. *Burlington N.*, 548 U.S. at 62–63.

41. *Id.* at 63–64.

42. *Id.* at 63.

43. *See* Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996).

44. *Burlington N.*, 548 U.S. at 63–64.

45. *Id.* at 64, 67.

46. 129 S. Ct. 846, 849 (2009).

discriminate against any of his employees [or applicants for employment] . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[47]

As interpreted by the courts, this provision contains two distinct clauses: the opposition clause and the participation clause.[48] The participation clause protects employees who have made a charge, testified, assisted, or participated in a formal proceeding authorized by Title VII.[49] In contrast, the opposition clause protects employees who have engaged in less formal activity. To receive protection under the opposition clause, an employee need not file a charge of discrimination with the EEOC or participate in a court proceeding. Instead, the employee simply must "oppose" conduct that he or she reasonably and in good faith believes to be unlawful under Title VII.[50] Therefore, opposition conduct can take many forms, ranging from filing an internal complaint of discrimination with the employer to expressing support of coworkers who have filed formal charges of discrimination.[51]

The plaintiff in *Crawford* claimed that her actions of answering questions about past instances of discrimination involving a supervisor during the course of an employer's internal investigation into similar complaints qualified as protected opposition and participation conduct.[52] Importantly, the plaintiff had not voluntarily approached the employer with evidence concerning the supervisor's discrimination. Instead, she provided the evidence in response to the employer's questioning.[53] The Sixth Circuit Court of Appeals had previously held that an employee must engage in "active, consistent 'opposing' activities" to receive protection under the opposition clause.[54] Because the employer's questioning did not take place within the context of an EEOC or court proceeding, the Sixth Circuit held that Crawford's actions did not fit within the parameters of the participation clause.[55]

Relying on a dictionary definition of the word "oppose," the Court reversed the Sixth Circuit, concluding that the plaintiff's "ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee"

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47. 42 U.S.C. § 2000e-3(a) (2006).

48. *See* Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989).

49. *Id.*

50. *See, e.g.*, Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1125 (8th Cir. 2006). Numerous states have adopted the same standard. *See, e.g.*, Bahr v. Capella University, 765 N.W.2d 428, 434, 436 (Minn. Ct. App. 2009).

51. *See* Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990).

52. Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 849–50 (2009).

53. *Id.* at 849.

54. Bell v. Safety Grooving & Grinding, LP, 107 F. App'x 607, 610 (6th Cir. 2004).

55. Crawford v. Metro. Gov't of Nashville, 211 F. App'x 373, 376 (6th Cir. 2006).

qualified as opposition to that behavior.[56] The Court drew support for its conclusion from an EEOC guideline, which explained that "[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity."[57] Because the Court concluded that the plaintiff's actions were protected under the opposition clause, it chose not to examine whether her conduct might also be covered under the participation clause.[58]

C. CBOCS West, Inc. v. Humphries, Gomez-Perez v. Potter, *and* Jackson v. Birmingham Board of Education

In three other cases decided between 2005 and 2008, the Court recognized retaliation claims brought pursuant to statutes that do not explicitly contain anti-retaliation provisions. In *CBOCS West, Inc. v. Humphries*, the Court held that § 1981(a) prohibited retaliation against an employee who complained to his employer about race discrimination that was directed at another employee—a prohibition not explicit in the statutory language.[59] In *Gomez-Perez v. Potter*, the Court held that the Age Discrimination in Employment Act (ADEA) prohibits retaliation against federal workers who file administrative complaints of age discrimination with the EEOC—once again in the absence of any express statutory prohibition of retaliation.[60] Finally, the Court held in *Jackson v. Birmingham Board of Education* that an employee who complained to his employer about sex discrimination alleged to be in violation of Title IX was protected from retaliation, despite the absence of any express anti-retaliation provision within Title IX.[61]

III. UNRESOLVED ISSUES AND POTENTIAL IMPLICATIONS OF THE SUPREME COURT'S RETALIATION DECISIONS

A. *The Reach of* Burlington Northern: *What Qualifies as Prohibited Retaliation?*

One issue that is still developing involves how courts will interpret and apply the Supreme Court's "material adversity standard" set out in *Burlington Northern*. In explaining when retaliation is actionable, the Court attempted to draw a line between "petty slights or minor annoyances" and "actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the

56. *Crawford*, 129 S. Ct. at 850–51, *rev'g Crawford*, 211 F. App'x 373.
57. *Id.* at 851 (alteration in original) (internal quotation marks omitted).
58. *Id.* at 853.
59. CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1961 (2008).
60. Gomez-Perez v. Potter, 128 S. Ct. 1931, 1943 (2008).
61. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183–84 (2005).

courts, and their employers."[62] Yet, predicting on which side of that line an employer's actions may fall in a given case can prove difficult.[63] Like the federal courts, state courts are slowly starting to confront similar issues when interpreting their own discrimination statutes.

1. Unresolved Issues Under Title VII: Federal Courts' Interpretation and Application of the Material Adversity Standard

There is at least some reason to suspect that employers will continue to enjoy a fair degree of latitude in retaliating against employees who oppose unlawful discrimination even after *Burlington Northern*. Professor Eric Schnapper's study of Title VII retaliation cases in the year following *Burlington Northern* led him to conclude that "[t]he lower courts have been surprisingly receptive" to employers' arguments that various forms of retaliation are still permitted, notwithstanding *Burlington Northern*'s articulation of the broader material adversity standard.[64] For example, Schnapper found that employees lost the majority of cases when the retaliation did not result in a loss of wages and when a court treated the question of whether the retaliation was actionable as one of law rather than fact.[65] Therefore, despite the Supreme Court's clear instruction that an employee need not suffer tangible harm for retaliation to be actionable, some courts continue to impose this *de facto* requirement.[66] Professors Deborah L. Brake and Joanna L. Grossman have likewise argued that post-*Burlington Northern* decisions "suggest that lower courts expect the reasonable employee to endure a substantial degree of adversity for the sake of challenging discrimination."[67]

In addition, some courts appear to be ignoring or misinterpreting other aspects of the Court's decision.[68] Although the Court stated that its material adversity standard was an objective one, it noted that context was an important factor for determining whether a reasonable worker might be dissuaded from engaging in protected activity.[69] As an example, the Court cited the case of a change in work schedule: to many workers, such a change would not be materially adverse, but to "a young mother with school-age children," the

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62. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2009) (citations omitted).

63. *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 907 (2008) (referring to the Court's opinion as "cryptic"); B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 483 (2008) (discussing potential issues under the *Burlington Northern* standard).

64. Eric Schnapper, Burlington Northern v. White *in the Lower Courts: An Interim Report*, Apr. 3, 2007, http://lawprofessors.typepad.com/laborprof_blog/2007/04/schnapper_on_ap.html.

65. *Id.* at 5.

66. *See id.* at 2–3.

67. Brake & Grossman, *supra* note 63, at 908.

68. Schnapper, *supra* note 64, at 4–6.

69. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68–69 (2009).

change might matter "enormously."[70] Brake and Grossman contend that this aspect of *Burlington Northern* has been lost on many courts as they "pay little heed to individual circumstances that might make certain employees especially sensitive to particular adverse actions."[71]

A related issue is the extent to which an employer may face liability for the retaliatory harassment by employees of a coworker who has engaged in protected activity. One commonly cited reason for the failure of employees to complain about discrimination in the workplace is their fear that coworkers will react negatively.[72] Coworker retaliation may take many forms, ranging from ostracism of the complaining employees to threats of physical violence.[73] Thus, the fear of coworker retaliation may, in some instances, dissuade a reasonable worker from complaining about unlawful discrimination. In some instances, employers have directed their employees to retaliate against the complaining employee.[74] In others, coworkers have taken it upon themselves to retaliate while their employers were aware of the conduct yet failed to put a stop to it.[75]

According to the pre-*Burlington Northern* view of some courts, only ultimate employment actions were actionable under a retaliation theory.[76] Therefore, because coworkers lack the authority to hire, fire, and deny compensation, coworker harassment was not actionable.[77] *Burlington Northern*'s rejection of the "ultimate employment decision" and "adverse employment decision" standards[78] should open the door to more claims of coworker retaliation. However, the Court's decision fails to address almost as many issues as it resolves in the coworker retaliation arena.

Since *Burlington Northern*, the federal courts have announced differing standards for employer liability in cases involving coworker retaliation. For example, the Sixth Circuit Court of Appeals has held that an employer may be

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70. *Id.* at 69.

71. Brake & Grossman, *supra* note 63, at 909.

72. *See, e.g.*, Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 270 (4th Cir. 2001) (holding that plaintiff's fear that she would be subjected to coworker retaliation if she made internal complaints about sexual harassment, which was subsequently proven to be correct, did not excuse her failure to take advantage of employer's internal complaint procedure); Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 412 ("[R]isk of alienation or retaliation by peers impedes victims' willingness to complain.").

73. *See* Christopher M. Courts, Note, *An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235, 236 (2001) (providing examples of coworker retaliation).

74. *See, e.g.*, Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 241–43 (4th Cir. 1997).

75. *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 82–83, 89 (1st Cir. 2005) (holding that employer may be liable for coworker retaliatory harassment if harassment is sufficiently severe or pervasive and if employer tolerated harassment).

76. *See supra* note 35 and accompanying text.

77. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997).

78. *See* Reaves, *supra* note 72, at 425.

liable for its failure to put a stop to severe or pervasive coworker harassment where the employer had actual or constructive knowledge of the retaliation and "responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances."[79] In contrast, the Eight Circuit Court of Appeals has suggested that an employer is only liable for coworker retaliation where the employer's failure to stop the conduct was *because* of the plaintiff's protected activities.[80]

Also unclear is how severe the coworker retaliation must be in order to be actionable. In seeking to explain its material adversity standard, the Court stated that "petty slights, minor annoyances, and simple lack of good manners" will ordinarily not suffice.[81] In support of this idea, the Court quoted a treatise noting "courts have held that . . . 'snubbing' by supervisors and co-workers [is] not actionable under § 704(a)."[82] As a general rule, the observation about snubbing makes some sense. But extreme forms of supervisor or coworker ostracism may be just as likely to dissuade a reasonable worker from complaining about discrimination as more tangible forms of retaliation.[83] Indeed, the Court spent considerable time in its decision explaining that context is crucial when determining whether retaliation is significant enough to deter a reasonable employee in the plaintiff's situation from complaining.[84] Since *Burlington Northern*, however, some courts have treated the Court's "snubbing" reference not so much as a general rule of thumb which may or may not be applicable depending upon the circumstances of a particular workplace, but as something approaching a hard and fast rule.[85]

It is important to note that despite the fact that it is a coworker retaliating in these cases, the plaintiff's only remedy is against the employer. Individual employees are not liable to other employees under Title VII.[86] Therefore, if a

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79. Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008); *see also* Moore v. City of Phila., 461 F.3d 331, 349 (3d Cir. 2006) (holding that employer may be liable for coworker retaliation where it had actual or constructive knowledge and failed to take prompt and adequate remedial action); *cf.* Huston v. Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 104 (3d Cir. 2009) ("[E]mployer liability for co-worker [sexual] harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.").

80. Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 619 (8th Cir. 2007).

81. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006).

82. *Id.* (quoting 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996) (some internal quotation marks omitted).

83. George, *supra* note 63, at 483.

84. *See supra* notes 64–65 and accompanying text.

85. *See* Brake & Grossman, *supra* note 63, at 910–11 (citing examples of significant supervisor and coworker ostracism found to be not actionable following *Burlington Northern*); George, *supra* note 63, at 483 ("[L]ower courts since *Burlington Northern* often have taken the Court's dicta at face value.").

86. *See, e.g.*, Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995).

plaintiff is unable to recover from the employer, the plaintiff will most likely be left without a remedy.

2. Implications for State Law and Possible Alternatives

a. State Anti-Discrimination Statutes with Similar Language

In prohibiting retaliation against those who oppose unlawful discrimination, many states employ statutory language that is identical or almost identical to the language of § 704(a).[87] In other areas of federal employment discrimination law, state courts have frequently followed the Supreme Court's lead when interpreting parallel state statutes.[88] Therefore, if prior experience is any guide, most states with comparable anti-retaliation provisions can be expected to adopt *Burlington Northern*'s material adversity standard when interpreting their own statutes. Indeed, several state appellate courts have already done so, in some cases overruling prior precedent that adopted an adverse or ultimate employment action standard.[89]

The fact that most state courts that have confronted this issue when interpreting their own similarly worded statutes have chosen to follow the lead of the Supreme Court does not mean that all will, however. In several instances—most notably in the disability discrimination context—state courts have chosen not to follow the Supreme Court's interpretation of the relevant federal employment discrimination statute when analyzing the similar state counterpart.[90] In some cases, state courts appear to have simply disagreed with the Supreme Court's interpretation of federal language and emphasized minor

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87. *See infra* app., tbl.I.

