The “Disappearing” Dilemma: Why Agency Principles Now Take Center Stage

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The “Disappearing” Dilemma: Why Agency Principles Now Take Center Stage

By Sandra F. Sperino

I. Introduction.

In a common magic trick called “The Disappearing Woman,” a magician places his assistant in a box, swirls the box around, and when the door opens, the woman has vanished. In reality, the woman drops through a trap door in the floor, only to reappear somewhere later in the act.

Retaliation law is now suffering from its own version of “The Disappearing Woman” trick. According to many scholars and commentators, the Supreme Court revolutionized retaliation law in 2006, when it issued its decision in Burlington Northern Santa Fe Railroad v. White. After Burlington, so the story goes, one of the major hurdles for a plaintiff to prove a retaliation claim under Title VII has vanished. The Supreme Court has indeed interpreted the term “discrimination” in the substantive retaliation provision in a way that is favorable to plaintiffs, but the decision in Burlington is much more important for an issue that it did not address.

For many reasons discussed below, the Court did not grapple with the question of agency. In other words, actions taken in the workplace may constitute retaliation, but that fact does not mean the employer is strictly liable for those actions. Rather, the retaliation claims in Title VII, just like its other substantive provisions, apply only when an employer engages in the unlawful activity. This Article argues that agency will become one of the

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1 Visiting Assistant Professor, University of Cincinnati College of Law. I would like to thank Matthew Bodie, Jarod Gonzalez, Richard Moberly, Scott Moss, and Nicole Porter for their helpful comments in developing the ideas expressed in this Article.
4 See, e.g., Note, Employer Liability Under Title VII: Creating an Employer Affirmative Defense for Retaliation Claims, 29 CARDOZO L.R. 1319 (2008) (arguing that no affirmative defense exists for employers for retaliation claims, but arguing that one should be created); Lisa M. Durham Taylor, Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Ry. Co. v. White, 9 U. PA. J. LAB. & EMP. L. 533, 533-34 (2007) (“While protection for whistleblowers is of utmost importance in today's workplace, the Court went too far in White, implementing a vague and highly subjective standard that affords employees who complain of discrimination, whether founded or not, what in practicality amounts to near immunity from even the slightest changes in working conditions.”); id. at 585 (suggesting that the Faragher/Ellerth defense does not apply to retaliation claims).
6 See generally Burlington, 548 U.S. 53.
7 When this article uses the term “agency” in reference to the federal discrimination statutes, it is not referring to pure agency. Rather, it is referring to the examination of agency principles under Title VII, which the Supreme Court has indicated is affected by the doctrine of avoidable consequences and an understanding that it might be preferable under Title VII to resolve workplace disputes without litigation. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 763-64 (1998). Because a complete articulation of these limitations would drive readers to distraction, the Article uses the shorthand of agency.
8 The full anti-retaliation provision reads as follows:
new battlegrounds in retaliation claims, posing similar dilemmas for plaintiffs as the ones that supposedly disappeared after *Burlington*.

Although the Supreme Court soundly rejected the idea that the plaintiff must establish that conduct rose to the level of a tangible employment action to constitute retaliation, this issue has simply disappeared for the moment. This Article posits that, in an effort to square *Burlington* with other Title VII agency jurisprudence, the courts will be required to re-import the concept of tangible employment action into decisions regarding whether an employer is vicariously liable for actions committed by supervisors. Thus, like the disappearing woman, the concept of tangible employment action remains lurking just beneath the trap door, waiting to reappear.

The Article attempts to make four key points. First, as a descriptive matter, the Article demonstrates how the facts of the *Burlington* case, as well as the way that the case was positioned legally, resulted in a decision where important agency principles appear to have been addressed, but actually were not. Next, the Article will argue that the lower courts in a post-*Burlington* world are intuitively sensing that agency concerns still lurk in retaliation claims. However, rather than address the agency issues, the lower courts appear to be improperly addressing concerns about employer liability through other portions of the retaliation inquiry, a practice that is not only disingenuous, but that will also result in an inconsistent development of the substantive retaliation provision.

The discussion then turns toward creating a framework to determine the types of cases in which agency will play an important role. Finally, the Article argues that unless *Burlington* is interpreted in the way suggested in this article, the decision will result in an agency jurisprudence that is at odds with the Court’s current Title VII agency decisions. Such an outcome is untenable, as there is no theoretical reason to treat agency principles differently in the retaliation context, than in the discrimination context.

To accomplish these four tasks, the Article is organized as follows. Section II provides important background material to understanding the agency issues at play in retaliation claims. Section III articulates a framework for discussing agency principles in the retaliation context and discusses whether these principles are in conflict with agency

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*It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.*

42 U.S.C. § 2000e-3(a) (emphasis added). See also 42 U.S.C. § 2000e-2(a)(1) (indicating that an employer is the proper defendant in a Title VII suit). Portions of Title VII also apply to labor organizations and employment agencies. See 42 U.S.C. § 2000e-2(a)(1). The liability of these two types of entities is not relevant to the instant discussion and will not be discussed further. When the Article mentions liability under Title VII, it is referring to the employer's liability.
principles in other Title VII contexts. Section IV explains why consistency regarding the concept of agency is important. The Article’s conclusion is contained in Section V.

II. A Discussion of the Legal Landscape.

To fully explore the agency principles left lurking in Title VII retaliation law, it is important to situate those principles within their proper legal context. This section begins by briefly describing the differences between Title VII’s discrimination provisions and its retaliation provisions, then continues with a discussion of the Burlington decision itself. The section concludes with a description of the Supreme Court’s other agency decisions that impact this discussion.

A. An Overview of Title VII.

Enacted in 1964, Title VII is the federal statute that prohibits discrimination in employment based on race, gender, color, national origin, and religion.\(^9\) The statute also protects an individual from retaliation after engaging in certain types of protected conduct.\(^10\)

More specifically, the operative anti-discrimination provision of Title VII provides that it is an unlawful employment practice “for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...”.\(^11\) In contrast, the anti-retaliation provision provides that it is unlawful for “an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”\(^12\)

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\(^12\) 42 U.S.C. § 2000e-3(a). The term “employer” is defined under Title VII as follows: a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year
A side-by-side comparison of the two provisions demonstrates three important points. First, Congress used the same term “discriminate” in Title VII’s discrimination provision, as it did in the subsequent retaliation provision. Second, despite the use of the same term “discriminate,” the words modifying that term are different in the discrimination and retaliation provisions. Third, in both the retaliation and discrimination provisions, prohibited actions must be taken by an employer to create liability. As discussed in Section III below, in *Burlington* the Supreme Court only addressed the meaning of the difference in the substantive provisions, and did not discuss the agency issues left lurking by the fact the retaliation provisions require that actions must be taken by the employer in order to be actionable.

The retaliation provisions and the discrimination provisions were enacted at the same time.\(^{13}\) Interestingly, even though the word “discriminate” is one of the essential terms of Title VII, Congress did not define that term within the statutory text of Title VII.

Nor is Title VII’s legislative history any help in elucidating the meaning of “discriminate.”\(^{14}\) As one court noted, “[t]he legislative history of Title VII has virtually been declared judicially incomprehensible.”\(^{15}\) Most of the discussion about the Civil Rights Act of 1964 related to whether the bill, as a whole, should be passed.\(^{16}\) There is little discussion about the specific provisions of Title VII, beyond the summaries of the

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\(^{14}\) By mentioning the legislative history, the author is not suggesting that reference to legislative history would be appropriate. The concerns with using legislative history have been widely discussed in the literature and will not be discussed in-depth here. These critiques include (1) concerns about whether an individual legislator’s expressions of intent reflect the collective will of the legislature; in other words, individual legislators can change the intent of the statute through manipulative use of legislative history; see Caleb Nelson, *What is Textualism*, 91 V.A. L. REV. 347, 362 (2005); (2) concerns that intentionalist judges selectively cull through legislative history for signals about intention that support the judge’s reading of the statute, while ignoring other relevant portions of the legislative history, see *id*.; and (3) concerns that statutes are carefully crafted outcomes created after compromises between competing political interests and that relying too much on legislative history may unduly upset the intended outcome, which can only be expressed through the actual language of the statutory provisions themselves, see *id.* at 370-71.

