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RETALIATORY DISCLOSURE: WHEN IDENTIFYING THE COMPLAINANT IS AN ADVERSE ACTION

Jamie Darin Prenkert, Julie Manning Magid ** & Allison Fetter-Harrott****

ABSTRACT

Sometimes the possibility of being publicly identified as a complainant will be enough to discourage a person from complaining. That is especially true when being identified as a complainant exposes her to a greater likelihood of reprisal. This paper addresses the circumstances when such publicity can be deemed materially adverse, such that it ought to be sufficient to support a claim of retaliation. We focus on the particular context of claims of employment discrimination, especially pursuant to Title VII of the 1964 Civil Rights Act. When an employee or applicant for employment files a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), the EEOC undertakes a process that is neither wholly public nor wholly private. The EEOC and its employees are statutorily required to treat the charge confidentially, upon penalty of fine or imprisonment. Nevertheless, charging parties not infrequently publicize the filing of their charge to exploit the possibility that the threat of negative publicity will induce an employer to negotiate or settle. The quasi-public nature of the EEOC's charge and investigation process has resulted in an important doctrinal gap in Title VII retaliation jurisprudence. While courts have refined the doctrine of statutory retaliation significantly in recent years, most notably in the U.S. Supreme Court's decision in *Burlington Northern & Santa Fe Railway v. White*, no unified body of law addresses whether or in what circumstances an employer's disclosure of the existence and identity of a complainant amounts to a materially adverse action under Title VII. This lack of guidance in the retaliation case law and the facial inapplicability to the parties of Title VII's confidentiality requirements it places on the EEOC necessitate seeking alternative sources of guidance in cases alleging retaliatory disclosure. We look to several sources of guidance to craft a framework that courts should use when analyzing claims of retaliatory disclosure. First, we look to the guidelines that federal courts use to determine whether a litigant should be allowed to proceed anonymously. Second, the *White* material adverse action standard focuses on actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Thus, we look to social science research examining whistleblower motivation to give some guidance on what, in reality, affects an individual's decision to complain or not complain about a perceived wrongdoing. Finally, we grapple with how to incorporate into our framework of retaliatory disclosure employment discrimination standards that clearly incent employers to take effective remedial action, which may require disclosure of complainant identity.

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INTRODUCTION

Oscar Wilde is purported to have said, "The only thing worse than being talked about is not being talked about."[1] Similarly, Mae West, PT Barnum, and others have been credited with variations on the statement, "There's no such thing as bad publicity."[2] This article explores a particular context—when an employer widely discloses the identity of a discrimination complainant or charging party—in which Wilde, West, and Barnum were probably woefully mistaken. A whistleblower, in some instances, will covet anonymity. She may find that public disclosure of her identity is threatening and can lead to adverse consequences. As a result, the employer who "talks" or "publicizes" may find itself subject to a claim of unlawful retaliation. But the line that delineates bad publicity (i.e., retaliation) from permissible disclosure (e.g., investigation, idle chatter) needs clarification. In this article, we offer a framework to analyze when an employer's disclosure of a complainant's identity should be labeled "retaliatory disclosure," such that it is a materially adverse action upon which a claimant can base an additional claim of retaliation. We begin with a brief case study.

For 26 years, Belmont Abbey College (Belmont Abbey or the College), an institution founded by Benedictine Monks and identified as a Benedictine Catholic college,[3] offered health insurance benefits that included coverage for prescription contraception.[4] In December 2007, Belmont Abbey changed its health insurance benefits to exclude coverage for oral contraceptives as well as abortions, vasectomies, and tubal ligations.[5] Belmont Abbey's Catholic traditions

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* Weimer Faculty Fellow and Associate Professor of Business Law, Indiana University Kelley School of Business. We are grateful to the members of the University of Michigan, Stephen M. Ross School of Business, Department of Law, History, and Communication, and the Indiana University Kelley School of Business, Department of Business Law and Ethics for the opportunity to present previous versions of this paper. Their comments and feedback were thoughtful and constructive. An earlier version of this article earned the Pacific Southwest Academy for Legal Studies in Business Award for Excellence in Scholarship at the 2012 PSWALSB annual conference in Palm Springs, California. Finally, we are indebted to Abbey Stemler for her excellent assistance.

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[1] *See Quotation Details, Quotation #39714*, THE QUOTATIONS PAGE, http://www.quotationspage.com/quote/39714.html (last visited Mar. 8, 2012).

[2] *See There's No Such Thing as Bad Publicity*, THE PHRASE FINDER, http://www.phrases.org.uk/meanings/there-is-no-such-thing-as-bad-publicity.html (last visited Mar. 8, 2012).

[3] *See Our History*, BELMONT ABBEY C., http://www.belmontabbeycollege.edu/pdf/BelmontAbbeyHistory.pdf (last visited Mar. 8, 2012).

[4] Yaakov Menken, *EEOC vs. Belmont Abbey, Continued*, CROSS-CURRENTS (Oct. 21, 2009), http://www.cross-currents.com/archives/2009/10/21/eeoc-vs-belmont-abbey-continued/ (interviewing David Neipert, one of the Belmont Abbey charging parties, who is reported to have said that the College offered coverage for these services for 26 years).

[5] Dena S. Davis, *Contraception, Abortion, and Health Care Reform: Finding Appropriate Moral Ground*, 29 MISS. C. L. REV. 379, 381 (2010) (summarizing popular press articles about the case); *see also* Jack Stripling, *Rebuke for Religion-Driven Policy*, INSIDE HIGHER ED (Aug. 11, 2009, 3:00 AM), http://www.insidehighered.com/news/2009/08/11/belmont.

include religious teachings prohibiting the use of contraception.[6] The decision to remove this coverage was, as expressed by many members of the Belmont Abbey community, including faculty, staff, and students, a way to align practice with the beliefs the College espouses.

Not everyone in the Belmont Abbey community, however, agreed. Eight faculty members—six men and two women—filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC) alleging that the change in the College's health insurance plan denying contraceptives benefits discriminated against them on the basis of gender and religion.[7] The gender-based discrimination claim arose because excluding prescription contraceptives impacts women exclusively. The religion-based claim focused on the College denying coverage to faculty and staff who did not hold the same religious beliefs as the College.

William Thierfelder became president of Belmont Abbey in 2004. His path to academics was atypical in that he held prominent positions in the sports business community prior to becoming President of the College.[8] His reaction to the charge of discrimination filed by faculty in 2007 also was somewhat atypical. He sent an e-mail to faculty, staff, and students notifying them of the claim based on the revised Belmont Abbey health insurance benefits coverage and identifying by name the eight faculty members who filed the complaint with the EEOC.[9] This e-mail resulted in an additional EEOC charge against the College—this one alleging retaliation.

In a July 30, 2009 Determination Letter, the EEOC found reasonable cause to believe Belmont Abbey had discriminated against the charging parties based on sex but found "no cause" supporting the religious discrimination charge. Separately, the EEOC indicated that Thierfelder's e-mail message to faculty, staff, and students in which he identified individually the faculty that filed the EEOC complaint constituted cause to find retaliation. Specifically, the EEOC found that the faculty members were exercising their legal right to file a claim with the EEOC. Thierfelder's e-mail in response to the filing, the EEOC found, was intended to produce a "chilling effect" on the campus and to create an environment where faculty and staff would hesitate before filing complaints against the College.[10]

The religious discrimination claim was the only claim that the EEOC found was unsupported by the evidence.[11] In its July 30 Determination Letter, the EEOC stated that the contraceptive "benefits were not changed based on each individual employee's religious beliefs; contraception benefits were removed from the health plan for all employees, regardless of

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[6] *Choose Life, That You and Your Children May Live: The Truth About Birth Control*, CATHOLICS UNITED FOR FAITH, http://www.cuf.org/faithfacts/details_view.asp?ffID=24 (last edited Sept. 26, 2007) (citing Pope Paul VI, *Humanae Vitae* [Encyclical Letter on the Regulation of Birth] (1968); *Catechism of the Catholic Church*, no. 2036) ("Under no circumstances is the use of contraception morally permissible. This infallible teaching of the Catholic Church flows from the natural law as given to us by God. As such, the teaching applies to all men and women.").

[7] The complaint focused only on contraception and did not include the other exclusions from the College's benefits: abortion, vasectomies, and tubal ligations.

[8] Biography of Bill Thierfelder, BELMONT ABBEY C., http://www.belmontabbeycollege.edu/president/pdf/BillThierfelderbio.pdf (last visited Mar. 8, 2012).

[9] Stripling, *supra* note 5.

[10] *See id.* ("Clearly, the president could have explained why the college was taking contraception benefits out of its new employee health insurance policy without stating each of your names as the persons who filed the charges." (quoting a March 5, 2009, letter from Victoria Mackey, EEOC Senior Investigator to the faculty filing charges)).

[11] Belmont Abbey does not require its employees to adhere to the Catholic Church's tenets. *See id.*

religions."[12] Ironically, it was the religious nature of the contraception dispute at the College that received the most attention as a firestorm erupted in the media.[13] Education forums, religion-focused blogs, and business publications all weighed in on the debate, much of the coverage politicizing the EEOC Determination Letter.[14]

The Belmont Abbey charge offers numerous lenses through which to examine the legacy of Title VII jurisprudence and related legislative actions and judicial decisions. Certainly, the religious discrimination charge levied against a religious institution prompts a nuanced interpretation of the basis for religious exemption from federal antidiscrimination statutes.[15] The gender discrimination charge as it related to prescription contraceptives remains legally nebulous.[16] However, as we indicated at the outset, we believe that the most compelling legal lens through which to consider the Belmont Abbey controversy is not through the discrimination claims but the most overlooked and final claim added to the charge—retaliation—which has potential impact for employers (and their employees) of virtually any type.

Clearly the faculty members identified in President Thierfelder's e-mail and the EEOC diverged from the sentiments attributed to Oscar Wilde, P.T. Barnum, and Mae West. They considered the publicity and talk to which they were subjected to be negative on the whole. As a result, the entire retaliation claim was based on Thierfelder's identification of the eight faculty

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[12] Jocelyn Fong, *Conservative Blogs Falsely Claim Obama is Forcing Catholic College "to Cover Abortion,"* MEDIA MATTERS (Oct. 8, 2009, 12:39 PM), http://mediamatters.org/research/2009/10/08/conservative-blogs-falsely-claim-obama-is-forci/155500 (quoting EEOC Determination Letter dated July 30, 2009).

[13] That outpouring of attention to the religious discrimination portion of the charge foreshadowed the related controversy during 2012 in which Catholic organizations decried regulations pursuant to the Patient Protection and Affordable Care Act (colloquially known as "Obamacare"), which would have required some religious organizations to provide coverage for reproductive health care, including contraceptives and sterilization. *See Contraception and Insurance Coverage (Religious Exemption Debate)*, N.Y. TIMES, http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/contraception/index.html (last updated Mar. 1, 2012). Thierfelder led Belmont Abbey to the forefront of that debate, filing a lawsuit claiming that the regulations violated the First Amendment's free exercise clause. *See Feds Ask for Delay in Belmont Abbey College's Lawsuit Against HHS Mandate*, CATHOLIC NEWS HERALD (Jan. 20, 2012, 1:34 PM), http://www.charlottediocese.org/n/features/53-roknewspager-local/1338-belmont-abbey-colleges-lawsuit-continues-lawyers-call-hhs-contraception-rule-a-coercive-action (updated Mar. 1, 2012, 5:47 AM).

[14] *See, e.g.*, Davis, *supra* note 5, at 381 n.13. Belmont Abbey proudly collected and promoted the coverage. S*ee Belmont Abbey College vs. EEOC*, BELMONT ABBEY C., www.belmontabbeycollege.edu/eeoc (last visited Jan. 5, 2012) (linking representative media coverage of the EEOC's determination of discrimination).

[15] *See, e.g.*, Symposium, *Twenty Years After* Employment Division v. Smith*: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How it Changed History*, 32 CARDOZO L. REV. 1731 (2011); Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191 (2005); Ralph D. Mawdsley, *Employment, Sexual Orientation, and Religious Beliefs: Do Religious Educational Institutions Have a Protected Right to Discriminate in the Selection and Discharge of Employees?*, 2011 BYU EDUC. & L.J. 279; Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 Am. Bus. L.J. 467 (2006); Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1 (2004).

[16] *See, e.g.*, Cheryl A. Beckett, *A Factor by Any Other Name: The Religious Employer's Defense to Contraceptive Equity Claims Under the Equal Pay Act and Title VII*, 7 RUTGERS J.L. & PUB. POL'Y 1 (2009); Stephen F. Befort & Elizabeth C. Borer, *Equitable Prescription Drug Coverage: Preventing Sex Discrimination in Employer-Provided Health Plans*, 70 LA. L. REV. 205 (2005); Julie Manning Magid, *Contraception and Contractions: A Divergent Decade Following* Johnson Controls, 41 AM. BUS. L.J. 115 (2003).

member charging parties, which raises the interesting question of when "bad publicity" is bad enough to be unlawful retaliation. Although notifying the Belmont Abbey community of changes in the health care coverage or of concerns voiced by faculty regarding these changes did not require an identification of the faculty involved in the EEOC charge, presumably "naming names" should not always be a viable basis for a retaliation claim. That might seem particularly important when, as in the Belmont Abbey charge, many of the faculty members involved were willing to speak to media about the claims. So when is disclosure of complainants' identities an adverse action that supports a retaliation claim?

To be sure, filing an EEOC charge does not shroud those involved in secrecy. The very intent of filing a charge is to commence an investigation of a complaint, including disclosing the complaint to the employer. Nevertheless, certain disclosures may constitute an adverse action under Title VII jurisprudence, if they are likely to have the type of chilling effect on the enforcement of the antidiscrimination laws that the EEOC contemplated. If so, what is the standard for disclosure to assure it does not result in adverse action?

This article examines whether and in what circumstances an employer's disclosure of the existence and identity of employees who complain of discrimination should constitute an adverse action to support a Title VII retaliation claim.[17] In Part I, we examine how the U.S. Supreme Court significantly refined statutory retaliation doctrine in recent years, most notably in *Burlington Northern & Santa Fe Railway Co. v. White*. Then, in Part II, we explore whether, in the context of the Supreme Court's generally solicitous approach to retaliation plaintiffs and the *White* standard for a materially adverse actions, existing statutory requirements, EEOC guidance, or retaliation case law provides specific guidance as to whether disclosure by the employer of the existence and identity of a complainant alleging unlawful discrimination amounts to a materially adverse action under Title VII. While each provide some clues as to how retaliatory disclosure claims should be handled, there is no clear or emerging doctrinal approach to be found in or among them. This doctrinal gap is significant and implicates interests for employers and employees alike. The lack of guidance in case law, legislation, and agency requirements necessitates consideration of alternative sources of guidance. Part III utilizes the stated rationale for anonymity and pseudonymity in federal court litigation as well as social science research examining the motivations of whistleblowers as perspectives to inform the discussion. Part IV then offers a framework concerning when disclosure of complainants' identities constitutes an adverse action. Part V identifies a prescriptive balance that considers the interests of both employers and employees in retaliatory disclosure claims. We conclude by noting that our proposed framework is flexible enough to accommodate those interests, while providing much-needed guidance that is currently lacking in the Title VII retaliation doctrine.