88. Long, *supra* note 20, at 477.

89. Donovan v. Broward County Bd. of Comm'rs, 974 So. 2d 458, 461 (Fla. Dist. Ct. App. 2008); Hoffelt v. Ill. Dep't of Human Rights, 867 N.E.2d 14, 19–21 (Ill. App. Ct. 2006); Greer-Burger v. Temesi, 879 N.E.2d 174, 180 n.2 (Ohio 2007); Allen v. McPhee, 240 S.W.3d 803, 820 (Tenn. 2007); *see also* Roa v. Roa, 2010 WL 114284, at *8–9 (N.J. Jan. 14, 2010) (citing *Burlington Northern* with approval and concluding that employer's cancellation of employee's insurance coverage was actionable under New Jersey law).

90. Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963–64 (Mass. 2001) (rejecting Supreme Court's interpretation of Americans with Disabilities Act while interpreting parallel state statute); Stone v. St. Joseph's Hosp., 538 S.E.2d 389, 395 (W. Va. 2000) (stating that West Virginia's Human Rights Act is independent of the corresponding federal anti-discrimination statutes and merits independent analysis); *see also* Sangamon County Sheriff's Dep't v. Ill. Human Rights Comm'n, 908 N.E.2d 39, 45–47 (Ill. 2009) (rejecting Supreme Court's interpretation of Title VII for use in state sexual harassment statute and holding that an employer is strictly liable for sexual harassment of a supervisory employee when the supervisory employee has no authority to affect the terms and conditions of the complainant's employment); Coryell v. Bank One Trust Co., 803 N.E.2d 781, 785–87 (Ohio 2004) (choosing not to adopt Supreme Court's interpretation of federal Age Discrimination in Employment Act for use in state age discrimination statute).

differences to support their departures.[91] Although they are still a distinct minority, a handful of state appellate courts—either through a conscious decision or inattention—have continued to reference the adverse employment action standard that had been developed prior to *Burlington Northern*, even in the face of the Supreme Court's more recent material adversity standard.[92]

This is a situation in which the problems associated with having separate federal and state standards outweigh any corresponding benefits. I have argued in greater detail elsewhere that, generally speaking, parallel construction of identical or similar state and federal statutory language is preferable.[93] This preference is especially true in the case of employment retaliation statutes. A state court that interprets language that is identical or nearly identical to the language of § 704(a) to require something other than a materially adverse action on the part of the employer injects an unnecessary degree of confusion and complexity into the area. As the *Burlington Northern* Court observed, nothing in the statutory language of § 704(a) requires that the employer's action be linked to the terms and conditions of employment.[94] Thus, nothing compels a state court writing on a clean slate to adopt either the adverse employment action or ultimate employment action standards. Moreover, where a state court has already adopted one of these standards and must decide whether to switch to the *Burlington Northern* standard, the arguments in favor of applying the principle of *stare decisis* are relatively weak because many jurisdictions borrowed from federal law when drafting their own employment discrimination laws.[95] Having originally borrowed from Title VII's language, a state legislature presumably intended that state law follow a reasonable federal standard formulated by the Supreme Court.[96] Additionally, the material adversity standard better promotes the underlying policies of anti-retaliation and anti-discrimination statutes than its counterparts.[97] Given a choice, then, between the competing standards when interpreting state statutory language that is identical or similar to § 704(a), state courts should choose the *Burlington Northern* option.

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91. *See* Chambers v. Trettco, Inc., 614 N.W.2d 910, 912 (Mich. 2000) (rejecting Supreme Court's vicarious liability standard in Title VII cases for use in parallel state statute); *see also* Long, *supra* note 20, at 554–56 (criticizing *Chambers*).

92. *See* Louisville-Jefferson County Metro Gov't v. Martin, Nos. 2007-CA-001629-MR, 2007-CA-001803-MR, 2009 WL 1636270, at *4, *9 (Ky. Ct. App. June, 12, 2009) (referencing *Burlington Northern*'s standard, but stating that in order to make out a prima facie case of retaliation, a plaintiff must establish that the defendant took an employment action adverse to the plaintiff); Goodman v. City of Brooklyn Ctr., No. A.06-202, 2007 WL 46289, at *3 (Minn. Ct. App. Jan. 9, 2007) (citing *Burlington Northern*, but concluding that receiving a poor performance review, being placed on a work plan, and being reassigned to a different division were not adverse employment actions).

93. Long, *supra* note 20, at 523–39.

94. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 62, 64 (2006).

95. Long, *supra* note 20, at 525–26.

96. *Id.* at 528.

97. *See supra* notes 38–40 and accompanying text.

Adopting *Burlington Northern*'s material adversity standard for use in a parallel state anti-retaliation statute would not necessarily render state law redundant in this instance, however. If in fact the federal courts are not faithfully applying the Supreme Court's framework, state courts may sometimes prove a better forum for furthering the policies embodied in anti-discrimination and anti-retaliation law. Indeed, in some jurisdictions, state courts can be expected to provide a more generous interpretation and application of the material adversity standard than their federal counterparts. In a few jurisdictions, statutes specifically direct courts to interpret the statutory language in a liberal manner.[98] Although the idea that, as a remedial measure, Title VII's language should be construed broadly is arguably implicit in the interpretation of § 704(a), it is an idea that appears to occasionally get lost in the shuffle in federal decisions. However, because some state anti-discrimination statutes directly incorporate this cannon of construction, state courts have sometimes expressly relied on this language when adopting more protective retaliation or discrimination standards.[99]

If there is a debate taking place as to the meaning of the Court's holding in *Burlington Northern*, there is no reason why the state courts should not be part of the debate. State judges too often have blindly adopted not only the prevailing federal interpretation of employment discrimination law, but also the federal courts' gloss or application of that law.[100] The potential for this same problem exists with the Court's material adversity standard.[101] Rather than simply citing *Burlington Northern* for the proposition that coworker or supervisor "snubbing" is generally not actionable, state courts should be willing to dig deeper into the specific facts of a given case. For example, the Kentucky Court of Appeals recently applied the material adversity standard and concluded that a supervisor had retaliated against the plaintiff, a human resources manager, by adversely modifying the duties and prestige of her position after she supported other female employees who had been sexually discriminated against.[102] Among the supervisor's actions were forms of reprisal

98. *See, e.g.*, Allison v. Hous. Auth. of Seattle, 821 P.2d 34, 38 (Wash. 1991) ("Title VII differs from R.C.W. 49.60 in that Title VII does not contain a provision which requires liberal construction for the accomplishment of its purposes.").

99. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 962 (Mass. 2001) (noting that Massachusetts's disability discrimination statute provides for liberal interpretation to justify departure from the Supreme Court's interpretation of parallel ADA language); *Allison*, 821 P.2d at 38 (relying on language in state statute requiring liberal construction as one reason for adopting a more generous causation standard in discrimination cases).

100. *See generally* Long, *supra* note 20, at 480–81 (noting the criticisms of state courts' "Pavlovian responses" to federal decisions).

101. *See* Montgomery County v. Park, 246 S.W.3d 610, 616 (Tex. 2007) (concluding that whether a challenged act is materially adverse is ordinarily a question of law for the court); Schnapper, *supra* note 64, at 4 (arguing that, contrary to *Burlington Northern*, numerous federal courts have held that whether a challenged act is materially adverse is ordinarily a question of law).

102. Louisville-Jefferson County Metro Gov't v. Martin, Nos. 2007-CA-001629-MR,

that some federal courts might not recognize as actionable, including directing other employees not to communicate with human resources and referring to the plaintiff in a derogatory manner during staff meetings.[103]

Federal courts will increasingly be called upon to examine state decisional law on workplace retaliation. Accordingly, state courts are well positioned to influence federal decision making in this area. Rather than rely unquestioningly on an approach taken by a few federal courts, state judges should be willing to take a fresh look at the *Burlington Northern* opinion and apply its standard as they deem appropriate. In so doing, they may perhaps provide innovative insight and help develop a consensus as to the true import of the material adversity standard. If there is indeed already uncertainty among the federal courts as to *Burlington Northern*'s true meaning, there is little harm and potentially something to be gained by state courts entering the debate. As such, they should be willing to act as coequal players in the interpretive game.

To the extent that state courts interpret and apply the Court's material adversity standard more consistently with what appears to have been the Court's intended meaning than some federal courts have, the benefits resulting from having separate federal and state systems for addressing employment retaliation outweigh any resulting complexity or other concerns in this instance.

b. State Anti-Discrimination Statutes with Different Language

In a number of jurisdictions, *Burlington Northern*'s material adversity standard may add an element of uncertainty to workplace retaliation law. A majority of jurisdictions employ anti-retaliation language that is noticeably different than that of § 704(a).[104] Therefore, the *Burlington Northern* standard may present some courts with potentially difficult interpretational issues stemming from differences in language between Title VII and state statutory law.

In some jurisdictions, the difference in language is unlikely to present much of an interpretive issue for courts. For example, some state statutes prohibit an employer from retaliating "in any manner" or engaging in "any form of reprisal" against a person who has engaged in protected activity.[105] This

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2007-CA-001803-MR, 2009 WL 1636270, at *1–2, *9 (Ky. Ct. App. June 12, 2009).

103. *Id.* at *9.

104. *See infra* app., tbl.II.

105. ME. REV. STAT. ANN. tit. 5, § 4572(1)(E) (2002) (unlawful to "discriminate in any manner"); MO. REV. STAT. § 213.070(2) (2000) (unlawful to "retaliate or discriminate in any manner"); N.D. CENT. CODE § 14-02.4-18 (Supp. 2009) (unlawful to "engage in any form of threats, retaliation, or discrimination"); OHIO REV. CODE ANN. § 4112.02(I) (LexisNexis 2007) (unlawful to "discriminate in any manner"); 43 PA. CONS. STAT. ANN. § 955(d) (West 2009) (unlawful to "discriminate in any manner"); R.I. GEN. LAWS § 28-5-7(5) (2003) (unlawful to "discriminate in any manner"); S.D. CODIFIED LAWS § 20-13-26 (2004) (unlawful to "directly or indirectly . . . engage in or threaten to engage in any reprisal, economic or otherwise"); TENN. CODE ANN. § 4-21-301 (2005) (unlawful to "[r]etaliate or discriminate in any manner); VT.

language seems generally in keeping with *Burlington Northern*'s observation that retaliation can take many forms and need not (and should not) be limited to retaliation that impacts the terms and conditions of employment. Thus, these kinds of differences in statutory language are unlikely to lead to competing standards regarding what forms of retaliation are prohibited.[106]

In a significant number of other jurisdictions, however, the statutory prohibition on retaliation could legitimately be read to prohibit only adverse employment actions or ultimate employment actions. In *Burlington Northern*, the Court based its decision that retaliation need not be employment-related to be actionable, in part, on the fact that, unlike Title VII's anti-discrimination provision, § 704(a) does not specifically link employer retaliation to an individual's employment.[107] Some jurisdictions, however, define prohibited retaliation specifically with reference to an individual's employment. As such, *Burlington Northern*'s material adversity standard may not apply.

For example, it is illegal under Delaware law "to discharge, refuse to hire or otherwise discriminate against any individual or applicant for employment" because of the individual's protected activity.[108] This language is more specific than § 704(a)'s open-ended prohibition on discrimination.[109] Indeed, it is quite similar to Title VII's anti-discrimination provision, § 703(a), which has been held to apply only to employment-related activity.[110] Under the canon of *ejusdem generis*, inclusion of the catch-all "or otherwise discriminate" provision at the end of a list of ultimate employment actions suggests an intent to limit prohibited forms of retaliation to employment-related actions or, perhaps, only ultimate employment actions.[111]

State courts are already beginning to confront this interpretive dilemma. For example, Washington's employment discrimination statute makes it unlawful "to discharge, expel, or otherwise discriminate" against an individual who has engaged in protected activities,[112] but several state appellate court

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STAT. ANN. tit. 21, § 495(a)(5) (2003) (unlawful to "discharge or in any other manner discriminate"); W. VA. CODE § 5-11-9(7)(C) (2002) (unlawful to "[e]ngage in any form of reprisal or otherwise discriminate"); Keeney v. Hereford Concrete Prods., Inc., 911 S.W.2d 622, 624–25 (Mo. 1995) (recognizing that Title VII's language is "considerably more limited" than the Missouri Human Rights Act's "in any manner" language and that a plaintiff who "suffers *any* damages due to an act of reprisal" may have a claim under state law) (emphasis added).

106. *See* Hughes v. Miller, 909 N.E.2d 642, 648 (Ohio Ct. App. 2009) (adopting material adversity standard for use with respect to Ohio's statute).

107. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 62–64 (2006).