\(^{15}\) Beverly v. Lone Star Lead Const. Corp., 437 F.2d 1136, 1138 (C.D. Tex. 1971). The debate over the Civil Rights Act of 1964, which also included civil rights protections in the areas of public accommodations and voting, has been coined “The Longest Debate.” Charles and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 118 (1985). Debate lasted nine days on the floor of the House of Representatives. See *id.* Behind-the-scenes maneuvering in the Senate lasted throughout 13 weeks of filibustering by the bill’s opponents, which represented the longest filibuster in the history of the Senate. See *id.* at 193. As one commentary indicates: “The 1964 civil rights Senate debate lasted over eighty days and took up some seven thousand pages in the Congressional Record. Well over ten million words were devoted to the subject by members of the upper house. In addition, the debate produced the longest filibuster in Senate history, as well as the first successful invocation of cloture in many years.” See Bernard Schwartz, *Statutory History of the United States: 2 Civil Rights* 1089 (Commentary).

provisions provided by individual legislators.\textsuperscript{17} Surprisingly, there is little discussion in the legislative history regarding what Congress intended by Title VII’s operative language. One legislator even commented on the lack of discussion regarding this important issue by indicating “[t]here is no attempt whatever in any title of the bill to define what is meant by the offense of discrimination. That definition is nowhere in the context, in the intent or in the purpose, or even in the preface of the bill.”\textsuperscript{18} Nor does the legislative history address why Congress chose to articulate Title VII’s discrimination and retaliation provisions in different ways.\textsuperscript{19}

Given these deficiencies in both the statutory text and the legislative history, it is not surprising that the lower courts had a difficult time consistently interpreting what it meant to retaliate against an individual in violation of Title VII.\textsuperscript{20} The Supreme Court was asked to resolve the developing circuit split in \textit{Burlington}.\textsuperscript{21}

B. A Discussion of Key Portions of \textit{Burlington}.

In discussing the \textit{Burlington} decision, it is important to look precisely at the issue the Supreme Court was asked to address. The question upon which the Court granted certiorari read as follows:

\begin{quote}
Whether an employer may be held liable for retaliatory discrimination under Title VII for any “\textit{materially adverse change} in the terms of employment” (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was “reasonably likely to deter” the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an “\textit{ultimate} employment decision” (as two other courts of appeals hold).\textsuperscript{22}
\end{quote}

\textsuperscript{17} See, e.g., H.R. REP. 88-914, at 2474 (1963) (summarizing provisions of Title VII).
\textsuperscript{18} See Bernard Schwartz, \textit{STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS} 1148 (Richard Russell, D.–Ga.).
\textsuperscript{19} See Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976) (“Neither in its wording nor legislative history does section 704(a) make plain how far Congress meant to immunize hostile and disruptive employee activity when it declared it unlawful for an employer to discriminate against an employee ‘because he has opposed any practice made an unlawful employment practice by this subchapter . . . .’ 42 U.S.C. s 2000e-3(a). The statute says no more, and the committee reports on the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1963, which later became Title VII of the Civil Rights Act, repeat the language of 704(a) without any explanation. The proceedings and floor debates over Title VII are similarly unrevealing. Courts are thus left to develop their own interpretation of protected opposition.”) (citations omitted).
\textsuperscript{21} \textit{Burlington}, 126 S.Ct. at 2410.
It appears that the Supreme Court did not fully address the question upon which it
granted certiorari. In describing its decision in *Burlington*, the Court indicated that it was
addressing the following two questions: (1) must an action affect the terms and conditions
of employment to be cognizable under the retaliation provisions, and (2) how harmful must
conduct be to create liability for retaliation under Title VII.\(^{23}\) In Section III, below, I will
explore how this leaves one important issue unanswered: the circumstances under which
the employer is liable for such conduct.

A brief recitation of the facts is necessary for our further discussion of agency.\(^{24}\)
Sheila White was employed by Burlington Northern in its Tennessee Yard as a track
laborer, “a job that involves removing and replacing track components, transporting track
material, cutting brush, and clearing litter and cargo spillage from the right-of-way.”\(^{25}\)
Although Ms. White performed other track laborer tasks, her primary responsibility was to
drive the forklift.\(^{26}\) In September of 1997, Ms. White lodged an internal complaint that her
immediate supervisor repeatedly told her that women should not be working in the
department.\(^{27}\) The company placed the supervisor on a 10-day suspension and required
him to attend sexual harassment training.\(^{28}\)

Later that month, another supervisor removed Ms. White from her forklift
responsibilities, instead assigning her other job duties within the track laborer job
description.\(^{29}\) Ms. White filed a Charge of Discrimination with the Equal Employment
Opportunity Commission (“EEOC”), alleging that she had been discriminated against and
that she was retaliated against after making the discrimination complaint.\(^{30}\)

Ms. White then alleged that she had been placed under surveillance at work, and
filed another Charge of Discrimination.\(^{31}\) A few days later, Ms. White became involved in
a disagreement with another supervisor. The supervisor alleged that Ms. White had been
insubordinate and placed her on an unpaid suspension. After an internal grievance
procedure, the company determined that Ms. White had not been insubordinate and
reinstated her with backpay for the 37 days of her suspension.\(^{32}\) Ms. White filed retaliation
claims against Burlington on two theories. Ms. White alleged that after she filed an

\(^{23}\) *Burlington*, 126 S.Ct. at 2408.
\(^{24}\) A full recitation of the facts of the case, as well as the circuit split that lead to the Supreme Court’s
eventual acceptance of the case, are not necessary for the current discussion. For a more detailed
examination of the case, see generally Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*,
111 PENN. ST. L. REV. 893 (2007); Ernest F. Lidge III, *What Types of Employer Actions are Cognizable
under Title VII? The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White*, 59 RUTGERS
\(^{25}\) *Burlington*, 126 S.Ct. at 2409.
\(^{26}\) *Burlington*, 126 S.Ct. at 2409.
\(^{27}\) *Burlington*, 126 S.Ct. at 2409.
\(^{28}\) *Burlington*, 126 S.Ct. at 2409.
\(^{29}\) *Burlington*, 126 S.Ct. at 2409.
05-259), 2005 WL 2055901, at *5.
05-259), 2005 WL 2055901, at *5.
\(^{32}\) *Burlington*, 126 S.Ct. at 2409.
internal complaint of discrimination, her job responsibilities were changed, and that after filing Charges of Discrimination with the EEOC, she was improperly suspended without pay.\(^3\)

The Supreme Court held that Title VII’s anti-retaliation provisions are not confined to actions “that are related to employment or occur at the workplace.”\(^3\) The Court also held that the anti-retaliation provisions cover those “employer actions that would have been materially adverse to a reasonable employee or job applicant.” The Court further indicated that “the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”\(^3\) In so noting, the court emphasized that the harm to the employee must be material and that the Burlington decision is not meant to insulate employees against “normally petty slights, minor annoyances, and simple lack of good manners.”\(^3\)

In so holding, the Court noted the distinctions between the anti-discrimination provision of Title VII and its anti-retaliation provision.

The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, \(i.e.,\) their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, \(i.e.,\) their conduct.\(^3\)

The Court found it difficult to fully articulate the types of actions that constitute retaliation. Rather, the court indicated that the context of each particular case would matter.\(^3\) “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” The Court continued by noting that in some circumstances, changes in an employee’s work schedule or a supervisor’s exclusion of an employee from a weekly training lunch might be actionable.

\(^3\) Ms. White also alleged that she had been discriminated against based on her gender. White v. Burlington Northern & Santa Fe Ry. Co., 364 F.3d 789, 791 (6th Cir. 2004); Burlington Northern & Santa Fe Ry. Co. v. White, Petition for Certiorari, No. 05-259, 2005 WL 2055901, at *6 (Aug. 24, 2005). A jury held in Ms. White’s favor on the retaliation claim and awarded her compensatory damages. The jury found in favor of Burlington on the discrimination claim. A divided panel of the Sixth Circuit Court of Appeals reversed the decision below on the retaliation claim; however, the Sixth Circuit, sitting en banc, affirmed the district court’s decision regarding the retaliation issues. Burlington, 126 S.Ct. at 2410. The Sixth Circuit held that a retaliatory action must meet the level of an adverse employment action to be cognizable under Title VII, holding that a suspension without pay and reallocating job responsibilities constituted adverse employment actions. White v. Burlington Northern & Santa Fe Ry. Co., 364 F.3d 789, 796, 803-04 (6th Cir. 2004).

\(^3\) Burlington, 126 S.Ct. at 2409.
\(^3\) Burlington, 126 S.Ct. at 2409 (emphasis added).
\(^3\) Burlington, 126 S.Ct. at 2415.
\(^3\) Burlington, 126 S.Ct. at 2412.
\(^3\) Burlington, 126 S.Ct. at 2415.
The Court did address other Title VII agency cases in the *Burlington* decision, but only to note that those cases did not relate to defining the term “discriminate” within Title VII’s retaliation provision.\(^{39}\)

In his concurrence, Justice Alito noted that following the majority’s interpretation of the statute would mean that “retaliation claim must go to the jury if the employee creates a genuine issue on such questions as whether the employee was given any more or less work than others, was subjected to any more or less supervision, or was treated in a somewhat less friendly manner because of his protected activity.”\(^{40}\)

C. Other Cases Impacting the Analysis.

Given that *Burlington* did not address agency issues, it is necessary to examine other Supreme Court cases to understand the contours of these principles within the Title VII context. The key cases discussing these issues are *Burlington Industries, Inc. v. Ellerth*\(^{41}\) and *Faragher v. City of Boca Raton*,\(^{42}\) both issued by the Court on the same day in 1998, with the first opinion written by Justice Kennedy and the latter by Justice Souter.

1. Discussion of Framework Created by Faragher and Ellerth.

As discussed earlier, the discrimination provision of Title VII applies to employers.\(^{43}\) Although the term “employer” is further defined within the statutory text,\(^{44}\) it was unclear what type of liability this provision placed on employers for the acts of their employees. This question became more important after the Court recognized harassment as a cognizable violation under Title VII.

In *Ellerth*, the Court considered whether an employer was liable for the conduct of a supervisor who sexually harassed an employee and who threatened to make employment decisions based on the employee’s gender, but never followed through on those threats.\(^{45}\) The Court emphasized that its decision related to vicarious liability,\(^{46}\) not the definition of what discrimination means.\(^{47}\) The Court explicitly noted that it was assuming that the trial court’s determination was correct, that the conduct at issue was severe and pervasive,\(^{48}\) thus constituting “discrimination . . . in the terms and conditions of employment.”