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[17] Although we focus our discussion on the Title VII retaliation claim, our analysis would likely apply with equal force to retaliation claims under the Age Discrimination in Employment Act, 24 U.S.C. § 603 (2006), the Americans with Disabilities Act, 42 U.S.C. § 12203 (2006), the Family and Medical Leave Act, 29 U.S.C. § 2615(a)(2) (2006), the Employee Retirement Income Security Act, 29 U.S.C. § 1140 (2006), and the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006), all of which have language that is identical or similar enough in relevant respects to Title VII to incorporate *White*'s "materially adverse action" standard, discussed *infra* Part II. *See* Alex P. Long, *Employment Retaliation and the Accident of Text*, 90 OREGON L. REV. 525, 546-47 (2011). Our analysis probably has little reach beyond those statutes. As Professor Alex Long explains, statutory provisions governing employment retaliation claims—though multitudinous—are wildly divergent. *See id.* While Part I discusses the Supreme Court's general approach to statutory retaliation claims, for purposes of clarity and readability, we are careful to confine our specific discussion in the remaining parts to Title VII, with the understanding that it has some application outside that context.

I. RETALIATION'S EMERGENCE AND EXPANSION

Congress understood the risks associated with employees exercising their rights against discrimination in the workplace at the time of Title VII's passage.[18] Section 704 of Title VII prohibits employer retaliation against employees who enforce their antidiscrimination rights.[19] Using intentionally broad language, this provision protects employee conduct.[20] It grants to employees freedom from interference by employers while pursuing the guarantee of equality in the workplace.[21] Since its passage, however, the broad language has required repeated refinement by the federal courts.[22]

A. Retaliation Claims on the Rise

Charges of retaliation rose 105% between fiscal years 1997 and 2011.[23] And retaliation charges rose in the proportion of all charges received by the EEOC by fifteen percent in that same period. The most significant jump occurred between 2006 and 2007—following the Supreme Court's 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*—when the number of retaliation charges leapt nearly twenty percent in a single year.[24] While the proportion of charges for other types of claims has largely decreased or remained steady over the past decade, retaliation claims have dramatically risen.[25]

The reason for the spike in retaliation claims is somewhat unclear. Some attribute the rise to an actual increase in retaliation, others point to the experience of employees and the plaintiffs' bar that retaliation claims are often successful even when the underlying

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[18] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e (2006)).

[19] Section 704 provides, in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e3(a).

[20] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006) ("Thus, purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.").

[21] *Id*. at 63.

[22] *See id*. at 59-62; Ashley R. Wright, *An Ambiguous Clarification: How* Burlington Northern & Santa Fe Railway Company v. White*'s Resolution of Circuit Split Creates Uncertainty in the Eighth Circuit*, 61 Ark. L. Rev. 161, 168-74 (2008) (summarizing various approaches taken by circuit courts interpreting Title VII's antiretaliation provisions).

[23] *EEOC Charge Statistics, FY 1997 to FY 2011*, U.S. EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Mar. 8, 2012).

[24] *Id*.

[25] *See* Adam J. Bernstein, *Retaliatory Litigation Conduct After* Burlington Northern & Santa Fe Railway Company v. White, 42 COLUM. J. L. & SOC. PROBS. 91, 114-15 (2008).

discrimination claim is dismissed.[26] Still others opine that judges and juries might be less likely to believe allegations of discrimination while "every[one] . . . who has ever worked understands retaliation," making it a desirable route of recovery.[27] Given the onslaught of retaliation charges, employers have reported feeling "paralyzed" when dealing with employee misconduct after advancement of a discrimination complaint.[28]

B. Retaliation Claims and the Supreme Court

The United States Supreme Court's docket has reflected retaliation's growth trend. The Court heard at least one statutory retaliation claim each year from 2008 through 2011.[29] The leading case interpreting Title VII's antiretaliation provision is the Court's opinion in *White*.[30]

To state a *prima facie* claim of retaliation under Title VII, a plaintiff must offer evidence that (1) she has engaged in a protected activity under the law, (2) she was subjected to an adverse action, and (3) there is a causal connection between the two.[31] No claim can survive, then, without alleging and proving that the employer subjected the claimant to some act that rises to the level of adversity contemplated under Title VII.[32] In the years leading up to *White*, a split emerged among the circuits as to exactly what kind of an adverse action could anchor a retaliation claim under Title VII.[33]

This controversy focused on the relative "badness" of the action and on its proximity to the employment relationship. Some circuits defined employer actions required for a retaliation claim narrowly, allowing plaintiffs to bring such a claim based only on an allegedly retaliatory "ultimate employment decisio[n]," like hiring, firing, and promotion.[34] Some circuits applied in

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[26] *See* Laura Beth Nielsen & Robert Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 690-91 (speculating about the reasons for the rise in retaliation charges); Joan M. Savage, Note, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 215 (2004) ("Plaintiffs find that they can recover on a retaliation claim even when the court dismisses their underlying claim. Retaliation claims have been successful with juries . . . ." (footnote omitted)).

[27] Bernstein, *supra* note 25, at 114 (quoting Marcia Coyle, *Retaliation Cases Hit High Court En Masse: Justices to Review Trio of Key Cases*, NAT'L L.J., Jan. 28, 2008, at 1.).

[28] Tresa Baldas, *Retaliation Claims "Paralyze" Employers*, NAT'L L.J., Oct. 20, 2008, at 1.

[29] *See* Kasten v. Saint-Gobain Perf. Plastics Corp., 131 S.Ct. 1325 (2011) (claim pursuant to Fair Labor Standards Act); Thompson v. N. Am. Stainless, LP, 131 S.Ct. 863, 867 (2010) (claim pursuant to Title VII); Crawford v. Metro. Gov't of Nashville & Davidson Cty, Tenn., 555 U.S. 271, 278-80 (2009) (same); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 445 (2008) (claims pursuant to § 1981); Gomez-Perez v. Potter, 553 U.S. 474, 477 (2008) (claims pursuant to the federal-sector provision of the Age Discrimination in Employment Act).

[30] 548 U.S. 53 (2006).

[31] *See* Lebofsky v. City of Phila., No. 09-2873, 2010 U.S. App. LEXIS 19436, at *6 (3d Cir. Sept. 17, 2010).

[32] *See, e.g.*,Vance v. Ball State Univ., 646 F.3d 461, 474-75 (7th Cir. 2011) (finding plaintiff's claim deficient for failure to advance allegations of a materially adverse action), *cert. granted on other grounds*, 2012 U.S. LEXIS 4685 (June 25, 2012).

[33] *See White*, 548 U.S. at 59-62.

[34] *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (finding that hostility from fellow employees, stolen tools, and anxiety are not ultimate employment decisions); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir.1997) ("Absent evidence of some more tangible change in duties or working conditions that

the retaliation context the "adverse action" standard generally governing the discrimination provision of Title VII, which permits a plaintiff to base a claim on only an adverse *employment* action—that is, one affecting an individual's benefits, terms, or conditions of employment.[35] Still other circuits held that any materially adverse action—even one not substantially altering employment—might be the basis of a valid Title VII retaliation claim.[36]

White gave the Supreme Court the chance to resolve the circuit split. In 1997, Burlington Northern hired plaintiff White as a track laborer in its Tennessee yard, where she was the only woman in the company's Maintenance Way department.[37] After White was assigned to assume some forklift operation tasks, she reported to the company roadmaster that her immediate supervisor repeatedly complained to her that women should not be assigned to the department and that he made inappropriate comments to her in front of male colleagues.[38] The company suspended the supervisor and required him to attend additional training,[39] but in the same conversation in which the higher-ranking roadmaster informed White of the supervisor's discipline, he told her also that she would be transferred from her forklift duties so that a "more senior man" could perform that "less arduous and cleaner" job.[40] A short time later, when the supervisor about whom White complained reported that White had been insubordinate, the roadmaster suspended her.[41] Consequently, she filed an internal grievance. White was cleared of the insubordination allegation through the company's internal procedure, and she was awarded back pay for the suspension, which in the end totaled thirty-seven days.[42]

White brought a Title VII retaliation claim against Burlington based on her suspension and the transfer of her duties away from the forklift. A jury found in her favor.[43] The Sixth Circuit Court of Appeals initially reversed the decision but later affirmed the district court in an en banc opinion. The judges on the en banc panel disagreed amongst themselves, however, as to the standard to apply to the adverse action prong of White's retaliation claim.[44]

On appeal, the Supreme Court adopted the broadest view accepted in the circuit courts. To be "actionable" under Title VII's antiretaliation provisions, the Court explained, an

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constituted a material employment disadvantage, we must agree with the district court that [plaintiffs] did not present evidence sufficient to demonstrate any adverse employment action that constitutes the sort of ultimate employment decision intended to be actionable under Title VII.").

[35] *See, e.g.*, Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) ("What is necessary in all . . . retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected [sic] 'the terms, conditions, or benefits' of the plaintiff's employment.").

[36] *See, e.g.*, Passer v. Am. Chem. Soc'y, 935 F.2d 320, 330-31 (D.C. Cir. 1991) (finding an adverse action in an employer's cancellation of an awards ceremony honoring the plaintiff, following the plaintiff's allegation of discrimination).

[37] *White*, 548 U.S. at 57.

[38] *Id*. at 58.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*. at 59.

[44] *Id*. at 59 (citing White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443 (2002)).

employer's action need not be employment related, nor must it even happen in the workplace.[45] Rather, an employer's retaliatory act is actionable under Title VII when it is materially adverse to an employee or applicant, meaning that the "actions are harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[46]

The Court's decision was based on two lines of reasoning. First, construing the plain language of the statute and comparing the antidiscrimination and antiretaliation provisions, the Court thought it most reasonable to interpret the retaliation protections more broadly. While Title VII's antidiscrimination provision by its terms limits its application to hiring, firing, compensation, and other "terms, conditions, and privileges of employment,"[47] the antiretaliation provision applies no such restriction.[48] Second, and significantly, to limit the scope of the antiretaliation provision of Title VII merely to work-related actions would not serve fully the purpose of deterring retaliation. To do so might permit employers otherwise to deter employees from exercising their rights under Title VII.[49] The antiretaliation provision critically supports the antidiscrimination provision.[50] Without the former, there can be no or significantly less enforcement of the latter.[51] Accordingly, the Court reasoned that applying the retaliation provision to actions both within and outside of the workplace would best preserve access to Title VII's protective mechanisms.[52]

This does not mean that every action an employee finds unpleasant, rude, or annoying is automatically an "adverse action" within Title VII jurisprudence. Rather, to be actionable, the adversity must be material, not trivial. The standard is context-specific.[53] Some actions in some circumstances might not be materially adverse—meaning they would not deter the reasonable worker from pursuing his rights under Title VII—but they might nonetheless be so in other circumstances.[54] Given the circumstances facing White, the Court reasoned, a reasonable jury could have found that the transfer of her duties and the suspension without pay—regardless of whether the pay was restored—were materially adverse as contemplated by Title VII.[55]

In the years since *White*, courts have continued to struggle to parse prevailing thresholds regarding what does and does not amount to a "materially adverse action" on which a Title VII

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[45] *Id*. at 67.

[46] *Id*. at 57.

[47] 42 U.S.C. §2000e-2(a) (2006).

[48] *White*, 548 U.S. at 62-63 (citing 42 U.S.C. §§ 2000e-2(a) and -3(a)).

[49] *Id*. at 63-64.

[50] This sentiment has animated much of the Supreme Court's antiretaliation jurisprudence in the last decade. *See, e.g.*, Gomez-Perez v. Potter, 553 U.S. 474 (2008) (finding that the federal-sector provision of the ADEA prohibits retaliation despite the absence of an express prohibition); CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008) (same for § 1981); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (same for Title IX).

[51] *White*, 548 U.S. at 67.

[52] *Id*.

[53] *Id*. at 69 ("Context matters.").

[54] *Id*. at 69-70.

[55] *Id*. at 70.

retaliation claim may be based.[56] A unified and consistent doctrine has not emerged. The circuit and district courts have continued to struggle with the application of the materially adverse action standard, including determining whether and under what conditions reassignment of duties,[57] social isolation,[58] investigation of the complainant's own conduct,[59] or criticism and oral counseling[60] might qualify.

The Supreme Court, for its part, has tacitly affirmed the breadth of its holding in *White*. In *Thompson v. North American Stainless, LP*,[61] the Court examined whether an employer's firing of Thompson, the fiancé of a woman who filed a complaint of discrimination, constituted a cognizable claim of retaliation by Thompson.[62] It found the broad interpretation of antiretaliation demanded such a finding because, "a reasonable worker might be dissuaded from engaging in protected activity" if she were aware an employer would take action against a third party.[63]

Nonetheless no consistent jurisprudence has emerged as to whether disclosure by the employer of the existence and identity of a complainant alleging unlawful discrimination amounts to a materially adverse action. This doctrinal gap is significant and implicates interests for employers and employees alike. Employees may view as very important the extent to which their complaints and identities are not widely publicized. They may fear reprisal from specific individuals, including both supervisors and coworkers. They may feel shame or embarrassment at the treatment directed toward them, may wish simply to keep a low profile at work and not face being the center of a controversy, or may have other reasons for keeping private their complaints. If so, employer disclosure, or the threat of it, might well dissuade a reasonable employee from making or supporting a charge of discrimination under those circumstances. By the same token, some employees may wish to make public their allegations, perhaps hoping that

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[56] *See* Emily White, Burlington Northern & Santa Fe Railway Co. v. White*: The Supreme Court Bolsters Worker Protections By Setting Broad Retaliation Test*, 27 BERKLEY J. EMP. & LAB. L. 530, 535 (2007).

[57] *Compare* Lucero v. Nettle Creek Sch. Corp., 566 F.3d 720 (7th Cir. 2010), *with* Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008) *and* Moore v. City of Phila., 461 F.3d 331 (3d Cir. 2006).

[58] *Compare* Weger v. City of Ladue, 500 F.3d 710 (8th Cir. 2007) *and* Lytle v. JPMorgan Chase, No. 08-Civ.-9503, 2012 U.S. Dist. LEXIS 15599 (S.D.N.Y. Feb. 8, 2012), *with* Freytes-Torres v. City of Sanford, 270 Fed. Appx. 885 (11th Cir. 2008).

[59] *Compare Billings*, 515 F.3d 39, *with Weger*, 500 F.3d 710 *and* Smith v. Harvey, 265 Fed. Appx. 197 (5th Cir. 2008).

[60] Delgado-O'Neil v. City of Minneapolis, Civ. No. 08-4924, 2010 U.S. Dist. LEXIS 78927 (D. Minn. Aug. 12, 2010). *But see* Blue v. IBEW, No. 09-cv-395-wmc, 2010 U.S. Dist. Lexis 71119 (W.D. Wis. July 15, 2010).

[61] 131 S.Ct. 863, 868 (2011) (noting that the Court had held in *White* "that Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct").