108. DEL. CODE ANN. tit. 19, § 711(f) (2005); *see infra* app., tbl.II (listing of states with similar statutory language).

109. *See* 42 U.S.C. § 2000e-3(a) (2006).

110. *See id.* § 2000e-2(a).

111. *See* Hall Street Associates. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008) ("Under [the *ejusdem generis* canon], when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.").

112. WASH. REV. CODE § 49.60.210(1) (2008).

decisions have nonetheless utilized *Burlington Northern*'s material adversity standard.[113] In contrast, in 2008 the California Supreme Court reaffirmed its prior holding that in order for retaliation to be actionable under California's Fair Employment and Housing Act (FEHA), the retaliation must materially affect the terms, conditions, or privileges of employment.[114] It did so despite the fact that at least one intermediate court of appeals had previously applied the material adversity standard.[115]

Unless there is a compelling reason to reject the material adversity standard, the costs in terms of adding complexity and uncertainty of having competing standards are too substantial to justify. In jurisdictions like California, Washington, and Delaware, there is little question that the material adversity standard better promotes the goals of employment discrimination law than does the adverse or ultimate employment action standards. Properly construed, the material adversity standard does not unduly limit the ability of employers to interact with their employees.

And, although the California Supreme Court's interpretation of its statutory language is certainly reasonable, it is not the only possible interpretation. Like California's anti-retaliation provision, Title VII's anti-discrimination provision in § 703(a) prohibits an employer from failing to hire, discharging, or otherwise discriminating against an individual.[116] However, § 703(a) prohibits an employer from otherwise discriminating specifically with respect to the individual's "terms, conditions, or privileges of employment."[117] The anti-retaliation provision of California's FEHA does not contain the "terms, conditions, or privileges of employment" qualifier.[118] Moreover, even if a court were inclined to follow the *ejusdem generis* canon, that interpretive tool might not apply as it is employed in some jurisdictions. Some courts state that the canon only applies when "a series of *more than two items* ends with a catchall term."[119] Thus, FEHA's statutory language does not point as strongly in favor

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113. Tucker-Slater v. City of Lakewood, No. 36097-7-II, 2008 WL 2811129, at *7 (Wash. Ct. App. July 22, 2008); Pedersen v. Snohomish County Ctr. for Battered Women, No. 60275-6-I, 2008 WL 1934846, at *5 (Wash. Ct. App. May 5, 2008); Moon v. City of Bellevue, No. 59605-5-I, 2008 WL 176340, at *7 (Wash. Ct. App. Jan. 22, 2008); *see also* Hoydic v. Genesco, Inc., No. AAN-CV-07-5003291-S, 2008 WL 1914338, at *5 (Conn. Super. Ct. Apr. 10, 2008) (adopting *Burlington Northern*'s material adversity standard despite fact that anti-retaliation provision prohibits an employer from "discharg[ing], expel[ling] or otherwise discriminat[ing] against any person" who has engaged in protected activity).

114. Jones v. Lodge at Torrey Pines P'ship, 177 P.3d 232, 239 (Cal. 2008).

115. Taylor v. City of L.A. Dep't of Water & Power, 51 Cal. Rptr. 3d 206, 219 (Cal. Ct. App. 2006).

116. 42 U.S.C. § 2000e-2(a)(1) (2006).

117. *Id.*

118. *See* CAL. GOV'T CODE § 12940(h) (West 2005).

119. McQueen v. Shelby County, 730 F. Supp. 1449, 1453 (C.D. Ill. 1990) (emphasis added) (quoting REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 234 (1975)).

of an adverse or ultimate employment action standard as does the language of § 703(a).

Furthermore, as a matter of common sense, one should generally assume that, absent strong evidence to the contrary, a legislature would prefer uniformity in state and federal standards to avoid the confusion and complexity that might emanate from conflicting guidelines. Therefore, unless there is something in the legislative history or in the development of state law that indicates an adverse legislative preference, jurisdictions like California should adopt the material adversity standard for use in their own anti-retaliation provisions.

c. The Special Case of Coworker Retaliation

The Supreme Court's conclusion in *Burlington Northern* that retaliation need not relate to employment to be actionable under § 704(a) certainly suggests that coworker retaliation could, in some instances, fall within the purview of this standard. As a result, state courts may soon find themselves faced with a choice between competing federal standards when coworker retaliation subjects an employer to liability under a parallel state statute.[120] Again, this is a debate to which state courts may have something to contribute. However, the rationale underlying *Burlington Northern* also raises an interesting theoretical question about coworker retaliation that some jurisdictions are dealing with on a practical level.

As the Supreme Court has suggested, the primary goal of anti-retaliation measures is to insure that employees are not dissuaded from reporting unlawful behavior.[121] If that is accurate, and if coworker retaliation may sometimes be as effective a deterrent to raising concerns about discrimination as employer retaliation, should liability for retaliation be limited to employers? Would the possibility of both employer and individual liability better further the goals of anti-retaliation measures than a system of employer liability alone?

Some jurisdictions have concluded that the statutory protection from retaliation should not be limited to employers.[122] Ohio's anti-retaliation law makes it unlawful for "any person" to retaliate "in any manner" against another

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120. *Cf.* Janssen v. Rockville Ctr., 869 N.Y.S.2d 572, 575 (N.Y. App. Div. 2008) (involving retaliation claim against employer based on employer's failure to take "any affirmative or effective measures" to prevent coworker retaliation based on plaintiff's internal complaints of harassment). *See generally* Madeja v. MPB Corp., 821 A.2d 1034, 1044–45 (N.H. 2003) (concluding that employer may be held liable for coworker retaliation where employer negligently failed to discover or remedy retaliation).

121. *See* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2009) ("The antiretaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." (citation omitted)).

122. *See infra* app., tbl.III.

who has engaged in protected activity.[123] This language has been interpreted to apply to coworker retaliation.[124] A surprising number of other jurisdictions employ similar language, thus raising an interpretive question as to whether coworkers may be subject to liability for retaliation.[125] For example, the anti-discrimination statutes of California and Washington use comparable language in defining who may be held liable for retaliation. California makes it unlawful "[f]or any employer, labor organization, employment agency, *or person* to discharge, expel, or otherwise discriminate against any person" for engaging in protected activity.[126] Likewise, in Washington it is unlawful "for any employer, employment agency, labor union, *or other person* to discharge, expel, or otherwise discriminate against any person" for partaking in covered activity.[127] However, the California Supreme Court has held that despite the inclusion of the "or person" language, the statute only applies to employers.[128] Conversely, a Washington appellate court has suggested that while coworkers may not be held liable for retaliation, supervisors may since they, like employers, have the power to "discharge" or "expel."[129]

To be sure, there are any number of potential concerns with exposing supervisors and coworkers to the prospect of liability, not the least of which is the potential disharmony that could result. But, in an age where retaliation claims are on the rise,[130] some states' allowance for the possibility of individual liability is an experiment worth monitoring.

d. State Wrongful Discharge Cases

Burlington Northern may ultimately influence not only states' statutory frameworks for dealing with retaliation but state common law claims of wrongful discharge in violation of public policy. The chapter of the proposed

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123. OHIO REV. CODE ANN. § 4112.02(I) (LexisNexis 2007).

124. Hughes v. Miller, 909 N.E.2d 642, 647 (Ohio Ct. App. 2009) ("Ohio's anti-retaliation law has a broader scope than Title VII because it does not limit its coverage to people in an employer-employee situation . . . ."); *see also* LeMasters v. Christ Hosp., 777 F. Supp. 1378, 1381–82 (S.D. Ohio 1991) ("Employing the common usage of the words in § 4112.02(I), no employer-employee relationship is required.").

125. *See infra* app., tbl.III.

126. CAL. GOV'T CODE § 12940(h) (West 2005) (emphasis added).

127. WASH. REV. CODE § 49.60.210(1) (2008) (emphasis added).

128. Jones v. Lodge at Torrey Pines P'ship, 177 P.3d 232, 238 (Cal. 2008).

129. *See* Malo v. Alaska Trawl Fisheries, Inc., 965 P.2d 1124, 1126 (Wash. Ct. App. 1998) (holding that language "is directed at entities functionally similar to employers who discriminate by engaging in conduct similar to discharging or expelling a person who has" engaged in protected activity and dismissing retaliation claim against coworker because he "did not employ, manage or supervise" plaintiff).

130. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 935 (2007) [hereinafter Long, *The Troublemaker's Friend*] (noting that "retaliation claims have reportedly doubled in the last decade").

Restatement (Third) of Employment Law that deals with the common law tort of wrongful discipline in violation of public policy discusses the types of adverse employer actions that may form the basis of an employee's claim.[131] The fact that the authors termed the theory wrongful *discipline* in violation of public policy, rather than wrongful *discharge* is noteworthy. This is because, in defining the tort, the authors adopted *Burlington Northern*'s material adversity standard, despite the fact that the majority of state courts that have previously considered the issue have declined to extend the coverage of the tort to employer actions not amounting to discharge or constructive discharge.[132] Thus, to the extent the proposed *Restatement* ultimately influences the development of the common law of the workplace, the Supreme Court's *Burlington Northern* decision may have an unintended positive effect on state law. Moreover, because the wrongful discipline (or discharge) tort covers a variety of unfair employer acts that are not addressed by federal law, the proposed *Restatement*'s rule illustrates some of the benefits of having separate state and federal frameworks in place and allowing them to influence each other.

B. The Extent of Coverage Under the Opposition and Participation Clauses for Participation in Internal Investigations

Crawford's holding that the protection of § 704(a)'s opposition clause extends to employees who answer questions during an employer's internal investigation of alleged discrimination will probably address most coverage questions concerning this scenario.[133] However, from the perspective of an employee participating in an internal investigation, it would have been preferable had the Court resolved *Crawford* by holding that the plaintiff's conduct was covered under § 704(a)'s participation clause. At present, at least some future employees will be forced to seek protection under the more limited opposition clause when their activity is more naturally classified as participation conduct. As a result, they may find themselves covered by neither.

1. Unresolved Issues Under Title VII

As interpreted by the courts, the participation clause provides substantially more coverage than does the opposition clause. It does so in several ways. First, the participation clause protects more than just opposing unlawful practices, making charges, or testifying in a Title VII proceeding; it also protects employees who have "assisted[] or participated *in any manner* in an investigation, proceeding, or hearing under this subchapter."[134] The "in any manner" language is absent from the opposition clause.[135] Thus, by its terms,

131. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 (Tentative Draft No. 2, 2009).
132. *Id.*; *see id.* cmt.b (listing cases).
133. *See* Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 850–51 (2009).
134. 42 U.S.C. § 2000e-3(a) (2006) (emphasis added).
135. *See id.* § 2000e-2(a).

the participation clause provides "exceptionally broad protection," according to at least one court.[136] As a result, the clause has been held to cover a variety of actions, including helping coworkers file their own formal discrimination complaints[137] and returning to work early from maternity leave in an attempt to help financially support a fiancé/coworker during the pendency of a discrimination case.[138]

Unfortunately for employees who become involved in internal investigations regarding unlawful discrimination, the federal courts have consistently held that the participation clause only covers employee action undertaken in conjunction with an investigation, proceeding, or hearing that is authorized by Title VII.[139] Thus, the participation clause only applies when Title VII's formal remedial mechanisms have been triggered.[140] The Supreme Court's refusal to consider whether the participation clause might also cover an employee who participates in an internal investigation unconnected to any EEOC or court proceeding leaves the majority rule intact. This refusal also has the potential to leave some employees uncovered who have engaged in conduct very much in keeping with the goals of Title VII's anti-retaliation provision.

The Supreme Court has emphasized the benefits of internal investigation and compliance procedures for dealing with discrimination complaints. In the Court's view, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance procedures" and was intended "to promote conciliation rather than litigation . . . ."[141] Implementing an effective internal grievance mechanism may also "encourage employees to report harassing conduct before it becomes severe or pervasive."[142] To that end, the Court has essentially required employees seeking to hold their employers vicariously liable for the harassment of supervisors to take advantage of any internal complaint procedure they may have before filing suit.[143] Indeed, this position presents a persuasive argument for why participation in an internal investigation should be considered protected participation in a Title VII proceeding.[144]

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136. Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989); Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969).

137. Eichman v. Ind. State Univ. Bd. of Trs., 597 F.2d 1104, 1107 (7th Cir. 1979).

138. EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 329 (M.D.N.C. 2003).

139. Long, *The Troublemaker's Friend*, *supra* note 130, at 953–54.

140. *See id.*

141. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

142. *Id.*

143. *See id.* at 765 (articulating affirmative defense for employers involving consideration of whether "employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior" and whether "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer").

