

Retaliation in the Wake of *Burlington Northern*: Making the Case for an Updated Standard for Proving an Adverse Action in Massachusetts Under Chapter 151B

“Much is at stake in the retaliation claim. The fear of retaliation and an awareness of the profound social costs of claiming discrimination are the primary reasons why people stay silent in the face of perceived inequality. For discrimination law to provide meaningful protection, legal standards must protect persons who perceive discrimination and give voice to their concerns. This is a worthy goal for discrimination law to pursue, as giving voice to discrimination produces a myriad of benefits, both personal and societal. Vocalizing opposition to inequality opens the door to important societal and institutional change and enables challengers to begin a valuable dialogue within their communities. By fully protecting persons who confront discrimination, the law can provide greater space for contesting and possibly reshaping the social norms that facilitate discrimination in the first place.”¹

I. INTRODUCTION

Juliana McCormick was the lone female carpenter on a major construction project in Boston that connected two of the city’s major subway lines.² While working on the project, McCormick’s co-workers sexually harassed her.³ When she complained of the harassment to her supervisor, the male employees retaliated against her.⁴ Her supervisor assigned McCormick projects where she was forced to work in isolation and to do physically demanding work against her doctor’s orders.⁵ The initial discrimination and subsequent retaliation wore on her.⁶ She was unable to sleep, cried constantly, noticed substantial changes

1. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 104 (2005) (footnotes omitted) (arguing for broader protection for retaliation claims).

2. *McCormick v. Modern Cont’l Constr. Co.*, No. 96-BEM-0584, 2005 WL 3478728, at *1-2, *11 (Mass. Comm’n Against Discrim. Dec. 13, 2005) (discussing McCormick’s involvement on Massachusetts Bay Transportation Authority (MBTA) North Station Super Station Project).

3. *Id.* at *1-5 (detailing sexual harassment of McCormick). McCormick found a carving inside of her sweatshirt shaped like a penis. *Id.* at *2. She was so upset upon finding the object that she left work and returned home. *Id.*

4. *Id.* at *5-7 (describing retaliatory acts taken against McCormick).

5. *Id.* at *6 (describing changes to working conditions following complaint). Additionally, her co-workers spat in her water bottle, intentionally crushed her lunch, stopped talking to her, called her vulgar and offensive names, and cut holes into her clothing. *Id.* at *14. The Massachusetts Commission Against Discrimination (MCAD) found that such acts were a pattern of retaliation against McCormick for reporting the sexual harassment. *Id.*

6. *McCormick*, 2005 WL 3478728, at *6 (describing herself as a “nervous wreck” who had just “shut down”).

in her moods, and, in her words, just “shut down.”⁷

Fortunately, the law provides protection for employees who suffer abuse similar to McCormick’s.⁸ Indeed, the law protected McCormick, because the actions taken against her occurred in the workplace and directly affected her employment.⁹ Massachusetts, however, needs to address its retaliation standard to ensure that all those who confront illegal discrimination and are unlawfully retaliated against for doing so, are provided the same level of protection as McCormick.¹⁰

Various Massachusetts and federal statutes protect employees from workplace retaliation by their employers.¹¹ Title VII of the Civil Rights Act of 1964 (Title VII)¹² and chapter 151B of the Massachusetts General Laws (Chapter 151B)¹³ permit an aggrieved employee who has suffered an adverse

7. *Id.* at *9 (describing physical and emotional toll that the incidents took on McCormick). She was also unable to have sexual relations with her husband for almost a year following the incident. *Id.*

8. *See* McCormick v. Modern Cont’l Constr. Co., No. 96-BEM-0584, 2005 WL 3478728, at *1-2 (Mass. Comm’n Against Discrim. Dec. 13, 2005) (setting forth action taken by McCormick). McCormick filed a complaint with the MCAD alleging that her employer unlawfully discriminated against her because of her sex and retaliated against her in violation of Massachusetts General Laws Chapter 151B. *Id.* While McCormick’s discrimination claim was unsuccessful because the MCAD concluded that her employer took adequate action to address the incident, the MCAD did award her \$50,000 in emotional distress damages attributable to her employer’s “retaliatory actions and/or failures to act to prevent retaliation.” *Id.* at *18.

9. *Id.* at *5 (describing retaliatory acts taken at workplace that impacted working conditions).

10. *See infra* Part III (addressing deficiencies with Massachusetts adverse action standard and suggesting changes).

11. *See* 29 U.S.C. § 158(4) (2006) (forbidding retaliation within National Labor Relations Act); 29 U.S.C. § 215(a)(3) (2006) (forbidding retaliation within Fair Labor Standards Act); 29 U.S.C. § 623(d) (2006) (forbidding retaliation within Age Discrimination in Employment Act); 29 U.S.C. § 1140 (2006) (forbidding retaliation within Employee Retirement Income Security Act); 42 U.S.C. § 2000e-3(a) (2006) (forbidding retaliation within Title VII); 42 U.S.C. § 12203(a) (2006) (forbidding retaliation within Americans With Disabilities Act); MASS. GEN. LAWS ch. 149, § 105B (2004) (forbidding retaliation within Massachusetts Equal Pay Act); MASS. GEN. LAWS ch. 149, § 148A(2) (2004) (forbidding retaliation within Massachusetts Payment of Wages statute); MASS. GEN. LAWS ch. 151, § 19(1) (2004) (forbidding retaliation within Massachusetts minimum wage and overtime law); MASS. GEN. LAWS ch. 151B, §§ 4(4), 4(4A) (2004) (forbidding retaliation within Massachusetts Anti-Discrimination Law); MASS. GEN. LAWS ch. 152, § 75B (2004) (forbidding retaliation within Massachusetts Worker’s Compensation law).

12. *See* 42 U.S.C. § 2000e-3(a) (2006) (articulating unlawful retaliation under federal law). The Civil Rights Act of 1964 was a landmark piece of legislation that outlawed discrimination based on race, color, religion, sex, or national origin in voting, employment, and public services. *See* 42 U.S.C. § 2000e (2006). Title VII of the Act states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an 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) (2006).

13. *See* MASS. GEN. LAWS ch. 151B, § 4(4) (2004) (setting forth unlawful retaliation under Massachusetts law). It is unlawful “[f]or any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.” *Id.*; *see also*

action because of his legally protected conduct to assert a retaliation claim against his employer.¹⁴ The public policy goals of anti-retaliation statutes are to ensure that workplaces are free of discrimination and to protect employees from retribution should they challenge such illegal conduct.¹⁵ Generally, under both federal and state law, to establish a prima facie case of retaliation, a plaintiff must prove that he engaged in protected activity (under the opposition or participation clauses of the respective provisions), suffered an adverse action, and the adverse action occurred because of his protected activity.¹⁶ Of

infra notes 97-98 and accompanying text (discussing procedural process in bringing complaint in Massachusetts).

14. Lisa Cooney, *Understanding and Preventing Workplace Retaliation*, 88 MASS. L. REV. 3, 3 (2003) (introducing retaliation under Title VII and Chapter 151B). Retaliation claims serve as independent claims. *See Sahli v. Bull HN Info. Sys., Inc.*, 774 N.E.2d 1085, 1089 n.8 (Mass. 2002) (finding liability on retaliation claim not conditioned on finding liability on underlying discrimination claim); Michael Rusie, Note, *The Meaning of Adverse Employment Actions in the Context of Title VII Retaliation Claims*, 9 WASH. U. J.L. & POL'Y 379, 384-85 (2002) (recognizing retaliation as distinct and independent cause of action under Title VII). Even if a court fails to find that an employer discriminated against an employee, the court may still find the employer liable for retaliation taken against the employee for the protected activity. *See Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 80-85 (1st Cir. 2001) (upholding \$400,000 in punitive damages based solely on state-law retaliation claim).

15. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006) (recognizing Title VII's primary purpose as "maintaining unfettered access to statutory remedial mechanisms" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (internal quotation marks omitted). While the legislative history for Title VII provides little guidance regarding the anti-retaliation provision, it clarifies the statute's intent. *See H.R. REP. NO. 88-914* (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2401-02 (articulating law's purpose). Title VII's purpose was "to eliminate through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin." *Id.*; *see also* 14 Mass. Prac. § 5.16 (Howard J. Alperin et al. 2005) (identifying purpose of Massachusetts anti-retaliation provision); Joan M. Savage, Note, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 218-19 (2004) (identifying purpose of Title VII's anti-retaliation provision). "The purpose of § 4(4) is to protect employees who seek to enjoy the benefits of c[hapter] 151B by filing claims or assisting others who do so, or who otherwise oppose practices forbidden under this chapter. Given the dangers of retaliation at the work site, the provision is critical . . ." 14 Mass. Prac. § 5.16 (Howard J. Alperin et al. 2005) (internal quotation marks omitted).