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39 *Burlington*, 126 S.Ct. at 2413.
40 *Burlington*, 126 S.Ct. at 2419 (Alito, J., concurring).
45 *Ellerth*, 524 U.S. at 747-49.
46 The Court indicated that its examination of agency principles under Title VII was affected by the doctrine of avoidable consequences and an understanding that it might be preferable under Title VII to resolve workplace disputes without litigation. *Ellerth*, 524 U.S. at 763-64.
47 *Ellerth*, 524 U.S. at 756.
48 *Ellerth*, 524 U.S. at 754.
The Court began to form a framework to determine when an employer faced liability for the conduct of its employees and held that actions that constituted tangible employment decisions would be imputed to the employer. As discussed in more detail in Section III, the Court was not indicating that an employer would only be liable for these actions, but rather, that these categories of cases would be ones in which both discrimination has been proved and the employer’s liability for that discrimination had been established. The Court further indicated that “[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

A full recitation of the connection between the concept of tangible employment action and vicarious liability is helpful. The Court articulated the following rationale:

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. . . . Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

The decision in Faragher, also a sexual harassment case, indicated that the concept of a tangible employment action played an important role in understanding employer liability under Title VII.

The result of Faragher and Ellerth was to create a framework for determining an employer’s vicarious liability. When a tangible employment action is taken, the employer is liable for the conduct. Although not directly considered by the Court in Faragher and

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49 Ellerth, 524 U.S. at 760-61.
50 Ellerth, 524 U.S. at 761. Later in Pennsylvania State Police v. Suders, the Court indicated that a constructive discharge may also constitute a tangible employment action. See generally 542 U.S. 129 (2007).
51 Ellerth, 524 U.S. at 761-62.
52 Faragher, 524 U.S. at 788-90.
53 See Ellerth, 524 U.S. at 762.
Ellerth, the company is also liable for discrimination committed by an alter ego of the company.\textsuperscript{54}

If no tangible employment action is taken, and the complained conduct is committed by co-workers, third parties, or even possibly by supervisors with no management responsibilities over the plaintiff, the plaintiff must establish that the employer is negligent before the company may be held liable.\textsuperscript{55}

When no tangible employment action is taken and the conduct at issue is committed by the employee’s supervisor or by someone in a successive chain of authority, the employer is liable for the actions, unless the employer can establish an affirmative defense to liability.\textsuperscript{56} As articulated by the Court, the affirmative defense has two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”\textsuperscript{57} This affirmative defense is commonly referred to as the Faragher/Ellerth defense.

Most importantly, this affirmative defense provides a complete defense to liability. In other words, even if the employee is subjected to severe and pervasive harassment in the workplace, the employer will not be held liable under Title VII, if it can establish the defense.\textsuperscript{58}

After considering Faragher and Ellerth, it becomes important to contrast the arguments made in those cases, with the arguments made in Burlington related to tangible employment actions. Burlington’s argument was that the tangible employment action standard developed in these cases defines cognizable claims for discrimination;\textsuperscript{59} not the separate, but related argument, that Faragher and Ellerth define the contours of the employer’s liability for discrimination. In other words, the second argument posits that there might be action that is taken within the workplace that constitutes discrimination, but for which no liability attaches, because it was not committed by the employer.\textsuperscript{60} This is

\textsuperscript{54} See Faragher, 524 U.S. at 789 (favorably citing a lower court decision in which a court found a company liable for harassment committed by president of the company).

\textsuperscript{55} See id. at 777.

\textsuperscript{56} Ellerth, 524 U.S. at 765.

\textsuperscript{57} Ellerth, 524 U.S. at 765.


\textsuperscript{60} Interestingly, Burlington’s Petition for Certiorari does not mention the anti-discrimination and anti-retaliation provisions the company has in place; nor does it mention any training provided to supervisors.
different than saying the action does not constitute potentially cognizable discrimination in the first place.

That Burlington proceeded with an argument regarding the scope of the substantive retaliation provision is not surprising for two reasons. As the Court discussed in Faragher, courts struggled with the scope of the discrimination provisions long before they addressed issues relating to agency.\(^{61}\) Thus, it is not surprising that these issues arose in a similar order in the retaliation context. Second, given the circumstances of the case, it is unlikely that the employer could have prevailed on any defense structured similar to the Faragher/Ellerth defense. Had defense counsel prevailed on argument that only tangible employment actions were cognizable violations of the retaliation provisions, it would have created a better legal position for employers than winning on an agency argument.

### 2. Discussion of Agency Principles.

One of the key arguments advanced herein is that agency principles should be consistent across all causes of action under Title VII.\(^{62}\) By describing the Court’s enunciation of a Title VII agency standard, the author is not expressing an endorsement of the framework set forth in the Faragher and Ellerth cases, merely the fact that this is the standard, though flawed, that has been provided by the Supreme Court.\(^{63}\)

Some may argue that if the current agency framework is flawed, it should not be expanded to cover retaliation claims, as well as discrimination claims. While I understand the concerns expressed in such an argument, I am even more concerned that a piecemeal approach to agency will, in the end, create a larger problem for both litigants and the courts.

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\(^{62}\) A minor extension of this argument is that these principles should also be consistent among all three of the major federal anti-discrimination statutes: Title VII, the ADEA, and the ADA. Preferably, agency principles would be consistent across all federal statutes that govern employment in the private sector. However, as the Southern saying goes, the horse may already be out of the barn, as the Supreme Court appears to have adopted different agency principles for other federal statutes outside of the employment discrimination context. For a broader discussion of these issues, see generally Catherine Fisk & Erwin Chemerinsky, *Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL OF RIGHTS J. 755 (1999).

\(^{63}\) Criticism of the framework created by Faragher and Ellerth is widespread. For a lengthier critique of the structure see Catherine Fisk & Erwin Chemerinsky, *Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL OF RIGHTS J. 755, 768-74 (1999). One of the most valid criticisms of Faragher and Ellerth is that the holding of the case does not appear to be supported by the agency principles enunciated by the Court. Catherine Fisk & Erwin Chemerinsky, *Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL OF RIGHTS J. 755, 768 (1999); Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41, 52, 55 (1999) (“They cited no common law cases in their cursory, formal, and rather abstract discussion of the Restatement exception on which they relied. In fact, there seem to be no common law cases that allow any kind of affirmative defense to employers.”)
The task at hand, therefore, is to consider whether this framework can appropriately be applied to retaliation claims. To undertake that discussion, a better understanding of the principles underlying the framework is necessary. The framework described in *Faragher* and *Ellerth* is based on a consideration of three ideas: agency principles, the doctrine of avoidable consequences, and an understanding that it might be preferable under Title VII to resolve workplace disputes without litigation.64

From a statutory perspective, the argument that the employer would be liable for the conduct of its agents begins with the statutory text itself, as Title VII defined the term employer as including “agents.”65 The Court interpreted this definitional section as an instruction by Congress for the federal courts to “interpret Title VII based on agency principles.”66 However, the definitional section provides no further guidance about how agency principles should operate in the Title VII context.67 The Court indicated that it sought to rely on general agency principles, rather than the law of a particular state, to create a uniform and predictable standard of agency principles to govern the Title VII context.68

The Court then examined the vicarious liability principles expressed within the Restatement (Second) of Agency, beginning with the proposition in Section 219(1) that “[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”69 Intentional torts committed by employees are less likely to create liability for the employer because they may not fall within the scope of the employee’s employment.70 An action falls within the scope of employment when it is motivated, at least in part, by a purpose to serve the employer.71 This is true even if the employer forbids the conduct.72

In *Ellerth*, the Court continued by considering whether sexual harassment was activity that an employee took within the scope of employment.73 The Court concluded that, although in some instances sexual harassment could be conducted to further the goals of the employer, in most instances, sexual harassment did not fall within the scope of

64 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 763-64 (1998). Additionally, in both opinions, the Court expressed concern about keeping the enunciated principles consistent with the principles enunciated in a prior decision. *Faragher*, 525 U.S. at 791-92; *Ellerth*, 524 U.S. at 745.
65 42 U.S.C. § 2000e(b); *Ellerth*, 524 U.S. at 754.
66 *Ellerth*, 524 U.S. at 754.
67 Professors Fisk and Chemerinsky posit that Title VII provides little guidance on agency issues, because the “kind of discrimination Congress had in mind when it enacted Title VII would, without doubt, form the basis of employer liability.” Catherine Fisk & Erwin Chemerinsky, *Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL OF RIGHTS J. 755, 762 (1999).
68 *Ellerth*, 524 U.S. at 754. The Court further described what it was doing as “statutory interpretation pursuant to congressional direction. This is not federal common law in the strictest sense, i.e., a rule of decision that amounts, not simply to an interpretation of a federal statute [,] but, rather, to the judicial ‘creation’ of a special federal rule of decision.” *Id.* at 754 (citation omitted).
69 *Ellerth*, 524 U.S. at 756.
70 *Ellerth*, 524 U.S. at 756.
72 *Ellerth*, 524 U.S. at 756.
73 *Ellerth*, 524 U.S. at 756-57.
employment.74 Strangely, Faragher appears to indicate that the Court’s holdings on the scope of employment actually contradicted general common law agency rules.75 Unlike in Ellerth where Justice Kennedy characterizes the Court’s interpretation as consistent with common law, Justice Souter in Faragher indicated: “An assignment to reconcile the run of the Title VII cases with those just cited would be a taxing one.”76 Thus, while the Court holds that sexual harassment is outside the scope of employment and that section 219(1) of the Restatement does not provide a basis for employer vicarious liability, this portion of its holding appears not to be well-supported.77

However, the Restatement does not just base vicarious liability on activities within the scope of employment.78 The employer also may face liability for actions that fall outside of the scope of employment, if there are reasons why liability should be imputed to the employer.79 The Court then listed the following four scenarios where such liability might be imputed:

(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.80

In discussing these four possibilities, the Court indicated that subsection (a) would apply when the person committing the action was an alter ego of the company.81 As for subsection (b), “[n]egligence sets a minimum standard for employer liability under Title VII.”82 It is this section that is used for the portion of the agency framework that requires a plaintiff to establish negligence before an employer is liable for co-worker or third-party harassment. The Court rejected the argument that any non-delegable duties created liability under subsection (c).83 In looking at factor (d), the Court indicated that, in most cases, an apparent authority argument would not be appropriate.