144. Long, *The Troublemaker's Friend*, *supra* note 130, at 976–77; *see also* Aragon v. Lazo, No. B204981, 2009 WL 81388, at *7 (Cal. Ct. App. Jan. 14, 2009) (considering, but rejecting similar argument made on state law grounds).

Through its employment discrimination decisions, the Court has emphasized that Title VII should be construed so as to encourage employees to make internal reports of unlawful conduct and to likewise encourage employers to deal with those reports in an effective manner.[145] By extending the reach of the opposition clause to an employee who provides information about unlawful harassment during an internal investigation, *Crawford* aids in this goal. But by not extending the scope of the participation clause to cover certain kinds of employee actions that facilitate internal grievance procedure but that do not amount to "opposition," Congress and the courts have left a potentially large gap in coverage.

Consider the case of the employee who assists a coworker with an internal complaint.[146] In *Sawicki v. American Plastic Toys, Inc.*, a group of employees brought their supervisor a memorandum detailing sexual harassment allegations against another shift leader.[147] The supervisor then retyped the memorandum for the employees, delivered it to the plant manager and the company's human resources manager, and informed the plant manager that the employees had consulted with an attorney.[148] The supervisor was later fired, allegedly in retaliation for these actions.[149] According to the district court, the participation clause did not protect the supervisor because she did not "engag[e] the formal machinery of government to seek redress for the sexual harassment alleged by her coworkers."[150] Nor, in the court's view, did the supervisor engage in protected opposition conduct.[151] Had the supervisor *signed* the memorandum detailing harassment or stated that she had consulted with an attorney on the employees' behalf, her actions might have amounted to opposition conduct.[152] But merely *delivering* the employees' memorandum did not demonstrate the "opposition" needed to fit within the opposition clause.[153]

If the participation clause were to apply to internal grievances, the supervisor's actions in *Sawicki* would almost certainly amount to participation or assistance "in any manner." But if one must fit the supervisor's actions under the heading of "opposing" unlawful conduct, there is something of a semantic obstacle to overcome. After *Crawford*, some federal courts maintain that the concept of opposition requires that the employee "communicate her belief that discrimination is occurring to the employer."[154] The *Crawford* plaintiff not only

145. *See Ellerth*, 524 U.S. at 764–65.

146. Long, *The Troublemaker's Friend*, *supra* note 130, at 958–59 (discussing whether one employee who provides information to another employee about filing an internal complaint has engaged in protected opposition conduct).

147. Sawicki v. Am. Plastic Toys, Inc., 180 F. Supp. 2d 910, 913 (E.D. Mich. 2001).

148. *Id.* at 913–14.

149. *Id.*

150. *Id.* at 916.

151. *Id.*

152. *Id.* at 918.

153. *Id.* at 917–18.

154. Demers v. Adams Homes of Nw. Fla., Inc., 321 F. App'x 847, 852 (11th Cir. 2009)

communicated the discrimination, but provided a "disapproving account of sexually obnoxious behavior toward her by a fellow employee."[155] In contrast, the *Sawicki* plaintiff's actions were more neutral in character; the plaintiff simply passed along a memo and stated, in an apparently neutral tone, that the coworkers were consulting an attorney.[156] To use some of the synonyms mentioned in *Crawford*,[157] it is difficult (although perhaps not impossible) to conclude that the supervisor's actions demonstrated "resistance" or "antagonism" to her coworkers' treatment. Therefore, it is far from clear that the result in this case would be any different after *Crawford*. However, by helping to facilitate the employees' internal complaint (perhaps for the protection of her subordinates and to her own possible detriment), the supervisor's actions are exactly the type of behavior that the courts and Title VII ought to encourage. Until courts are willing to declare that this sort of assistance is covered under the participation clause, as well as recognize coverage for participation in internal grievance procedures, employees will remain at risk.[158]

The failure to treat participation in an employer's internal investigation as participation conduct may also leave employees whose job requires involvement in these types of proceedings vulnerable to potential retaliation. This leaves a potential gap in Title VII for employees who may play a vital role in helping bring discrimination to the attention of their employers. For example, in another case, a supervisor oversaw the division that was responsible for investigating claims of sexual harassment.[159] After meeting with the complaining employee, the supervisor prepared a written memorandum for his boss documenting that he had met with the complaining employee, that a complaint was imminent, and that he had advised the complaining employee of the proper procedures to follow in pursuing her complaint.[160] In addition to his written memorandum, the supervisor also gave the complaining employee the phone number of the EEOC and verbally warned his boss that a complaint addressing harassment and a hostile work environment was forthcoming.[161] A few months later, the supervisor was discharged, allegedly in retaliation for his

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(quoting Webb v. R&B Holding Co., 992 F. Supp. 1382, 1389 (S.D. Fla. 1998)).

155. Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 850 (2009).

156. *See Sawicki*, 180 F. Supp. 2d at 913–14.

157. *See Crawford*, 129 S. Ct. at 850 ("The term 'oppose,' being left undefined by the statute, carries its ordinary meaning: 'to resist or antagonize . . . ; to contend against; to confront; resist; withstand.'" (citations omitted) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1710 (2d. ed. 1958))).

158. *Cf.* Muir v. Chrysler L.L.C., 563 F. Supp. 2d 783, 789 (N.D. Ohio 2008) (holding, pre-*Crawford*, that providing relevant addresses of company officials to coworker for coworker's use as part of an internal complaint is not protected opposition conduct).

159. Guess v. City of Miramar, 889 So. 2d 840, 845 (Fla. Dist. Ct. App. 2004).

160. *Id.* at 847.

161. *Id.* at 845.

actions.[162] Consistent with the prevailing interpretation of § 704(a), the court ruled that the supervisor's actions did not constitute protected participation conduct because they predated the filing of a formal charge with the EEOC.[163] Moreover, the court held that the supervisor's actions were not substantial enough to amount to opposition conduct.[164] As was the case in *Sawicki*, the plaintiff's actions, on their face, were neutral in character and did not amount to "confrontation" or "resistance" to the employer's conduct.[165]

Interestingly, the ADA[166] would likely provide protection for an employee who similarly assisted a coworker in an internal grievance. Under the ADA, it is unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual . . . on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of[] any right granted or protected by this chapter."[167] This language has been interpreted to protect employees who speak to their employers on behalf of a coworker with a disability who needs a reasonable accommodation.[168] Since an employee has a right to oppose unlawful discrimination by complaining internally, it stands to reason that an employee who assists a coworker in the exercise of this right—say, for example, by retyping a memorandum and presenting it to the employer—should also be protected, regardless of whether the assisting employee "opposed" the employer's unlawful conduct. Unfortunately, there is no analogue under Title VII.

The participation clause provides more expansive retaliation protection than the opposition clause for an additional reason. When an employee claims protection under the opposition clause, most courts require the employee to have a good faith, reasonable belief that the conduct the employee opposed was unlawful under Title VII.[169] In contrast, a number of courts, citing the

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162. *Id.*

163. *Id.* at 847.

164. *Id. But see* Baranek v. Kelly, Civ. A. No. 85-0376-C, 1987 WL 17546 (D. Mass. 1987) (holding that employee who, as part of her job, assisted in an internal investigation of discrimination complaint had engaged in protected participation conduct).

165. *Guess*, 889 So. 2d at 847. Of course, employees whose jobs involve processing internal complaints must be careful that their opposition is not too substantial. Opposition conduct that is unnecessarily disruptive is not protected. *See, e.g.*, Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 231–32, 233 (1st Cir. 1976). In several cases, employees whose jobs entailed handling internal discrimination complaints were unable to claim protection under the opposition clause because their active opposition positioned them adversely to the employer and left them unable to perform their jobs, namely assisting their employers in resolving the complaints. Holden v. Owens-Ill., Inc., 793 F.2d 745, 753 (6th Cir. 1986); Smith v. Singer Co., 650 F.2d 214, 217 (9th Cir. 1981).

166. 42 U.S.C. §§ 12101–12213 (2006).

167. *Id.* § 12203(b).

168. Barker v. Int'l Paper Co., 993 F. Supp. 10, 16 (D. Me. 1998).

169. *See, e.g.*, Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1125 (8th Cir. 2006); Byers v. Dallas Morning News, Inc., 209 F.3d 419, 428 (5th Cir. 2000); Trent v. Valley Elec. Ass'n, 41 F.3d 524, 526 (9th Cir. 1994).

importance of preserving access to Title VII's statutory remedial mechanisms, have held that coverage under the participation clause does not depend on the reasonableness of the employee's belief that the employer's actions are unlawful.[170]

Because many courts have adopted a rather strict conception of what a "reasonable" employee would believe about Title VII,[171] this distinction is potentially quite significant for those who instigate internal discrimination complaints. For example, in one recent case from a federal court in Tennessee, an employee claimed that he was retaliated against after he encouraged his coworkers to complain to management about a supervisor's threat to send another employee onto a "crew with the niggers."[172] The court held that no reasonable employee could believe that this statement was unlawful under Title VII.[173] Accordingly, the employee's actions were not protected under the opposition clause.

Finally, *Crawford* also leaves open the question of whether an employee's "silent opposition" can qualify as protected opposition conduct. In attempting to flesh out the meaning of the word "oppose" in § 704(a), the Court cited with approval a dictionary definition, which defined the term, in part, to mean "'to be hostile or adverse to, as in opinion.'"[174] As an example, the Court suggested that one could "'oppose' capital punishment . . . without writing public letters, taking to the streets, or resisting the government."[175] In his separate concurring opinion, Justice Alito suggested that the Court's expanded definition of "opposition" might enable employees who had expressed general opposition to an employer's practices to coworkers or others, but not to the employer directly, to claim protection under the opposition clause.[176] If word of this opposition somehow reached the employer through indirect channels, Alito expressed concern that an employee could create a genuine issue of fact on the question of causation as a result of the timing of the employer's adverse action.[177] Applying the Court's expanded definition of "opposition" to these cases "would be especially problematic because of uncertainty regarding the point in time when the employer became aware of the employee's private expressions of disapproval."[178] Moreover, Justice Alito voiced apprehension that an expansive

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170. *See, e.g.*, Johnson v. Univ. of Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000) (stating that the participation clause protects an employee even "if the contents of the charge are malicious or defamatory as well as wrong").

171. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 99 (2005) (criticizing the courts' application of this standard as being too narrow and too strict).

172. Thomas v. Grinder & Haizlip Constr., 547 F. Supp. 2d 825, 827 (W.D. Tenn. 2007).

173. *Id.* at 831.

174. Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 850 (2009) (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1359 (2d ed. 1987)).

175. *Id.* at 851.

176. *Id.* at 854 (Alito, J., concurring).

177. *Id.* at 854–55.

178. *Id.* at 855.

view of opposition conduct would contribute to an increase in the already-growing number of retaliation claims filed each year.[179] Therefore, Alito wrote separately in *Crawford* to note that "[t]he question of whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct [was] not before [the Court]."[180]

Justice Alito's concurring opinion, which was joined by Justice Thomas, leaves open the question of whether an employee must oppose an employer's unlawful practices with the purpose of communicating that opposition to the employer. For example, would an employee be protected if she did not direct her opposition at the employer, but nonetheless knew with substantial certainty that the employer would learn of her opposition? Would an employee who had less certainty that an employer would learn of her opposition be protected, such as in the case of an employee who did not intend for her opposition to reach the ears of the employer, but who was at least aware of the possibility that it might?[181]

The Sixth Circuit Court of Appeals, sitting en banc, was confronted with such a case in 2009. In *Thompson v. North American Stainless, LP*, an employee helped a coworker—who also happened to be his fiancée—prepare and file a charge of discrimination with the EEOC.[182] Three weeks after the EEOC informed the employer of the discrimination complaint, the employee was terminated.[183] Although the employee did not directly communicate to the employer that he had assisted his fiancée in filing the complaint, several coworkers were aware of that fact.[184] Therefore, it seems entirely plausible that the employer learned of the employee's active opposition to the alleged discrimination through the company grapevine and that such a result was foreseeable to the employee. It does not appear that the employee's purpose was to convey his opposition to the employer, however. Relying on Justice Alito's concurrence, the Sixth Circuit stated that "*Crawford*'s reach does not extend to the present circumstances."[185]

2. Implications for State Law and Possible Alternatives

Like § 704(a), most state anti-retaliation provisions contain distinct opposition and participation clauses, with participation conduct typically linked

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179. *Id.*

180. *Id.*

181. Justice Alito provided the example, among others, of an employee who expresses opposition at a restaurant frequented by coworkers. *Id.* at 854.

182. Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 823 (6th Cir. 2009) (en banc) (Moore, J., dissenting).

183. *Id.* at 806 (majority opinion).

184. *Id.* at 823 n.7 (Moore, J., dissenting).