16. *See Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 22 (1st Cir. 2002) (describing elements of prima facie case of retaliation under Title VII); *Mole v. Univ. of Mass.*, 814 N.E.2d 329, 338-39 (Mass. 2004) (describing elements of prima facie case of retaliation under Chapter 151B); *see also Bourbeau v. City of Chicopee*, 445 F. Supp. 2d 106, 122-23 (D. Mass. 2006) (noting elements of prima facie case essentially same under Title VII and Chapter 151B). *But see Billings v. Town of Grafton*, 441 F. Supp. 2d 227, 239-40 (D. Mass. 2006) (recognizing *Burlington Northern* made second prong of prima facie case different under federal and state law). Under either federal or state law, the plaintiff must engage in legally protected activity, which is the first prong of a prima facie case of retaliation. *See Morris v. Boston Edison Co.*, 942 F. Supp. 65, 68-72 (D. Mass. 1996) (outlining participation and opposition clauses of Massachusetts General Laws Chapter 151B § 4(4) and Title VII). Legally protected conduct encompasses a wide array of activities including reporting suspected illegal discrimination to a manager, supervisor, or outside entity; utilizing a company's internal grievance procedure; or filing, assisting, or participating in a discrimination charge with the Equal Employment Opportunity Commission (EEOC) or the MCAD. *See infra* notes 42-44 and accompanying text (enumerating protected activities under participation and opposition clauses). Given that plaintiffs can recover solely on a retaliation claim, plaintiffs often attach retaliation claims to their discrimination claims. *See PATRICIA A. WISE, UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION* 4 (2000) (observing retaliation claims easier to prove and result in larger awards than other discrimination claims); Nancy Landis Caplinger & Diane S. Worth, *Vengeance Is Not Mine: A Survey of the Law of Title VII Retaliation*, 73 J. KAN. B. ASS'N 20, 21 (2004)

these three elements, the second has undergone the most scrutiny because courts have defined the adverse action requirement differently throughout the years.¹⁷

Title VII, a direct response to the Civil Rights movement of the 1960s, was enacted to rid the workplace of discrimination on the basis of race.¹⁸ In Section 703(a), the anti-discrimination provision of Title VII, Congress extended the statute's protection beyond race and prohibited employment discrimination based on sex, color, religion, or national origin.¹⁹ Section 704(a), the anti-retaliation provision, prohibits an employer from retaliating against an employee who has engaged in protected activity.²⁰ The anti-retaliation provision exists to further the goals of the anti-discrimination provision by ensuring that employees are provided redress to confront the evils of illegal discrimination.²¹ Similarly, Massachusetts enacted its anti-retaliation provision so employees who engage in protected activity to challenge illegal discrimination are sheltered from unlawful retaliation.²²

(recognizing plaintiffs routinely raise discrimination and retaliation claims in one lawsuit). Retaliation claims are on the rise; according to the EEOC, Title VII retaliation claims increased over five percent between 1997 and 2006, and in 2006, nearly thirty percent of all charges filed with the EEOC were for unlawful retaliation. Charge Statistics FY 1997 through FY 2006, U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/stats/charges.html> (last visited July 7, 2007) (documenting charges filed between 1997 and 2006).

17. See Caplinger & Worth, *supra* note 16, at 27 (acknowledging adverse action requirement generates more litigation and appellate opinions than other elements); Rusie, *supra* note 14, at 384-85 (suggesting adverse action requirement most contentious element of prima facie case of retaliation); Savage, *supra* note 15, at 224 (noting much debate centered on adverse action requirement).

18. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (explaining motivation behind Title VII). "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Id.*; see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 203 (1979) (emphasizing Title VII's purpose of preventing discrimination against African Americans). The "crux" of the problem addressed by Title VII "[was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Id.* (quoting 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey)) (internal quotation marks omitted).

19. 42 U.S.C. § 2000e-2(a)(1) (2006) (identifying protected classes).

20. See *supra* note 12 (defining unlawful retaliation under federal law).

21. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (recognizing anti-retaliation provision's primary purpose as "[m]aintaining unfettered access to statutory remedial mechanisms"); *Rainer v. Refco, Inc.*, 464 F. Supp. 2d 742, 750 (S.D. Ohio 2006) (recognizing purpose of Title VII as preventing employees from fearing retaliation following protected activity); Christopher M. Courts, Note, *An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235, 237-38 (2001) (discussing how two provisions work hand in hand with each other). If employees were not protected from retaliation for reporting alleged discrimination, then the goal of Title VII—to protect employees from discrimination based on sex, race, religion, or national origin—would be frustrated. Sources cited *supra*.

22. See *Noviello v. City of Boston*, 398 F.3d 76, 91 (1st Cir. 2005) (noting similarity of purpose between Massachusetts and federal anti-discrimination and anti-retaliation provisions). The Massachusetts provision exists to allow employees to "seek redress for allegations of discrimination without fear of retaliation for or interference with the exercise of that right." *Sahli v. Bull HN Info. Sys. Inc.*, 774 N.E.2d 1085, 1090 (Mass. 2002) (internal quotation marks omitted).

When the United States Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. White*,²³ it resolved a split among the circuit courts over what constituted an adverse action in the scope of a Title VII retaliation claim.²⁴ The Court addressed two questions: whether Title VII's anti-retaliation provision is limited to employer actions that are related to employment, or occur in the workplace, and how serious the harm must be to be actionable under the anti-retaliation provision.²⁵ In the first part of its holding, the Court held that section 704(a) covered harm suffered outside the workplace and was not limited to conduct that affected an employee's "compensation, terms, conditions or privileges of employment."²⁶ The Court answered the second question by requiring that the conduct rise to the level of being "materially adverse to a reasonable employee or job applicant."²⁷ The Court further defined this standard by stating 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."²⁸ Plaintiffs' lawyers hailed the decision as a victory for employees because the Court adopted a more

23. 126 S. Ct. 2405 (2006).

24. *Id.* at 2410-11 (recognizing split among circuits and identifying purpose of decision). The Court stated:

We granted certiorari to resolve this disagreement. To do so requires us to decide whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace. And we must characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope.

Id. at 2411.

25. *Id.* (posing two questions to be answered by Court). The Court recognized that the circuit courts were troubled by the scope of the anti-retaliation provision and were divided on these two main issues. *Id.*

26. *Id.* at 2411-12 (setting forth first portion of Court's holding). Some commentators have contended that this portion of the Court's holding is dicta because the facts of the case did not present an occasion where an employee alleged a retaliatory action suffered outside the workplace. See Erwin Chemerinsky, *Workers Win in Retaliation Case*, 43 SUP. CT. REV. 58 (2007) (arguing Court's discussion of retaliation outside workplace was dicta); *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 312, 322 (2006) (recognizing facts of case did not present question of relationship between anti-discrimination and anti-retaliation provisions); REGINALD E. JONES, DLA PIPER US LLP, WASHINGTON, DC, AN UPDATE: HOW WILL THE LONG GROWING TREND OF SUCCESSFUL RETALIATION CLAIMS UNDER U.S. DISCRIMINATION LAWS BE IMPACTED BY RECENT RULINGS 8 (2007), <http://vtbar.org/Upload%20Files/WebPages/CLE/2007teleseminar/050707.pdf> (recognizing one could argue first part of Court's holding is merely dicta). While the first portion of the Court's holding may technically be dicta, lower courts have not treated it as such. See, e.g., *Jordan v. Chertoff*, 224 F. App'x 499, 501 (7th Cir. 2006) (recognizing retaliation can occur outside workplace as Court's holding and not treating it as dicta); *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 19-20 (1st Cir. 2006) (recognizing Court's holdings without referencing dicta); *Padilla v. Bechtel Const. Co.*, No. CV 06 286 PHX LOA, 2007 WL 1219737, at *8 (D. Ariz. April 25, 2007) (recognizing Court held anti-retaliation provision extends beyond harm related to, or suffered at, workplace).

27. *Burlington Northern*, 126 S. Ct. at 2415 (highlighting reference to "reasonable employee" because standard should be viewed objectively).

28. *Id.* at 2409 (articulating Court's new standard for finding materially adverse action). The Court relied on the Seventh Circuit's "dissuade a reasonable worker" standard in developing its own test. See *infra* note 54 (outlining Seventh Circuit's standard).

lenient standard than many anticipated.²⁹ Many lawyers predicted that the number of retaliation claims brought under Title VII and other similar statutes would increase as a result of the decision.³⁰

This Note analyzes workplace retaliation in Massachusetts after *Burlington Northern*, highlighting the need for Massachusetts to adopt an updated standard for proving an adverse action under Chapter 151B.³¹ Part II.A explores Title VII and the circuit split concerning what constituted an adverse action prior to *Burlington Northern*.³² Part II.B investigates the *Burlington Northern* decision, the two components of the Court's holding, and analyzes its rationale for adopting a broad definition of an adverse action.³³ Part II.C discusses Chapter 151B and analyzes the current standard for proving an adverse action in Massachusetts.³⁴ Part III focuses on each part of the Supreme Court's holding in *Burlington Northern* and analyzes whether Massachusetts residents receive the same level of protection under the state's current retaliation jurisprudence.³⁵ This Note concludes that they do not and that Massachusetts needs to update its adverse action standard to ensure that all employees who confront illegal

29. See E.J. Graff, *The Supreme Court Recently Handed Workers a 9-0 Victory in a Pivotal Workplace Discrimination Case*, BOSTON GLOBE, Aug. 31, 2006, at D1 (analyzing decision as victory for plaintiff employees and loss for defendant employers); Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, N.Y. TIMES, June 23, 2006, at A22 (highlighting plaintiff-side lawyers excitement over decision). "This is an exceptionally important decision that changes the law in most of the country . . ." Greenhouse, *supra* (quoting Eric Schnapper, University of Washington law professor, who helped represent plaintiffs in *Burlington Northern*). But see Patti Waldmeir, *US Workers Win More Power in Job Discrimination Lawsuits*, FIN. TIMES, June 22, 2006, available at 2006 WLNR 10948341 (recognizing objective standard makes ruling less damaging to employers).