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74 Ellerth, 524 U.S. at 757.
75 Faragher, 524 U.S. at 794-95.
76 Faragher, 524 U.S. at 795.
77 Faragher, 524 U.S. at 796-98; see also Catherine Fisk & Erwin Chemerinsky, Vicarious Liability Under Title VII, Section 1983, and Title IX, 7 WM. & MARY BILL OF RIGHTS J. 755, 768 (1999) (“This aspect of the opinion is puzzling because the bulk of the Court’s analysis points to the opposite conclusion than the Court ultimately reached.”)
78 Ellerth, 524 U.S. at 758.
79 Ellerth, 524 U.S. at 758.
80 Ellerth, 524 U.S. at 758.
81 Ellerth, 524 U.S. at 758.
82 Ellerth, 524 U.S. at 759. In a prior decision, the Court had also expressed concern about imputing liability to the employer in every instance. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (“surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”)
83 Ellerth, 524 U.S. at 758.
In crafting the Faragher/Ellerth defense, the Court primarily considered the second portion of subsection (d), that the employee “was aided in accomplishing the tort by the existence of the agency relation.” The Court rejected an interpretation that would create employer liability every time the conduct took place in the workplace. This discussion then culminated in the multi-part framework described in the prior section.

As discussed in Section IV below, these same principles should guide the Court in determining agency issues within the retaliation context.

III. Creating a Framework for Analyzing Agency Issues.

Although it remains to be seen how the lower courts parse out the somewhat confusing language of the Burlington decision, I would argue that the decision creates four categories of retaliatory conduct. This Section seeks to develop a framework for courts to use in determining when agency issues are important in the retaliation context. It also discusses why Burlington appears to address agency issues, but in reality, does not.

A. The Framework

The key to understanding the framework is to recognize that there is a difference between the seriousness of the conduct at issue and whether the employer is liable for such conduct. While acknowledging that courts in the past have often confused and conflated the two inquiries, this article argues that the question of seriousness and employer

84 Ellerth, 524 U.S. at 758.
85 Ellerth, 524 U.S. at 760.
86 In its prior cases, the Supreme Court has recognized that this dichotomy exists. Ellerth, 524 U.S. at 752 (“The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive. The distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination.”); Faragher v. City of Boca Raton, 524 U.S. 788-89 (1998) (“Given the circumstances of many of the litigated cases, including some that have come to us, it is not surprising that in many of them, the issue has been joined over the sufficiency of the abusive conditions, not the standards for determining an employer's liability for them.”)
87 See, e.g., Donaldson v. Burlington Indus., No. 03-51362, 2004 WL 1933603, at *2 (5th Cir. Aug. 31, 2004); Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002); Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir. 2001); Bowman v. Shawnee State Univ., 220 F.3d 456, 461, n. 5 (6th Cir. 2000); Lukewitte v. Gonzales, 436 F.3d 248 (D.C. Cir. 2006); see also Lisa M. Durham Taylor, Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Ry. Co. v. White, 9 U. PA. J. LAB. & EMPL. L. 533, 541-42 (2007) (“Most significant here is the Court’s ‘importation’ of the ‘tangible employment action’ concept from circuit court cases defining the adverse action element of a Title VII discrimination claim to mark the dividing line between conduct for which employers are strictly liable and conduct for which an affirmative defense may be available.”). It appears that this same conflation appeared during the oral argument in Burlington, when counsel for Burlington, Carter Phillips, argued: “There are two standards under--under an adverse employment action. The first one is whether there's a tangible action, and that's the Ellerth standard. And then there's always the pervasive and severe standard, so that if you--you know, being routinely excluded rises to the level of pervasive or severe, that would still be actionable under 704 in exactly the same way that that's actionable under 703.” Transcript of Oral Argument, Burlington Northern & Santa Fe Ry. Co. v. White, No. 05-259, 2006 WL 1063292 (April 17, 2006).
culpability are separate inquiries. In other words, when we ask what it means to discriminate versus to retaliate against an employee, *Burlington* implies that the seriousness of the conduct that will create a cognizable violation for retaliation is different, and in some cases, less severe, than that required for discrimination.  

First, it is clear that actions by the employer that would violate Title VII’s discrimination provisions would also violate the retaliation provisions, assuming the other elements of a retaliation claim are established. To present the easiest hypothetical, if an employer terminated an individual based on a protected trait or if the employer terminated an individual because he had filed a charge with the EEOC, the employer faces liability under Title VII. In this hypothetical, two important concepts are linked: the seriousness of the action and the liability of the employer. For ease of discussion, I will refer to these types of cases as Category I cases. In Category I cases, the employer’s liability arises because the seriousness of the type of action taken suggests that the power of the company was used to carry out the act. Proving agency is simply not a problem for the plaintiff in these cases.  

On the other end of the spectrum are actions that will not create employer liability under either the discrimination or the retaliation provisions. As the Court noted in *Burlington*, the retaliation provisions do not insulate employees against “normally petty slights, minor annoyances, and simple lack of good manners.” The Court provided more concrete examples of the types of conduct that would fall into this category: personality conflicts, “snubbing by supervisors and co-workers,” and the refusal by a supervisor to invite an employee to a non-training lunch. These cases can be labeled as Category IV cases. In Category IV cases, the actions are characterized as so minimal, that they do not create liability under any Title VII provision. In these instances, although courts might examine the culpability of the employer, employer liability is not the determinative inquiry. Rather, the seriousness of the conduct is.

However, in the middle are the cases that more clearly separate agency issues from the seriousness of the conduct. In Category II are cases of severe and pervasive

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88 *Burlington*, 126 S.Ct. at 2409 (indicating that conduct leading to retaliation must be conduct that a reasonable person would believe is materially adverse).
89 But see Ernest F. Lidge III, *What Types of Employer Actions are Cognizable under Title VII? The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White*, 59 Rutgers L. Rev. 497, 512 (2007) (arguing that the anti-discrimination provisions might be broader in some contexts because “all the plaintiff has to show is an alteration in terms, conditions, or privileges of employment, rather than showing, as in the retaliation context, that the employment action would dissuade a reasonable employee from filing a charge with the EEOC”).
90 Indeed, Category I cases are the types of cases that are most likely to be pursued as the types of economic harms incurred are clearer and easier to establish than the intangible harms that are often present in harassment cases or the less serious harms that might occur for actions that do not rise to the level of a tangible employment action.
91 *Burlington*, 126 S.Ct. at 2415.
92 *Burlington*, 126 S.Ct. at 2415.
harassment. In these instances, the seriousness of the conduct is established, whether proceeding under retaliation or discrimination provisions. Although seriousness and liability do not work in tandem in this situation, the agency issues in the discrimination context would be worked through using the Faragher/Ellerth structure. This Article argues that a similar analysis should apply in a retaliation case.

The Category III cases are the most interesting. The Burlington decision strongly suggests that there are actions that might be taken against an employee that do not rise to the level of seriousness for purposes of violating the discrimination provisions, but that would, nonetheless, violate the retaliation provisions. Some examples of Category III cases might be certain types of discipline (such as placing a warning in an employee’s file) or certain kinds of changes in job responsibilities.

Additionally, retaliatory harassment that is more than trivial, but which does not arise to the level of a severe and pervasive case of harassment, might fall within this category. In these retaliatory harassment cases, the plaintiff would be trying to establish that a reasonable person would be deterred from complaining based on the conduct. This would be a different legal standard than the severe and pervasive standard adopted for cases of sexual harassment.

In these Category III cases, the materiality of the conduct is enough to warrant potential liability under the retaliation provisions. However, such liability should only attach if the employer has the appropriate level of culpability.

Some commentators’ analysis of the Burlington case suggests that once a case is placed in Category III, the employer is liable. Indeed, such interpretation is

95 But see Ernest F. Lidge III, What Types of Employer Actions are Cognizable under Title VII? The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White, 59 Rutgers L. Rev. 497, 525-26, 530 (2007) (arguing that both the discrimination provisions and the retaliation provisions should reach all non-trivial conduct).
96 It is difficult to pinpoint the seriousness line between those cases in Category I versus those in Category III. Problems with the Court’s articulation of the materially adverse standard have been well-considered in other articles. See, e.g., Ernest F. Lidge III, What Types of Employer Actions are Cognizable under Title VII? The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White, 59 Rutgers L. Rev. 497, 515-20 (2007) (discussing how even though the Supreme Court appeared to adopt a test provided by the Seventh Circuit, that the standard set forth in Burlington appears to conflict with the standard adopted by the Seventh Circuit).
98 Category III may also need to include actions occurring outside of the workplace, which the Court suggested may be more cognizable under the retaliation provisions than under the discrimination provisions. See Burlington, 126 S.Ct. at 2408, 2412-15.
understandable for several reasons. First, the question accepted for certiorari in *Burlington* suggests that the court addressed the liability issue. The question accepted for certiorari indicated that the Court addressed “Whether an employer may be held liable for retaliatory discrimination under Title VII for any ‘materially adverse change in the terms of employment[.]’”\(^{100}\) Such an interpretation, though, incorrectly inserts the word “shall” for the word “may.” In other words, the question simply posited that if the conduct reached a level of seriousness that is termed “materially adverse,” there are circumstances under which the employer could be liable, assuming the proper connection is made between the conduct and the employer.