185. *Id.* at 813 (majority opinion). In an unusual twist, the Sixth Circuit seemed to say both that the plaintiff had forfeited any argument that he engaged in protected activity through this action and that this argument was foreclosed by *Crawford*. *See id.* at 813–14.

specifically to a proceeding or hearing "under this chapter" or "under this article."[186] Relying on the federal courts' interpretation of § 704(a), some states have concluded that their own participation clauses do not cover employees who have made a charge, testified, assisted, or participated in an internal investigation procedure. Instead, these actions are covered under the opposition clause.[187] Thus, if anything, the Court's decision in *Crawford* to classify involvement in an internal investigation as opposition conduct—as well as its decision to altogether avoid attempting to define the contours of the participation clause—is likely to encourage state courts to follow a similar approach.[188]

There is at least some reason to believe, however, that some employees who participate in an internal grievance procedure, but who do not engage in what can be deemed "opposition" conduct, may be able to find protection under their state's parallel anti-retaliation provision. As was previously mentioned, some state statutes specifically require courts to construe the language of anti-retaliation provision in a liberal manner, thus increasing the odds that conduct that might not be protected under federal law would be protected under state law.[189] And until the Supreme Court definitively resolves the issue, state courts should not feel compelled to follow the lead of most federal courts merely for the sake of uniformity. Instead, state courts should be willing, where appropriate, to initiate dialogue as to the proper approach for protecting employees who participate in or otherwise facilitate internal investigations.

Other employees may find that slight differences in their jurisdiction's statutory language may provide greater protection from retaliation.[190] In Texas, for instance, employers are prohibited from retaliating "against a person who, *under this chapter*: (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing."[191] Section 704(a) of Title VII limits protection to participation conduct in conjunction with investigations,

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186. *See, e.g.*, W. VA. CODE § 5-11-9(7)(C) (2002) (declaring that it is an unlawful discriminatory practice to "[e]ngage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.").

187. *See, e.g.*, Guess v. City of Miramar, 889 So. 2d 840, 846–47 (Fla. Dist. Ct. App. 2004).

188. *See* Hughes v. Miller, 909 N.E.2d 642, 651 (Ohio Ct. App. 2009) (holding, in light of *Crawford*, that filing an internal grievance qualifies as opposition conduct but refusing to consider whether it qualifies as participation conduct). Other courts, while concluding that complaining internally is protected activity, have failed to clarify whether the activity is protected under the opposition or participation clause. *See, e.g.*, VECO, Inc. v. Rosebrock, 970 P.2d 906, 921 (Alaska 1999).

189. *See supra* note 98 and accompanying text.

190. *See infra* app., tbl.V (listing miscellaneous provisions in state anti-retaliation statutes, some of which might arguably be read to cover participation in an internal proceeding).

191. TEX. LAB. CODE ANN. § 21.055 (Vernon 2006) (emphasis added).

proceedings, or hearings "under this subchapter."[192] Federal courts have seized on the "under this subchapter" language to conclude that only participation in a lawsuit or EEOC proceeding is protected.[193] In contrast, the "under this chapter" language of the Texas Human Rights Act is not restricted to any particular activity.[194] Thus, on its face, the language would seem to cover one who testifies, assists, or participates in an internal investigation. Indeed, several Texas appellate court decisions have interpreted the language in this fashion.[195] Similarly, South Dakota's statutory anti-retaliation provision is not limited to participation in a proceeding initiated pursuant to a discrimination statute. Instead, South Dakota prohibits an employer from retaliating against an employee who has "fil[ed] a charge, testif[ied] or assist[ed] in the observance and support of the purposes and provisions of this chapter."[196]

Still other employees may find that their jurisdiction's anti-retaliation provision plainly provides greater protection than does § 704(a). Like the ADA, some states prohibit an employer from intimidating, threatening, or interfering with an individual in the exercise of a right provided by the statute *or* because the individual has aided or encouraged another in the exercise of a right provided by the statute.[197] However, unlike the ADA, the protection of these statutes is not limited to those who oppose or file charges concerning *disability* discrimination. Instead, the statutes provide a right to be free from discrimination on the basis of race, sex, or other protected characteristics. Therefore, an employee who participates in an internal investigation procedure concerning another employee's discrimination claim or who, in some manner, helps to bring the employee's allegations to the employer's attention may have

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192. 42 U.S.C. § 2000e-3(a) (2006).

193. *See, e.g.*, Morris v. Boston Edison Co., 942 F. Supp. 65, 69–71 (D. Mass. 1996) (discussing the significance of this language in concluding that participation in an internal investigation does not constitute protected participation conduct).

194. TEX. LAB. CODE ANN. § 21.055. The statute does limit its protection to a person who, "under this chapter," engages in any of the various listed forms of protected activities. *Id.*

195. Arguably, this language might be read to protect only those who, in the course of a lawsuit or other formal proceeding, opposed a discriminatory practice or engaged in some other listed activity. However, the Texas Supreme Court has rejected this argument and held that an employee who makes an internal discrimination complaint has engaged in protected activity by opposing a discriminatory practice. City of Waco v. Lopez, 259 S.W.3d 147, 151 (Tex. 2008); *see also* Wilber v. Cox Commc'ns, Inc., No. 2-06-093-CV, 2007 WL 2067818, at *1 (Tex. App. July 19, 2007) (stating that employee who files an informal, internal complaint has "fil[ed] a complaint" for purposes of Texas's statute); Tex. Dep't of Assistive & Rehabilitative Servs. v. Abraham, No. 03-05-00003-CV, 2006 WL 191940, at *6 (Tex. App. Jan. 27, 2006) (concluding that employee who had filed an internal discrimination complaint and participated in subsequent internal investigation had engaged in protected activity under Texas's statute); Wal-Mart Stores, Inc. v. Lane, 31 S.W.3d 282, 295 (Tex. App. 2000) (holding employee who complained internally about sexual harassment had "file[d] a complaint" for purposes of Texas's statute).

196. S.D. CODIFIED LAWS § 20-13-26 (2004).

197. *See infra* app., tbl.IV.

aided the complaining employee in the exercise of a right provided by the statute and should be entitled to protection.

This is an area in which state law may serve as a useful model for federal reform. Courts and legislatures should encourage individuals to assist their coworkers in the exercise of their statutory right to be free from discrimination. This is as true for victims of race, sex, and other forms of discrimination as it is for victims of disability discrimination. However, as Title VII is currently interpreted, employees who assist their coworkers in making internal complaints of discrimination are vulnerable to retaliation. In this respect, jurisdictions that employ anti-retaliation language that parallels that of the ADA may serve as models of reform for Congress in light of the under inclusiveness currently plaguing Title VII.

C. Third-Party Retaliation

Burlington Northern extended the protection of § 704(a) to cover situations in which an employer retaliates against an employee in a manner that has no direct bearing on the terms and conditions of employment.[198] However, the decision fails to fully close a potentially large gap in § 704(a)'s coverage. In a surprising number of cases, employees have accused employers of retaliation for engaging in protected activity by taking action against a coworker who is also a friend or relative.[199] The question of whether these coworkers have a retaliation claim remains open under federal law.[200]

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198. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 67 (2009).

199. *See* Long, *The Troublemaker's Friend*, *supra* note 130, at 934 n.10 (citing third party retaliation cases); *see also* Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 816 (6th Cir. 2009) (en banc) (holding that fiancé of coworker who filed a discrimination complaint was not entitled to statutory protection unless he himself had engaged in protected activity); EEOC v. Wal-Mart Stores, Inc., 576 F. Supp. 2d 1240, 1242, 1246–47 (D.N.M. 2008) (holding that children of employee who had engaged in protected activity had no retaliation claim resulting from employer's failure to hire them); Freeman v. Barnhart, No. C 06-04900 JSW, 2008 WL 744827, at *5 (N.D. Cal. Mar. 18, 2008) (holding that African-American employee who associated with other African-American employees who had filed EEOC complaints had not engaged in protected activity); Mutts v. S. Conn. State Univ., No. 3:04 CV 1746(MRK), 2006 WL 1806179, at *11 (D. Conn. June 28, 2006) (holding that wife and coworker of an employee who filed a discrimination complaint did not engage in protected activity). In one unusual case, a wife was allegedly fired because her husband, who was a lawyer, filed a discrimination claim on behalf of his client against the wife's employer. Norman-Nunnery v. Madison Area Technical Coll., No. 08-cv-320-bbc, 2008 WL 4379298, at *1 (W.D. Wis. Sept. 23, 2008). The court held not only that the wife could not claim protection from retaliation by virtue of her husband's protected activity, but also that her husband's activity was not protected because the lawsuit that he filed on behalf of his client was frivolous. *Id.* at *4–5. Thus, he lacked the requisite reasonable belief that the conduct that was the subject of his lawsuit was unlawful. *Id.* at *5.

200. The issue has come up under other federal statutes as well. Elsensohn v. St. Tammany Parish Sheriff's Office, 530 F.3d 368, 373 (5th Cir. 2008) (decided under the Family and

1. Unresolved Issues Under Title VII

Under § 704(a), it is unlawful for an employer to retaliate against an employee or applicant "because *he* has opposed any practice made an unlawful employment practice by this subchapter, or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[201] Read literally, § 704(a) only protects those employees who have engaged in protected conduct, not those who are associated with those employees.[202] The majority of courts have concluded, based on the plain language of § 704(a), that the coworker of an employee who has engaged in protected conduct has no recourse through a retaliation claim simply by virtue of his or her association with the complaining employee.[203] The problem with this interpretation is that it would, in the words of one court, "'defeat the plain purpose'" of Title VII by allowing employers to deter employees from complaining about unlawful conduct by subjecting their friends and relatives to retaliation.[204] Taking action against a friend or loved one is a highly effective way of discouraging an employee from opposing unlawful conduct and filing a complaint under Title VII's statutory framework.[205]

Indeed, the fact that retaliation against one's friends or loved ones is such an effective deterrent to engaging in protected activity has led several courts to conclude that an employee who engages in protected activity may be able to claim protection under *Burlington Northern*'s material adversity standard.[206] Ironically, this conclusion actually appears to have influenced courts to conclude that the friend or relative did not have a viable retaliation claim, reasoning that the availability of a claim on the part of the employee engaging in protected activity obviates the need to recognize a claim on the part of the friend or relative.[207] The problem with limiting recovery to the complaining employee lies in the remedy. In the overwhelming majority of these cases, the friend or relative will have either lost or been denied a job, a harm likely to be more substantial than the emotional distress the complaining employee may have endured after seeing a friend or family member punished for her

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Medical Leave Act); Fitzgerald v. Codex Corp., 882 F.2d 586, 589 (1st Cir. 1989) (decided under the Employee Retirement Income Security Act).

201. 42 U.S.C. § 2000e-3 (2006) (emphasis added).

202. Long, *The Troublemaker's Friend*, *supra* note 130, at 950.

203. *Id.* at 934 & n.10.

204. Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 647 (6th Cir. 2008), *rev'd en banc*, 567 F.3d 804, 811 (6th Cir. 2009).

205. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 568–69 (3d. Cir. 2002).

206. *Thompson*, 567 F.3d at 827–28 (White, J., dissenting); Freeman v. Barnhart, No. C 06-04900 JSW, 2008 WL 744827, at *7 (N.D. Cal. Mar. 18, 2008); Mutts v. S. Conn. State Univ., No. 3:04 CV 1746(MRK), 2006 WL 1806179, at *11 (D. Conn. June 28, 2006).

207. *See Mutts*, 2006 WL 1806179, at *11.

actions.[208] Therefore, the majority approach prevents the party who has suffered the more tangible and likely greater harm from obtaining compensatory and possibly punitive damages. While allowing the employee who has engaged in protected activity to recover under a retaliation theory certainly furthers the policies underlying § 704(a), it is not nearly as effective a deterrent to employer retaliation as is permitting the friend or relative who has suffered the more tangible harm to bring his or her own claim.

There are potentially other ways in which courts could effectively prohibit this kind of third-party retaliation that are just now starting to be explored at the federal level. In *Thompson v. North American Stainless, LP*,[209] the Sixth Circuit Court of Appeals was confronted with a situation in which the plaintiff was fired after his fiancée (who also happened to be a coworker) filed a discrimination charge with the EEOC.[210] Relying on the plain language of § 704(a), the Court concluded that since the plaintiff had not alleged that he himself had opposed an unlawful practice or participated in an EEOC proceeding, he had no retaliation claim.[211] However, the court was also forced to wrestle with an additional argument for why the plaintiff should be protected. While the language of § 704(a) defines what kind of employer activity is prohibited, the statute also authorizes a court to award relief to "an aggrieved person."[212] Although the plaintiff in *Thompson* may not have engaged in protected activity (or at least failed to allege it), he was nonetheless aggrieved by the employer's act of retaliating against his fiancée, who had actually engaged in protected activity. The majority opinion quickly glossed over this issue, but Judge Rogers, in a separate concurrence, took the time to argue specifically that the "aggrieved person" language should not be expanded to include employees like Thompson, who were not the "intended beneficiaries" of Title VII.[213] In her dissent, Judge Moore took issue with the idea that a person who loses a job because of retaliation directed at another is not within the class of persons protected by § 704(a).[214]

Another way courts could effectively prohibit third-party retaliation would be to award reinstatement, with back pay, to the third party who was fired in retaliation for another employee's protected activity. If, as both the majority and dissent seemed to agree in *Thompson*, the plaintiff's fiancée had a viable retaliation claim based on the plaintiff's firing,[215] reinstatement of the plaintiff

208. Long, *The Troublemaker's Friend*, *supra* note 130, at 980.

209. *Thompson*, 567 F.3d 804.