30. See Becky Gottsegen, *United States Supreme Court Delivers Double-Whammy for Employers: Retaliation and Discrimination Just Got Easier to Prove*, LAB. & EMP. UPDATE (Jones Walker LLP, New Orleans, La.), Sept. 2006, at 3, available at <http://www.joneswalker.com/db30/cgi-bin/pubs/ezinelabor0906.pdf> (predicting standard will apply to other federal and state laws with retaliation provisions); *U.S. Supreme Court Struggles to Define Employee Retaliation Under Title VII*, LAB. L. UPDATE (Vedder Price, Kaufman & Kammholz, P.C., Chicago, Ill.), Aug. 2006, at 5, available at http://www.vedderprice.com/docs/pub/97591459-fe2d-40ee-a6c7-56ae5f1b967d_document.pdf (predicting decision will lead to more retaliation claims filed and getting decided by juries). But see Allan H. Weitzman & Jurate Schwartz, *Managing Burlington Northern Claims: What Actions May Dissuade a Reasonable Worker from Maintaining or Supporting a Charge?*, 13 No. 3 HR ADVISOR: LEGAL & PRAC. GUIDANCE 2 (2007) (recognizing predictions that floodgates would open for retaliation suits was untrue); *Lower Courts Use Burlington Standard to Dismiss Weak Retaliation Claims*, EMP. L. UPDATE (Mayer, Brown, Rowe & Maw LLP, New York, NY), Spring 2007, at 1, available at <http://www.mayerbrownrowe.com/publications/article.asp?id=3310&nid=6> [hereinafter Mayer, Brown, Rowe & Maw] (arguing predictions *Burlington Northern* would broaden scope of retaliation cases erroneous). In actuality, Title VII retaliation claims increased by less than one percent in 2006 as compared to 2005. Charge Statistics FY 1997 through FY 2006, U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/stats/charges.html> (last visited July 7, 2007) (documenting charges filed between 1997 and 2006).

31. See *infra* Parts II-III (analyzing federal and state retaliation claims).

32. See *infra* Part II.A (highlighting Title VII and pre-*Burlington Northern* circuit split).

33. See *infra* Part II.B (analyzing facts of case and Court's holdings and reasoning).

34. See *infra* Part II.C (reviewing unlawful retaliation under Massachusetts law).

35. See *infra* Part III (comparing Massachusetts adverse action standard to *Burlington Northern* and arguing Massachusetts needs to update standard).

discrimination are protected from unlawful retaliation.³⁶

II. HISTORY

A. Federal Law Prior to Burlington Northern

1. Title VII of the Civil Rights Act of 1964

Title VII prohibits employers from discriminating against employees because of their race, color, sex, religion, or national origin.³⁷ Section 703(a), the core anti-discrimination provision, makes it unlawful 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.”³⁸ The statute seeks to deter discriminatory conduct, but Congress was also concerned that employers might overstep their authority and create a culture of fear among employees who presented discrimination claims.³⁹ To protect against such abuse, Congress included section 704(a), the anti-retaliation provision, which prohibits employers from discriminating against employees who have engaged in protected activity.⁴⁰

To establish a prima facie case of retaliation under Title VII, a plaintiff must prove that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) there was a causal connection between the protected act and the employer’s adverse action.⁴¹ The first prong of the plaintiff’s prima facie case protects two types of activity: opposition to discrimination and participation in Title VII proceedings.⁴² The opposition clause protects a wide range of

36. See *infra* Part IV (calling for an updated adverse action standard in Massachusetts).

37. See *supra* text accompanying note 19 (listing Title VII’s protected classes).

38. 42 U.S.C. § 2000e-2(a)(1) (2006).

39. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (recognizing objective of Title VII). The statute’s objective was not to “provide redress but to avoid harm.” *Id.* at 806; see also *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (identifying Congress’s intention behind Title VII). Congress wanted “to promote conciliation rather than litigation in the Title VII context.” *Burlington Indus.*, 524 U.S. at 764; see also *supra* note 15 and accompanying text (recognizing while legislative history is scant, intent behind statute remains clear).

40. See *supra* note 12 (outlining unlawful retaliation under Title VII).

41. See *McDonough v. City of Quincy*, 452 F.3d 8, 17 (1st Cir. 2006) (setting forth prima facie case of retaliation under Title VII). Prior to *Burlington Northern*, the circuit courts disagreed about how to define the adverse action requirement. See *infra* text accompanying notes 50-54 (discussing circuit split over definition of adverse action). The Supreme Court settled this debate in *Burlington Northern*. See *Billings v. Town of Grafton*, 441 F. Supp. 2d 227, 238 (D. Mass. 2006) (recognizing new second prong of prima facie case after *Burlington Northern*). In setting forth the requirements for the plaintiff to establish her prima facie case, the court applied *Burlington Northern* and required that Billings “suffered a materially adverse action in that it ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Id.* (quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2420 (2006)).

42. See 42 U.S.C. § 2000e-3(a) (2006) (containing opposition and participation clauses). The statute

activity, including utilization of an employer's internal grievance procedure and reporting alleged unlawful discrimination to supervisors, managers, and outside entities.⁴³ To be protected under the participation clause, an employee must have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing"⁴⁴

To prove the third prong of a prima facie case of retaliation, plaintiffs use direct evidence of retaliatory intent or circumstantial evidence of disparate treatment.⁴⁵ If the plaintiff relies on circumstantial evidence, the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*⁴⁶ for cases brought under the core anti-discrimination provision applies.⁴⁷ Under *McDonnell Douglas*, once a plaintiff establishes his prima facie case, the burden shifts to the employer to demonstrate a nondiscriminatory, legitimate reason for its adverse action.⁴⁸ If the employer meets its burden, it shifts back to the plaintiff to establish that the employer's proffered reason was merely a pretext for proscribed retaliation.⁴⁹

protects an employee from retaliation where he or she has "opposed any practice made an unlawful employment practice by this subchapter [] or . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Id.*; see also Kurtis A. Kemper, Annotation, *Who has "Participated" in Investigation, Proceeding, or Hearing and Is Thereby Protected from Retaliation Under § 704(a) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-3(a))*, 149 A.L.R. FED. 431 (1998) (discussing participation and opposition clauses).

43. See 42 U.S.C. § 2000e-3(a) (2006); Courts, *supra* note 21, at 239 (finding protection under opposition clause for exposing employer discrimination, internal grievance procedures, and informal protests); Irene Gamer, Comment, *The Retaliatory Harassment Claim: Expanding Employer Liability in Title VII Lawsuits*, 3 SETON HALL CIRCUIT REV. 269, 283-284 (2006) (recognizing opposition activity as communicating to employer or another entity belief that unlawful discrimination occurred). While the opposition clause does encompass a wide array of conduct, its protection from retaliation is somewhat narrow because of the requirement that the employee's conduct be reasonable and that the employee possess a good-faith belief that the employer's action was discriminatory. See Savage, *supra* note 15, at 222 (discussing limited protection under opposition clause).

44. 42 U.S.C. § 2000e-3(a) (2006); see Caplinger & Worth, *supra* note 16, at 26-27 (providing examples of protected activities under participation clause). These activities include filing a charge with the EEOC or state discrimination agency; testifying or cooperating in an investigation by the EEOC or state discrimination agency; and participating in an employer's investigation into discrimination charges pending before the EEOC or state discrimination agency. See Caplinger & Worth, *supra* note 16, at 26-27. In contrast to the opposition clause, the participation clause covers fewer activities but provides greater protection because there is no reasonableness standard for the employee, and the discrimination charge need not be valid. See Savage, *supra* note 15, at 222 (comparing protection under participation clause to opposition clause).

45. See *Mannie v. Potter*, 394 F.3d 977, 983 (7th Cir. 2005) (recognizing circumstantial evidence allowed because direct evidence rare in retaliation cases); *Mole v. Univ. of Mass.*, 814 N.E.2d 329, 338 (Mass. 2004) (recognizing retaliation proven through circumstantial evidence where plaintiff lacks direct evidence of retaliatory motive).

46. 411 U.S. 792 (1973).

47. See *Velez v. Janssen Ortho, LLC*, 467 F.3d 802, 805 (1st Cir. 2006) (affirming applicability of *McDonnell Douglas* to retaliation claims under Title VII).

48. See *McDonnell Douglas*, 411 U.S. at 802 (presenting second stage of burden-shifting analysis).

49. See *id.* at 804 (prescribing third stage of burden-shifting analysis).

2. Pre-Burlington Northern Circuit Split

Prior to the Supreme Court's decision in *Burlington Northern*, the federal circuit courts of appeals had different interpretations of the adverse action element of the prima facie case for retaliation under Title VII.⁵⁰ The courts disagreed whether conduct must be employment or workplace related to constitute an adverse action, and differed about the level to which an adverse action must rise to be actionable.⁵¹ The Fifth and Eighth Circuits adopted the most restrictive standard, requiring an ultimate employment action—a firing, refusal to hire, refusal to grant leave, failure to promote, or change in employee compensation—to find an adverse action.⁵² On the opposite end of the spectrum, the Ninth Circuit adopted the Equal Employment Opportunity Commission's (EEOC) approach, recognizing an adverse action as any conduct that is reasonably likely to deter employees from engaging in protected activity.⁵³ In between these two standards was an intermediate standard adopted in some variation by the remaining nine circuits.⁵⁴

50. See Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 536 (2007) (recognizing adverse action required to prove second prong of prima facie case). The circuit split made it difficult for employers to understand their responsibilities and for employees to understand their rights regarding retaliation. See Savage, *supra* note 15, at 220 (arguing split made understanding rights difficult for employees and employers). Consequently, a plaintiff's ability to establish the second prong of its prima facie case for retaliation depended on where the plaintiff brought the claim. See Shannon Vincent, Comment, *Unbalanced Responses to Employers Getting Even: The Circuit Split Over What Constitutes a Title VII-Prohibited Retaliatory Adverse Employment Action*, 7 U. PA. J. LAB. & EMP. L. 991, 992 (2005).

51. See Taylor, *supra* note 50, at 544-53 (providing thorough discussion of circuit split). The disagreement resulted from the similarities and differences between the two sections of the statute. *Id.* at 537. While both use the phrase "discriminate against," the anti-discrimination provision makes it "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 his or her status as a member of a protected class. 42 U.S.C. § 2000e-2(a)(1) (2006). The anti-retaliation provision makes it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment" for reasons of engaging in protected activities. 42 U.S.C. § 2000e-3(a) (2006). The anti-discrimination provision references specific types of prohibited discrimination, but the anti-retaliation provision merely makes it an unlawful employment practice "to discriminate," without including the anti-discrimination provision's further limiting language—"with respect to his compensation, terms, conditions, or privileges of employment." *Id.*; 42 U.S.C. § 2000e-2(a)(1) (2006).