This improper conflation of the question of the concept of seriousness with that of liability is understandable, because, in the past, courts have used the words “tangible employment action” to mean both seriousness and liability.\(^{101}\) However, this conflation of the two concepts is, in some cases, incorrect, and leads to improper analysis of agency issues.

A reading of *Burlington* that equates seriousness with liability does not consider the holding and facts of the case. Such an interpretation also forgets that the courts have recognized this dichotomy in the discrimination context. We know that serious, discriminatory conduct can occur in the form of sexual or racial harassment, but for which the employer is not liable, because it was committed by co-workers or third parties without the knowledge of the employer, or because the employee failed to complain, or even because the employer insulated itself from liability by providing an appropriate response to an employee’s complaint.\(^{102}\) In these cases, the question of the seriousness of the conduct is separate from the question of the employer’s liability.\(^{103}\)

This same distinction still applies in retaliation cases. In other words, once it is established that an action is materially adverse under the retaliation provision, the question still remains whether the employer faces liability for that conduct. After all, Title VII requires that the “employer,” be liable for the action at issue.

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\(^{101}\) See, e.g., Ivey v. Paulson, 222 Fed. Appx. 815, 819, 2007 WL 216284, at *4 (11th Cir. 2007); Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1202, n.5 (11th Cir. 2004) (indicating that the concept of a tangible employment action relates to whether conduct is serious enough to create liability).

\(^{102}\) See generally Sections II.B. & C., *supra* (discussing negligence standard and *Faragher/Ellerth* defense).

\(^{103}\) This is not to suggest that the two questions are unrelated.
B. Placing Burlington within the Framework.

I would argue that the facts underlying Burlington place it within Category I.\(^\text{104}\) Let’s explore the retaliatory actions separately. First, Ms. White did not work for a period of time, and the employer did not pay her for this period. I characterize the issue in this vague way because it seems that one of the important unnoted facts in Burlington is that there is substantial disagreement between the plaintiff and the defendant about the actions taken. While the employer maintained that Ms. White had been suspended without pay pending an investigation, she contended that she had actually been terminated with a right under the collective bargaining agreement to appeal.\(^\text{105}\) If the plaintiff’s assertion is true, Burlington’s conduct would be actionable under Title VII, whether it was taken for discriminatory reasons or retaliatory ones, both because it is serious enough to meet the substantive standard and because a termination is an action considered to be taken on behalf of the employer.\(^\text{106}\)

However, even assuming that the action was, as the Court characterized it, a suspension without pay,\(^\text{107}\) this conduct rises to the level of seriousness that would create potential liability under the discrimination provisions,\(^\text{108}\) as well as being the type of conduct for which we normally hold an employer liable. Regarding the suspension without pay,\(^\text{109}\) counsel for Burlington conceded during the oral argument that this was a company action.\(^\text{110}\)

Indeed, Burlington appears to concentrate on the fact that the suspension was, after an investigation, found to be wrongful and that Ms. White was provided with backpay for this time period. It appears that Burlington was arguing that because the conduct was corrected, it was not serious enough to result in actionable retaliation. Had the initial

\(^{104}\) Justice Alito agreed with this characterization of the Burlington facts. Burlington, 126 S.Ct. at 2421-22 (Alito, J., concurring).


\(^{107}\) See Burlington, 126 S.Ct. at 2405.


\(^{109}\) Even though the opinion categorizes the action taken as a suspension without pay, plaintiff’s counsel said that she was terminated and this termination would have been effective had she not appealed it through the union grievance mechanisms. Transcript of Oral Argument, Burlington Northern & Santa Fe Ry. Co., No. 05-259, 2006 WL 1063292, at *45-46 (April 17, 2006). Counsel for the defendant characterized the action as a suspension that would become a termination, if 15 days passed without an appeal. Id. at 58.

suspension period been much shorter and the company’s reversal of such decision faster, this might have been a plausible argument. However, while a company’s correction may reduce its backpay liability, reduce its liability for punitive damages, and perhaps convince a plaintiff not to file suit in the first place, these issues do not change the fact that the first action rose to the level of actionable discrimination.

Even if Burlington were making the argument that while the activity constituted retaliation, the employer could not be liable for such activity because it later corrected the problem, this argument is not consistent with any accepted Title VII agency jurisprudence. As discussed earlier, a 37-day suspension without pay is both serious enough and chargeable to the employer, so that it creates automatic liability for the employer, even using the less plaintiff-friendly discrimination provision.

However, even if we assume for purposes of argument that a 37-day suspension without pay would not constitute an official act of the company, this leads to the conclusion that the employer should still be allowed to potentially escape liability through the Faragher/Ellerth defense. So, why was Burlington’s counsel not arguing for application of Faragher/Ellerth? Far from constituting a mistake, such an omission was likely based on two premises. First, it seems unlikely that Burlington could have prevailed on such an affirmative defense. And, second, had defense counsel prevailed on the argument that he was making, employers would have been in a better position, than they would have been in had Burlington simply argued for application of Faragher/Ellerth.

It is unclear whether Burlington’s counsel was arguing that a Faragher/Ellerth defense should be available; however, based on one exchange during the oral argument, it appears that the defense might have been rejected, at least with regard to the suspension claim:

MR. PHILLIPS: Right, but then the question still remains, Justice Scalia, for it to be a tangible employment action, is it--is it available to the employer to cure, when the purpose of this entire statutory scheme is to avoid litigation and to provide informal mechanisms for protecting the rights of the employee.
JUSTICE GINSBURG: But it didn’t—
JUSTICE SOUTER: Yes, but if the employer—
JUSTICE GINSBURG: --it didn't cure. I mean, it was 37 days, right, that she went without pay?
MR. PHILLIPS: Right.
JUSTICE GINSBURG: Not just 2 weeks. And she understandably experienced much stress in that time. She worried about how she would be

111 Transcription of Oral Argument, Burlington Northern & Santa Fe Ry. Co., No. 05-259, 2006 WL 1063292, at *26 (April 17, 2006) (“JUSTICE GINSBURG: --official action is-- is different from--the problem with Ellerth was that if there's nothing formally that had been done, the employer-- this--Ellerth was concerned with vicarious liability, nothing official. There had been none--the boss wouldn't know about it. But somebody who is suspended, that is an official--that's a tangible action. MR. PHILLIPS: To be sure. And the question is, can you cure it? And that's the fundamental issue we ask you to decide.”)
able to feed her children, could she get them Christmas presents. That
was--there was nothing that she got, when it was determined that she
hadn't been insubordinate, that compensated her for that stress and, indeed,
for the medical expense that she incurred because she had that stress.\footnote{112}

Ms. White also alleged that after she complained, her forklift duties were removed,
and she was required to perform other, less desirable tasks. Here again, there is a dispute
between the parties about how to characterize this change. Ms. White argued that she was
hired to perform forklift duties, but was placed in the general classification “track laborer”
because there was no existing job classification within the collective bargaining agreement
that fully described her job.\footnote{113} In other words, Ms. White argued that she was not a “track
laborer,” and that when she was made to perform tasks under a completely different job
description, in essence that she was transferred to a different job. Further, according to the
respondent, the employer’s supervisors had articulated several conflicting reasons for the
reason that Ms. White’s job responsibilities were changed.\footnote{114} Demoting an individual to a
different job would have been both serious enough and chargeable to the employer prior to
the Court’s decision in \textit{Burlington}.\footnote{115}

Indeed, one can easily imagine that the result in \textit{Burlington} would be the same
whether the trial court instructed the jury using the materially adverse language or the
tangible employment action language. If the jury believed Ms. White’s characterization of
the actions, it means that she was reassigned to almost completely different job
responsibilities after submitting an internal complaint, and that she was terminated pending
an appeal after she filed Charges of Discrimination with the EEOC.

However, even if we believe the employer’s version of events, that the action was a
change of assignments within the same job classification, the outcome remains the same.
This is because, in the end, it does not matter whether the facts of \textit{Burlington} place it
within Category I or Category III. The employer simply did not make an agency argument
as a defense to liability. In other words, the employer focused upon arguing that the
conduct did not constitute retaliation, because it did not rise to an appropriate level of
seriousness. This is a different argument than one based on agency, where the employer
would have essentially conceded that the actions met the minimum threshold of
seriousness, but argued that it could not be held responsible for those actions.\footnote{116}

\footnote{112} Transcript of Oral Argument, Burlington Northern & Santa Fe Ry. Co., No. 05-259, 2006 WL 1063292, at
\#25 (April 17, 2006).
\footnote{113} Respondent’s Brief in Opposition to Petition for Certiorari, Burlington Northern & Santa Fe Ry. Co. v.
White, 548 U.S. 53 (2006) (No. 05-259), 2005 WL 2974439, at *3 (“But White’s job was quite different from
the work of the other employees in that classification. White spent most of her day operating the forklift; the
rest of her time was devoted primarily to cleaning up in the tool building and distributing supplies.”)
\footnote{114} Respondent’s Brief in Opposition to Petition for Certiorari, Burlington Northern & Santa Fe Ry. Co. v.
\footnote{116} As discussed earlier, this choice of argument by defense counsel was likely a good one.
The Court itself seems to recognize that agency issues did not factor in to its decision. The Court finds that liability is created when "employer actions [] would have been materially adverse to a reasonable employee or job applicant." The Court further indicated that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."117

It appears clear from the underlined language that the Court considered the conduct of which Ms. White complained to be appropriately charged to the employer. Unfortunately, some have assumed this is because the employer faces strict liability under the retaliation provisions. This Article posits that one or more of the following reasons supports the outcome: (1) the conduct constituted tangible employment actions; (2) the employer did not argue that it was entitled to a *Faragher/Ellerth* defense; and (3) even if the employer had made such an argument, it would not have insulated the employer from liability, given the facts of the case.