210. *Id.* at 806.

211. *Id.* at 811.

212. 42 U.S.C. § 2000e-5(b), -5(e)(1) (2006).

213. *Id.* at 817 (Rogers, J., concurring).

214. *Id.* at 821–22 (Moore, J., dissenting).

215. *See id.* at 826 (White, J., dissenting) ("All members of the en banc panel appear to agree that the firing of an employee's co-worker-spouse (or co-worker-fiancée) in retaliation for the employee's opposition to an unlawful employment practice is unlawful under § 704(a), 42 U.S.C. § 2000e-3(a).").

might be the only appropriate remedy. In analogous cases brought under the National Labor Relations Act (NLRA), courts have upheld the NLRB's decision to grant this form of relief.[216] In her dissent, Judge Moore raised reinstatement of the third party as a possible remedy for the party who engaged in protected activity, but noted that it was unclear whether such relief would be available.[217]

Interestingly, not every federal statute governing the workplace is as restrictive in its language as §704(a). In addition to an anti-retaliation provision that parallels §704(a), the ADA contains language declaring it unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, . . . any right granted or protected by this chapter."[218] Because action against a friend or family member may be an attempt to "coerce, intimidate, threaten, or interfere" with an employee's exercise of the right to oppose unlawful discrimination, at least one court has concluded that this language prohibits an employer from taking action against the relative of an employee who filed a disability discrimination claim.[219]

2. Implications for State Law and Possible Alternatives

The problem of third-party or associational discrimination is another situation in which state courts and legislatures may have a role to play. As is the case with §704(a), most states employ statutory language that, read literally, requires that the person retaliated against also be the person who engaged in protected activity.[220] As has been the case in the federal system, the majority of state courts to consider the question have concluded that the friend or relative of an employee who has engaged in protected activity does not have a retaliation claim unless she has actually engaged in protected activity herself.[221]

But once again, state courts need not fall in lockstep with federal courts on this issue. The federal courts are now beginning to confront more sophisticated arguments concerning whether §704(a) should be read to provide a remedy to

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216. *See* Long, *The Troublemaker's Friend*, *supra* note 130, at 943–44.

217. *Thompson*, 567 F.3d at 822 n.5 (Moore, J., dissenting).

218. 42 U.S.C. § 12203(b) (2006).

219. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570 (3d Cir. 2002).

220. *See infra* app., tbls.I–III.

221. Gagliardi v. Ortho-Midwest, Inc., 733 N.W.2d 171, 183 (Minn. Ct. App. 2007); Pope v. Motel 6, 114 P.3d 277, 282 (Nev. 2005); Dias v. Goodman Mfg. Co., 214 S.W.3d 672, 677–78 (Tex. App. 2007); *see also* Millstein v. Henske, 722 A.2d 850, 855 (D.C. 1999) (rejecting these claims, at least where the plaintiff was not a relative or close friend of the employee engaged in protected activity). Similar issues have arisen outside of the employment discrimination context in common claims of retaliatory discharge in violation of public policy. *See, e.g.*, Fortunato v. Office of Stephen M. Silston, 856 A.2d 530, 532 (Conn. Super. Ct. 2004) (permitting common law retaliatory discharge claim where mother was fired after her daughter contemplated filing a medical malpractice claim against mother's employer).

the innocent bystanders of employer retaliation, including the arguments that these individuals have been "aggrieved" by the employer's action and that reinstatement should be available as a remedy to the employee who actually engaged in protected activity.[222] Thus, this is an area in which the courts are beginning to benefit from the percolation of these issues among other courts. There is no reason why state courts construing identical or substantially similar language should not engage in the debate as equal players.[223]

In addition, coverage under state law may be a more viable option for some employees based on the different statutory language. For example, New Jersey's Law Against Discrimination contains language that parallels the ADA's prohibition against interference, coercion, or intimidation.[224] As at least one federal court has held with respect to the ADA's parallel language, the New Jersey Supreme Court has concluded that this language prohibits an employer from retaliating against the associates of an employee who has engaged in protected activity.[225] Similar language exists in several other states' anti-retaliation statutes.[226]

Even more directly on point is Missouri's anti-retaliation measure. In Missouri, an employer is prohibited from "discriminat[ing] in any manner against any other person because of such person's association with any person protected by this chapter."[227] The provision certainly protects employees from discrimination based on their association with coworkers with disabilities or of a different race.[228] But a person who opposes an unlawful employment practice or participates in a proceeding pursuant to Missouri's employment discrimination act is also a "person protected by this chapter."[229] Therefore, as the Eighth Circuit Court of Appeals has concluded when interpreting this language, the statute also prohibits an employer from punishing friends and family for the "sins" of the complaining employee.[230]

Here again is a situation in which state law could serve as a model for federal reform. Instances of third-party or associational retaliation appear to be

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222. *See supra* notes 212–17 and accompanying text.

223. *See* Long, *The Troublemaker's Friend*, *supra* note 130, at 518 (arguing for increased role of state courts in fleshing out legal arguments that may ultimately reach Supreme Court).

224. N.J. STAT. ANN. § 10:5–12(d) (West 2002).

225. Craig v. Suburban Cablevision, Inc., 660 A.2d 505, 509 (N.J. 1995) (concluding that New Jersey's Law Against Discrimination, which parallels § 12203(b) of the ADA, permits claims of third-party retaliation); *see also* Poveromo-Spring v. Exxon Corp., 968 F. Supp. 219, 226 (D.N.J. 1997).

226. *See infra* app., tbl.IV.

227. MO. REV. STAT. § 213.070(4) (2000).

228. *See* Francin v. Mosby, Inc., 248 S.W.3d 619, 622 (Mo. Ct. App. 2008) (concluding that statute protects individual from discrimination based on his association with a person with a disability).

229. MO. REV. STAT. § 213.070(2), (4).

230. *See* Sweeney v. City of Ladue, 25 F.3d 702, 703 (8th Cir. 1994) (holding that statute prohibits retaliation in these cases).

a problem that Congress simply overlooked when considering Title VII.[231] Courts have suggested several reasons why Congress might have deliberately chosen not to provide protection for the associates of employees who engage in protected activity, most notably the concern that providing protection for these individuals would potentially subject employers to a barrage of frivolous lawsuits from coworkers throughout the workplace.[232] The experience of those jurisdictions that have allowed these claims suggests that these concerns are vastly overstated.[233] For example, there is currently only one reported decision involving a claim of third-party or associational retaliation under Missouri's anti-retaliation statute,[234] a statute that has been in effect since 1992.[235] Even assuming more employees were to claim retaliation based on the protected activities of another, they would still need to establish that the other employee's activities were a legal cause of the retaliation. This is no easy task; for example, in the one and only reported case applying Missouri's anti-retaliation provision to a case of alleged third-party or associational discrimination, the party alleging retaliation lost on the causation element.[236]

This is an area where the states can (and in at least one instance have actually tried to) take the lead and initiate a dialogue with Congress. In 2008, legislation was introduced in the California legislature to address this form of third-party or associational retaliation.[237] Under Senate Bill 1244, employers would have been prohibited from discriminating against an employee or applicant for employment because a coworker or immediate family member, as defined, has filed a claim with or instituted a proceeding before the Labor Commissioner relating to the coworker's or immediate family member's rights, because the coworker or immediate family member testifies or will testify in that proceeding, or because the coworker or immediate family member exercised, on behalf of himself, herself, or others, rights afforded employees or applicants by the Labor Code.[238]

Despite the failure of Senate Bill 1244 to become law, the bill's introduction reflects a noteworthy response by some legislators to the shortcomings of Title VII with respect to third-party or associational discrimination. Indeed, this is not the first time the California legislature has

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231. *See* McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (suggesting that Congress' failure to provide protection for third parties was the result of "pure oversight").

232. *See* Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570 (3d Cir. 2002).

233. *See* Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 649 (6th Cir. 2008), *rev'd en banc*, 567 F.3d 804, 811 (6th Cir. 2009) (stating that a prior decision within the circuit opened the door to potentially frivolous claims in 1993, but "very few cases asserting a similar cause of action have been seen").

234. *Sweeney*, 25 F.3d at 703.

235. MO. REV. STAT. § 213.070 (2000).

236. *Sweeney*, 25 F.3d at 704.

237. S.B. 1244, 2007–2008 Legis. Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1201-1250/sb_1244_bill_20080407_amended_sen_v98.pdf.

238. *Id.*

considered whether to reject the dominant federal approach to a civil rights issue. In 2000, California amended its FEHA in response to a series of controversial Supreme Court decisions interpreting the ADA in a restrictive manner.[239] The new law singled out these decisions and specifically rejected them, providing that California's statute should be interpreted more broadly.[240] California's high-profile decision to reject the prevailing interpretation of the ADA for use in its own disability discrimination statute added to the chorus of criticism concerning the ADA that ultimately led Congress to pass the ADA Amendments Act of 2008 and was cited frequently in the public debate concerning the problems with the ADA's definition of disability.[241]

IV. STATE COMMON LAW AND STATUTORY PROTECTION OF INTERNAL WHISTLEBLOWERS

The Supreme Court's recent retaliation decisions may potentially cast a long shadow. Already the decisions are having ripple effects beyond the employment discrimination context. For example, several federal courts have wrestled with the issue of whether *Burlington Northern*'s material adversity standard should apply to the whistleblower protection and anti-retaliation provisions contained in other federal statutes, such as the Sarbanes-Oxley Act (SOX)[242] and the Uniformed Services Employment and Reemployment Act (USERRA).[243] The same issue has also emerged under state whistleblower protection statutes that are not necessarily limited to the employment discrimination setting.[244] Perhaps then, the decisions may cause states to re-

239. *See* CAL. GOV'T CODE § 12926.1 (West 2005).

240. *Id.* § 12926.1(a).

241. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *see also* Center & Imparato, *supra* note 29, 329–31 (proposing a statutory amendment to the ADA's definition of disability based, in part, on California law); David G. Webbert, *In Defense of* Whitney, 22 ME. B.J. 104, 105 (2007) (arguing in favor of a broader definition of disability and citing California as an example of a state that provides for broader protection of individuals with disabilities).

242. 18 U.S.C. § 1514A(a) (2006); Allen v. Admin. Review Bd., 514 F.3d 468, 476 n.2 (5th Cir. 2008) (concluding that the *Burlington Northern* standard applies to SOX whistleblower claims).

243. 38 U.S.C. § 4311(b) (2006); Crews v. City of Mt. Vernon, 567 F.3d 860, 869–70 (7th Cir. 2009) (relying on *Burlington Northern* to conclude that an "adverse employment action" under USERRA must be materially adverse before it is actionable).

244. *See, e.g.*, Rutledge v. SunTrust Bank, 262 F. App'x 956, 958 (11th Cir. 2008) (adopting *Burlington Northern*'s material adversity standard for claims brought under Florida's Whistleblower Protection Act, which prohibits an employer from taking a "retaliatory personnel action" against an employee who objects to or refuses to participate in an employer action "in violation of a law, rule, or regulation"); Montgomery County v. Park, 246 S.W.3d 610, 614–15 (Tex. 2007) (adopting *Burlington Northern*'s material adversity standard for use in state whistleblower protection statute, which covers public employees who report violations of the law to appropriate authorities); *see also* Leiendecker v. Asian Women United of Minn., 731

evaluate the limited protection they generally afford to internal whistleblowers. Generally speaking, those who raise concerns internally about what they believe to be unlawful conduct are less likely to receive protection from the law than are those who raise concerns externally. This is as true for employees who blow the whistle on their employers' violation of criminal law as it is for employees who blow the whistle about unlawful discrimination under Title VII. Although most jurisdictions have adopted whistleblower-protection statutes or have adopted a public policy exception to the at-will employment rule that affords protection to employees who report illegal or unethical conduct on the part of their employers, external whistleblowers are more likely to receive protection than are internal whistleblowers.