[62] The question presented to the court was whether the fiancé, Thompson, who was fired could pursue a claim under Title VII, even though he personally had not engaged in opposition or participation conduct as required by the antiretaliation provision of Title VII. *Id.* at 867. The Court determined he was a "person aggrieved" by a violation of Title VII and could, thus, pursue a claim in his own right. *Id.* at 870. The violation was the retaliatory conduct directed at his fiancé, Regalado. His firing was understood by the Court as a materially adverse action against her in retaliation for her protected activity, in that the termination of someone that close to her was likely to deter a reasonable employee from making a charge of discrimination. *Id.* at 868 ("[W]e have little difficulty concluding that if the facts alleged by Thompson are true, then [the employer's] firing of Thompson violated Title VII.").

[63] *Id*.

the court of public opinion will assist them in advancing their claims or obtaining a settlement, or they may wish to make the public aware of what they rightly or wrongly perceive as injustice.[64]

Likewise, employers may have varying interests relating to the confidentiality of discrimination allegations. Employers may wish to keep complaints confidential to avoid disrupting the workplace, to preserve their public image, or to avoid encouraging copycat claims against them. They may, however, sometimes have interests in addressing such claims publicly, such as to refute a commonly known claim, to report to shareholders or other stakeholders, or to make public what they believe to be their own subjection to injustice.[65] More pragmatically, employers must often conduct investigations of complaints of discrimination against them, regardless of whether the complaints emerge internally or through the filing of a charge of discrimination at the EEOC.[66]

The Belmont Abbey case falls in this doctrinal gap and demonstrates potentially competing interests of employers and employees. As previously noted, the President of the College singled out by name faculty members filing EEOC claims against the College based on a change in health care coverage of prescription contraception. Although the employees added a retaliation claim to the EEOC filing, several of them discussed the matter openly with press and internet bloggers.[67]

Given these substantial and often competing interests that are at play in disclosure situations, in the next part we analyze the statutory, regulatory, and case law to determine if existing positive law provides sufficient guidance to delineate the boundaries of a retaliatory disclosure claim.

II. EXISTING DOCTRINE AND RETALIATORY DISCLOSURE

Though we have coined the term "retaliatory disclosure," we started from the point of view that it is possible that existing legal doctrine provides sufficient guidance as to the materiality of adversity posed by the disclosure of a complainant's identity. We find, though, that it does not. In this part, we first look to the statutory requirement of confidentiality of the EEOC charge

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[64] Indeed, charging parties will from time to time hold a press conference on the EEOC's steps after filing a charge. *See, e.g.*, PMac, *Warehouse Workers to File Discrimination Charges with EEOC Against DB Schenker*, COPYLINE NEWS MAG. (Apr. 28, 2011), http://www.copylinemagazine.com/news/2011/04/28/warehouse-workers-to-file-discrimination-charges-with-eeoc-against-db-schenker/.

[65] Hooters and Mitsubishi Motor Manufacturing have both famously—and with dramatically differing results—attempted to capitalize on public sentiment in fighting charges of discrimination. *See* Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REFORM 551, 567-68 (1998) (noting Hooters' public relations campaign in response to sex discrimination claims); Stephen Braun, *Workers Protest Harassment Suit Against Mitsubishi*, L.A. TIMES (Apr. 23, 1996), http://articles.latimes.com/1996-04-23/business/fi-61695_1_sexual-harassment (describing Mitsubishi's corporate-sponsored employee protests at the EEOC's offices in Chicago).

[66] *See infra* Part II.A.2.

[67] For example, Dr. David Neipert, one of the charging parties and then-former faculty at Belmont Abbey, authored a guest post for the *Baltimore Sun* explaining his perspective on the controversy. Neipert's piece refuted criticisms of the case and added additional information about the circumstances and dynamics of communications at Belmont Abbey out of which the charges arose. David Neipert, *Guest Post: Another View on Belmont Abbey*, BALT. SUN (Oct. 19, 2009), http://weblogs.baltimoresun.com/news/faith/2009/10/guest_post_another_view_on_bel.html.

process to determine whether it provides direct or analogous authority to regulate disclosure. Finding that the confidentiality requirements are not directly applicable, we look to EEOC guidance documents for direction. The guidance documents are interesting, but not directly on point; thus, we turn to retaliation case law to see how courts have handled disclosure claims in the past. Again, no clear doctrinal path emerges.

A. The Statute and EEOC Guidance Documents

The issue of retaliatory disclosure would be easily enough resolved if Title VII or EEOC regulations dealt directly with the responsibility of the parties to keep charge information confidential. Neither the statute nor agency guidance contemplates retaliatory disclosure specifically. What emerges from a review of both, however, is a picture of a process that is neither wholly private nor wholly public. Congress was clearly concerned with protecting the charge and conciliation process from public disclosure by the EEOC and its agents. But those requirements do not directly regulate the parties to the complaint. Moreover, EEOC guidance contemplates and encourages disclosure in some circumstances.

1. Statutory Provisions

Title VII itself compels the EEOC to keep information regarding the details of a claim of discrimination or retaliation confidential from public view, stating:

> Charges shall not be made public by the Commission. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.[68]

Courts have opined that this duty of confidentiality is two-fold. The first requirement prohibits the Commission from publicizing an unproven charge,[69] while the second imposes broader limits on the disclosure of information gathered in the conciliation process.[70] The first, contrary to the interests implicated in a retaliatory disclosure claim seems to contemplate protection of the employer's interest in its reputation as the motive for confidentiality. Indeed, charging parties will often try to use public pressure by disclosing the charge details; however, Title VII makes clear the EEOC cannot be complicit in that public airing of the details underlying the charge. The duty of confidentiality with respect to conciliation agreements is so

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[68] 42 U.S.C. § 2000e-5(b) (2006).

[69] Branch v. Phillips Petroleum Co., 638 F.2d 873, 879-80 (5th Cir. 1981) ("The [first confidentiality requirement] is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges."); H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1150 (5th Cir. 1973) (citing 110 Cong. Rec. 112723).

[70] EEOC v. Philip Servs. Corp., 635 F.3d 164, 165 (5th Cir. 2011).

powerful that at least one court has found that a breach of contract proceeding to enforce an oral conciliation agreement could not proceed, the importance of the confidentiality provision outweighing interest in the enforcement.[71] And these nondisclosure provisions specifically exempt from release under the Freedom of Information Act (FOIA) information gained by the EEOC in its investigation and conciliation efforts.[72] The fact that the confidentiality of the information gained in the process outweighs the otherwise strong preference for transparency in government activity further underscores the depth of concern Congress had for protecting the sanctity and nonpublic nature of the charge process.

Regardless of how serious a duty this provision imposes on the EEOC, several courts have rejected the application of this provision to impose confidentiality constraints on employers.[73] And several courts have opined that the provision was aimed at providing employers a "modicum of protection" of their confidential information and at encouraging conciliation and voluntary resolution by the parties.[74] While this provision appears not to place on employers the same duty of silence imposed on the EEOC, it does little to answer whether disclosure can amount to retaliation.

The existence of the provision itself may indicate statutory intent to protect the privacy of the charging party, yet it applies to the privacy of both parties, and as evidenced by the few courts who have opined on the intent of the provision, it may in fact be more indicative of a policy in favor of mediation and voluntary resolution than of privacy protection for any one person or entity involved in a charge.[75]

2. Agency Guidance

Similarly, other EEOC guidance offers little indication to whether disclosure is an adverse action. Under Title VII jurisprudence, an employer can avoid vicarious liability for otherwise unlawful discrimination by showing (1) it exercised reasonable care to promptly prevent and correct any sexually harassing behavior and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise to avoid harm.[76] One might suppose that, at least with respect to internal complaints of discrimination, cases interpreting the Faragher/Ellerth defense might yield insight on an employer's duty to keep confidential employee complaints of discrimination. Yet no consensus exists.

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[71] *Id*. at 879-83.

[72] *See* Am. Centennial Ins. Co. v. EEOC, 722 F. Supp. 180, 182 (D.N.J. 1989).

[73] Whitaker v. Carney, 778 F.2d 216, 216-22 (5th Cir. 1985); EEOC v. Phillip Servs. Corp., Civ. Action No. H-09-1625, 2010 U.S. Dist. LEXIS 18296, at *8 (S.D. Tex. Jan. 6, 2010).

[74] Univ. of Pa. v. EEOC, 492 U.S. 182, 192 (1990); *Whitaker*, 778 F.2d at 222.

[75] *Branch*, 638 F.3d at 880-81 ("[I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation on the ground that voluntary compliance is preferable to court action. Indeed, it is apparent that the primary role of the EEOC is to seek elimination of unlawful employment practices by informal means leading to voluntary compliance.").

[76] Burlington Indus. v. Ellerth, 524 U.S. 742, 756 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

The EEOC's enforcement guidance documents indeed recommend that employer's antidiscrimination and reporting policies require confidentiality,[77] but these recommendations are not legally binding on employers. The Second Circuit has held that a company's antidiscrimination policy need not require confidentiality to meet the requirements of the Faragher/Ellerth defense.[78] "Indeed," the court noted, "it is hard to imagine how a company could keep a complaint confidential and also conduct a fair and thorough investigation."[79] Yet opinions from other courts indicate that some kind of confidentiality guarantee might be required for the employer to stand under the Faragher/Ellerth umbrella.[80] In a 2007 case, a district court declined to grant summary judgment on Faragher/Ellerth immunity on the grounds that the supervisor receiving a complaint failed to maintain confidentiality, disclosed the complaint to the alleged discriminator immediately after it was filed, and questioned the complainant within earshot of the alleged discriminator.[81] And another court found that evidence of a failure to provide confidentiality of internal complaints might indicate that the employer's policy is not protective enough to satisfy the Faragher/Ellerth demands.[82] The inclusion of a provision guaranteeing confidentiality to the extent practical for conducting an effective investigation has been found to meet the defense's requirements of reasonableness, however.[83] Accordingly, while the cases seem to favor the preservation of confidentiality, there is not a consensus among courts as to the requirement of such a guarantee, and several seem to observe that an effective investigation at the very least requires some disclosure of the details of a complaint of discrimination.

B. Case Law on Disclosure

Because the statute and agency guidance do not provide sufficient direction from which to build a doctrine of retaliatory disclosure, we look to the case law interpreting Title VII's antiretaliation mandate to see if there are emerging themes through which to build a coherent framework or analysis of retaliatory disclosure. We do so by looking first to the pre-*White* case law, both for the purpose of completeness and with the understanding that it may be of limited value due to the shift *White* ushered in. We then proceed to look to cases decided by the lower courts since the Supreme Court opinion in *White*, but find them no more helpful.

1. Pre-*White* Cases Addressing Whether Disclosure Is Actionable

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[77] *E.g.*, U.S. EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* Amie v. City of Jennings, No. 2:03-CV-2011, 2005 U.S. Dist. LEXIS 36875, at *7 (W.D. La. July 15, 2005).

[78] Finnerty v. William H. Sadlier, Inc., 176 Fed. Appx. 158 (2d Cir. 2006).

[79] *Id*.

[80] *See* Hill v. Am. Gen. Fin., Inc., 218 F.3d 639, 646 (7th Cir. 2000).

[81] EEOC v. Smokin' Joe's Tobacco Shop, Inc., No. 06-01758, 2007 U.S. Dist. LEXIS 31512, at *24-25 (E.D. Pa. Apr. 30, 2007).

[82] Lake v. AK Steel Corp., No. 2:03-cv-517, 2006 U.S. Dist. LEXIS 25118, at *160-61 (W.D. Pa. April 27, 2006).

[83] Myers v. Croell Ready Mix, Inc., 672 F. Supp. 2d 889, 915 (D. Iowa 2009).

The majority of courts considering retaliatory disclosure claims prior to the U.S. Supreme Court's decision in *White* found that the action was not sufficient to be the basis for a retaliation claim.

In several cases, the courts' decisions are transparently based on antiquated pre-*White* standards regarding whether a claim is actionable under Title VII. For example, in *Hudson v. Tahoe Crystal Bay, Inc.*,[84] the Ninth Circuit Court of Appeals rejected a plaintiff's retaliation claim based on the alleged breach of confidentiality regarding her internal complaint of discrimination. In this pre-*White* case, the court held that because the alleged breach of confidentiality "did not result in a termination, demotion, reduction in salary . . . nor any material change in the terms and conditions of employment," it could not amount to an adverse action on which to base a successful retaliation claim.[85] The employment-specific language indicates the court's adherence to a much narrower standard than articulated by *White*.

A similar result ensued in the case of *Mintzmyer v. Babbitt*.[86] Following a bench trial on the plaintiff's employment discrimination and retaliation claims, the District of Columbia District Court rejected the theory that disclosure of a confidential internal complaint of discrimination could anchor an actionable Title VII retaliation claim. In *Mintzmyer*, the plaintiff, a decorated and successful Regional Director for the National Park Service, filed an allegation of discrimination with the Park Service under both Title VII and the Age Discrimination in Employment Act, claiming that the deputy director of the agency discriminated against her unlawfully.[87] Mintzmyer alleged that after she filed her complaint, the deputy director met with a friend of the plaintiff who previously worked for the agency and who—at the time of the meeting with the deputy director—was working as a staff member for the Majority on the House Subcommittee on Parks and Insular Affairs, which was responsible for funding allocation to the Parks Service.[88] During the meeting, the deputy director informed the plaintiff's friend of the plaintiff's complaint and asked her to appeal to the plaintiff to resolve the complaint without involving an attorney in the negotiations.[89] The friend then did as the deputy director reportedly requested, meeting with Mintzmyer shortly after and relaying the deputy director's offer: Mintzmyer could contact the director of the agency and could obtain a higher position at the Park Service if she informally resolved the complaint. She was embarrassed by this exchange. And, worse, when she took the offer and contacted the director to pursue her position, she discovered that the director had no knowledge of the proposed agreement.[90]

Mintzmyer brought several claims against the Park Service, among them that the disclosure by the deputy director of her confidential discrimination complaint to her congressional staffer friend constituted unlawful retaliation under Title VII.[91] The court declined to find that such a disclosure could be serious enough to amount to retaliation. However

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[84] No. 98-17023, 1999 U.S. App. LEXIS 20881 (9th Cir. Aug. 27, 1999).

[85] *Id*. at *7.

[86] No. 93-0773, 1995 U.S. Dist. LEXIS 1182 (D.D.C. Jan. 12, 1995).

[87] *Id*. at *1.

[88] *Id*. at *17-18.

[89] *Id*. at *17.

[90] *Id*. at *18.

[91] *Id*. at *53.

"professionally embarrass[ing]" and "improper," the disclosure led to no actual adverse *employment* action against plaintiff at the Park Service.[92] The *Mintzmyer* opinion clearly relies on a higher, pre-*White* adverse action standard of retaliation that requires a much greater connection between the alleged wrong and the plaintiff's employment than the standard articulated by the Supreme Court. Given the court's acknowledgment of the wrongful and embarrassing nature of the disclosure, it may today find the opposite under the materially adverse action standard set in *White*.