IV. Avoiding Contradictions with Other Title VII Agency Jurisprudence.

Reading *Burlington* as establishing a dichotomy between the seriousness of conduct and the employer’s liability for such conduct is the only construction of the case that avoids serious conflicts between the case and other Supreme Court decisions relating to agency. However, as this section discusses, reading all of the cases as consistent leads to a fairly complex analysis relating to cases that fall within the first three categories of the framework. Importantly, it means the concept of tangible employment action still plays a significant role in retaliation cases.

Let’s begin by assuming, as some commentators have, that once a materially adverse action has been taken against an employee in retaliation for protected activity, the employer is liable. If we make this assumption, an inconsistency develops in the concept of agency as applied in Title VII cases.

As discussed in Section II.C. above, under the discrimination provisions of Title VII, an employer is liable for tangible employment actions. In other words, once an employee demonstrates that he or she has been subjected to a termination or a demotion or other tangible employment action, the employer is liable for that conduct. However, when a tangible employment action has not been taken, the employer may not be liable for the action taken. In instances where co-workers, third parties, or non-direct supervisors engage in discriminatory conduct, the employee must establish the employer’s negligence prior to liability attaching. If a supervisor has taken an action, then the employee will prevail, unless the employer establishes the elements of the *Faragher/Ellerth* affirmative defense.

If we read *Burlington* as conflating the issues of seriousness with agency, we end up with a scenario in which the agency relationship is defined more broadly for retaliation than it is for underlying discrimination claims. For example, all non-trivial, retaliatory harassment would result in liability for the employer, even though in discrimination cases

117 *Burlington*, 126 S.Ct. at 2409 (emphasis added).
the employer’s liability would depend on the establishment of negligence by the employee or upon the employer’s proof of an affirmative defense. As there is nothing specific about retaliation that would suggest such an expansion of agency is warranted in that context, the better path is to believe that the same general agency principles govern both the retaliation and discrimination provisions. To do this, one must assume that Burlington left the distinction between seriousness and agency intact.

While this solution is consistent, it is also complex, at least for certain types of retaliation claims. If reference is made to the framework developed earlier, the simple cases fall within Category IV. In Category IV cases, the issue of agency is not considered because the conduct itself is not serious enough to trigger liability.

However, to make retaliation agency principles consistent with the rest of Title VII agency principles, it becomes necessary to import the concept of tangible employment action back into retaliation jurisprudence. In other words, once a plaintiff has established all of the elements of a retaliation claim, including that the action taken was materially adverse, the court must consider whether the employer is liable for that conduct.

For cases in which the action constitutes a tangible employment action (Category I cases), as used in discrimination cases, the employer faces liability. Thus, the tangible employment concept that the employer fought so hard to be incorporated into the substantive definition of retaliation in Burlington, reappears in relation to the agency issue.

For Category II cases, the courts should follow the general agency principles already enunciated for harassment cases, although, as discussed below, application of an agency theory developed with discrimination in mind may be problematic. In other words, if an employee is subjected to severe and pervasive retaliatory harassment, the structure enunciated in the Faragher/Ellerth framework determines how the court should address agency issues.

A discussion of the Category III cases remains. In Category III cases, the complained-of conduct is serious enough to result in substantive liability under the retaliation provision, but the conduct does not result in a tangible employment action. It is in this Category, that some commentators and courts have assumed that an employer is strictly liable. However, in order to keep agency principles consistent throughout Title VII, the Faragher/Ellerth structure must be applied. Therefore, when the action is taken by co-workers, third parties, or supervisors without direct supervision over the plaintiff, the plaintiff must establish the employer’s negligence to prevail. In cases where a supervisor engages in the conduct, the employer may attempt to establish an affirmative defense to liability.

\[118\] Another possible argument is that the Faragher/Ellerth affirmative defense only applies to harassment claims and that some other standard of liability would apply for actions that fall within Category III. Such an outcome is possible, but creates unnecessary complexity in the law.

\[119\] The author expresses no opinion regarding which party would bear the burdens of production and persuasion on this element.
A. Considering Faragher/Ellerth in the Retaliation Context.

What the above discussion highlights is that the Faragher/Ellerth affirmative defense may be appropriately applied to retaliation claims, in which a plaintiff establishes that a supervisor has taken a materially adverse action, but where that action does not arise to the level of a tangible employment action. This raises the issue whether an affirmative defense developed in the discrimination context should be applied in the retaliation context.

When no tangible employment action is taken and the conduct at issue is committed by the employee’s supervisor or by someone in a successive chain of authority, the employer is liable for the actions, unless the employer can establish an affirmative defense to liability.\(^{120}\) As discussed earlier, the Faragher/Ellerth affirmative defense has two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”\(^{121}\)

Several questions remain regarding how this defense would apply in the retaliation context. One common way for an employer to prevail on the affirmative defense is to establish that it had a published, effective complaint procedure of which the plaintiff was aware, but that the plaintiff failed to use the procedure to make a complaint. Using this same defense in the retaliation context raises interesting issues.

The first issue to consider will be whether the courts require the employee to make a separate complaint about retaliation. In the administrative exhaustion context, the plaintiff’s failure to allege retaliation in an administrative charge, results in that claim being subject to dismissal for failure to exhaust administrative remedies.\(^{122}\) This is because the courts consider retaliation to be analytically distinct from discrimination claims.\(^{123}\) Based on this line of thinking, it seems plausible that employers will argue that a plaintiff’s failure to complain about retaliation should result in a complete defense to liability. After all, how can an employer remedy retaliation, if it does not know that it is occurring?

However, in some instances, requiring a second complaint may not be justified. For example, assume that an employee complains about sexual harassment by a supervisor and that, following the initial complaint, the same supervisor retaliates against the plaintiff. It seems likely that in some circumstances, a court will find that a plaintiff does not need to engage in an endless procession of complaints before seeking relief from outside of the company.

\(^{121}\) Ellerth, 524 U.S. at 765.
\(^{122}\) See, e.g., Miles v. Dell, Inc., 429 F.3d 480, 492 (4th Cir. 2005) (indicating that a plaintiff failed to properly exhaust her administrative remedies when she notified EEOC of discrimination claims, but not retaliation claim).
\(^{123}\) See, e.g., Wallin v. Minnesota Dept. of Corrections, 153 F.3d 681, 688 (8th Cir. 1998).
Additionally, the employer’s ability to establish that its complaint procedure is effective may be different in the retaliation context. In some cases, plaintiffs will be able to successfully demonstrate that a complaint procedure that results in its users being subjected to retaliation is not effective.

This discussion shows that courts may face facts that alter the Faragher/Ellerth calculus in retaliation cases. However, just because the dynamics of the Faragher/Ellerth affirmative defense may play out differently in the retaliation context, does not mean that application of the structure is not appropriate.

B. The Importance of a Consistent Agency Doctrine

The importance of creating a consistent agency doctrine under Title VII cannot be overstated. First, Title VII is the preeminent federal statute dealing with discrimination and retaliation. Both state and federal courts refer to and rely on Title VII jurisprudence when analyzing claims under other federal discrimination statutes, other employment-related federal statutes, state discrimination statutes, and other state employment-related statutes.

Second, the importance of retaliation claims continues to grow as more and more retaliation-based claims are filed against employers. These claims are often filed in tandem with discrimination claims. As discussed in more detail below, creating a different agency doctrine for retaliation and discrimination law will result in practical chaos in the analysis of such claims and in jury instructions. Additionally, such inconsistency may wreak havoc in the substantive retaliation provisions as well.

Third, maintaining a consistent agency analysis furthers one of the goals the Court has articulated for Title VII – encouraging employers and employees to work together to prevent and remedy discrimination and retaliation outside of the litigation process.\textsuperscript{124}

Finally, and perhaps most importantly, there is no difference between the types of conduct that leads to retaliation and the types of conduct that results in discrimination that would justify altering agency principles. Although the federal courts have spelled out a special common law of agency within the Title VII context, there is no need to further sub-divide this agency law between retaliation and discrimination claims.

1. Title VII is often the standard bearer for employment-related principles.

For better or worse, Title VII decisions have a broad impact on employment-based litigation.\textsuperscript{125}

\textsuperscript{124} See, e.g., Ellerth, 524 U.S. at 763-64.
\textsuperscript{125} See generally Sandra F. Sperino, Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith, 44 Hous. L. Rev. 349 (2007) (arguing that the interpretation of federal employment discrimination standards often plays too great a role when courts consider state law causes of action).
The federal government, through statutes such as the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") prohibit certain types of employers from engaging in discrimination against employees on the basis of the statutorily-defined traits of disability and age. Both the ADA and the ADEA contain retaliation provisions, and it is likely that courts interpreting agency issues relating to these statutes will reference, if not rely on, agency principles adopted in the Title VII context. At a minimum, the federal courts should place emphasis on creating a uniform agency jurisprudence among the ADA, the ADEA, and Title VII. My hope is that this consistency will begin to develop, if the Title VII agency doctrine remains unfractured.