52. See Okruhlik v. Univ. of Ark., 395 F.3d 872, 879 (8th Cir. 2005) (affirming judgment for employer because tenure denial not "ultimate act" and therefore not adverse action); Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528, 531 (5th Cir. 2003) (recognizing court's strict approach to adverse action requirement); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (discussing conduct rising to actionable level under ultimate employment action standard), *abrogated by Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).

53. See Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (establishing liberal standard for adverse action based on EEOC test); see also U.S. EQUAL OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL 8-II.D.3 (1998), available at <http://www.eeoc.gov/policy/docs/retal.html> (disagreeing with circuits requiring ultimate employment actions or material adversity).

54. See Taylor, *supra* note 50, at 549-53 (explaining "middle ground majority approach" adopted by remaining nine circuits). The Second, Third, Fourth, and Sixth Circuits required a materially adverse change in the terms and conditions of employment. See Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 609 (2d Cir.

B. Burlington Northern

1. Facts of the Case

Sheila White was the only female employee in Burlington Northern's maintenance department, where she worked as a track laborer.⁵⁵ Shortly after beginning work, White's primary responsibility became forklift duties.⁵⁶ In September of 1997, White complained that she was sexually harassed at work after her supervisor made insulting comments to her in front of her male co-workers; this led to the supervisor being suspended for ten days and required to attend sexual harassment training.⁵⁷ After her supervisor's suspension, Burlington Northern reassigned White from forklift duty to performing standard track laborer tasks.⁵⁸ Her supervisor told her that the position reassignment reflected co-worker complaints that the job should go to "a more senior man."⁵⁹ White filed a complaint with the EEOC on October 10, 1997, claiming that her reassignment was gender discrimination and retaliation for her initial complaints about sexual harassment.⁶⁰ Shortly after White filed her complaint, Burlington Northern suspended her for insubordination based on a disagreement with a supervisor.⁶¹ Ultimately, the company determined that

2006) (denying retaliation claim absent materially adverse change in terms, conditions, or privileges of employment); *White v. Burlington Northern & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004) (en banc) (defining adverse employment action as materially adverse change in terms and conditions of employment), *aff'd*, 126 S. Ct. 2405 (2006); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (holding adverse action is any act with adverse effect on employment terms, conditions, or benefits), *abrogated by Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (retaliatory conduct must alter employment terms, conditions, privileges, deprive employment opportunities, or adversely affect employment status), *abrogated by Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). The Seventh and D.C. Circuits required the action to be "material to a reasonable employee," which in this context means it would dissuade "a reasonable worker from making or supporting a charge of discrimination." *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (concluding reassignment that did not affect pay or promotion opportunities would not dissuade reasonable worker); *see also Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (adopting 7th Circuit's "dissuade reasonable worker" test).

55. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2419 (2006) (explaining White's position and job responsibilities). As a track laborer, White removed and replaced track components, transported track material, cut brush, and cleared litter and cargo spillage from the right-of-way. *Id.*

56. *Id.* (discussing events leading up to White's assignment to forklift duties). White had previous experience operating forklifts and operating the forklift became her primary responsibility after the reassignment. *Id.*

57. *Id.* at 2409 (discussing incident and suspension of supervisor).

58. *Id.* While her duties following this reassignment were within her general job description as a track laborer, the Court recognized that the reassignment consisted of taking on responsibilities that were "more arduous and dirtier," that the forklift job was objectively considered a better job, and that White's co-workers resented her for having it. *Id.* at 2417 (quoting *White*, 364 F.3d at 803 (en banc), *aff'd*, 126 S. Ct. 2405 (2006)).

59. *Burlington Northern*, 126 S. Ct. at 2409 (quoting *White*, 364 F.3d at 803 (discussing employer's actions)).

60. *Id.* (detailing EEOC complaint). White filed a second complaint in December of 1997 claiming that Burlington Northern placed her under surveillance. *Id.*

61. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2409 (2006) (describing incident

White was not insubordinate and they reinstated her and awarded thirty-seven days of back pay.⁶²

Following her reinstatement, and after utilizing all of her administrative remedies, White filed a lawsuit in the United States District Court for the Western District of Tennessee, alleging that the reassignment of her job duties and suspension were two separate retaliatory acts to her sexual discrimination complaint.⁶³ The jury in the district court awarded her \$43,500 in damages, and the court denied Burlington Northern's motion for judgment as a matter of law on White's retaliation claim.⁶⁴ On appeal, a Sixth Circuit panel initially reversed, but that decision was later vacated.⁶⁵ After rehearing the case en banc, the Sixth Circuit upheld the district court's decision to deny Burlington Northern's motion for judgment as a matter of law.⁶⁶

2. *First Portion of the Court's Holding: Retaliation Can Occur Outside the Workplace and Is Not Limited to Actions that Affect Employment*

The Supreme Court affirmed the Sixth Circuit's holding that Burlington Northern retaliated against White, but rejected the court's standard for finding that an adverse action occurred.⁶⁷ The Court held that the application of section 704(a) was not limited to an employer's employment-related actions or actions that occurred in the workplace.⁶⁸ Justice Breyer began with a statutory analysis

leading to suspension for insubordination). The disagreement was over the proper truck to be used to transport White from one location to the other. *Id.* White said of the suspension, which took place during the holiday season, "That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed." *Id.* at 2417 (internal quotation marks omitted) (quoting trial transcript).

62. *See id.* at 2409 (discussing internal grievance procedures leading to finding White not insubordinate).

63. *Id.* at 2409-10 (discussing procedural history of case). As part of her district court suit, White filed a sex discrimination claim against Burlington Northern. *White v. Burlington Northern & Santa Fe Ry. Co.*, 364 F.3d 789, 794 (6th Cir. 2004) (en banc) (discussing district court action), *aff'd*, 126 S. Ct. 2405 (2006).

64. *See White v. Burlington Northern & Santa Fe Ry. Co.*, No. 99-2733, 2000 WL 35448693, at *1 (W.D. Tenn. Nov. 16, 2000) (stating jury awarded \$43,500 in compensatory damages for medical expenses and pain and suffering). White failed on her sex discrimination claim, but the jury found in her favor on the retaliation claim. *Id.* Following the trial, the district court denied Burlington Northern's motion for judgment as a matter of law. *White*, 364 F.3d at 794 (discussing district court action).

65. *White v. Burlington Northern & Santa Fe Ry. Co.*, 310 F.3d 443, 455 (6th Cir. 2002) (finding White failed to demonstrate prima facie case for retaliation), *rev'd en banc*, 364 F.3d 789 (6th Cir. 2004), *aff'd*, 126 S. Ct. 2405 (2006).

66. *See White*, 364 F.3d at 804. After vacating the decision, the full court upheld the district court's finding for White, but defended the Sixth Circuit's prior definition of an adverse employment action. *Id.* at 797 (upholding district court but disagreeing on correct standard for retaliation). The majority opinion rejected the more liberal definition of the Ninth Circuit and the EEOC, but found that White's shift in duties and suspension were sufficient to meet the Sixth Circuit's current standard. *Id.* at 800-03.

67. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2416 (2006) (finding White's reassignment and suspension were unlawful retaliation under newly articulated standard); *see id.* at 2415 (adopting Seventh and D.C. Circuit standards). In adopting this standard and rejecting the Sixth Circuit's standard, Justice Breyer also rejected the Fifth and the Eighth Circuits' "ultimate employment action" standard and the Ninth Circuit's "reasonably likely to deter" standard. *See id.* at 2410-11 (discussing different circuit interpretations of adverse action requirement).

68. *See id.* at 2411-14 (highlighting absence of modifying phrase in anti-retaliation provision as support

and recognized that the standard for discriminatory conduct under section 703 is not the same as the standard for retaliatory conduct under section 704.⁶⁹ He looked at the goal of the anti-discrimination provision, which seeks to create a workplace where individuals are not discriminated against because of race, sex, national origin, or religion.⁷⁰ To secure this goal, Congress did not need to prohibit discrimination unrelated to employment, which is why the anti-discrimination section is limited to discriminating against an individual “with respect to his compensation, terms, conditions, or privileges of employment.”⁷¹ Justice Breyer noted that the modifying clause limiting the anti-discrimination provision to employment was absent from the anti-retaliation provision, which merely makes it unlawful for an employer “to discriminate against” an employee who has engaged in protected activity.⁷² The anti-retaliation provision seeks to protect employees from discrimination based on their conduct to secure or advance the provisions of Title VII, which Congress did not limit to employment.⁷³

Through this analysis, the Court reasoned that the retaliation provision covers more conduct than the anti-discrimination provision because retaliation can occur outside the workplace or through actions against an employee not directly related to his employment.⁷⁴ The Court concluded that if retaliation was limited to employment actions, the anti-retaliation provision’s purpose— “[m]aintaining unfettered access to statutory remedial mechanisms”—would fail because of the many forms that retaliation can take.⁷⁵

for holding).

69. See *id.* (comparing text of anti-discrimination and anti-retaliation provisions).

70. See *id.* at 2412 (explaining anti-discrimination provision’s purpose as detailed in *McDonnell Douglas*).

71. 42 U.S.C. § 2000e-2(a)(1) (2006); *Burlington Northern*, 126 S. Ct. at 2412 (recognizing Congress could achieve goal if all employment-related discrimination were eliminated).