Numerous other cases do not mention specifically a higher standard than in *White*, but in all but one pre-*White* case, courts rejected the theory that disclosure of one's discrimination complaint was a valid basis for a retaliation claim. In *Dunn v. Washington County Hospital*,[93] the plaintiff, a nurse in a public hospital, brought an action alleging that her employer was liable for sexual harassment and retaliation against her by an independent contractor physician with whom she worked. Among the nurse's complaints were that the physician harassed her in retaliation for complaining about his behavior, meaning that he was made aware of her complaints in a manner that did not protect her.[94] While the majority found no actionable wrong in her averments, Judge Rovner dissented, noting that after the plaintiff and other nurses complained, they submitted to interviews by the hospital's counsel.[95] They each expressed concern about the damage their complaints could do to their relationship with the hospital and the physician, and each was assured confidentiality.[96] Yet it was not long, the dissent explained, before the hospital turned over the nurses' statements to the physician, who taunted the plaintiff, telling her, for example, that "[p]aybacks are hell."[97] Given these circumstances, Judge Rovner would have found that the disclosure of the complaints and the identity of those complaining could constitute sufficient action on which to base a retaliation claim within the purview of Title VII.[98]

In *Ross v. Communications Satellite Corp.*,[99] a plaintiff engineer brought a sexual harassment charge against his employer based on alleged discrimination by a female technician. When the company did not resolve the matter to his satisfaction, he filed an EEO charge. The company published a short article about the charge in its internal company news digest.[100] The plaintiff eventually brought a slew of claims alleging, among other things, that the company retaliated against him by publishing the article disclosing his charge and identity.[101] While the EEOC found cause for the retaliation claim, the district court rejected it on the grounds that the article was truthful.[102] The Fourth Circuit reversed the district court's grant of summary

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[92] *Id*. at *55-56.

[93] 429 F.3d 689 (7th Cir. 2005).

[94] *Id*. at 690.

[95] *Id*. at 694 (Rovner, J., dissenting).

[96] *Id*. at 698.

[97] *Id*. at 692 (majority opinion).

[98] *Id*. at 696-97.

[99] 759 F.2d 355 (4th Cir. 1985).

[100] *Id*. at 357.

[101] *Id*. at 357-58.

[102] *Id*. at 360.

judgment for the company, omitting substantive discussion of the retaliation claim on its merits.[103]

Notably, at least one court has commented that the disclosure of an EEOC charge of discrimination to the accused's supervisor cannot warrant a breach of confidentiality rising to the level of an actionable adverse action under Title VII, stating that such disclosure is an "integral part of the discipline process."[104] To the extent that the foregoing cases are based not on a faulty standard but instead on this kind of practical rationale, they may be relevant to post-*White* jurisprudence.[105] The reasoning in these cases on the point of whether disclosure amounts to actionable retaliation is minimal, however. It is difficult to discern the extent to which they relied on a now-defunct and exceedingly high adverse action standard.

In the sole pre-*White* case to find disclosure of a complaint could constitute an actionable retaliatory action under Title VII, *Lafate v. Chase Manhattan Bank*,[106] the court declined to set aside a verdict in favor of a Title VII retaliation plaintiff alleging, among other things, that her employer unnecessarily disclosed details of her EEOC charge. The plaintiff filed a charge after being denied a promotion to which she believed she was entitled.[107] She eventually filed a suit alleging retaliation as well, and a jury found in her favor.[108] The trial court rejected the employer's argument that the plaintiff failed to offer evidence sufficient to demonstrate an adverse action under Title VII's retaliation framework.[109] By moving the employee to a less comfortable workspace, assigning her a task she was untrained to complete, and "most importantly,"[110] by filing plaintiff's EEOC charges in her personnel file, an act that gave four of her managers access to the documents, the employer had, indeed, committed a materially adverse employment action on which a Title VII retaliation claim could be based.[111] By taking these allegations together, the court's decision leaves some ambiguity as to whether the disclosure, if taken alone, would have constituted an adverse action. Nonetheless, the court's characterization as this error as most important suggests that in another case, such an outcome may be possible.

2. Post-*White* Cases Addressing Whether Disclosure Is Actionable

The variation in pre-*White* retaliatory disclosure cases shows that no coherent approach to retaliatory disclosure claims was emerging in the earlier case law. Thus, we look to cases decided subsequent to the newer standard *White* articulated to determine if it provides employers

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[103] *Id*. at *5-6, 34; *see also* Kunsler v. Canon, USA, Inc., 257 F. Supp. 574 (E.D.N.Y. 2003) (holding that a company's violation of its internal policy by breaching the confidentiality of an internal discrimination allegation did not rise to the level of retaliation under Title VII).

[104] Hertenstein v. Kimberly Home Health Care, Inc., 58 F. Supp. 2d 1250 (D. Kan. 2000).

[105] In Part V, *infra*, we address how these and related issues might be incorporated in our retaliatory disclosure framework.

[106] 123 F. Supp. 2d 773 (D. Del. 2000).

[107] *Id*. at 776.

[108] *Id*. at 777.

[109] *Id*. at 778-79.

[110] *Id*. at 779.

[111] *Id*. at 778-79.

with guidance as to when they may not disclose the existence of a complaint of discrimination or the identity of the complainant.

At least initially, post-*White* cases have only addressed discrete issues on a seemingly ad hoc basis and do not provide the necessary direction. In *Bowman-Farrell v. Cooperative Education Service Agency 8*,[112] the District Court for the Eastern District of Wisconsin rejected a plaintiff's Title VII claim that her public employer retaliated against her by disclosing to a complained-of party certain unnamed details of the plaintiff's discrimination allegations.[113] Although *Bowman-Farrell* was decided after *White*, the court's disposition of other retaliation claims on the grounds that they did not cause an adverse employment action indicates that the court was operating under a pre-*White* standard.[114] The court seemed to mandate a more substantial link to employment, a link *White* unambiguously does not require. Without significant discussion on the standard, however, the court granted summary judgment on the plaintiff's retaliatory disclosure claim, explaining "presumably at some point in a retaliation complaint the accused is going to learn the details of the complaint against her."[115]

But two cases following *White* more directly and substantially address the question of when employer disclosure of a discrimination complaint can rise to the level of retaliation under Title VII. The recent opinion by the Tennessee Supreme Court in *Allen v. McPhee*[116] may shed light on how an employer might respond to a charge of discrimination in the public eye without incurring retaliation against the charging party.[117]

The plaintiff in *Allen*, who worked in a university president's office, filed complaints with the Tennessee Board of Regents alleging that she was subjected to sexual harassment by the president of the university himself. Following the allegations, the president issued two press releases acknowledging that he was the subject of sexual harassment complaints by an employee of the university and denying the allegations.[118] He additionally granted an interview to the university's student newspaper, an interview in which he vehemently denied the allegations against him and characterized the complaints as false accusations.[119] The plaintiff alleged that the president's public discussion of her allegations and his puffery-style denial and denigration of the charges against him amounted to retaliation under the THRA. Noting that none of the public statements identified her by name or otherwise provided information leading to the discovery of her identity, the court rejected her theory.[120]

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[112] No. 02-C-818, 2007 U.S. Dist. LEXIS 77283, at *78 (E.D. Wis. Oct. 17, 2007).

[113] *Id.* at *78-*79.

[114] *Id.* at *60.

[115] *Id.* at *79.

[116] 240 S.W.3d 803 (Tenn. 2007).

[117] Although a state case interpreting the Tennessee Human Rights Act (THRA), the framework for establishing a *prima facie* retaliation claim under the THRA mirrors that under Title VII, requiring a known protected activity, a materially adverse action, and a causal connection between the two. *Id.* at 807. And, significantly, the THRA applies the *White* standard to the "materially adverse action" prong of the retaliation test, allowing a retaliation claim anchored on an act unrelated to employment if it has the requisite objectively identifiable deterrent effect on protected activity. *Id*. at 820-21.

[118] *Id.* at 810, 811.

[119] *Id.* at 811.

[120] The court explained:

The court's decision in *Allen* may shed light on how a federal court might interpret a claim regarding disclosure of a confidential complaint. The court's analysis recognizes as reasonable an accused's desire to refute allegations of discrimination, and by negative implication, hints that disclosure of the name of a charging party might tread impermissibly into the domain of the materially adverse action.

Most recently, in *Franklin v. Local 2 of the Sheet Metal Workers International Ass'n*,[121] the Eighth Circuit Court of Appeals confronted the question of whether revelation of a charge and the identity of a charging party amounts to retaliation under Title VII. In *Franklin*, several members of the Sheet Metal Workers' union filed charges with their local EEOC office alleging that the union's referral practices were racially discriminatory.[122] Shortly thereafter, the union began posting for all to see its legal bills relating to the charges.[123] The bills detailed the charging parties' names and some of their allegations.[124] The charging parties filed another charge based on the posting practice, alleging it amounted to unlawful retaliation. The EEOC agreed.[125] In response to criticism from the EEOC, the union continued to post the bills but redacted the charging parties' names. The union, however, continued to read aloud information from the bills, including the names, during union meetings.[126] The district court granted summary judgment for the union on the retaliation claims, finding that although the posting of the names was actionable under Title VII, the union had a non-retaliatory reason for its postings—namely, the duty to inform its members about the basis for its legal expenditures and to obtain members' approval for such expenditures.[127]

The Eighth Circuit reversed. The postings and name-reading at meetings did amount to adverse actions within the meaning of Title VII's retaliation provisions after *White*, the court explained. Plaintiffs argued that the public revelation and posting of information regarding the existence of their charges and their identities was "per se" retaliatory, and the court rejected this

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> Although both press releases imply that [the president] was being falsely accused of sexual harassment and were arguably intended to curry favor with the public, this alone is insufficient to support a finding that the press releases were materially adverse to [the plaintiff]. We are unwilling to hold that a person accused of sexual harassment necessarily exposes himself to liability for retaliation merely by asserting his innocence publicly. A reasonable employee would expect that a person accused of harassment will oppose the accusation. This is no less true of public figures who, as a result of their public status, will be expected to respond to the accusations publicly. While public figures do not have license to use their status to bully or embarrass their accuser, we hold that a reasonable employee would not be dissuaded from reporting discrimination based solely on the fact that the accused will publicly assert his innocence. Because the press releases are essentially limited to statements that imply [the president's] innocence, we conclude that the issuance of the press releases was not materially adverse to [the plaintiff].

Id. at 824.

[121] 565 F.3d 508 (8th Cir. 2009).

[122] *Id.* at 512.

[123] *Id.* at 512-13.

[124] *Id.* at 512.

[125] *Id.*

[126] *Id.* at 513.

[127] *Id.* at 513-14.

position.[128] Given the union's duty to obtain approval for legal fees, the court explained, the posting alone could not fairly amount to per se retaliation.[129] However, reversing the district court's grant of summary judgment for the union, the Eighth Circuit found that some of the union's actions—such as announcing the plaintiffs' names aloud at the meetings—might have published more widely than necessary the plaintiff's identities.[130] Given that, the court explained, a genuine issue of fact remained regarding the retaliation claim that precluded summary judgment being entered on that claim.

The cases decided prior to *White* seem no longer to be instructive in light of the clarified adverse action standard provided in *White*. Those decided after *White*—though perhaps instructive in building the various constituent parts—provide little in the way of a well-developed framework to guide employers or courts faced with claims of retaliatory disclosure. Thus, we look elsewhere for additional guidance from which to fashion such a framework.

III. ALTERNATIVE SOURCES OF GUIDANCE

The fact is that *some* disclosure of charging party identity is likely necessary in *some* cases. Nevertheless, it is equally clear that widespread disclosure of the charging party's identity—or even the threat of such disclosure—can be coercive and may, in some circumstances, lead a would-be charging party to abandon his or her claim. The retaliation case law's current lack of guidance in drawing the line between permissible and retaliatory disclosure combined with the inapplicability of the nondisclosure and confidentiality requirements otherwise active when a charge of discrimination is filed with the EEOC suggest that a court applying the *White* "dissuade a reasonable worker" standard will need to look elsewhere for guidance in retaliatory disclosure cases. We discuss two sources of such guidance in this section.

A. Anonymity/Pseudonymity in Litigation

As we have noted, the Title VII charge process is neither wholly public nor wholly private. In federal courts, litigation is generally public, though rarely litigants are allowed to proceed anonymously. Given that is the case, understanding the circumstances and countervailing interests at play when the public nature of litigation gives way may be helpful to delineating the parameters of retaliatory disclosure. Anonymity runs afoul of both the public's common law right to access judicial proceedings[131] and Federal Rule of Civil Procedure 10(a), which states that the title of every complaint shall "include the names of all the parties."[132] However, many

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[128] *See id.* at 520.

[129] *Id.* at 521.

[130] *See id.* ("Local 2 continued to read Appellant's names at union meetings. Although Local 2's prior practice and obligation to disclose expenses may justify what Local 2 did, the degree of Local 2's disclosures raises credibility issues and a potential reasonable inference of retaliation.")

[131] Does I thru XXIIII v. Advanced Textile Corp., 214 F.3d 1058, 1076 (9th Cir., 2000); *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978).

[132] FED. R. CIV. P. 10(a) ("Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the

federal courts permit parties to proceed anonymously when weighty circumstances justify secrecy.[133] A review of federal court decisions reveals that there are three main situations in which a plaintiff may proceed anonymously: (1) when identification creates a risk of retaliatory physical or mental harm;[134] (2) when anonymity is necessary "to preserve privacy in a matter of sensitive and highly personal nature;"[135] and (3) when the anonymous party is "compelled to admit [his or her] intention to engage in illegal conduct, thereby risking criminal prosecution."[136]

Two of these three situations—where identification creates a risk of retaliatory physical or mental harm and where the matter is sensitive or highly personal in nature—are interests that may be analogous to those of plaintiffs in retaliatory disclosure claims. The following sections outline in more detail federal court rulings in these two situations and shed light on how courts can fashion protection for Title VII complainants against retaliatory disclosure.

1. Privacy

Courts often consider an individual's right to privacy as a critical factor in determining whether he or she can proceed anonymously. Sometimes however, it is difficult to parse whether the nature of the private matter or the possibility of embarrassment and potential for ostracism are the motivating factors in the courts determination. For example, particular cases involving challenges to religious practices often receive special protection,[137] while situations involving sexual harassment claims and sexual assaults do not.[138]

i. Matters Involving Religion

Courts appear more willing to protect an individual's identity when the individual is challenging particular religious practices. This heightened protection is more common in communities with

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names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.").

[133] *E.g.*, *Advanced Textile Corp.*, 214 F.3d 1058; Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir.1997); James v. Jacobson, 6 F.3d 233, 238-39 (4th Cir. 1993); Doe v. INS, 867 F.2d 285, 286 n. 1 (6th Cir.1989); Doe v. Stegall, 653 F.2d 180, 186 (5th Cir. 1981); Moe v. Dinkins, 533 F.Supp. 623, 627 (S.D.N.Y.1981), aff'd, 669 F.2d 67 (2d Cir. 1982); *see also* Doe v. Bell Atl. Bus. Sys. Services, Inc., 162 F.R.D. 418, 420 (D. Mass. 1995) ("Courts have allowed plaintiffs to proceed anonymously in cases involving social stigmatization, real danger of physical harm, or where the injury litigated against would occur as a result of the disclosure of plaintiff's identity. Economic harm or mere embarrassment is not sufficient to override the strong public interest in disclosure. Cases in which parties are allowed to proceed anonymously because of privacy interests often involve 'abortion, mental illness, personal safety, homosexuality, transsexuality and illegitimate or abandoned children in welfare cases.'" (citations omitted)).