The majority of state whistleblower statutes provide no explicit protection for public employees who make only internal reports of suspected illegal activity.[245] Similarly, private employees who make external reports of wrongdoing to law enforcement or other outside agencies are more likely to have success on their common law claims of retaliatory discharge in violation of public policy than are employees who make internal reports.[246] Where the discharge of an employee somehow offends public policy, most courts have been willing to recognize a common law exception to the employment at-will rule.[247] Some jurisdictions have limited the public policy exception to situations in which an employee is discharged for seeking to obtain some benefit to which he is statutorily entitled (such as worker's compensation benefits) or for refusing to commit an illegal act.[248] Others have also been willing to recognize an exception where an employee is fired for reporting suspected illegal activity.[249] However, even when courts have recognized this type of whistleblower exception to the at-will rule, they have sometimes expressed reluctance in recognizing a cause of action where an employee only raises concerns about unlawful conduct on an internal basis.[250]

N.W.2d 836, 842 n.1 (Minn. Ct. App. 2007) (questioning whether prior case law under Minnesota's whistleblower statute remained good law in light of *Burlington Northern*).

245. *What Price Free Speech?: Whistleblowers and the* Garcetti v. Ceballos *Decision: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 5 (2006) (statement of Stephen M. Kohn, Chair, Board of Directors, National Whistleblower Center) (stating that 58% of state whistleblower statutes provide no explicit protection for internal whistleblowers).

246. *See* House v. Carter-Wallace, Inc., 556 A.2d 353, 357 (N.J. Super. Ct. App. Div. 1989) (summarizing law of other jurisdictions); Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 445–46 (2009) (noting that courts frequently dismiss retaliatory discharge claims when the employee merely reports internally); Moberly, *supra* note 6, at 984 (noting inconsistent treatment of external and internal whistleblowers).

247. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 402 (3d ed. 2004).

248. *See, e.g.*, Groce v. Eli Lilly & Co., 193 F.3d 496, 502–03 (7th Cir. 1999) (summarizing Indiana law).

249. ROTHSTEIN, *supra* note 247, at 449.

250. *See id.* at 449–50 (noting the difficulties courts face in deciding to recognize claims in these cases).

One of the primary concerns influencing judicial decisions in this area is that an employer's response to an internal complaint about the employer's actions is merely an internal matter rather than a matter of public concern and a threat to public policy.[251] As such, limiting the employer's ability to take action in these cases would unduly limit the traditional discretion they enjoy under the employment at-will rule with respect to their internal operations.[252] Other courts have suggested that providing protection for those who limit their opposition to suspected illegal behavior on the part of their employers to internal complaints do not further the public's interest in detection and deterrence to the same extent as external whistleblowers.[253]

Title VII case law also reflects the belief that external participation conduct deserves greater protection than does internal opposition conduct.[254] This is certainly understandable in light of the fact that the statute envisions (and requires) the EEOC's involvement in the remedial process. Title VII's remedial framework would be severely hampered if employees fear retaliation for providing complaints to the EEOC or participating in an EEOC proceeding.[255] This helps explain why courts have held that an employee who files a charge with the EEOC or who assists or participates in an EEOC investigation need not have a good faith, reasonable belief that the employer's conduct was unlawful.[256]

That said, the Supreme Court's decisions in the discrimination and retaliation contexts over the past decade have recognized the value of internal resolution of disputes prior to the filing of formal complaints. The trend started with the Court's decisions in *Burlington Industries, Inc. v. Ellerth*[257] and *Faragher v. City of Boca Raton*,[258] in which the Court stressed that Title VII should be interpreted so as to encourage internal reporting of alleged discrimination, thus potentially obviating the need for resort to the courts and the EEOC.[259] The trend continued with the Court's retaliation decisions, all of which (with one exception) involved pro-employee outcomes in situations involving retaliation based, at least in part, on internal complaints of discrimination.[260] Especially noteworthy is the fact that in several of these cases

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251. *Id.*

252. Lobel, *supra* note 246, at 446.

253. *Id.*

254. *See supra* note 169 and accompanying text.

255. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1004–07 (5th Cir. 1969).

256. Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978); *Pettway*, 411 F.2d at 1005.

257. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

258. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

259. *See supra* Part II.B.1.

260. *See supra* Part III. The lone exception was *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008).

the Court was willing to read into the statutes in question a prohibition against retaliation that did not exist on their faces.[261]

Crawford represents the continuation of this trend. Despite the limitations of the decision, Justice Souter's opinion in *Crawford* emphasized that the decision was consistent with the Court's preference for internal resolution of discrimination complaints previously expressed in *Ellerth* and *Faragher*.[262] Indeed, as the Court noted, failing to provide protection to those employees who provide information to an employer about unlawful discrimination taking place in the employer's workplace would undermine the Court's previous attempts in *Ellerth* and *Faragher* to promote internal reporting and resolution of concerns over discrimination.[263] But many of the Court's observations concerning the need to protect employees who respond to employer questioning apply with equal force to employees who come forward of their own volition. The Court recognized that "'[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about [unlawful conduct].'"[264] Failing to afford protection to those who provide information about unlawful discrimination would frustrate the policy underlying Title VII by encouraging employees "to keep quiet about Title VII offenses against themselves or against others."[265] Therefore, properly read, *Crawford* is the latest in a series of decisions recognizing the need to protect those who raise concerns about unlawful conduct on an internal basis.

The Supreme Court's recent decisions in the employment discrimination and retaliation contexts are consistent with a growing recognition that the law should encourage employees to raise concerns about suspected wrongdoing with their employers internally prior to reporting outside the confines of the employer.[266] In 2002, Congress passed the Sarbanes-Oxley Act (SOX), the most important corporate reform measure in recent years.[267] SOX not only provides protection for internal whistleblowers, but attempts to make internal procedures for the reporting, investigation, and resolution of suspected corporate misfeasance a fundamental part of the corporate culture.[268] To some

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261. *See supra* Part III.C.

262. *See* Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 852 (2009) (discussing the "strong inducement" those decisions provide employers to "ferret out and put a stop to any discriminatory activity in their operations").

263. *Id.*

264. *Id.* (quoting Brake, *supra* note 171, at 20).

265. *Id.*

266. *See generally* Lobel, *supra* note 246, at 435 (arguing that the law should prioritize "internal resolution over exit, except under extraordinary circumstances").

267. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

268. *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1148 [hereinafter Moberly, *Sarbanes-Oxley's Structural Model*] ("Sarbanes-Oxley's Structural Model might provide a means to encourage the development of . . . an ethical corporate culture by mandating both a process for whistleblowers to follow and a high-level recipient for whistleblower disclosures.").

extent, therefore, SOX represents Congress' recognition that sole reliance on external reporting to public agencies is an ineffective means of rooting out misconduct.[269]

Moreover, at least one study has concluded that external whistleblowers are more likely to face retaliation than internal whistleblowers.[270] One reason for this is almost certainly the fact that external reporting is more frequently considered—by employers and employees alike—to be an act of disloyalty.[271] When presented with an effective procedure for making internal complaints of suspected unlawful conduct, employees generally prefer internal reporting to external whistleblowing because internal reporting is more consistent with their own conceptions of loyalty to the employer.[272] Therefore, providing legal protection to those who raise concerns to their employer on an internal basis prior to reporting outside the confines of the employer is a more realistic and efficient means of encouraging employees to help root out wrongdoing. In the process, it will allow employers to address and remedy the wrongdoing before the wrongdoing does any greater damage to the individuals at issue and the public interest more generally.

Perhaps then, the Supreme Court's recent decisions can serve as something of a catalyst and cause state courts to reconsider their prior reluctance to protect internal whistleblowers. One of the benefits of having a separate system of state law regulation of the workplace is that, through the device of common law retaliatory discharge claims, state courts are able to respond to social problems and changing circumstances in a more fluid manner than their federal counterparts, who are more statute-bound.[273] Through the evolving common law, state courts can more rapidly respond to new developments and devise effective solutions. Thus, the Supreme Court's recent employment discrimination and retaliation decisions have the potential to provide state

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269. *See id.* at 1141–50 (discussing benefits of SOX's approach in comparison with prior models for encouraging whistleblowing).

270. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 301–02 (1991).

271. Terry Morehead Dworkin, *Whistleblowing, MNCS, and Peace*, 35 VAND. J. TRANSNAT'L L. 457, 463 & n.42 (2002) ("Studies of whistleblowers indicate that the best predictor of retaliation is external whistleblowing."); Moberly, *Sarbanes-Oxley's Structural Model*, *supra* note 268, at 1143 (describing "the psyche of the American employee, whose sense of loyalty to the organization keeps her from reporting misconduct externally, but who may report internally if encouraged by the organization").

272. Moberly, *Sarbanes-Oxley's Structural Model*, *supra* note 268, at 1142 ("An internal disclosure channel provides a way for employees to demonstrate their loyalty by disclosing misconduct without having to report colleagues to 'outside' authorities.").

273. *See generally* Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 601–03 (1997) (noting that, unlike state courts, the jurisdiction of federal courts is curtailed by statute and noting the dialogue that takes place between state legislatures and courts concerning the common law and the interpretation of statutes).

courts with the impetus to reexamine their past reluctance to extend common law protection to internal whistleblowers.

The Supreme Court's recent discrimination and retaliation decisions should serve as examples for state courts considering whether to extend common law protection to whistleblowers in general and internal whistleblowers in particular. Provided an employee can identify a clear statement of substantial public policy that would be threatened were a court to permit an employer's retaliation to stand, the fact that the employee complained internally should not preclude a common law retaliatory discharge claim. Take the 2008 decision of *Darrow v. Integris Health, Inc.*[274] from Oklahoma. The plaintiff in *Darrow* was fired after raising concerns internally about the possible falsification of documents related to patient care in the home health care field.[275] In support of his retaliatory discharge claim, the plaintiff pointed to Oklahoma's Home Care Act, an act that, by its terms, related to public health and safety.[276] As such, the court concluded that the plaintiff's reports of records discrepancies impacted not just the narrow concerns of the employer but the public's interests in affordable and safe home health care.[277] The fact that the plaintiff raised his concerns internally did not make the matter any less a matter of public concern.[278]

Courts that have previously recognized common law protection for internal whistleblowers have cited many of the same salutary effects of internal whistleblowing mentioned by the Supreme Court and by other commentators. For example, echoing the Supreme Court's observation in *Ellerth* about the desirability of internal resolution of concerns, the Oklahoma Supreme Court had previously observed that one of the goals of protecting whistleblowers is to "reduce wrongdoing in a speedy, efficacious manner."[279] A federal court discussing Massachusetts' common law similarly observed that forcing employees to make external reports of wrongdoing before they could be entitled to protection "would deprive management of the opportunity to correct oversights straightaway," thereby resulting in "needless public investigations of matters best addressed internally in the first instance."[280] In addition, courts that have considered whether to extend common law protection to internal whistleblowers have also cited the loyalty concerns external whistleblowing raises[281] and observed that "internal disclosures are much less disruptive to the company than external disclosures."[282]

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274. Darrow v. Integris Health, Inc., 176 P.3d 1204 (Okla. 2008).

275. *Id.* at 1207–08.

276. *Id.* at 1214.

277. *Id.* at 1215.

278. *See id.* ("Oklahoma law protects both **internal** and **external** reporting of whistleblowers who rely on an employer's public-policy violation to support an actionable employment termination.") (emphasis in original).

279. Barker v. State Ins. Fund, 40 P.3d 463, 468 (Okla. 2001).

280. Sullivan v. Mass. Mut. Life Ins. Co., 802 F. Supp. 716, 725 (D. Conn. 1992).

281. *See generally* Wagner v. City of Globe, 722 P.2d 250, 257 (Ariz. 1986) (en banc)

To be sure, these ideas have percolated through state decisional law for some time.[283] But now, no less an authority than the Supreme Court of the United States has repeatedly expressed its approval of internal reporting of suspected unlawful conduct prior to external reporting and acted to protect those employees who engage in such conduct. Perhaps then, the Court's actions will spur state courts to reconsider the reasons behind their past reluctance to extend similar protection as a matter of common law.

CONCLUSION

All too often states have taken a backseat when it comes to the law of the workplace, either by virtue of having been overlooked by federal courts and employment scholars or as a result of their own willingness to assume a subordinate role. However, the rise in the number of employment retaliation claims, the changing attitudes toward employee whistleblowers, and the increasing number of legal issues involving these matters suggests that there is a role for states to play in influencing federal law. At the same time, the Supreme Court's recent decisions involving employment retaliation suggest the potential for federal law to influence the decision making of state courts and legislatures in both direct and indirect ways. Hopefully, a meaningful dialogue may soon develop.

(noting the tension between external whistleblowing and "accepted concepts of employee loyalty"); Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 728 (Tex. 1990) (Doggett, J., concurring) (noting that employees usually try to address concerns about unlawful behavior internally).