72. See *Burlington Northern*, 126 S. Ct. at 2411-12 (quoting 42 U.S.C. § 2000e-3(a) (2006)) (recognizing Congress intended to leave limiting words out of anti-retaliation provision). But see *Burlington Northern*, 126 S. Ct. at 2418-19 (Alito, J., concurring) (preferring to read two provisions together). In Justice Alito’s view, “discriminate” under the anti-retaliation provision would be limited and consistent with references to “discriminate” under the anti-discrimination provision. *Id.*

73. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006) (stating purposes of anti-retaliation provision). “The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.” *Id.* This is different than the anti-discrimination provision, which seeks to protect individuals because of their protected class. See 42 U.S.C. § 2000e-2(a)(1) (2006).

74. *Burlington Northern*, 126 S. Ct. at 2412 (discussing Congress’s objectives and how limiting anti-retaliation provision fails to meet them). To demonstrate this, the Court mentioned a case where the Federal Bureau of Investigation (FBI) retaliated against one of its agents, when, contrary to policy, the FBI refused to investigate death threats made against the agent and his wife. *Id.*; *Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006) (holding FBI’s retaliatory refusal to investigate death threats against agent actionable).

75. *Burlington Northern*, 126 S. Ct. at 2412 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (observing primary purpose of anti-retaliation provision). Justice Alito concurred in the opinion because he agreed that White had been unlawfully retaliated against, but he did not agree with the majority’s formulation. See *id.* at 2421 (Alito, J., concurring). He differed with the majority in his interpretation of the adverse action standard. *Id.* at 2418. Justice Alito contended that Title VII provided a single standard for

3. *Second Portion of the Court's Holding: The Action Must Be Materially Adverse to a Reasonable Employee*

In the second portion of its holding, the Court held that an adverse action must rise to the level of being materially adverse to a reasonable employee or applicant to be actionable under section 704.⁷⁶ Justice Breyer was careful to explain that not all conduct is covered under the new standard.⁷⁷ The action, viewed objectively, must be materially adverse to a reasonable employee, which means that it might dissuade a reasonable worker from pursuing or supporting a discrimination claim.⁷⁸ The Court also stressed that the application of this standard was a fact-based inquiry to be decided by the trier of fact.⁷⁹

While the Court argued that an objective “reasonable employee” standard avoided the inherent uncertainties in determining an individual’s subjective feelings, it also articulated a subjective component of the test by stating that individual context matters.⁸⁰ Courts must consider the plaintiff’s individual

unlawful conduct and that section 704 is violated only when the conduct would be unlawful under section 703 if motivated by discrimination against a protected class. *Id.* at 2419. Justice Alito felt that conduct could occur outside the workplace and still relate to an employee’s terms, conditions, or privileges of employment, and therefore the Sixth Circuit’s standard was not as narrow as implied by the majority opinion. *Id.* However, he still found that under the Sixth Circuit’s standard, White’s suspension and reassignment amounted to unlawful retaliation. *Id.* at 2421-22.

76. *See id.* at 2415 (adopting adverse action standard under Title VII). The EEOC previously argued that section 704 “prohibit[s] any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.” U.S. EQUAL OPPORTUNITY COMMISSION, *supra* note 53, at 8-II.D.3. While the Court gave deference to certain aspects of the EEOC’s position, it did not go so far as to adopt the agency’s position; instead, the Court stated that it was adopting the standard employed by the Seventh and D.C. Circuits. *Burlington Northern*, 126 S. Ct. at 2413-15 (rejecting contention that adverse action must relate to compensation, terms, conditions, or status of employment, and agreeing with Seventh and D.C. Circuits’ standards).

77. *See Burlington Northern*, 126 S. Ct. at 2415 (recognizing that not all retaliation is protected under Title VII, rather it must produce “injury or harm”). The Court stressed that it was important to “separate significant from trivial harms” and that the new standard would not protect “petty slights or minor annoyances.” *Id.*

78. *See id.* at 2415 (stressing advantage of objective standard in Title VII context).

79. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2416 (2006) (holding that jury’s finding was adequately supported). The Court applied its new standard to the facts and found that there was sufficient evidence to support the jury’s verdict in White’s favor. *Id.* The determination of whether an action was materially adverse was often previously treated as a question of law; however, following *Burlington Northern*, the determination of whether an act would deter a reasonable employee from pursuing a charge is a fact-based inquiry. *See* ERIC SCHNAPPER, *BURLINGTON NORTHERN V. WHITE IN THE LOWER COURTS: AN INTERIM REPORT* (2007), http://lawprofessors.typepad.com/laborprof_blog/files/burlingtonnorthernapril_2007.doc (calling transformation from question of law to question of fact a “little noticed aspect of decision”).

80. *Burlington Northern*, 126 S. Ct. at 2415 (arguing objective standard is “judicially administratable,” but stating retaliation depends on particular circumstances). The Court wanted to present the standard in general terms rather than specifically prohibit certain conduct because an act can impact individuals differently. *Id.* at 2415-16; *see also* Sid Steinberg, *U.S. Supreme Court Expands the Reach of Retaliation Claims*, LEGAL INTELLIGENCER, July 12, 2006, at 1 (describing Court’s discussion of objective standard combined with attention to particular circumstances as “curious”).

circumstances when deciding if the challenged conduct is actionable.⁸¹ The standard is that of a reasonable employee in the plaintiff's position.⁸² The Court explained that a schedule change "may make little difference to many workers, but may matter tremendously to a young mother with school age children."⁸³ By focusing on the context of the retaliatory action, the Court clearly demonstrated that the issue is a fact-based inquiry.⁸⁴ Justice Alito attacked this component of the test in his concurring opinion, as did many commentators after the decision.⁸⁵ Despite this criticism, it is clear that the Court's ruling broadened the scope of what constitutes an adverse action in the majority of the country.⁸⁶ The Court took a large step in the continuing struggle to eradicate illegal discrimination when it adopted a standard that provides employees with substantial protection from unlawful retaliation.⁸⁷

81. See Taylor, *supra* note 50, at 586 (arguing Court "[injects] substantial subjectivity into inquiry"). But see Mayer, Brown, Rowe & Maw, *supra* note 30, at 1 (highlighting objective standard strictly enforced thus far in cases following *Burlington Northern*).

82. See *Burlington Northern*, 126 S. Ct. at 2416 (describing new standard).

83. *Id.* at 2415-16 (detailing examples of how context matters in determining results of new standard). The Court also used an example of how normally a supervisor's refusal to invite an employee to lunch is not actionable; however, if the lunch is a weekly event that contributes to the employee's professional advancement, that conduct could meet the Court's new standard. *Id.*

84. See Weitzman & Schwartz, *supra* note 30, at 2 (acknowledging context focus is problematic for employers because leads to jury trials). Because of the newfound fact-intensive component of proving retaliation, to succeed on a retaliation claim, plaintiff's counsel must clearly address issues such as proof of harm suffered, proof of objective undesirability, proof that the action was materially adverse to the particular plaintiff, and proof that the action might result in future harm to the plaintiff. See Schnapper, *supra* note 79, at 9-15 (addressing factual issues now important following *Burlington Northern*).

85. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2421 (2006) (Alito, J., concurring) (criticizing majority's "reasonable worker" test as unclear because individual characteristics must be considered). Justice Alito recognized that the majority's test requires reviewing courts to consider individual characteristics such as age, gender, and family obligations, but it is not clear how many other individual characteristics should be considered. *Id.*; see also Taylor, *supra* note 50, at 588 (describing Court's standard as "highly subjective" and "unworkably vague"). Critics contend that the standard will require an employer to have a heightened knowledge of an employee's personal life to determine whether one employee will view conduct as "trivial," while another might find the action "materially adverse." See Taylor, *supra* note 50, at 586-88 (considering difficulty employers face under new standard). Taylor argues that an employer is now faced with two options when considering a change that might affect an employee who engaged in protected activity: gather extensive information on the employee to determine whether the change may affect her more substantially than the "reasonable worker," or make no change despite whatever necessity exists. *Id.* at 586-87.

86. See Allan H. Weitzman & Heather G. Magier, *The Dark Clouds of Burlington Northern: Is There a Silver Lining?* 12 No. 5 HR ADVISOR: LEGAL & PRAC. GUIDANCE 2 (2006) (recognizing Ninth Circuit only circuit where Supreme Court's test more employer-friendly).

87. See Gina Cook, *U.S. Supreme Court Expands Extent of Employer Liability for Retaliation Claims*, 43 TENN. B.J. 30, 30 (2007) (asserting decision "shifted the balance of power in employment disputes toward employees"); Emily White, *Burlington Northern & Santa Fe Railway Co. v. White: The Supreme Court Bolsters Worker Protections by Setting Broad Retaliation Test*, 27 BERKLEY J. EMP. & LAB. L. 530, 536 (2006) (recognizing Court's bold step in reinforcing strong public interest with broad standard).

C. *Massachusetts Law Before Burlington Northern*

Title VII is similar to Massachusetts's anti-discrimination and anti-retaliation provisions in many respects.⁸⁸ This has led the Massachusetts courts to look to federal court interpretations of Title VII when construing Chapter 151B.⁸⁹ Massachusetts courts, however, are not bound by federal law in the interpretation of Chapter 151B and have declined to follow federal precedent in certain instances.⁹⁰ The next four sections explain the current state of unlawful retaliation under Massachusetts law and demonstrate how *Burlington Northern* highlights the need for an updated adverse action standard in Massachusetts.⁹¹

1. *Massachusetts General Laws Chapter 151B*

Massachusetts General Laws chapter 151B, section 4(1), the state's core anti-discrimination provision, makes it an unlawful employment practice

[f]or an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, [or] sexual orientation . . . of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.⁹²

The legislature included an anti-retaliation provision because it was concerned that employees who sought to confront unlawful discrimination would not be otherwise protected.⁹³ Chapter 151B, section 4(4) of the

88. See 45 Mass. Prac. § 8.2 (Scott C. Moriearty et al. 2007) (recognizing Chapter 151B closely analogous to federal law in many respects).