[134] *Stegall*, 653 F.2d at 186; Gomez v. Buckeye Sugars, 60 F.R.D. 106, 107 (N.D. Ohio 1973).

[135] *James*, 6 F.3d at 238; *see also* Doe v. United Servs. Life Ins. Co., 123 F.R.D. 437 (S.D.N.Y.1988); Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont.1974).

[136] *Stegall*, 653 F.2d at 185.

[137] *See* Doe v. Harlan Cnty. Sch. Dist., 6 F. Supp. 2d 667 (E.D. Ky. 2000) (involving parents of a minor child who were permitted to proceed pseudonymously in challenging the school district's practice of hanging the Ten Commandments in schools because the plaintiffs could be subject to humiliation and harassment).

[138] *See* S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979); *Bell Atlantic Bus. Sys. Servs.*, 162 F.R.D. 418.

strong religious convictions, where challenges to the religion subject the plaintiff to widespread and hostile ridicule by a unified group. A similar situation of widespread ostracism is likely not the case in sexual harassment situations because there is likely no identified group hostile to the putative victim.

In *Doe v. Stegall*, the court determined that the plaintiffs challenging prayer in school could proceed anonymously. The court explained:

> Here, the Does complain of public manifestations of religious belief; religion is perhaps the quintessentially private matter. Although they do not confess either illegal acts or purposes, the Does have, by filing suit, made revelations about their personal beliefs and practices that are shown to have invited an opprobrium analogous to the infamy associated with criminal behavior. Evidence on the record indicates that the Does may expect extensive harassment and perhaps even violent reprisals if their identities are disclosed to a Rankin County community hostile to the viewpoint reflected in plaintiffs' complaint.[139]

Similarly, in *Doe v. Harlan County School District*, parents of a child attending middle school in Kentucky were permitted to proceed pseudonymously when they challenged the school district's practice of hanging the Ten Commandments in classrooms. The court stated:

> In a similar case, the Fifth Circuit held that the showing of possible harm, the risk of serious social ostracization based upon religious attitudes, and the fundamentally private nature of religious beliefs required that a child litigant remain anonymous. Because this case also involves a religious matter, a child litigant, and a community which is highly interested in this issue's resolution, a balancing of interests justifies the plaintiffs' continued anonymity.[140]

These cases suggest that the sensitive nature of religious objection, especially when unpopular, may be sufficiently weighty to overcome the presumption in favor of naming parties in a case. But it cannot be ignored that the cases pertain centrally to religious challenges of children, and so it must be considered that the courts' recognition of the need for privacy is heavily influenced by the tender age of the plaintiffs.

ii. Matters Involving Sexuality and Abortion

In matters involving sexuality, courts seem willing to protect individuals' privacy. For example, several courts have allowed transsexuals to sue under pseudonyms.[141] In addition, a court has acknowledged that an individual has a right to have his or her identity protected if the case will reveal that he or she is a homosexual.[142] The court asserted that while lawsuits are typically

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[139] *Stegall*, 653 F.2d at 186.

[140] *Harlan Cnty. Sch. Dist.*, 96 F. Supp. 2d at 671 (internal citation omitted).

[141] McClure v. Harris, 503 F. Supp. 409 (N.D. Cal. 1980), *rev'd on other grounds in* Schweiker v. McClure, 456 U.S. 188 (1982); Doe v. McConn, 489 F. Supp. 76, 77 (S.D. Tex. 1980); Doe v. Alexander, 510 F.Supp. 900 (D. Minn. 1981). In *McConn* the court explained that "[t]he Jane Doe Plaintiffs and Plaintiff M.B., in various stages of sexual transition, are suing under fictitious names to insulate themselves from possible harassment, to protect their privacy, and to protect themselves from prosecution resulting from this action." *McConn*, 489 F. Supp. at 77.

[142] Doe v. United Servs. Life Ins. Co., 123 F.R.D. 437 (S.D.N.Y. 1988).

public events in which the public has an interest, keeping the plaintiff's sexual identity private was necessary to protect his privacy in light of the widespread public fear engendered by AIDS.[143]

It is no surprise that courts are sensitive to anonymity concerns in matters involving abortion. Courts are willing to allow pregnant women bringing actions to contest the validity of laws and regulations involving abortions to proceed anonymously.[144] Furthermore, the Supreme Court implicitly endorsed anonymity in several important abortion cases including *Roe v. Wade* and *Doe v. Bolton*.[145] In addition, the Court has allowed anonymity in a birth control case: *Poe v. Ullman*.[146] That said, however, in *M.M. v. Zavaras*,[147] the district court would not allow an inmate to proceed under a pseudonym when she sought to compel the state department of corrections to pay for her abortion, because the court reasoned that the public's interest in the use of public funds outweighed the inmate's interest in anonymity.[148]

iii. Matters Involving Sexual Harassment and Sexual Assault

Sexual assault and sexual harassment claims have typically received the least amount of anonymity protection, though case outcomes in this area are mixed.[149] In *Doe v. Bell Atlantic Business Systems Services, Inc.*, a Massachusetts district court would not allow a plaintiff who alleged that she had been sexually harassed and assaulted by her work supervisor to file pseudonymously.[150] The court argued that economic harm or mere embarrassment is not sufficient to warrant anonymity. It further argued that the plaintiff had not demonstrated a compelling need for privacy that outweighed the rights of the defendant and the public to open proceedings.[151]

More recently, in *Doe v. Penzato*,[152] the Northern District of California granted a plaintiff's request to proceed in her case alleging that the defendants, a couple in whose home she lived and worked in the United States, subjected her to human trafficking, forced labor, and

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[143] *Id.* at 437 ("Concern to avoid public identification as a homosexual is heightened in light of the widespread public fear engendered by the Acquired Immunodeficiency Syndrome ('AIDS') crisis."). Of course we may now find the court's specific reasoning to incorporate antiquated notions about homosexuality and AIDS; nevertheless, the court was animated by its evaluation of the possibility that the facts of the case presented some risk of social stigma. *See id.* That concern, even if not its particular application in this case, appears to be timeless.

[144] *See* Francis M. Dougherty, Annotation, Propriety and Effect of Use of Fictitious Name of Plaintiff in Federal Court, 97 A.L.R. Fed. 369 (1998).

[145] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

[146] 367 U.S. 497 (1961).

[147] 939 F. Supp. 799 (D.C. Colo. 1995).

[148] *Id.* at 802.

[149] *See, e.g.*, Doe v. Bell Atlantic Bus. Sys. Servs., Inc., 162 F.R.D. 418 (D. Mass. 1995); Doe v. Hallock, 119 F.R.D. 640 (S.D. Miss. 1987); S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979).

[150] *Bell Atlantic*, 162 F.R.D. 418.

[151] *Id.* at 420-21.

[152] No. CV10-5154 MEJ, 2011 U.S. Dist. LEXIS 51681 (N.D. Cal. May 13, 2011).

sexual assault.[153] The court agreed with defendants that the plaintiff had evidenced little reasonable fear of retaliatory reprisal. But, in finding that anonymity was appropriate, the court agreed with the plaintiff's arguments that revelation of her identity in open pleadings would subject her to psychological trauma and an invasion of her privacy.[154] Finally, the court was persuaded that the public interest in encouraging victims of human trafficking to come forward—an interest that would be harmed, the plaintiff alleged, if victims were forced to reveal their identities—weighed in favor of plaintiff anonymity.[155]

Comparing cases involving abortion and cases involving sexual harassment or assault, it appears that some courts are more likely to find that pregnant women challenging abortion laws deserve more privacy protection than victims of sexual harassment or assault because of both the extremely private nature of abortion and the potential for public ridicule. This view might exist because sexual harassment and assault cases always involve another or several other people, so the victim has already lost some privacy as a matter of course. Furthermore, the public might be more critical of a woman challenging an abortion law than a victim of sexual harassment or assault. Yet there is some support, anchored by the public interest in encouraging reports of sexual assault, perhaps, for providing alleged victims anonymity in pursuing alleged perpetrators.

2. Fear of Reprisal[156]

Fear of reprisal or retribution can be a critical factor in determining whether anonymity is required. "That a plaintiff may suffer embarrassment or economic harm is not enough" to warrant use of a pseudonym.[157] Rather, plaintiffs must evidence a weighty showing of real harm. In cases involving the threat of physical retribution, courts usually rule in favor of those seeking anonymity.[158] For example, in *EEOC v. ABM Industries Inc.*, the court allowed eight employees to intervene anonymously in a Title VII action brought by the EEOC against an employer,

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[153] *Id.* at *2-3.

[154] *Id.* at *8-9.

[155] *Id.* at *10-11.

[156] Throughout the remainder of this article, we use the words "reprisal" or "retribution" to refer to acts carried out against an individual that are detrimental to that individual. These types of actions may be the sort of thing that could be the materially adverse action in a retaliation claim as described *supra* in Part I.B, but are broader than that as well. We choose not to use the term "retaliation" in this colloquial sense to avoid confusion; we use "retaliation" only in reference to the legal claim. Our use of reprisal and retribution reflects the broad definition of retaliation in the whistle-blowing literature. *See* Michael T. Rehg et al., *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships*, 19 ORG. SCI. 221, 222 (2008) ("[R]etaliation against whistleblowers represents an outcome of a conflict between an organization and its employee, in which members of the organization attempt to control the employee by threatening to take, or actually taking, an action that is detrimental to the well-being of the employee, in response to the employee's reporting, through internal or external channels, a perceived wrongful action." (quoting Michael T. Rehg, An Examination of the Retaliation Process Against Whistle-Blowers: A Study of Federal Government Employees 17 (1998) (unpublished dissertation)). The literature treats reprisal or retaliation as including both the imposition of negative consequences and the withholding of positive benefits to the whistleblower. *See* John P. Keenan, *Comparing Indian and American Managers on Whistleblowing*, 14 EMP. RESPS. & RTS. J. 79, 82 (2002). We do as well.

[157] Doe v. Megless, 654 F.3d 404, 414 (3d Cir. 2011).

[158] *E.g.* United States v. Doe, 655 F.2d 920, 922 n. 1 (9th Cir.1981) (using pseudonyms in opinion because appellant, a prison inmate, ''faced a serious risk of bodily harm'' if his role as a government witness were disclosed).

because the employees had an objectively reasonable fear that their supervisor would physically threaten or harm them.[159] The employees' need for anonymity outweighed any prejudice to defendants and the public's interest in knowing their identities.[160]

On borderline retribution cases, however, courts have diverged greatly. For example, in the seminal case of *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*, the court found that threats of humiliation and reprisal were not sufficient to warrant anonymity in a sexual discrimination case, because the plaintiffs—female law students and lawyers—faced no greater threat of reprisal than a typical plaintiff alleging civil rights violations.[161] The court was unsympathetic to the plaintiffs' argument that disclosure of their identities would leave them vulnerable to retribution from their current employers, prospective future employers, and the organized bar.[162] In addition, in *Doe v. Hallock*, a sexual harassment and sexual assault case, the court found that the plaintiff had "not demonstrated that this is an exceptional case in which a compelling need exists to protect an important safety or privacy interest."[163] The court reasoned that such reprisal was more likely to come from defendants who already knew the victim's identity rather than the community at large.[164] Therefore, fear of reprisal did not support the need for anonymity. Yet, in *Doe v. Stegall*, the court found that a mother and her two children could proceed anonymously because their suit, which challenged the constitutionality of prayer and Bible-reading exercises in Mississippi public schools, would likely lead to harassment and possible violence by members of their community.[165]

The Ninth Circuit has outlined the clearest standard for dealing with cases involving the threat of reprisal, evolving in two major steps over the course of a decade. It first considered the following factors in determining whether anonymity is necessary: "(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation."[166] In *Does I thru XXIIII v. Advanced Textile Corp.*, the court found that the district court abused its discretion when it denied Chinese employees the ability to proceed anonymously. The employees, on appeal, argued that if their identities were revealed, they could lose their jobs, be deported, be burdened with debts, and be imprisoned in China.[167] The Court of Appeals found that the threatened harms to the Chinese workers were reasonable given evidence of collaboration between labor contracting agencies and the Chinese

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[159] EEOC v. ABM Indus. Inc., 249 F.R.D. 588, 593 (E.D. Cal. 2008).

[160] *Id.* at 594.

[161] 599 F.2d 707 (5th Cir. 1979).

[162] *See id.* at 713.

[163] 119 F.R.D. 640, 644 (S.D. Miss 1987) (noting also that, because the defendants were publicly named in the complaint, they had been exposed to reputational harm and embarrassment and that fairness dictated revelation of the plaintiff's identity as well).

[164] *See id.* ("Rather, the source of any harassment apparently is already aware of plaintiff's identity, and there is little reason to believe that disclosure of her identity in this lawsuit would serve to increase the number of such incidents.").

[165] 653 F.2d 180, 183 (5th Cir. 1981). *Stegall* also involved privacy issues concerning the Does' religious beliefs, *see supra* note 139, and documentation of the physical threats to the plaintiffs in a local newspaper. *Stegall*, 653 F.2 at 183.

[166] Does I thru XXIIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000) (citations omitted).

[167] *Id.* at 1071.

government.[168] In addition, the court found that the employers would suffer no prejudice from the plaintiff's anonymity and that permitting use of pseudonyms would serve the public interest by allowing the suit to go forward, perhaps helping future plaintiffs.[169]

The Court of Appeals distinguished *Advanced Textile Corp.* from *Southern Methodist University Ass'n of Women Law Students* by stating that while "threats of termination and blacklisting are perhaps typical methods by which employers retaliate against employees who assert their legal rights, the consequences of this ordinary retaliation to plaintiffs are extraordinary."[170] In addition, the court made it clear, that where there are threats of extraordinary retribution such as deportation, arrest, and imprisonment, plaintiffs do not need to prove threat of physical harm.[171]

In addition to the three-factored test articulated by the Ninth Circuit in *Advanced Textile Corp.*, it held ten years later in *Doe v. Kamehameha Schools*[172] that consideration of a party's request to proceed anonymously must additionally include the threat of prejudice to the opposing party and the public interest in freely available information.[173] The addition of these factors reveals attention to interests beyond solely those of the plaintiff seeking anonymity.[174]

B. Social Science Research

While the approach to anonymity in litigation provides the beginnings of a framework for evaluating claims of retaliatory disclosure, the reasonable employee standard announced in *White* requires us to seek additional guidance for implementing it. The goal is to fashion a standard that allows courts to separate disclosure that, although uncomfortable, is not an adverse action from disclosure that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[175] What courts determine a reasonable worker should withstand and what actually would dissuade a reasonable worker ought to have some basis in reality. Fortunately, a substantial body of social science research has begun to provide insight into how employees react to conflict and discrimination in the workplace. In this section, we summarize some findings of this literature, which helps to develop the retaliatory disclosure framework we propose in the next part.