Additionally, courts also rely on Title VII cases when examining other federal employment statutes. States also have enacted statutes that prohibit discrimination in the workplace, and these states often look to federal court interpretations of Title VII to

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128 The ADEA's retaliation provision is similar to the one provided in Title VII. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2005) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.") However, the retaliation provision of the ADA is articulated differently. That provision reads as follows:

(a) Retaliation
No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation
It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.


129 Courts have applied the Title VII analysis to both ADA and ADEA retaliation claims. See, e.g., Grubic v. City of Waco, No. 06-51631, 2008 WL 248411, at *1 (5th Cir. Jan. 30, 2008) (indicating that same analysis applies for retaliation claims under ADA and Title VII); Satterfield v. Consol Pennsylvania Coal Co., No. 06-1262, 2007 WL 2728541, at *6 (W.D. Pa. Sept. 17, 2007) (noting the similarity between the retaliation provisions of the ADEA and Title VII and applying both in similar manner). Likewise, courts have applied the Faragher/Ellerth defense in ADA and ADEA cases. See, e.g., Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 687-88 (8th Cir.1998) (applying Faragher to harassment claim under the ADA); Oleyar v. County of Durham, 336 F. Supp. 2d 512, 519, n.5 (M.D. N.C. 2004) (same for ADEA).

130 See, e.g., ALA. CODE §§ 25-1-20 to 25-1-29; ALASKA STAT. §§ 18.80.010 to 18.80.300; ARIZ. REV. STAT. §§ 41-1401 to 41-1493; ARK. CODE §§ 16-123-101 to 16-123-108; CAL. GOV'T CODE §§ 12900 to 12996; COLO. REV. STAT. §§ 24-34-301 to 24-34-804; CONN. GEN. STAT. §§ 46a-51 to 46a-104; DEL. CODE ANN. tit. 19, §§ 710 to 718; FLA. STAT. Ch. 760.01 to 760.11; GA. CODE ANN. §§ 45-19-20 to 45-19-45; HAW. REV. STAT. §§ 378-1 to 378-69; IDAHO CODE §§ 67-5901 to 67-5912; 775 ILL. COMP. STAT. 5/1-101 to 5/9-102; IND. CODE §§ 22-9-1-1 to 22-9-8-3; IOWA CODE §§ 216.1 to 216.20; KAN. STAT. ANN. §§ 44-1001 to 44-1110; KY. REV. STAT. ANN. §§ 344.010 to 344.990; LA. REV. STAT. ANN. tit. 23, §§ 301 to 369; ME. REV. STAT. ANN. tit. 5, §§ 4551 to 4634; MD. ANN. CODE art. 49B, §§ 1-43; MASS. GEN LAWS ch. 151B, §§ 1-10;
interpret their statutes. More specifically, many state courts have referenced federal cases related to how agency principles should apply for state law claims. If Burlington is read as creating different agency principles for retaliation and discrimination claims, it is likely that such a reading would impact the interpretation of other federal and state employment statutes.

2. As the importance of retaliation grows, inconsistency in agency principles could lead to chaos.

There is no question that over the past decade, the EEOC has seen a rapid increase in the total number of retaliation claims filed. In 1992, 72,302 individuals filed discrimination charges with the EEOC, and 10,499 individuals alleged retaliation under Title VII. Fourteen years later, the total number of individual claims of discrimination rose to 75,768, while the number of retaliation claims ballooned to 19,560. Over the past decade, the number of retaliation charges filed with the EEOC has doubled. Even

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the EEOC itself is placing emphasis on retaliation claims. From 2002 until 2005, 30 percent of suits filed by the EEOC against employers involved retaliation claims.136

Burlington cited the rapid growth in the number of retaliation cases as one of the reasons that the Supreme Court should accept the case for consideration.137 Given the plaintiff-friendly substantive standard adopted in Burlington, it is likely that retaliation claims will continue to comprise a significant, if not an increased, presence within Title VII lawsuits.

If Title VII agency principles do not remain consistent for both discrimination and retaliation claims, another layer of complexity will be added to an already complex scheme. This is because retaliation claims are often filed in tandem with discrimination claims. Looking at the following hypothetical should be helpful in illustrating that point. Sally works for an employer and alleges that she has been subjected to discrimination in the workplace based on her disability and her gender. She then complains about that conduct and alleges that she thereafter suffers retaliation. Sally files suit against the employer, bringing claims of gender and disability discrimination under both federal and state law.

If federal agency principles are not held to be consistent across federal statutes and among the various causes of action, the courts potentially face a set of jury instructions that must take into account eight instructions regarding substantive liability and numerous instructions regarding agency principles. On the substantive issues, the jury may need to be instructed regarding the elements for a discrimination claim under the ADA, a discrimination claim under Title VII,138 a discrimination claim for gender discrimination

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137 Petition for Writ of Certiorari, Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (No. 05-259), 2005 WL 2055901, at *17 (“Were that not apparent from the fact that every regional court of appeals has weighed in on the issue, it is confirmed by even the briefest review of the annotated United States Code, which lists hundreds of cases related to 42 U.S.C. § 2000e-3(a) under the heading of “retaliatory acts.” Indeed, in fiscal year 2004 alone, more than 20,000 charges of retaliatory discrimination under Title VII were filed with the EEOC, and the trend is strongly upward - this is twice as many retaliation charges as were filed in 1992. See EEOC, Charge Statistics FY 1992 Through FY 2004, at http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005). The volume of these cases provides a compelling reason for this Court to intervene . . .[].”)
138 For example, under the ADA only a qualified individual with a disability or a person associated with such an individual is a proper plaintiff under the discrimination provisions. See 42 U.S.C. §§ 12111(8), 12112(a) & (b)(4). Even ignoring the definitional differences, there is not absolute uniformity regarding the elements of a cause of action for discrimination among the federal anti-discrimination statutes. See, e.g., Baqir v. Principi, 434 F.3d 733, 745 (4th Cir. 2006) (indicating that Desert Palace analysis does not apply to claims under the ADEA); Aquino v. Honda of America, Inc., No. 04-4274, 2005 WL 3078627, at *7 (6th Cir. Nov. 18, 2005) (refusing to apply Desert Palace standard to claims brought under 42 U.S.C. § 1981, because Congress chose not to amend this statute); Bolander v. BP Oil Co., No. 3:02CV7341, 2003 WL 22060351, at *3 (N.D. Ohio Aug. 6, 2003) (indicating Desert Palace does not apply to ADEA).
under state law, and a disability discrimination claim under state law. Likewise, the jury may need to be instructed on four different retaliation standards.

If agency principles change according to the cause of action, it appears possible that the court might also have to instruct the jury with an equal number of separate agency instructions. It is likely that agency principles will be held to be consistent for discrimination provisions under the ADA and Title VII. Also, the state agency law may be consistent for gender and disability discrimination claims. However, even under this scenario, it is still possible that the jury would need to be provided four separate instructions regarding agency: one for the federal discrimination claims, another for the federal retaliation claims, a third for the state discrimination claims, and another for the state retaliation claims.

Courts would confront similar complexity when trying to determine whether summary judgment in the employer’s favor is appropriate. While some of this complexity will remain despite uniformity within agency jurisprudence, it is desirable to lessen the complexity added through agency.

Additionally, reading Burlington as creating a separate set of agency principles will have repercussions for the substantive retaliation standard. The retaliation cases decided by lower courts after Burlington provide an interesting window into the agency issues now facing the courts. Although it is difficult to pinpoint the motivation of a court, these cases strongly suggest that lower courts may mask concerns about agency by considering those concerns under the rubric of whether an action is materially adverse.

In Reis v. Universal City Development Partners, Ltd., the plaintiff worked as in a guest services position, which required her to work outdoors. The plaintiff requested that she be allowed to transfer to a position inside a lobby, and the employer denied this

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139 Although many states have modeled their discrimination statutes after the federal statutes, there are many instances in which the elements for a federal discrimination claim are different than those required under state law. See, e.g., CAL. GOV’T CODE § 12926(k)(1)(B); E.E.O.C. v. United Parcel Service, Inc., 424 F.3d 1060, 1068 (9th Cir. 2005) (discussing differences between ADA definition of disability, and California statute’s definition of that term); CONN. GEN. STAT. § 46a-60(a)(1); Beason v. United Technologies Corp., 337 F.3d 271, 277 (2d Cir. 2003) (discussing how Connecticut statute’s definition of “disability” is broader than the definition provided by the ADA). Again, even ignoring these threshold inquiries, the substantive elements of the cause of action might also be articulated differently. See, e.g., Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 992 (D. Minn. 2003) (explaining that Minnesota did not amend its state statute to reflect amendments made to Title VII); see also Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 (Mo. 2007); Plagmann v. Square D Co., 695 N.W.2d 333, 2004 WL 2809521, at *2 (Iowa Ct. App. 2004). For a broader discussion of these issues, see generally Sandra F. Sperino, Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith, 44 HOU. L. REV. 349 (2007)

140 It remains to be seen whether the retaliation provisions of the ADEA and ADA are read in tandem with Title VII’s retaliation provision. Likewise, some state courts have read the retaliation provisions in state discrimination laws to be different than the federal standard. See, e.g., Yanowitz v. L’Oreal USA, Inc., 116 P.3d 1123, 1127 (indicating standard under California retaliation provision was whether conduct materially affected terms and conditions of employment).

141 Reis v. Universal City Development Partners, Ltd., 442 F. Supp. 2d 1238, 1253-54 (M.D. Fla. 2006). The retaliation claim was brought under the Americans with Disabilities Act; however, the case is relevant to the current discussion because the court applied a Title VII analysis to the retaliation issue.
The trial court indicated that the denial of the transfer request was not an action that a reasonable person would find to be materially adverse. The court indicated that a reasonable person would not find these differences to be materially adverse because the two positions had the same pay scale, the same level of prestige, and the provided the same opportunities for advancement.