89. See *Wynn & Wynn, P.C. v. Mass. Comm'n Against Discrim.*, 729 N.E.2d 1068, 1080 n.29 (Mass. 2000) (explaining relationship between federal and state court in interpreting similar statutes), *overruled on other grounds by* *Stonehill Coll. v. Mass. Comm'n Against Discrim.*, 808 N.E.2d 205 (Mass. 2004). While not bound by federal interpretations of Title VII when interpreting Chapter 151B, the state courts often look to federal interpretations for guidance. *Id.*

90. See *Mass. Gen. Elec. Co. v. Mass. Comm'n Against Discrim.*, 375 N.E.2d 1192, 1198 (Mass. 1978) (rejecting federal precedent concerning temporary disability plan under Title VII). The SJC explains:

Title VII and the decisions construing it are not determinative of the questions presented in this case; rather the issue presented is purely one of the interpretation[s] of a Massachusetts statute. While interpretations of a Federal statute which is similar to the State statute under consideration are often helpful in setting forth all the various policy considerations, such interpretations are not binding on a State court construing its own State statute.

Id. (citations omitted).

91. See *infra* Part II.C (outlining unlawful retaliation under Massachusetts law).

92. MASS. GEN. LAWS ch. 151B, § 4(1) (2004) (defining unlawful discrimination in Massachusetts). The Massachusetts provision has similar language to Title VII's anti-discrimination provision. See *supra* note 38 and accompanying text (laying out Title VII's anti-discrimination provision).

93. See *Dahms v. Cognex Corp.*, No. 993192, 2001 WL 1771994, at *4 (Mass. Super. Ct. Oct. 29, 2001)

Massachusetts General Laws protects employees from retaliation if they have opposed any practice forbidden under Chapter 151B or if they have filed complaints or assisted in any proceeding before the Massachusetts Commission Against Discrimination (MCAD).⁹⁴ The provision provides:

It shall be an unlawful practice . . . [f]or any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.⁹⁵

Like Congress, the Massachusetts legislature did not limit the extent of protection from retaliation in crafting the anti-retaliation provision by including the qualifier, “compensation, terms, conditions, or privileges of employment,” which appears in the state’s anti-discrimination provision.⁹⁶

2. *The Massachusetts Commission Against Discrimination*

Before a plaintiff can sue for retaliation in state court, he must first file a complaint with the MCAD, the administrative agency in charge of enforcing Chapter 151B.⁹⁷ A parallel enforcement structure exists, which allows complainants to remove their case from the MCAD and proceed with a civil action in court.⁹⁸ The MCAD formulates policies to effectuate the purposes of

(commenting legislature prohibited retaliation because it recognized person complaining of discrimination risked retaliation following protected activity); *see also* Kelley v. Plymouth County Sheriffs Dep’t, 22 M.D.L.R. 208, 217 (Mass Comm’n Against Discrim. 2000) (discussing retaliation under Massachusetts law), *aff’d in relevant part*, 24 M.D.L.R. 342 (Mass Comm’n Against Discrim. 2002) (full comm’n). “Retaliation is . . . ‘motivated at least in part, by a distinct intent to punish or rid a workplace of someone who complains of unlawful practices.’” *Id.* (quoting Ruffino v. State Street Bank & Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995)).

94. MASS. GEN. LAWS ch. 151B, § 4(4) (2004) (recognizing unlawful retaliation in Massachusetts).

95. *Id.* (articulating unlawful retaliation under Massachusetts law). The Massachusetts anti-retaliation provision contains similar language to the Title VII anti-retaliation provision. *See supra* note 12 (quoting unlawful retaliation under federal law). The Massachusetts provision does not actually use the word “retaliation,” but rather uses the term to “discriminate against;” however, courts frequently use “retaliation,” when referencing this provision. *See* Bain v. City of Springfield, 678 N.E.2d 155, 160 (Mass. 1997) (discussing absence of word “retaliation” from statute).

96. *See supra* notes 68-73 and accompanying text (examining statutory language of Title VII’s anti-discrimination and anti-retaliation provisions). *Compare* MASS GEN. LAWS ch. 151B, § 4(1) (2004) (setting forth anti-discrimination provision), *with* MASS GEN. LAWS ch. 151B, § 4(4) (2004) (setting forth anti-retaliation provision).

97. *See* MASS. GEN. LAWS ch. 151B, § 3 (2004) (setting forth functions, powers, and duties of MCAD). The MCAD has the power to receive and investigate complaints of discrimination, conduct hearings, subpoena witnesses, promulgate rules and regulations, and impose sanctions based on its findings. *Id.*; MASS. GEN. LAWS ch. 151B, § 5 (2004) (requiring complaint with MCAD before redress of Chapter 151B violations); *Butner v. Dep’t of State Police*, 803 N.E.2d 722, 727-28 (Mass. App. Ct. 2004) (requiring plaintiff to pursue MCAD remedy before entertaining Chapter 151B claim).

98. *See* MASS. GEN. LAWS ch. 151, § 9 (2004) (allowing removal to superior court after plaintiff filed with

Chapter 151B and makes recommendations to agencies and officers throughout the state about the interpretation of the statute.⁹⁹ The MCAD has taken a broad view of retaliation because of the legislature's express delegation empowering the agency to act forcibly to implement the statute to eliminate discrimination at its roots.¹⁰⁰

3. Massachusetts Law Versus Federal Law

Regardless of whether a plaintiff chooses to remove his case from the MCAD to state or federal court, a plaintiff must establish a prima facie case of retaliation.¹⁰¹ Establishing a prima facie case of retaliation under Massachusetts law requires a three-pronged analysis similar to that under federal law.¹⁰²

MCAD). A complainant waives his or her right to relitigate the matter in superior court by remaining at the MCAD. *See* Brunson v. Wall, 541 N.E.2d 338, 341-42 (Mass. 1989). The respondent does not have the right to remove to superior court. *See* Stonehill Coll. v. Mass. Comm'n Against Discrim., 808 N.E.2d 205, 216 (Mass. 2004) (concluding respondents had no constitutional right to jury trial under Chapter 151B). The respondent, however, may demand a jury trial after the MCAD enters a final decision and the complainant seeks more than equitable relief. *Id.* The MCAD also has a work share agreement with the EEOC; therefore, a plaintiff may file both federal and state claims under one charge. *See* Davis v. Lucent Techs., Inc., 251 F.3d 227, 231 n.1 (1st Cir. 2001) (recognizing dual state and federal filing).

99. *See* MASS. GEN. LAWS ch. 151B, § 2 (2004); Conway v. Electro Switch Corp., 523 N.E.2d 255, 256 (Mass. 1988) (asserting MCAD has broad discretion to fashion remedies best to effectuate goals of statute). While the MCAD must follow Massachusetts law as interpreted by the SJC, the SJC has given substantial deference to the MCAD Guidelines in interpreting Chapter 151B. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 961 (Mass. 2001) (providing MCAD Guidelines entitled to substantial deference even though not controlling authority).

100. MASS. GEN. LAWS ch. 151B, § 2 (2004) (establishing MCAD's authority); *see* Mass. Comm'n Against Discrim. v. Flatley Co., No. 97-BEM-4600, 2005 WL 2993474, at *13 (Mass. Comm'n Against Discrim. Sept. 2, 2005) (stating MCAD broadly interprets anti-retaliation provision); Kealy v. City of Lowell, No. 98-BEM-0335, 2005 WL 677588, at *3 (Mass. Comm'n Against Discrim. Mar. 11, 2005) (recognizing MCAD's broad discretion and authority to fashion remedies where unlawful retaliation occurred).

101. *See* Mole v. Univ. of Mass., 814 N.E.2d 329, 339-40 (Mass. 2004) (requiring prima facie case for retaliation claim). Massachusetts requires a plaintiff to show that he engaged in legally protected conduct and suffered an adverse employment action in addition to demonstrating that a causal connection existed between the protected conduct and the adverse action. *Id.*

102. *Cf.* Billings v. Town of Grafton, 441 F. Supp. 2d 227, 239-40 (D. Mass. 2006) (recognizing second prong different in Massachusetts following *Burlington Northern* because of restrictive language of *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1 (Mass. 1996)). *Compare* McDonough v. City of Quincy, 452 F.3d 8, 17 (1st Cir. 2006) (setting forth prima facie case of retaliation under Title VII), *with* *Mole*, 814 N.E.2d at 339-40 (describing elements of prima facie case of retaliation under Massachusetts law). The SJC adopted the *McDonnell Douglas* burden-shifting scheme for proving discrimination and retaliation. *See* Wheelock Coll. v. Mass. Comm'n Against Discrimination, 355 N.E.2d 309, 314 (Mass. 1976) (adopting *McDonnell Douglas* burden-shifting framework for cases under anti-discrimination provision of Chapter 151B). The SJC also applied *McDonnell Douglas* to retaliation claims under state law. *Mole*, 814 N.E.2d at 338 (applying *McDonnell Douglas* burden-shifting framework to retaliation case under anti-retaliation provision of Chapter 151B). Also separate to federal law, retaliation claims under state law are separate and independent causes of action. *See* Sahli v. Bull HN Info. Sys., Inc., 774 N.E.2d 1085, 1089 (Mass. 2002) (finding liability on retaliation claim not conditioned on finding liability on underlying discrimination claim). To succeed on a retaliation claim, a plaintiff must prove that he reasonably and in good faith believed that his employer engaged in wrongful discrimination; therefore, the retaliation claim can succeed even if the

The statutory protection for employees from retaliation in Massachusetts is broader than under federal law.¹⁰³ In 1989, the legislature amended Chapter 151B to include section 4(4A), which makes it unlawful “[f]or any person to coerce, intimidate, threaten, or interfere with another person [or someone assisting such person] in the exercise or enjoyment of any right granted or protected by this chapter”¹⁰⁴ This section extended the scope of what constituted an adverse action beyond what is statutorily defined in Title VII.¹⁰⁵ As the Massachusetts Supreme Judicial Court (SJC) noted in *Bain v. City of Springfield*,¹⁰⁶ “our c. 151B, section 4(4A) . . . is much more specific than Title VII[’s] [anti-retaliation provision,] . . . and we may well find liability under c. 151B even if the same conduct would not be actionable under Title VII.”¹⁰⁷

The legislature also directed that Chapter 151B “shall be construed liberally” to accomplish the statute’s purpose, which is to eliminate discrimination and specifically to remove “artificial, arbitrary, and unnecessary barriers to full participation in the workplace.”¹⁰⁸ In *Cuddy v. Stop & Shop Supermarket*

underlying discrimination claim fails. See *Abramian v. President & Fellows of Harvard Coll.*, 731 N.E.2d 1075, 1087-88 (Mass. 2000) (upholding \$522,136 in compensatory damages based on retaliation claim alone).