Three important themes emerge from the social science literature.[176] They inform our inquiry and guide the development of the framework we describe in the next part. We elaborate on each in turn.

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[168] *Id.*

[169] *Id.* at 1072.

[170] *Id.* at 1071.

[171] *Id.*

[172] 596 F.3d 1036 (9th Cir. 2010).

[173] *Id.* at 1042.

[174] See *infra* Part V for how we propose these interests can be incorporated into our retaliatory disclosure framework.

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

[176] Professor Deborah L. Brake, in her seminal article on the promise and failures of the retaliation claim, first explicated the three themes. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 15-42 (2005). For our discussion, we have reordered and expanded upon them with additional and updated research, as well as adapting

1. Whistleblowers'[177] Perceptions and the Reality of Reprisal

First, the threat of reprisal for reporting wrongful acts creates a disincentive for victims to report them.[178] This is true regardless of whether reprisals are carried out in fact. Studies support the common sense notion that would-be whistleblowers engage in a cost-benefit analysis when deciding whether to report wrongdoing.[179] Those who report conclude that the potential benefits of doing so outweigh the potential costs. Those who remain silent come to the opposite conclusion.[180] Thus, when an employee is confronted with the decision to report discrimination or file a charge, the analysis depends on *expected* chances of reprisal. Perceptions of the likelihood of retribution are just as important as the reality, if not more so.[181] Those perceptions can include fears of not being believed; of reprisals like "reprimands, punitive transfers, threats, demotion, and dismissal";[182] of embarrassment or humiliation; of slander and harassment; of

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them for the specific context of retaliatory disclosure. Nonetheless, Professor Brake's excellent discussion served as a guide for our exploration of the social science literature.

[177] For purposes of clarity and ease of reading, in this section we will refer to those who report the bad behavior of others, including employees who file charges of discrimination with the EEOC, as "whistleblowers." The definition of *whistleblower* in the social science literature is broader than how it is sometimes used in the law. Most of the social science literature considers individuals who report wrongdoing for the purpose of creating organizational change to be whistleblowers, even if that reporting is nonpublic and even if the organizational change sought is solely for the whistleblower's personal gain (rather than for the benefit of the general public). *See, e.g.*, Michael T. Rehg et al., *supra* note 156, at 222 ("Following earlier research, we define whistle-blowing as 'the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.'" (quoting Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-blowing*, 4 J. BUS. ETHICS 1, 4 (1985))). *See generally* MARCIA P. MICELI ET AL., WHISTLE-BLOWING IN ORGANIZATIONS (2008) (providing a comprehensive overview of whistle-blowing literature). Laws addressing whistle-blowing sometimes give the impression that whistleblowers are more narrowly constituted of those who publicly disclose wrongdoing for the benefit of the general public. *See, e.g.*, Whistleblower Protection Act of 1989, 5 U.S.C. § 2302 (2006); False Claims Act, 31 U.S.C. §§ 3729-3733 (2006).

[178] *But see* Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1772 (2007) (arguing that "fear of retaliation is not dominant in preventing observers of wrongdoing from coming forward"). We do not argue that the threat of reprisal *always* stops a whistleblower, but rather than it can. Subsequent research supports the notion that, although threats of reprisal against a particular individual whistleblower tend not to deter that whistleblower from continuing with her complaint, but they are more likely to deter subsequent potential whistleblowers. *See* Rehg et al., *supra* note 156, at 235-36.

[179] *See, e.g.*, Mark Keil et al., *Toward a Theory of Whistleblowing Intentions: A Benefit-to-Cost Differential Perspective*, 41 DECISION SCI. 787, 789, 804 (2010) (presenting a study of 159 information technology project managers who were presented with multiple scenarios testing their whistleblowing intention and finding that would-be whistleblowers' calculation of the "benefit-to-cost differential" plays the "crucial mediating role" linking drivers of whistleblowing to whistleblowing intentions); *cf.* MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 4-15 (1992) (engaging in a cost-benefit analysis of the entire whistleblowing enterprise).

[180] *See* Paul Harvey et al., *Causal Perception and the Decision to Speak Up or Pipe Down*, *in* VOICE AND SILENCE IN ORGANIZATIONS 64, 74 (Jerald Greenberg & Marissa S. Edwards, eds. 2009) ("The likelihood of speaking up also is likely to be affected by the extent to which observers expect to receive tangible punishments or rewards for reporting deviant behavior." (citation omitted)).

[181] *See* Rehg et al., *supra* note 156, at 236.

[182] Keil et al., *supra* note 179, at 788.

social isolation; and of being labeled a trouble-maker.[183] These perceptions, though, are not wholly subjective or abstract. They are informed by a number of contextual factors that affect calculations that those fears will be realized.

The contextual factors are largely based on the characteristics of the institution, the wrongdoer, and the whistleblower herself. Institutional organization and structure have a strong influence on would-be whistleblowers' perceptions of the likelihood of reprisal and the actual likelihood of reprisal. For instance, if an individual perceives that previous whistleblowers in her organization have experienced reprisal, then she will be less likely to blow the whistle.[184] Conversely, employees will be more likely to report wrongdoing in organizations that have policies and procedures that create the impression that a whistleblower will be taken seriously and assisted.[185] Otherwise, if an employee perceives her organization tolerates—or, worse, relies on—wrongdoing, she likely will not complain.[186] Moreover, institutions that are perceived to be hierarchical and authoritarian in structure create power dynamics that can more readily inhibit employees from blowing the whistle.[187] As discussed in the next two paragraphs, power dynamics between the victim and the perpetrator affect whether wrongdoing is reported. The structure of an organization can create or exacerbate such power differentials.

In addition to institutional characteristics, the individual characteristics of the would-be whistleblower can affect both his perception of the chances for negative response to reporting and the reality that reprisal will occur if wrongdoing is reported. Those who have lower power within an organization are particularly vulnerable in this regard.[188] That low power can result from several characteristics, including individuals from traditionally marginalized groups.[189] Moreover, isolation can lead to low power, especially isolation from institutional powerbrokers.[190] Individuals who fit more than one of these characteristics are particularly

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[183] *See* Elizabeth H. Dodd et al., *Respected or Rejected: Perceptions of Women Who Confront Sexist Remarks*, 45 SEX ROLES 567, 569 (2001); Keil et al., *supra* note 179, at 788.

[184] As noted *supra* note 178, there is evidence that the fear of reprisal against a whistleblower is not a significant source of deterrence for that whistleblower. *See, e.g.*, Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 J. MGMT. 507, 523 (1996). Nevertheless, more recent research supports the proposition that a perception that prior whistleblowers were subject to reprisal by the organization can deter subsequent would-be whistleblowers. Rehg et al., *supra* note 156, at 235-36 ("In the long term, then, retaliation may deter other potential whistleblowers . . . .").

[185] Harvey et al., *supra* note 180, at 73-74.

[186] *Cf.* MICELI ET AL., *supra* note 177, at 148-150 (explaining that resource dependence theory creates an organizational incentive to give greater power and deference to those who provide important resources, even if that involves wrongdoing, and will marginalize those who challenge that dependence).

[187] MICELI & NEAR, *supra* note 179, at 157 ("Organizations that are more hierarchial [sic], bureaucratic, or authoritarian may be less open to whistle-blowing challenges."); Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 712 (1997).

[188] *See* Rehg et al., *supra* note 156, at 224 ("Power and status generally are inversely related to retaliation.").

[189] *See id.* (explaining how status characteristic theory posits that status leads to influence and power and that "status within the workplace is somewhat influenced by status outside the workplace," particularly noting that gender affects status outside the workplace).

[190] *See* MICELI ET AL., *supra* note 177, at 103 ("All other factors being equal, . . . whistle-blowers with little power can be ignored or retaliated against more easily and with fewer negative consequences to the organization, than can those who hold high-level positions or have special expertise that is needed and hard to replace, who are well respected for their experience and competence."); Knapp et al., *supra* note 187, at 694; *cf.* Janet P. Near & Tamila C.

likely to be subjected to reprisal and, thus, particularly likely to be silenced by the fear of reprisal.[191] Take for instance, a black woman who is employed as the only female machine mechanic in a team of ten mechanics at a remote mining operation. She belongs to two demographic groups that have traditionally enjoyed lower institutional power status: African Americans and women. She is also a pioneer; there are no other women mechanics.[192] So she is isolated demographically; however, she is also isolated geographically and relationally from the organization's powerbrokers, who presumably reside in a less remote area and work at the corporate headquarters. She is extraordinarily vulnerable to reprisal and, thus, much more likely to remain silent. By contrast, supervisors tend to have more power to assist with their attempts to blow the whistle.[193] Nevertheless, studies suggest that the elevation of supervisory status can be negatively overcome by other characteristics that create a power deficit (for example, being a woman or minority).[194]

The relative power between the victim and the perpetrator is also a contextual characteristic that affects both the perception and the reality of reprisal.[195] The more powerful the perpetrator is within the organization, the less likely the organization is to address the subject of the complaint or any reprisal that follows reporting the perpetrator's wrongdoing, especially if the victim enjoys little institutional power.[196] By contrast, the smaller the power differential between the perpetrator and the victim, the more likely it is to be remedied without threat of or actual reprisal.[197] Recent research reveals that power is often situational and particularistic, such that the power of the perpetrator or the victim may vary with the leverage they bring to the situation.[198] For instance, a victim with low indicators of general power in an organization might

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Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 23 (1983) (finding that the "comprehensiveness of retaliation" as perceived by whistleblowers was greatest when the whistleblower likewise perceived a lack of support from top management).

[191] For instance, women who are "gender pioneers" in their particular positions or organizations are more likely to suffer marginalization, reprisal, and silencing. *See* MICELI ET AL., *supra* note 177, at 108; Lilia M. Cortina et al., *What's Gender Got To Do with It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235 (2002) (reporting on a study that showed female attorneys experienced more interpersonal mistreatment than their male counterparts); Knapp et al., *supra* note 187, at 704 (discussing the plight of gender pioneers in terms of organizational support).

[192] *See* Rehg et al., *supra* note 156, at 224 (noting that trailblazers likely invite greater scrutiny to see if they "measure up" and are allowed little leeway when they deviate from authority or role expectations).

[193] *Id.*

[194] *See id.* at 235 ("[F]emale whistleblowers received the same treatment regardless of the amount of organizational power they held: Their status as women overrode their status as powerful or powerless organization members.")

[195] *Cf.* Karl Aquino, *How Employees Respond to Personal Offense: The Effects of Blame, Attribution, Victim Status and Gender Status on Revenge and Reconciliation in the Workplace*, 86 J. APPLIED PSYCHOL. 52 (2001) (finding that relative power differential between perpetrator and victim was predictive of revenge); Sung Hee Kim et al., *Effects of Power Imbalance and the Presence of Third Parties on Reactions to Harm: Upward and Downward Revenge*, 24 PERSONALITY SOC. PSYCHOL. BULL 353 (1998) (same). Revenge is a broader term than retaliation in the social science literature. Retaliation may be motivated by hoped-for revenge, but it does not have to be.

[196] *See* Rehg et al., *supra* note 156, 226.

[197] *See* Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230, 239 (2002).

[198] *See* Miceli et al., *Predicting Employee Reactions to Perceived Organizational Wrongdoing: Demoralization, Justice, Proactive Personality, and Whistle-Blowing*, 65 HUMAN REL. 923, 944 (2012) (detailing the first known study to support the proposition that leverage is predictive of whistleblowing).

enjoy greater power if the alleged wrongdoing is associated with her particular area of expertise or when the threat to her also threatens something of particular importance to the organization[199] (for example, if she is an integral part of a team that is assigned to an important project with an impending deadline).

2. Whistleblowers' Challenge to Existing Social Hierarchies

It may or may not be true as a general matter that people often do not like complainers. More likely, people do not like complainers whose complaints challenge the dominant social order. Or more specifically, people who are the beneficiaries of the dominant social order really do not like complainers whose complaints challenge that order.[200] Thus, when whistleblowers are in a position to present complaints that challenge the social order, they are stigmatized, isolated, and otherwise subject to reprisals.[201] This dynamic is especially harsh when it is combined with the tyranny of the majority. When a whistleblower confronts privilege and that privilege is widely shared by a dominant group, the group dynamics magnify the possibility and perception of cost to the whistleblower.[202]

Studies have shown that, for instance, men and white people react negatively to women and people of color when they complain about unfair treatment.[203] Remarkably, that is true even when the complainant has strong evidence to support his or her claim—and even when evaluators are presented with that evidence and "believe" it.[204] Moreover, in a study in which negative race-related comments were confronted alternately by White and Black subjects, the authors found that the White observers of the confrontation rated the White confronter as more persuasive and the negative comment as more biased than the same action by the Black confronter, who was rated as more rude and whose confrontation led to a greater level of observer agreement with the original negative comment.[205] The implication is that the very fact

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[199] *See id.*

[200] *See* Faye J. Crosby, *Why Complain?*, J. SOC. ISSUES, Spring 1993, at 169, 170-71 (describing social norms that value suffering in silence and view complainers negatively); Robin E. Roy et al., *If She's a Feminist It Must Not Be Discrimination: The Power of the Feminist Label on Observers' Attributions About a Sexist Event*, 60 SEX ROLES 422, 423 (2009) ("Several studies indicate that observers have negative reactions toward people who indicate they have been discriminated against or who call attention to prejudice.").

[201] This tendency, as it relates to women, is explained in part by social role theory, which "predicts that gender-based societal division of labor reduces the influence of women in work groups, regardless of their status, and that women who violate gender expectations will be sanctioned." MICELI ET AL., *supra* note 177, at 108.

[202] *See* Rehg et al., *supra* note 156, at 228 (theorizing that women are more concerned about being labeled as a "troublemaker" as a result of whistleblowing and, thus, will try to avoid the imposition of that label).

[203] For studies exemplifying this tendency, see Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254 (2001); Heather M. Rasinski & Alexander M. Czopp, *The Effect of Target Status on Witnesses' Reactions to Confrontations of Bias*, 32 BASIC & APPLIED SOC. PSYCHOL. 8 (2010). *Accord* MICELI ET AL., *supra* note 177, at 106 (explicating a model of predictors and outcomes of retaliation in which reprisal is expected to be more comprehensive when the whistleblower is a member of a minority group).

[204] *See* Kaiser & Miller, *supra* note 203.