It seems quite apparent that anyone who has been to Central Florida during the summer would recognize that an employee might not complain about discrimination if the employee believed that, as a result, the employee would be required to work outside without air conditioning. It appears that what the Court is really concerned about is the fact that a low-level supervisor could make this decision without anyone else in the company being aware of it. Indeed, this is the kind of decision that is unlikely to be reflected in a written record or to require review by higher levels of supervision. However, because common interpretations of Burlington suggest that an examination of agency principles is not appropriate, lower courts must funnel their agency concerns into other parts of the analysis.

In another case, the lower court found that a plaintiff could not establish that a materially adverse action had taken place after a supervisor “isolated her into a small room and threatened with being fired if she came out onto the workroom floor, told her that she was ‘worthless,’ and told her not to talk to coworkers.” Again, although it is difficult to pinpoint the concerns of the district court, it seems plausible that the court was concerned that the employer should not be strictly liable for such conduct. After all, this is the same type of conduct that might be at issue in a harassment case, and the employer has an affirmative defense to liability in that case.

I believe that concerns about agency will be masked within the materially adverse standard, leading to cases that make the substantive standard almost meaningless. Likewise, it is plausible that lower courts’ agency concerns will result in these courts more strictly construing what constitutes protected activity under the retaliation provision, placing greater emphasis on causation, and considering retaliatory incidents singularly, rather than in their totality, to determine whether material adversity is present.

At least one case appears to properly consider concerns about agency within the agency context. In Ferguson v. Associated Wholesale Grocers, Inc., the plaintiff alleged

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142 Reis, 442 F. Supp. 2d at 1253-54.
143 Reis, 442 F. Supp. 2d at 1253-54.
144 Reis, 442 F. Supp. 2d at 1253-54.
145 Reis, 442 F. Supp. 2d at 1253-54.
that she had been sexually harassed by a supervisor.\footnote{148} After she complained, the plaintiff alleged that she was retaliated against by unknown co-workers who slashed the tires on her car, made threatening telephone calls to her workplace and home, and threw two soda cans at her.\footnote{149} She also alleged that non-supervisory co-workers called her derogatory names.\footnote{150} The district court granted summary judgment in the employer’s favor, because there was no evidence that “supervisory or management personnel either (1) orchestrate[d] the harassment or (2) [knew] about the harassment and acquiesce[d] in it so as to condone and encourage the co-workers’ actions.”\footnote{151}

Notably, the employer also made the argument that it could not be liable for retaliation because the actions taken were not “materially adverse.”\footnote{152} The district court noted that given its finding on the agency issue, it did not need to reach the question of material adversity, but also noted that the employer’s argument in this regard was “facially untenable.”\footnote{153}

3. \textit{Consistency will encourage employees and employers to work together to resolve claims without the intervention of the federal government.}

In \textit{Burlington}, the Court indicated that the primary purpose of Title VII’s retaliation provision is to “prevent an employer from interfering with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”\footnote{154} The Court failed to mention that one of the overarching themes in Title VII jurisprudence is the concern that courts do not provide the best mechanism for resolving work-related grievances. In the past, the Court has expressed that the statutory framework should encourage employers to develop policies to prevent Title VII violations and to create mechanisms to promptly remedy any violations that do occur.\footnote{155} Likewise, the Court has indicated that employees should, in many instances, be required to take advantage of these employer-implemented policies.\footnote{156}

If \textit{Burlington} is read as rejecting a \textit{Faragher/Ellerth} structure, employees will be encouraged to take their complaints of retaliation straight to the EEOC or comparable state agency without first seeking recourse through the employer. When conducted appropriately, employer-mediated responses to retaliation provide the best mechanism for resolving retaliation claims. The fact that, at times, these internal mechanisms are ineffective, does not lead to the conclusion that internal resolution should not be the preferred choice. Emphasizing internal employer procedures provides the possibility that

\footnote{148} Id. at 966.\footnote{149} Id. at 967.\footnote{150} Id.\footnote{151} Id. at 971 (citing Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998)).\footnote{152} Id. at 971.\footnote{153} Id. at 971.\footnote{154} \textit{Burlington}, 126 S.Ct. at 2405.\footnote{155} Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 763-64 (1998); see also Lisa M. Durham Taylor, \textit{Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Ry. Co. v. White}, 9 U. PA. J. LAB. & EMP. L. 533, 581 (2007) (discussing the informal conciliation and other goals of Title VII).\footnote{156} See id.
many instances of retaliation will be resolved in the most economically efficient way possible, without the interference of state and federal agencies, and without the costs (both financial and emotional) of litigation.

4. There is no doctrinal difference that justifies differences in agency principles.

Some may argue that if the Supreme Court believes it necessary to adopt different substantive standards for retaliation and discrimination under Title VII, then it naturally follows that the Court should feel unconstrained in adopting different agency principles for the two causes of action. While this argument has some surface appeal, I hope to dispel it through the following discussion.

It is helpful to think of agency principles under Title VII in a concrete way. It is easy to imagine a circle. Inside the circle are all of the acts for which an employer may potentially be held to be either strictly or vicariously liable. Outside of the circle are acts which, under agency principles, will not be imputed to the employer.

My argument asserts that the contours of the circle should remain relatively fixed, at least in relation to claims brought under Title VII, the ADEA, and the ADA. This does not mean that the employer will be held liable for all activities that fall within the circle – only that the circle represents the maximum possible extent of liability.

There may be many, non-agency reasons regarding why conduct within the possible realm of employer liability produces no liability. For example, using federal discrimination law as a model, the employer may have too few employees, the employer may not be an employer who falls within the requirements of Title VII, or the action taken by the employer may not rise to the level of an actionable violation. To further expound on this latter point, if the president of the company sends a mean e-mail to employees each morning in an effort to spur action, the company is not liable for this conduct under federal law. However, this outcome relates not to the contours of the agency relationship, but rather, to the fact that sending a mean e-mail is not otherwise cognizable. If sending mean, work-related e-mail was actionable, the company would likely be held liable for the president’s conduct, because he is acting as an alter ego of the corporation.

Likewise, activities might fall outside of the circle because the action of the person conducting them cannot be imputed to the employer and the employer exercised due care. For example, if a stranger enters a reasonably secure workplace and without notice murders an employee, it is unlikely that this action will be imputed to the employer for purposes of liability. Using agency principles, this activity simply falls outside of the circle.

Thus, if Burlington can be read as creating different substantive standards with respect to some discrimination and retaliation claims, this does not mean that the Court redefined the contours of the agency circle for purposes of each of these causes of action. Rather, what the Court did was to articulate that once an activity is one for which an
employer may be liable according to agency principles, the type of conduct that is prohibited varies for retaliation and discrimination.

Such a reading comports with the practical realities of the workplace, as well as the Supreme Court’s articulation of the purpose behind the retaliation provision. Realistically, the employer cannot control everything that happens in the workplace; nor should it face unending liability for its failure to accomplish an impossible task. The Supreme Court recognized this when it outlined federal common law agency principles in *Faragher* and *Ellerth*. In doing so, it defined the contours of agency principles in the context of federal employment claims. Those contours should remain untouched by *Burlington*. Although I am skeptical of the two-part test articulated in *Faragher/Ellerth*, the general agency contours it provides strike a proper balance.

To provide a rough sketch of these contours, the company is always liable when the alter ego of the corporation commits a prohibited act. The company is always liable when a supervisor commits an act that clearly requires the official power of the company (a so-called tangible employment action). In other situations where it is less clear that the supervisor is using the official power of the company, there is an assumption that the company faces liability, subject to an affirmative defense by the employer. Where a third-party, a co-worker, or a supervisor without direct power over the plaintiff commits a prohibited act, there is an assumption that these are the types of activities for which an employer will not be held liable, unless the plaintiff proves otherwise.

The simplest hypothetical for demonstrating that the same agency principles carry over from the discrimination context to the retaliation context is one of retaliatory harassment. In cases of retaliatory harassment, the harasser is performing the same types of activities that might be discriminatory harassment, but for a different motivation. After *Burlington*, it remains possible that a claim for retaliatory harassment will be cognizable, even when the conduct is less severe and pervasive than it would need to be to lead to a discrimination claim. It seems anomalous that a less severe pattern of behavior would result in strict liability for the employer under the retaliation provisions and potentially no liability under the discrimination provisions.

V. Conclusion.

As discussed earlier, the question accepted for certiorari in *Burlington* suggests that the case resolved the scope of the substantive retaliation provision and employer liability for such actions.157 While it is clear from the opinion that the Court is trying to draw a distinction between the types of conduct that might violate Title VII’s retaliation provision versus the statute’s discrimination prohibition, the Court did not answer the secondary question of employer liability. This is because the facts of *Burlington* did not call for such a resolution, and the defense counsel did not argue for one.

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Reading *Burlington* as deciding agency principles is problematic, because it places agency principles in the retaliation context on a different course than those enunciated for Title VII’s discrimination provisions. This Article argues that such a dichotomy is unwarranted and will lead to significant problems in Title VII agency jurisprudence and with the appropriate development of the substantive retaliation provisions. The Article also provides a framework for assisting courts in deconstructing the difference between the seriousness of the offense committed and the secondary question of whether the employer is liable for that conduct.

In the end, what is most interesting about the *Burlington* decision is how much pressure it places on agency principles. Hopefully, clear identification of these pressures will lead to awareness of their existence and then to a consistent resolution of agency principles.