103. See *infra* notes 104, 106-111 and accompanying text (demonstrating how Massachusetts statute provides broader protection). The statutory protection under Massachusetts law is broader because of the language of the respective statutes and the directive by the legislature that Chapter 151B be interpreted liberally to provide support for the victims of discrimination. See *id.*

104. MASS. STAT. ch. 722, § 14 (1989) (codified as amended at MASS GEN. LAWS ch. 151B, § 4(4A) (2004)) (setting forth additional provision to protect employees not found in Title VII).

105. Compare *supra* note 104 and accompanying text (presenting Massachusetts provision not found under Title VII), with *supra* note 12 and accompanying text (discussing Title VII’s anti-retaliation provision). Therefore, it could be unlawful retaliation for a person to refuse to hire someone who filed a discrimination claim at his previous place of employment. See *Madera v. Naratone Sec.*, No. 99-BEM-2629, 2002 WL 31318574, at *24 (Mass. Comm’n Against Discrim. Sep. 22, 2002) (holding failure to hire was retaliation even where protected activity was directed toward prior employer); see also *U.S. Supreme Court Gives Employees an Expanded Right to Claim Retaliation*, LAB. & EMP. L. UPDATE (Rubin & Rudman LLP, Boston, Mass.), Sept. 2006, at 2, available at <http://www.rubinrudman.com/Site/Articles/200609-LaELU.pdf> (recognizing Massachusetts anti-retaliation provision broader than federal because applies to “any person” rather than simply “employer”).

106. 678 N.E.2d 155 (Mass. 1997).

107. *Id.* at 160 n.4 (recognizing unlawful retaliation in form of threat to employee). In *Bain*, a mayor ordered one of his associates to “[g]et rid of” another employee following the employee’s complaints of discrimination and a newspaper article detailing the plaintiff’s allegations. *Id.* at 157-58. The court recognized that this threat constituted a violation of Massachusetts law, even though the threat would not be actionable under federal law at the time. *Id.* at 160 n.4. The greater protection in Massachusetts for employees extends to protected classes as well. See MASS. GEN. LAWS ch. 151B, § 4(1) (2004). Massachusetts recognizes sexual orientation as a protected class, while Title VII does not. Compare *id.*, with 42 U.S.C. § 2000e-2(a)(1) (2006) (defining protected classes as “race, color, sex, religion, or national origin”). Therefore, an employee would be protected under Massachusetts law for filing a complaint against his or her employer for discrimination based on his or her sexual orientation, but would not be protected under federal law. Compare *id.*, with 42 U.S.C. § 2000e-2(a)(1) (2006).

108. MASS. GEN. LAWS ch. 151B, § 9 (2004) (requiring liberal interpretation of Chapter 151B); see *Harvard Law Sch. Coal. for Civil Rights v. President & Fellows of Harvard Coll.*, 595 N.E.2d 316, 318 (Mass. 1992) (quoting *College-Town, Div. of Interco, Inc. v. Mass. Comm’n Against Discrim.*, 508 N.E.2d 587, 591 (Mass. 1987) (articulating purpose of Chapter 151B)).

Co.,¹⁰⁹ the SJC listed the liberal provision as one of the reasons the court does not follow the reasoning of federal courts regarding Title VII when construing Chapter 151B.¹¹⁰ The liberal interpretation provision gives courts the power to broadly interpret the anti-discrimination provisions and remedies found within Chapter 151B.¹¹¹

4. Adverse Action Standard in Massachusetts

While the language of Massachusetts's anti-retaliation provision is broader than its federal counterpart, the Massachusetts courts have limited the statute's reach by interpreting the adverse action requirement more strictly than the provision allows.¹¹² The SJC articulated the adverse action standard in *MacCormack v. Boston Edison Co.*¹¹³ The SJC found that an employee failed to suffer an "adverse employment action" where "he offered no objective evidence that he had been [materially] disadvantaged in respect to salary, grade, or other objective terms and conditions of employment," despite the fact that this language is absent from the anti-retaliation provision.¹¹⁴ The court further stated that the employee's claim of retaliation amounted "to no more than subjective feelings of disillusionment" when his employer reassigned his job duties after a discrimination complaint.¹¹⁵ Under this standard, a plaintiff must demonstrate a material disadvantage with respect to salary, grade, terms, or conditions of employment to establish the second prong of a prima facie case of retaliation; anything outside this realm is not actionable.¹¹⁶ This standard is

109. 750 N.E.2d 928 (Mass. 2001).

110. See *id.* at 939 (justifying not following reasoning of federal decisions applying Title VII when construing Chapter 151B). In *Cuddy*, the SJC refused to adopt a federal interpretation of the application of the continuing violation doctrine to a claim of hostile worker environment under Chapter 151B. *Id.* at 940.

111. See Robert S. Mantell, *The Liberal Interpretation of Chapter 151B*, ARTICLES (Rodgers, Powers, & Schwartz LLP, Boston, Mass.), available at <http://www.theemploymentlawyers.com/Articles/Chapter%20151B.htm> (arguing for adoption of mandatory analysis of liberal interpretation in choosing between competing interpretations of Chapter 151B).

112. See *infra* notes 113-115 (discussing Massachusetts standard for proving adverse action). The Massachusetts courts consistently require plaintiffs to establish an "adverse employment action" to establish the second prong of a prima facie case of retaliation. See *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8-9 (Mass. 1996).

113. *MacCormack*, 672 N.E.2d at 8-9.

114. *Id.* at 8 (setting forth Massachusetts's standard for proving adverse employment action). *MacCormack* filed an age discrimination suit when his employer gave a promotion to a younger employee. *Id.* at 2-4. Unlike federal law, where age is protected under the Age Discrimination in Employment Act (ADEA), age is protected under Chapter 151B, the state's general anti-discrimination law. See MASS. GEN. LAWS ch. 151B, §§ 4(1B), (1C) (2004). Following his charge of age discrimination, *MacCormack* alleged that he was retaliated against even though his job grade and pay level remained the same. *MacCormack*, 672 N.E.2d at 2-4. He based this allegation on the fact that he received a lower ranking within the organization, had his reporting duties changed, lost certain job responsibilities, and was not assigned a higher job grade, while co-workers were. *Id.* at 7-8.

115. *MacCormack*, 672 N.E.2d at 9 (denying *MacCormack* suffered adverse action and therefore finding for employer on retaliation claim).

116. *Clancy v. Town of Mashpee*, No. BACV2002-00751, 2006 WL 4121707, at *5 (Mass. Super. Ct. Dec.

similar to the interpretation of an adverse action previously applied by the Second, Third, Fourth, and Sixth Circuits.¹¹⁷

The *MacCormack* standard has never been explicitly overturned, but subsequent decisions appear to extend its scope, demonstrating that there is not a bright-line rule for determining an adverse action under Massachusetts law.¹¹⁸ In *Bain*, the SJC applied section 4(4A) and held that a mayor's order to an employee's supervisor to "get rid of her" for complaining about gender discrimination constituted a threat or intimidation, and therefore, unlawful retaliation.¹¹⁹ In *Clifton v. Massachusetts Bay Transportation Authority*,¹²⁰ the SJC ruled that retaliatory acts were not limited to ultimate employment decisions, but also encompassed hostile or abusive workplace treatment.¹²¹ This ruling applied the continuing violation doctrine to retaliation claims brought under Massachusetts law.¹²² In *Sahli v. Bull HN Information Systems Inc.*,¹²³ the SJC held that the filing of a lawsuit against a former employee is not a sufficient adverse action for the purposes of sections 4(4) and 4(4A), but the court did suggest that a "sham lawsuit" may be a sufficient adverse action.¹²⁴

20, 2006); see *supra* text accompanying note 114 (articulating standard for adverse employment action). "In bringing her claim under this statute, . . . [plaintiff] is obligated to prove a change in working conditions that materially disadvantaged her." *Clancy*, 2006 WL 4121707, at *5 (citing *MacCormack*, 672 N.E.2d at 8) (internal quotation marks omitted); see also GOODWIN PROCTER LLP, MANAGING EMPLOYEES IN ADVERSARIAL SITUATIONS-SUCCESSFUL AVOIDANCE AND DEFENSE OF RETALIATION AND WHISTLEBLOWING CLAIMS 33 (2003), available at http://www.goodwinprocter.com/getfile.aspx?filepath=/Files/publications/LE_adversarial_situations_06_03.pdf (recognizing *MacCormack* test as standard for proving adverse action in Massachusetts).

117. See Taylor, *supra* note 50, at 549-53 (outlining federal materially adverse standard limited to compensation, terms, conditions, or privileges of employment).