282. *Barker*, 40 P.3d at 468; *see also* Appeal of Bio Energy Corp., 607 A.2d 606, 608 (N.H. 1992) (observing that reporting internally allows an employer the opportunity to avoid harm to its reputation).

283. *See* Connelly v. Kan. Highway Patrol, 26 P.3d 1246, 1266–67 (Kan. 2001) (discussing prior analysis of the issue and concluding that internal whistleblowers are protected).

APPENDIX

TABLE I: Jurisdictions with Anti-Retaliation Provisions that Are Identical or Nearly Identical to Title VII

Alabama	ALA. CODE § 25-1-28 (2007) (age discrimination only).
Arizona	ARIZ. REV. STAT. ANN. § 41-1464(A) (2004).
Florida	FLA. STAT. § 760.10(7) (2009).
Kentucky	KY. REV. STAT. ANN. § 344.280(1) (LexisNexis 2005); Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 802 (Ky. 2004) (concluding that Kentucky's statutory language is no broader than Title VII's).
Louisiana	LA. REV. STAT. ANN. § 23:312(D) (1998) (age discrimination only).
Nevada	NEV. REV. STAT. § 613.340(1) (2007).
South Carolina	S.C. CODE ANN. § 1-13-80(F) (2005).
Utah	UTAH CODE ANN. § 34A-5-102(17), -106(1)(a)(i) (2005 & Supp. 2009).

TABLE II: Jurisdictions with Anti-Retaliation Provisions Containing Language that Arguably Differs from Burlington Northern's *"Material Adversity" Standard*

Alaska	ALASKA STAT. § 18.80.220(a)(4) (2008) (unlawful to "discharge, expel, or otherwise discriminate").
California	CAL. GOV'T CODE § 12940(h) (West 2005) (unlawful to "discharge, expel, or otherwise discriminate").
Connecticut	CONN. GEN. STAT. § 46a-60(a)(4) (2009) (unlawful to "discharge, expel, or otherwise discriminate").
Delaware	DEL. CODE ANN. tit. 19, § 711(f) (2005) (unlawful to "discharge, refuse to hire or otherwise discriminate").
Georgia	GA. CODE ANN. § 34-5-3(c) (2008) (unlawful to "discharge or in any other manner discriminate").
Hawaii	HAW. REV. STAT. § 378-2(2) (Supp. 2007) (unlawful to "discharge, expel, or otherwise discriminate").
Illinois	775 ILL. COMP. STAT. 5/6-101(A) (2008) ("retaliate" against a person because that person has engaged in protected activity).
Iowa	IOWA CODE § 216.11(2) (2009) (unlawful to

Iowa	"discriminate or retaliate against another person in any of the rights protected against discrimination by this chapter").
Kansas	KAN. STAT. ANN. § 44-1009(a)(4) (2000) (unlawful to "discharge, expel or otherwise discriminate").
Maine	ME. REV. STAT. ANN. tit. 5, § 4572(1)(E) (2002) (unlawful to "discriminate in any manner").
Maryland	MD. CODE ANN., STATE GOV'T § 20-606(f) (LexisNexis 2009) (unlawful to "discriminate or retaliate").
Massachusetts	MASS. GEN. LAWS ch. 151B, § 4(4) (2008) (unlawful to "discharge, expel or otherwise discriminate").
Michigan	MICH. COMP. LAWS § 37.2701(a) (1979) (unlawful to "retaliate or discriminate").
Minnesota	MINN. STAT. § 363A.15 (2008) (prohibiting "reprisals," which "includes, but is not limited to, any form of intimidation, retaliation, or harassment" or "for an employer to do any of the following with respect to an individual because that individual has engaged in [protected] activities . . . refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in [protected] activities").
Missouri	MO. REV. STAT. § 213.070(2), (4) (2000) (unlawful to "retaliate or discriminate in any manner").
Montana	MONT. CODE ANN. § 49-2-301 (2009) (unlawful to "discharge, expel, blacklist, or otherwise discriminate").
Nebraska	NEB. REV. STAT. § 48-1004(3) (2004) (unlawful to "discharge, expel or otherwise discriminate").
New Hampshire	N.H. REV. STAT. ANN. § 354-A:19 (2009) (unlawful to "discharge, expel, or otherwise retaliate or discriminate").
New Mexico	N.M. STAT. § 28-1-7(I)(2) (2009) (unlawful to "engage in any form of threats, reprisal or discrimination against any person").
New York	N.Y. EXEC. LAW § 296(1)(e) (McKinney Supp. 2009) (unlawful to "discharge, expel or otherwise discriminate").
North Carolina	N.C. GEN. STAT. § 95-241(a) (2007) ("No person

North Carolina	shall discriminate or take any retaliatory action . . . .”).
North Dakota	N.D. CENT. CODE § 14-02.4-18 (Supp. 2009) (unlawful to “engage in any form of threats, retaliation, or discrimination”).
Ohio	OHIO REV. CODE ANN. § 4112.02(H)(12), (I) (LexisNexis 2007) (unlawful to “discriminate in any manner” or to “[c]oerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted”).
Oklahoma	OKLA. STAT. tit. 25, § 1601(1) (2001) (unlawful to “retaliate or discriminate”).
Oregon	OR. REV. STAT. § 659A.030(1)(f) (2007) (unlawful to “discharge, expel or otherwise discriminate”).
Pennsylvania	43 PA. CONS. STAT. ANN. § 955(d) (West 2009) (unlawful to “discriminate in any manner”).
Rhode Island	R.I. GEN. LAWS § 28-5-7(5) (2003) (unlawful to “discriminate in any manner”).
South Dakota	S.D. CODIFIED LAWS § 20-13-26 (2004) (unlawful to “directly or indirectly; . . . engage in or threaten to engage in any reprisal, economic or otherwise”).
Tennessee	TENN. CODE ANN. § 4-21-301(1) (2005) (unlawful to “[r]etaliate or discriminate in any manner”).
Texas	TEX. LAB. CODE ANN. § 21.055 (Vernon 2006) (unlawful to “retaliate[] or discriminate[]”).
Vermont	VT. STAT. ANN. tit. 21, § 495(a)(5) (2003) (unlawful to “discharge or in any other manner discriminate”).
Washington	WASH. REV. CODE § 49.60.210(1) (2008) (unlawful to “discharge, expel, or otherwise discriminate”).
West Virginia	W. VA. CODE § 5-11-9(7)(C) (2002) (unlawful to “[e]ngage in any form of reprisal or otherwise discriminate”).
Wisconsin	WIS. STAT. § 111.322(2m) (2007–2008) (unlawful to “discharge or otherwise discriminate”).

TABLE III: Jurisdictions with Anti-Retaliation Provisions that Arguably Provide for Individual Liability

Colorado	COLO. REV. STAT. § 24-34-402(1)(e)(IV) (2009) (unlawful for “any person” to discriminate against any person who has engaged in protected activity)
District of Columbia	D.C. CODE § 2-1402.61(b) (2001) (unlawful for “any person” to require, request, or suggest a prohibited practice).

Idaho	IDAHO CODE ANN. § 67-5911 (2006) (unlawful for "a person" to discriminate against an individual for engaging in protected activity).
Illinois	775 ILL. COMP. STAT. 5/6-101(A) (2008) (unlawful for "a person, or for two or more persons to conspire").
Iowa	IOWA CODE § 216.11(2) (2009) (discriminatory practice for "[a]ny person" to "retaliate against another person").
Kentucky	KY. REV. STAT. ANN. § 344.280(1) (LexisNexis 2005) (unlawful for "a person, or for two (2) or more persons to conspire").
Michigan	MICH. COMP. LAWS § 37.2701(a) (1979) (unlawful for "[t]wo or more persons" to conspire to retaliate or discriminate).
Montana	MONT. CODE ANN. § 49-2-301 (2009) (unlawful for "a person" to retaliate).
New Jersey	N.J. STAT. ANN. § 10:5-12(d) (West 2002) (unlawful for "any person" to retaliate).
New Mexico	N.M. STAT. § 28-1-7(I)(2) (2009) (unlawful for "any person or employer" to retaliate).
North Dakota	N.D. CENT. CODE § 14-02.4-18 (Supp. 2009) (unlawful for "a person" to be connected in any manner to threats or reprisals).
Ohio	OHIO REV. CODE ANN. § 4112.02(H)(12), (I) (LexisNexis 2007) (unlawful for "any person" to retaliate in any manner).
Oklahoma	OKLA. STAT. tit. 25, § 1601(1) (2001) (unlawful for "a person, or for two or more persons to conspire" to discriminate or retaliate).
Oregon	OR. REV. STAT. § 659A.030(1)(f) (2007) (unlawful for "any person" to "discriminate against any other person").
Pennsylvania	43 PA. CONS. STAT. ANN. § 955(d) (West 2009) (unlawful for "any person" to discriminate or retaliate in any manner).
Tennessee	TENN. CODE ANN. § 4-21-301(1) (2005) (unlawful for "a person or for two (2) or more persons" to retaliate or discriminate against any other person).
Washington	WASH. REV. CODE § 49.60.210(1) (2008) (unlawful for an employer or for any "other person" to retaliate or discriminate in any manner).
West Virginia	W. VA. CODE § 5-11-9(7)(C) (2002) (unlawful for "any person" to retaliate in any manner).

TABLE IV: Jurisdictions with Anti-Retaliation Provisions that Prohibit Coercion or Intimidation of Individuals who Have Exercised a Statutory Right or Have Aided or Encouraged Another in the Exercise of a Statutory Right

District of Columbia	D.C. CODE § 2-1402.61(a) (2001).
New Jersey	N.J. STAT. ANN. § 10:5-12(d) (West 2002).
Ohio	OHIO REV. CODE ANN. § 4112.02(H)(12) (LexisNexis 2007).

TABLE V: Miscellaneous Provisions

Georgia	GA. CODE ANN. § 34-5-3(c) (2008) ("It shall be unlawful for any person to discharge or in any other manner discriminate against any employee covered by this chapter because such employee has made a complaint to his employer or any other person or has instituted or caused to be instituted any proceeding under *or related* to this chapter or has testified or is about to testify in any such proceedings.") (emphasis added).
Illinois	775 ILL. COMP. STAT. 5/6-101(A) (2008) (providing that it is unlawful to "[r]etaliate against a person because he or she has opposed that which he or she *reasonably and in good faith believes* to be unlawful discrimination") (emphasis added).
Missouri	MO. REV. STAT. § 213.070(4) (2000) ("It shall be an unlawful discriminatory practice: . . . (4) To discriminate in any manner against any other person because of such person's association with any person protected by this chapter.").
North Carolina	N.C. GEN. STAT. § 95-241(a) (2007) ("No person shall discriminate or take any retaliatory action against an employee because the employee *in good faith does or threatens* to [engage in protected activity] . . . .") (emphasis added).
North Dakota	N.D. CENT. CODE § 14-02.4-18 (Supp. 2009) ("It is a discriminatory practice for a person . . . to engage in any form of threats, retaliation, or discrimination against a person . . . who, *in good faith*, has filed a complaint, testified, assisted, or participated in an investigation, proceeding, hearing, or litigation under this chapter.") (emphasis added).
Oregon	OR. REV. STAT. § 659A.030(1)(f) (2007) ("It is an

Oregon	unlawful employment practice: . . . (f) For any person to discharge, expel or otherwise discriminate against any other person because that other person has [engaged in protected activity] *or has attempted to do so.*") (emphasis added).
South Dakota	S.D. CODIFIED LAWS § 20-13-26 (2004) ("It is an unfair or discriminatory practice for any person, directly or indirectly; . . . to engage in or threaten to engage in any reprisal, economic or otherwise, against any person by reason of the latter's filing a charge, testifying or assisting in the observance and support *of the purposes* and provisions of this chapter.") (emphasis added).
Texas	TEX. LAB. CODE ANN. § 21.055(1)-(4) (Vernon 2008) ("An employer, labor union, or employment agency commits an unlawful employment practice if the employer, labor union, or employment agency retaliates or discriminates against a person who, under this chapter: (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.").
Vermont	VT. STAT. ANN. tit. 21, § 495(a)(5) (2003) ("It shall be unlawful employment practice, . . . (5) For any employer, employment agency, or labor organization to discharge or in any other manner discriminate against any employee because such employee has lodged a complaint of discriminatory acts or practices or has cooperated with the attorney general or a state's attorney in an investigation of such practices, or is about to lodge a complaint or cooperate in an investigation, or *because such employer believes that such employee may lodge a complaint or cooperate* with the attorney general or state's attorney in an investigation of discriminatory acts or practices . . . .") (emphasis added).
Wisconsin	WIS. STAT. § 111.322(2m)(d) (2007–2008) ("[I]t is an act of employment discrimination to do any of the following: . . . (2m) To discharge or otherwise discriminate against any individual because of any of the following: . . . (d) The individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).").