[205] *See* Rasinski & Czopp, *supra note* 203.

of being a target of biased treatment will result in negative reactions to one who confronts them.[206]

In one study where subjects observed women who confronted sexist remarks (some blatant, some more nuanced), the results showed that men reacted *most* negatively to the women who confronted the blatant sexist remarks. They were less harsh on the women who objected to the more ambiguous remarks. The authors attributed this to a social penalty that privileged groups impose on role transgressors from marginalized groups. The social penalty is intended to maintain the dominant social order. The greater challenge to the social order came from the confrontation of the more direct expression of it (i.e., the blatant sexist comment). Thus, it merited the greater opprobrium from the dominant group.[207]

Yet there is some hope for those who blow the whistle in that the research suggests that they may be able to seek out powerbrokers who share their demographic characteristics without suffering the same strong negative reactions. Notably, women observers in the Dodd et al. study involving sexist remarks did not share this negative reaction. In fact, they reacted more positively to those who confronted the blatant sexism than those who did not.[208] In general, the identity and demographic characteristics of the complaint recipient are important variables in the calculus of the whistleblower.[209] Though transgressors have reason to fear reprisal from the dominant group, they may expect some greater level of support and encouragement from their compatriots.[210] This is further borne out by studies that find whistle blowing more likely when whistleblowers can make private reports, especially when they can do so anonymously or to a complaint recipient who shares the salient characteristic that underlies the whistleblowers' complaint.[211]

3. People's Reluctance to Be Whistleblowers

The foregoing analysis of the social science related to whistle blowing and retaliation is built on a foundation that people fundamentally (and often unconsciously) avoid viewing themselves as victims. Thus, people of all types are reluctant to acknowledge and report discrimination of any kind. Part of that reluctance comes from the strong tendency we all have to internalize the reasons for our bad outcomes.[212] Study subjects who failed tests, for example, were more likely

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[206] *Id.* at 9 ("People label targets as complainers when they claim that they have been the victim of discrimination.").

[207] Dodd et al., *supra* note 183 (describing study and findings); *see also* Alexander M. Czopp & Margo J. Monteith, *Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCH. BULL. 532 (2003) (documenting similar results from a study of confronting sexist comments).

[208] *See* Dodd et al., *supra* note 183, at 574-75.

[209] Indeed the support of middle managers (or lack thereof) is a significant predictor of the likelihood of reprisal. *See* Rehg et al., *supra* note 156, at 224, 226.

[210] *But see* Rasinski & Czopp, *supra note* 203, at 9 (citing Donna M. Garcia et al., *Perceivers' Responses to In-Group and Out-Group Members Who Blame a Negative Outcome on Discrimination*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 769 (2005)) ("Furthermore, even fellow target group members may label confronters as complainers, perhaps in an attempt to maintain their groups positive image.").

[211] *See, e.g.*, Charles Stangor et al., *Reporting Discrimination in Public and Private Contexts*, 82 PERSONALITY & SOC. PSYCHOL. BULL. 69, 73 (2002). For a more comprehensive discussion of this point, see Brake, *supra* note 176, at 35 & n.51.

[212] *See, e.g.*, Brenda Major & Cheryl Kaiser, *Perceiving and Claiming Discrimination*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 285, 286-88 (Laura Beth Nielsen & Robert Nelson, eds. 2005)

to explain that failure by their own shortcomings than by any external factor, even when faced with evidence of bias by the test administrator, unless that evidence was unambiguous.[213] This effect was once again multiplied when the dominant social hierarchy places the victim in a subordinate position to the wrongdoer. When the discriminatory conduct of the wrongdoer is focused on a marginalized population in a given circumstance, say minority racial or religious groups or women, the tendency for internalization has consistently proven strong.[214] Thus, the very act of protesting wrongdoing already is foreign to most of us. Just making the decision to blow the whistle, divorced from any perception or reality of reprisal, requires a significant departure from our typical way of viewing the world. Psychologically we are hampered by the "just world" hypothesis, which leads us to view the world as a place where we control our destinies and our merit or lack thereof determines our success.[215] So, we distort our impressions of situations to blame ourselves, rather than others.[216] And, then, even when we do recognize the wrongfulness of an action such as discriminatory treatment, we are less likely to report it than we might otherwise expect we are. People who have been subject to discriminatory behavior often employ coping strategies rather than confront the behavior.[217]

Because we are reluctant to perceive ourselves as victims, and reluctant to report that victimization even if we do perceive it, the threat of reprisal of any kind is particularly troubling.

(discussing minimization of personal discrimination as one view of why "members of disadvantaged groups typically miss, underestimate, or deny the extent to which they are personally targets of prejudice"); Karen M. Ruggiero & Donald M. Taylor, *Why Minority Group Members Perceive or Do Not Perceive the Discrimination That Confronts Them: The Role of Self-Esteem and Perceived Control*, 72 J. PERSONALITY & SOC. PSYCH. 373, 373-74 (1997) (same, despite their recognition of group-based discrimination).

[213] *See* Ruggiero & Taylor, *supra* note 212, at 374.

[214] *See id.*

[215] The just world hypothesis was first introduced by Melvin J. Lerner. He explained that people have an inherent, psychological desire to believe that the world is just and that, as a result, everyone gets their just deserts and deserve whatever they get. *See* Melvin J. Lerner, *The Justice Motive: Some Hypotheses as to Its Origins and Forms*, 45 J. PERSONALITY 1, 1-2 (1977). Thus, when confronted with an injustice visited upon an undeserving victim, observers will resort to cognitive reevaluation of situation to realign it with the underlying belief in justice. The cognitive process through which this occurs is called "assimilation of injustice." Claudia Dalbert, *Belief in a Just World*, *in* HANDBOOK OF INDIVIDUAL DIFFERENCES IN SOCIAL BEHAVIOR 288, 289 (Mark R. Leary & Rick H. Hoyle, eds. 2009). This can manifest itself by the observer demonizing the victim. *See* Carolyn L. Hafer & Larent Bègue, *Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges*, 131 PSYCHOL. BULL. 128, 128 (2005); Melvin J. Lerner & Carolyn H. Simmons, *Observer's Reaction to the "Innocent Victim": Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966) (finding that study subjects devalued victim when they believed that victim would continue to suffer and they could not alleviate that suffering through compensation). A strong belief in a just world has also been shown to lead to lower perceptions of personal discrimination. *See* Isaac M. Lipkus & Ilene C. Siegler, *The Belief in a Just World and Perceptions of Discrimination*, 127 J. PSYCHOL.: INTERDISCIPLINARY & APPLIED 465 (1993) (finding a relationship between the belief in a just world and lower perceptions of personal sex, age, and religious discrimination).

[216] Faye Crosby, *The Denial of Personal Discrimiation*, 27 AM. BEHAV. SCIENTIST 371, 377-78 (1984).

[217] *See, e.g.*, Carolyn L. Hafer & Leanne Gosse, *Predicting Alternative Strategies for Preserving Belief in a Just World: The Case of Repressive Coping Style*, 41 EUR. J. SOC. PSYCHOL. 730 (2011); Tawanda M. Greer, *Coping Strategies as Moderators of the Relationship Bewteen Race- and Gender-Based Discrimination and Psychological Symptoms for African American Women*, 37 J. BLACK PSYCHOL. 42 (2011); Janet K. Swim & Lauri L. Hyers, *"Excuse me—What Did You Just Say?!": Women's Public and Private Responses to Sexist Remarks*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 68, 85 (1999) (finding that coping strategies result in confrontation of sexist remarks at a rate much lower than subjects predict they will).

Placing extra costs on identifying and reporting bad behavior is likely to magnify the fundamental tendency we all have to explain away bad behavior of others as more likely due to our own failures. Our inherent psychological makeup in this regard leads us to inaccurately evaluate the cost-benefit analysis discussed at the beginning of this section.[218] Thus, courts should be very careful not to use the *White* reasonable employee standard to undervalue the influence and effect of the perceived likelihood of reprisal. Those behaviors that "could well dissuade a reasonable worker from making or supporting a charge of discrimination"[219] are likely broader than courts have thus far been willing to accept.

IV. A FRAMEWORK FOR IDENTIFYING RETALIATORY DISCLOSURE

Based on the Supreme Court's guidance in *White* and the lower courts' interpretation of that decision, supplemented significantly by the two sources of guidance in Part III, we have developed the following framework that courts should utilize when determining if the employer's disclosure of an complaining employee's identity can be the basis of a valid retaliation claim. Though some disclosure of a complainant's identity is inevitable and even desirable, as explained above, some types of broad disclosure surely are prompted by a retaliatory motive and have the likelihood of dissuading a reasonable employee from making such a claim. Complaining employees should have some expectation that they are not engaging in a wholly private process; however, some publications of a complaining employee's identity and the details of the charge should be discouraged, because they will interfere with the remedial purpose of Title VII. In other words, such disclosures are prototypical materially adverse actions for which employers should face potential liability.

The framework we propose—like the doctrine it navigates—will not lead to easy, bright-line rulings. Instead, it provides a conceptual structure from which courts, litigants, and employers facing discrimination complaints may draw the salient considerations and balance them based on the totality of the circumstances in order to aid in the determination of whether a disclosure is truly retaliatory (i.e., whether it "could well dissuade a reasonable worker from making or supporting a charge of discrimination"[220]).

We are initially guided by the approach the federal courts take to determining whether to allow a litigant to proceed anonymously. The two relevant considerations the courts use are concerns of privacy and fear of reprisal. We, likewise, identify two possible ways that disclosure might be retaliatory. Specifically, we suggest that disclosures of complaining employees' identities might be retaliatory based on (1) the primary effect of the disclosure itself or (2) the potential for secondary retaliatory actions that the disclosure makes more likely. Put another way, on one hand, a reasonable employee might be dissuaded from making a charge of discrimination simply because wide publication of the details of the charge would subject the employee to severe embarrassment or humiliation or other invasion of privacy. We call this "primary retaliatory disclosure."[221] On the other hand, even if the details of the charge are not so

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[218] *See supra* Part III.B.1.

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

[220] *Id.*

[221] We note that primary retaliatory disclosure may have some overlap—but is not by necessity synonymous—with the theory behind the so-called "per se" retaliatory conduct that the plaintiffs argued for and the court rejected in

salacious or potentially embarrassing to cause an employee to fear disclosure as a matter of general privacy or reputation, the disclosure of the charge details may sufficiently increase the likelihood of reprisal from those who learn about it such that the threat of those secondary effects would dissuade a reasonable employee from making a charge. We call this "secondary retaliatory disclosure."

A. Primary Retaliatory Disclosure

Though we expect such circumstances to be less frequent, primary retaliatory disclosure could be based on privacy concerns, much like anonymity in federal courts. For example, an employee who is a minor and who was subjected to severe sexual harassment might be dissuaded from making a charge if she thought the details of the harassment would be widely publicized to her coworkers or her community or her parents. Similarly, though outside the Title VII context, an employee with a disability might have a primary interest in avoiding wide dissemination of the details of his or her disability discrimination charge, which might compromise confidential medical information. While we do not presume to provide the exact contours of all the various situations under which a concern of primary retaliatory disclosure might arise, courts would be well-served to consult analogous cases addressing requests for anonymity in litigation. If, for example, a court would be likely to grant the charging party a request for anonymity if the charge proceeds to court, then the charging party ought to enjoy the same right to protection from publication and disclosure of her identity during the charge and investigation phase of the case. Moreover, in the litigation context the clear default legal standard is one of transparency, which has a strong normative underpinning as part of our long-standing civil processes. That contrasts to the legally ambiguous quasi-public nature of the charge process, which is animated more by practical than normative concerns. Thus, a charging party ought to sometimes enjoy protection from retaliatory disclosure even when she would not be allowed to proceed anonymously should the charge result in a federal court case.

Applying this part of the framework to the Belmont Abbey case that introduced this paper, the charging parties would be unlikely to prevail on retaliation claim based on primary retaliatory disclosure. Though the courts have granted litigants the right to proceed anonymously in litigation involving sensitive issues of religion and religious belief, those cases seem to be more motivated by the concerns we associate with secondary primary disclosure than with the humiliation, embarrassment, or invasion of privacy that marks the other classes of cases involving sexuality, sexual orientation, sexual assault, and the like. The anonymous litigants in the religion cases were often minors and were objecting to practices and beliefs that many in their communities held dear.[222] Thus, they were more akin to the role transgressors described below. There's nothing particularly worrisome in this regard about the details of the Belmont Abbey charge.[223]

Franklin v. Local 2 of the Sheet Metal Workers International Ass'n, 565 F.3d 508, 520-21 (8th Cir. 2008). *See supra* notes 128-129 and accompanying text.

[222] *See supra* Part III.A.1.i.

[223] Arguably, an implication of the charge might be that the charging parties were using birth control and family planning services that were no longer covered under the Belmont Abbey insurance plan. Certainly, there is a privacy interest in such decisions and practices, *see generally* Griswold v. Connecticut, 381 U.S. 479 (1985) (finding a right to privacy in the U.S. Constitution, which protected a married couple's right to use contraceptives), but it is

B. Secondary Retaliatory Disclosure

As discussed above, federal courts also consider the possibility that a party will be subjected to retaliation or reprisal for his or her involvement in the litigation when determining if the party should be allowed to proceed anonymously.[224] This is a concern animated not by the primary effect of the disclosure itself, but that others will learn about the litigation and then take action of their own volition against the party as a result of that knowledge. The same concern is active here. As the social science literature revealed, whistleblowers are affected by their perception of the likelihood of reprisal.[225] The concern is that others will learn about their complaint and cause them harm as a result. The more likely that is, the less likely it is the employee will blow the whistle on the wrongful behavior. Under some circumstances, an employer's disclosure of the identity of a charging party employee increases the perceived or actual likelihood of reprisal from those who learn about the charge such that a reasonable employee faced with that threat of disclosure would forgo the opportunity to file the charge. The secondary effect—what others do with the information the disclosure provides—is the threat. Drawing the line between disclosures that are secondarily retaliatory and those that are not should involve a more detailed inquiry, balancing numerous factors that influence the likelihood of reprisal and the behavior of would-be whistleblowers.

Courts confronted with determining whether a disclosure of the charging party's identity was retaliatory should thus consider the effect that disclosure might reasonably have or might be perceived to cause. As a starting point, the Ninth Circuit's approach to determining when the threat of retaliation warrants anonymity is useful. That standard involves three factors: "(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation."[226] We adapt these three factors and add an additional one that is uniquely implicated by disclosures of charging party identity: the character or tone of the disclosure itself. We discuss how these factors should be employed in evaluating a claim of retaliatory disclosure, using the social science research detailed in Part III.B to supplement and expand.

1. Severity of Possible Reprisal

The severity of threatened or perceived harm that flows from a disclosure will affect how likely a disclosure would be to dissuade a reasonable employee from making a charge in the first place. Easy cases involve those where a specific threat of physical violence has been made against a previously anonymous charging party.[227] Certainly a disclosure looks more retaliatory if an

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unlikely that the interest should outweigh what we consider to be the default rule that charging parties have no general right to expect their employers to keep their identities confidential.

[224] *See supra* Part III.A.

[225] *See supra* Part III.B.1.

[226] Does I thru XXIIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000) (citations omitted).

[227] One could envision, for instance, a situation in which an employee files a charge of discrimination based on harassment by a coworker who, when confronted with the allegation, threatened to hurt or kill whoever filed the complaint. Disclosure of the identity of the complainant in such a situation raises the specter of severe harm. Though less arresting than this hypothetical example, the experience of the nurse-plaintiff in *Dunn v. Washington*

employee has reason to fear physical violence, assault, or intimidation should the details of the charge be disclosed. The *Advanced Textile* court, discussed previously, reasoned that this sort of extraordinary reprisal activity—which in that case included the possibility of prosecution and deportation—suggested anonymity was warranted.[228] If the charge of discrimination claims systemic racial or sexual harassment, for instance, disclosure would give the perpetrators a clear target for intimidation and violence. In contrast, some disclosure might upset a coworker or two, but realistically subject the charging party only to fairly benign social ostracism or isolated comments of disapproval. The latter would suggest the disclosure was not materially adverse. In between those two extremes, courts should consider issues suggested by the social science literature. For example, reactions tend to be stronger when a marginalized individual challenges the dominant social hierarchy directly.[229] Thus, the more directly the charge of discrimination challenges powerful or entrenched interests in the workplace or its surrounding community, the more the reaction to it is likely to be extreme, particularly if the charge threatens to disrupt an established social hierarchy. Likewise, the severity of the possible reprisal increases as the charging party challenges the interests of a dominant group qua group. In such situations, the risk of groupthink influencing and escalating collective retaliatory activities is real. In contrast, a conflict that is uniquely situated between two coworkers or a supervisor and coworker is less likely to lead to severe reprisal (absent special characteristics of the perpetrator, such as mental illness or a history of violence).

Obviously, whether a reasonable employee would be dissuaded from filing a charge based on these threats of reprisal should be influenced by how dangerous or severe the perceived threat is. But, even nonviolent, social threats might dissuade a reasonable employee from filing a charge the more likely they are to occur. In this way, courts confronting retaliatory disclosure claims would be well-served to call upon their experience with sexual harassment claims. Though a certain level severity of harassing behavior is required for a claim to survive, less severe forms of harassment can form the basis of the claim the more pervasive they are.[230] By analogy, the same holds true for cases of retaliatory disclosure. The more likely a reprisal of any kind, the more likely it is to dissuade an employee from proceeding with a charge. Thus, we proceed to discuss the considerations courts should use to determine that likelihood.

2. Likelihood of Reprisal

In determining the likelihood of the threatened or feared reprisal and, as a result, the "reasonableness of the [charging party's] fears,"[231] the social science research discussed above

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County Hospital, 429 F.3d 689 (7th Cir. 2005), supports the claim as well. There, the nurse's complaint was brought to the attention of the allegedly offending doctor who warned her that "[p]aybacks are hell." *Id.*

[228] *Advanced Textile Corp.*, 214 F.3d at 1071; *see also supra* text accompanying notes 166-171 (discussing the case).

[229] *See supra* Part III.B.2

[230] *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (noting that severity and pervasiveness are inversely related in making determinations on sexual harassment claims). *See generally* Laura D. Francis, Note, *What Part of "Hostile Environment" Don't you Understand? The Need for an Entire-Environment Approach in Sexual Harassment Cases*, 72 GEO. WASH. L. REV. 815 (2004) (advocating that courts remember this formula in making determinations about the "entire" environment in sexual harassment claims).

[231] *Advanced Textile Corp.*, 214 F.3d at 1068

provides a framework for this analysis. Courts should look to characteristics of the organization, the perpetrator, and the complainant to determine this.

Organizational characteristics point to the likelihood of reprisal or at least the reasonableness of a charging party's perception of that likelihood. Courts should consider the history, organizational structure, and homogeneity of the organization in evaluating retaliatory disclosure claims. Institutions with a history of retaliatory action or with a history of undermining the interests and efforts of whistleblowers are more likely to encourage or allow reprisals. Thus, charging parties who are employed by such institutions are justified in their fears, and courts should not easily dismiss the possibility that a disclosure from such an organization has a retaliatory motive. This makes prior charges of discrimination and claims of retaliation relevant to the retaliatory disclosure claim.[232] In addition, hierarchical organizations marked by authoritarian leadership structures increase the threat of disclosure, because such organizations are more likely to retaliate or tolerate retaliatory actions by coworkers. This is especially true if the charging party has challenged the hierarchy or a higher authority. Finally, homogeneous organizations are more likely to retaliate against an outlier, especially if the outlier challenges the orthodoxy shared by the rest of the members of the organization. For instance, the charging parties in the Belmont Abbey case challenged the orthodoxy of the shared beliefs of the religious college, which made them major transgressors and the potential targets of a unified group.

The characteristics of the perpetrator should also be a consideration. To the extent the perpetrator is a powerful individual in the organization, the victim is less likely to be protected from reprisal and the disclosure more likely can be manipulated by the powerful perpetrator to discourage and intimidate the complainant. *Dunn v. Washington County Hospital* provides an illustrative example.[233] There, the nurse who complained about the allegedly harassing behavior of the independent contractor physician with whom she worked was clearly at a power deficient both in social and organizational status as compared to the physician. The disclosure of her identity to the physician, coupled with his reaction, would reasonably be chilling to the nurse's or any subsequent victim's resolve.

Related to that, the characteristics of the complainant affect the likelihood of reprisal. The lower the power status of the complaining employee, the more likely he is to be subject to reprisal, especially if he is isolated from the organization's powerbrokers. When the complainant is a member of an out group or otherwise a demographic outlier, this effect is exacerbated. When the employee is a pioneer (i.e., the "first" or "only" of his or her type working at a location or in a job), the reasonableness of the fear of reprisal is stronger.

3. Vulnerability of Employee

The characteristics of the employee not only affect how likely reprisal is, but also affect how vulnerable to that reprisal he or she may be. The federal courts consider this in determining whether to allow a party to proceed anonymously. Children, for instance, are more vulnerable,[234] as are victims of sexual assault. In this context, pioneers are not only more likely to be subject to

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[232] *See* Rehg et al., *supra* note 156, at 223-36.

[233] *See supra* text accompanying notes 93-98 (describing the case).

[234] *See, e.g.*, *supra* Part III.A.1.i (discussing the vulnerability of children in the context of courts' decisions to let litigants proceed anonymously).

reprisal, but are more likely to be vulnerable to its effects. They generally lack a support structure and are isolated from the power structure of the organization. Individuals, like the Belmont Abbey employees, who reject the prevailing beliefs or attitudes of an otherwise unified workforce likewise are vulnerable.

The relative power of the employee in the organization (particularly in relation to the perpetrator) may make the employee more vulnerable. That is especially the case if coworkers and others have reason to rally around the perpetrator, either out of blind allegiance or out of the possibility to garner favor with a powerful individual. Charging parties who lack power on multiple of these dimensions are the most vulnerable and are most likely dissuaded by the threat of disclosure.

4. Form and Tone of Disclosure

Though closely related to some of the foregoing, we recommend that courts should also evaluate the form and tone of the disclosure. As described in Part I.B, courts have considered this previously.[235] When a disclosure goes to the entire organization, from a highly powerful official, describing and objecting to the charge and identifying the charging parties specifically by name, as happened in Belmont Abbey, the thumb should be on the scale of finding the disclosure materially adverse. Contrast that to situations of disclosure of the details of the charge without specifically identifying the charging party[236] or inadvertent (or at least noncalculated) oral disclosures of the charging party's identity. As the retaliatory motive of the employer becomes clearer based on the form and tone of the disclosure, the burden on the employee should lighten to prove the likelihood that a reasonable employee would be dissuaded by the disclosure.

5. Totality of the Circumstances

No single factor that we have described should be dispositive. Rather we provide these considerations to delineate a consistent and principled approach to determining when a form of confidentiality should be foisted on an employer in the charge process. Ultimately, *White*'s reasonable employee standard is incapable of accommodating a bright-line test for retaliatory disclosure or any other type of alleged retaliatory action.

Moreover, we recognize that the claim of retaliatory disclosure is somewhat at odds with incentives that are otherwise embedded in employment discrimination law; namely, to proactively engage in investigation and to take immediate corrective actions when potential violations of the law are discovered.[237] Those may encourage or require the disclosure of the charging party's identity. The next section addresses how courts should incorporate these considerations.

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[235] *Compare* Allen v. McPhee, 240 S.W.3d 803 (Tenn. 2007), *with* Franklin v. Local 2 of the Sheet Metal Workers Int'l Ass'n, 565 F.3d 508 (8th Cir. 2009).

[236] *See, e.g.*, *Allen*, 240 S.W.3d at 824.

[237] *See supra* Part II.A.2.

V. DISCLOSURE AS ADVERSE ACTION UNLESS A DEFENSE EXISTS FOR "NEED TO KNOW"

The Supreme Court's decision in *White* stated clearly that, when it comes to judging whether acts undertaken by an employer amount to actionable retaliation, "context matters."[238] This is nowhere more true than in considering whether disclosure of complainants amounts to a materially adverse action. The employer has an obligation to participate in EEOC investigations of charges. As one court noted, disclosure of an EEOC charge of discrimination to the accused's supervisor is necessary for the discipline process.[239]

While it is certainly true that investigations and appropriate discipline are reasonable practices for an employer confronted with an EEOC charge, disclosure outside the normal expectations presents an altogether different context. In the Belmont Abbey case, the president of the College disclosed individual faculty members' names responsible for filing the EEOC charge against the College in an e-mail received not only by all other faculty members but also by all staff and students at Belmont Abbey.[240] This broad publication, without another purpose, suggests an attempt to shame or ostracize the complainants to produce a "chilling effect."[241] Similarly, the Eighth Circuit found in *Franklin* that some of the union's actions while keeping members informed of legal fees—such as announcing the plaintiffs' names aloud at the meetings—might have published the plaintiff's identities more widely than necessary.[242]

There is a clear need to balance the necessary actions an employer must take when confronted with a discrimination claim and the right for an employee to pursue such claims without fear of reprisal. This balance must formalize the twin notions of considering the context of disclosure and the breadth of publication to determine whether actionable retaliation occurred.

The courts have utilized a similar balance when addressing tort doctrine in defamation and invasion of privacy claims. Often in such common law cases the issue concerns who "needs to know" the information, or the "publication" requirement, as it is known in defamation law.[243] Courts in many jurisdictions exclude intracorporate communications as publication on the theory of agency within a company.[244] The four rights contained with the privacy tort contain stronger parallels to the "need to know" defense in Title VII retaliatory disclosure in that they do not rely on a false publication damaging to an individual, but rests on an individual's right "to be left

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[238] Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 70-71 (2006).

[239] Hertenstein v. Kimberly Home Health Care, Inc., 58 F. Supp. 2d 1250, 1255 (D. Kan. 2000) (calling it an "integral part of the discipline process").

[240] Davis, *supra* note 5, at 381.

[241] Stripling, *supra*, note 5 (citing a March 5, 2009 letter from Victoria Mackey, EEOC Senior Investigator to the faculty filing charges).

[242] See *supra* text accompanying notes 121-130.

[243] *See* Frank J. Cavico, *Defamation in the Private Sector: The Libelous and Slanderous Employer*, 24 DAYTON L. REV. 405 (1999) (noting that the essential elements of defamation requires "a false statement of fact, harmful to the reputation, of and concerning the plaintiff, an unprivileged publication to a third party, causation, and damages").

[244] RESTATEMENT (SECOND) OF TORTS §577 (1977); *see also* Luckey v. Goia, 496 S.E.2d 539, 541 (Ga. Ct. App. 1998) ("To hold otherwise could impede legitimate inquiries by employers into employee conduct.")

alone."[245] It is the publication of a claim itself, not the truth or falsity of the claim, which makes it actionable. However, as with defamation, publication to those who have an appropriate interest in the information is protected as privileged.

We have identified two ways courts could utilize this "need to know" balancing of employer interests as part of the retaliatory disclosure claim.[246] Courts may consider unprivileged communication as an element of causation similar to the defamation claim. In this way, claiming retaliatory motive would include showing the disclosure was made outside those who need to know the information for legitimate employer interests. Alternatively, the "need to know" may be considered a defense available to an employer to show the disclosure was necessary in context of the situation and breadth of publication. In other words, the employer could defend on the grounds that despite the potential chilling effect of the disclosure, it had a legitimate nonretaliatory motive for doing so.

In Belmont Abbey, the identities of the faculty members filing a complaint of discrimination based on a change in the College's health insurance plan were made public to all faculty, staff, and students in an e-mail notifying the College community about the complaint.[247] In this circumstance, Belmont Abbey would have difficulty establishing the "need to know" balancing using either theory. As an element of causation, the faculty members would use the broadly distributed e-mail publication that provided unnecessary details of an EEOC filing concerning the change in health insurance. Naming the faculty members involved seemingly added nothing to the information other than to put them in an uncomfortable position of being ostracized by their President and College community.[248] Alternatively, as a defense to a claim of retaliation, it seems unlikely that the breadth of publication and the specificity of the publication were necessary for a full investigation of the complaint.

An e-mail or other type of broad publication that did not involve naming the faculty members involved in the complaint may meet the "need to know" standard under each of the theories proffered. If the publication was meant to address a controversial change in policy and offer transparency as well as a reinforcement of the decision as a public relations measure, it is possible that a court would view this as necessary for the employer's interests rather than retaliatory. Admittedly, however, it will remain more difficult to satisfy the "need to know" balancing of employer's interests in this framework when the publication is beyond those participating in an investigation of the complaint.

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[245] William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). The four rights contained with the invasion of privacy tort are: interests against intrusion, public disclosure of embarrassing facts, publicity that places an individual in a false light, and the appropriation of another's name or likeness. RESTATEMENT, *supra* note 244, § 652A.

[246] *But cf.* Steven Seidenfeld, *Employer Liability Under Title VII: Creating an Employer Affirmative Defense for Retaliation Claims*, 29 CARDOZO L. REV. 1319, 1323 (2008) (advocating for an affirmative defense for employers similar to that used in sexual harassment claims to counter the "unintended consequences" of *White*.)

[247] Stripling, *supra* note 5.

[248] *Compare* Lafate v. Chase Manhattan Bank, 123 F. Supp. 2d 773, 778-9 (D. Del. 2000) (declining to set aside a verdict of Title VII retaliation based on, among other things, the plaintiff's employer unnecessarily disclosed details of the EEOC Charge internally), *with* Allen v. McPhee, 240 S.W.3d 803, 824 (Tenn. 2007) (declining to find retaliation based on the employer's public denial of a sexual harassment allegation because none of the statements named the plaintiff or otherwise provided information that would lead to the discovery of her identity).

CONCLUSION

Belmont Abbey did not discriminate against its employees based on religion, as the EEOC determined, despite outrage among many that might suggest otherwise. However, in publicly disclosing the names of the eight faculty members who sought to utilize the process established for asserting employee rights against discrimination, the College may have sought to discourage other employees from taking similar actions. The facts of Belmont Abbey demonstrate a doctrinal gap in the competing interests of employers and employees.

In the absence of clear guidance from Title VII, the EEOC regulatory documents, and the existing case law, we turned to analogous authority dealing with anonymity in federal court litigation, as well as the social science literature addressing the motivations of whistleblowers and the antecedents of retribution against whistleblowers to develop a framework for retaliatory disclosure. As the framework establishes, employer disclosures may both directly dissuade complainants and create secondary chilling effects. Disclosures, then, serve a significant role in discouraging employees from exercising rights established under Title VII. We recognize, however, there remains a need to balance the interests of employers in appropriate disclosures. We recommend a standard for retaliatory disclosure that considers disclosure an adverse action unless a "need to know" defense exists.