118. See *infra* notes 119-124 and accompanying text (documenting cases expanding reach of *MacCormack* standard).

119. *Bain v. City of Springfield*, 678 N.E.2d 155, 160 (Mass. 1997) (applying section 4(4A) to find threat an adverse action); see also *Ritchie v. Dep't of State Police*, 805 N.E.2d 54, 63 (Mass. App. Ct. 2004) (denying defendant's motion to dismiss retaliation claim). In *Ritchie*, the court recognized that a threat itself could be an adverse action for the purpose of section 4(4A). *Ritchie*, 805 N.E.2d at 63 n.16.

120. 839 N.E.2d 314 (Mass. 2005).

121. *Id.* at 318 (finding no reason to exclude retaliation claim under section 4(4) from continuing violation doctrine). In *Clifton*, an African American MBTA employee alleged his co-workers discriminated against him on the basis of his race. *Id.* at 315. While at work, the plaintiff's co-workers shot bottle rockets at him, sprayed him with fire hoses, and painted "fag bait" and "Sanford and Son" on his locker. *Id.* at 316. When he filed a discrimination charge with the MCAD, his co-workers continued to harass him. *Id.* at 317.

122. *Id.* at 318 (applying hostile work environment to adverse action under section 4(4)). The court in *Clifton* ruled that while retaliation typically involves concrete and identifiable adverse employment actions, it may also involve "a continuing pattern of behavior that is, by its insidious nature, linked to the very acts that make up a claim of hostile work environment." *Id.*

123. 774 N.E.2d 1085 (Mass. 2002).

124. *Id.* at 1091-92 (discussing sham or baseless litigation). When an employer and employee enter into a legitimate contract and the employer brings a lawsuit that has a legitimate basis in law and fact, the employer does not violate section 4(4) or 4(4A) unless there is evidence that the purpose of the lawsuit is other than to stop conduct that the employer reasonably believes violates the contract. *Id.* at 1092. This is one of the few cases where the SJC has dealt with a case in which the alleged retaliatory action is outside the realm of employment. *Id.*

These cases expanded *MacCormack*'s restrictive definition of an adverse action because they allowed threats or substantial harassment to constitute an adverse action sufficient to violate Chapter 151B.¹²⁵ Despite these developments, courts and commentators continue to frequently cite the *MacCormack* standard as the controlling principle in the majority of retaliation cases to define an adverse action in Massachusetts.¹²⁶ Even the MCAD, which has developed a broad definition of retaliation, continues to follow the *MacCormack* test.¹²⁷ It is clear that the SJC has not clearly directed judges in Massachusetts whether *MacCormack*'s restrictive test still applies.¹²⁸

III. ANALYSIS

In *Burlington Northern*, the Supreme Court interpreted a federal statute that the Massachusetts courts are not bound to follow in developing their own anti-retaliation law.¹²⁹ The decision, however, exposes the deficiencies inherent in the Massachusetts standard for finding an adverse action, and thus compels the state to update its standard.¹³⁰

The MCAD could promulgate guidelines that clarify that the anti-retaliation provision does not limit an adverse action in the manner that the court has;

125. See *supra* notes 119-124 and accompanying text (documenting development of *MacCormack* standard by Massachusetts courts). While these rulings broadened the definition of an adverse action, courts continue to apply *MacCormack*'s limited standard. See *infra* note 126 and accompanying text (explaining *MacCormack*'s prominence as test for proving adverse action).

126. See *Billings v. Town of Grafton*, 441 F. Supp. 2d 227, 241 (D. Mass. 2006) (citing *MacCormack* in stating Chapter 151B still requires materially adverse action related to employment); *Lavalley v. Quebecor World Book Servs., LLC*, 315 F. Supp. 2d 136, 147 (D. Mass. 2004) (relying on *MacCormack* test in determining whether plaintiff suffered adverse action under Massachusetts law); *Flanagan-Uusitalo v. D.T. Indus., Inc.*, 190 F. Supp. 2d 105, 117 (D. Mass. 2001) (denying adverse action absent objective evidence of material disadvantage to salary, grade, terms, or conditions of employment); *Fallon v. Mass. Comm'n Against Discrim.*, No. 05-P-676, 2006 WL 1914134, at *3 (Mass. App. Ct. July 12, 2006) (unpublished table decision) (requiring objective change in terms and conditions of employment to demonstrate adverse action), *appeal denied*, 853 N.E.2d 1060 (Mass. 2006); *Offley v. Acushnet Co.*, No. 2003700, 2006 WL 2424730, at *6 (Mass. Super. Ct. June 1, 2006) (relying on *MacCormack* language to find adverse employment action); see also SEYFARTH & SHAW LLP, STATE AND FEDERAL RETALIATION LAW COMPARED 4 (2006), http://www.seyfarth.com/dir_docs/news_item/fc8ed736-ed14-4953-806c-f28f52f7536e_documentupload.pdf [hereinafter SEYFARTH] (recognizing *MacCormack* standard for adverse action under Massachusetts law).

127. See *Mass. Comm'n Against Discrim. v. Nat'l R.R. Passenger Corp.*, No. 00-130662, 2006 WL 1586392, at *16 (Mass. Comm'n Against Discrim. June 5, 2006) (relying on *MacCormack* for proving adverse action); *Mass. Comm'n Against Discrim. v. Mass. Gen. Hosp.*, No. 95-BEM-1397, 2003 WL 22849917, at *27 (Mass. Comm'n Against Discrim. Nov. 18, 2003) (identifying adverse action as changes in objective terms and conditions of employment which materially disadvantage).

128. See *supra* notes 126-127 and accompanying text (documenting how *MacCormack* standard continues to be applied throughout the state); Interview with the Honorable Geraldine Hines, Massachusetts Superior Court Judge, in Boston, Mass. (Nov. 20, 2006) (discussing how *MacCormack* is still the controlling precedent for proving adverse action in Massachusetts).

129. See *supra* note 90 and accompanying text (recognizing instances in which Massachusetts courts have rejected federal precedent in interpreting Chapter 151B).

130. See *infra* Parts III.A-III.B (arguing for update and clarification of Massachusetts's standard to bring it in line with *Burlington Northern* decision).

however, the MCAD is ultimately bound to follow the SJC, and the court has limited the standard through the *MacCormack* decision.¹³¹ Therefore, while regulations from the MCAD may be an effective starting point, it is ultimately up to the court to clarify its standard.¹³² To provide the citizens of Massachusetts with the utmost protection and to continue advancing the MCAD's goal of eliminating discrimination, the SJC should clarify its standard and explicitly provide that retaliation is not limited to employment-related actions or actions that occur at the workplace.¹³³ The court should further adopt the second holding from *Burlington Northern* and provide that an adverse action is any action that materially disadvantages a reasonable employee, which means that it might dissuade a reasonable employee from pursuing a charge of discrimination under Chapter 151B.¹³⁴ Lastly, the SJC should qualify its objective material adversity requirement, turning the issue into a fact-based inquiry by focusing on individual contexts in the same way that the *Burlington Northern* Court did.¹³⁵ To properly understand the need for an updated standard, this section will compare the current Massachusetts standard to the respective holdings announced in *Burlington Northern*.¹³⁶ Following each comparison will be an argument for why the SJC should update its current standard and adopt the *Burlington Northern* standard.¹³⁷

A. Harm that Occurs Outside the Workplace or Is Not Related to Employment

In rejecting the Sixth Circuit's definition of an adverse action under Title VII, the *Burlington Northern* Court held that an adverse action is not limited to an employee's "terms, conditions, or privileges of employment," but can constitute an act that is not employment related or occurs outside the workplace.¹³⁸ If, however, *MacCormack* is still the test for finding an adverse action in Massachusetts, the opposite is true.¹³⁹ By requiring an employee to demonstrate that his salary, grade, or other objective terms and conditions of employment were materially disadvantaged, *MacCormack* strictly limits the

131. See *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956, 961 (Mass. 2001) (recognizing weight of MCAD guidelines as source). "Guidance provided by the . . . MCAD . . . is also illuminating. . . . The guidelines represent the MCAD's interpretation of G.L. c. 151B, and are entitled to substantial deference, even though they do not carry the force of law." *Id.*

132. See *infra* Parts III.A-III.B (demonstrating how and why SJC should clarify standard).

133. See *infra* Part III.A (arguing SJC needs to provide that retaliation under Chapter 151B can occur outside of workplace).

134. See *infra* Part III.B.1 (arguing SJC needs to update its material adversity standard).

135. See *infra* Part III.B.2 (explaining benefit of subjective component of test).

136. See *infra* Parts III.A-III.B (comparing state and federal standards).

137. See *infra* Parts III.A-III.B (arguing for clarification and update of current Massachusetts standard).

138. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414 (2006) (rejecting standards treating anti-retaliation provision as forbidding same conduct prohibited by anti-discrimination provision).

139. See *infra* notes 140-141 and accompanying text (explaining *MacCormack* standard limited to actions within the workplace).

finding of an adverse action to those that occur within the workplace and are employment related.¹⁴⁰ While the facts of *MacCormack* did not provide the SJC with a situation involving an adverse action outside of the employment context, the limiting nature of the standard can be read as excluding actions occurring outside the workplace.¹⁴¹

The SJC seemingly expanded what can constitute an adverse action in its *Bain* and *Clifton* decisions, but these cases involved very specific circumstances differing from the majority of retaliation claims.¹⁴² In *Bain*, the SJC applied section 4(4A) to find that a threat was a sufficient adverse action; in *Clifton*, the court applied the continuing violation doctrine to retaliation claims.¹⁴³ In the context of a typical retaliation claim under section 4(4), where an employer takes a direct action or actions against an employee, an “adverse employment action,” as specified in *MacCormack*, continues to be required.¹⁴⁴ In *Sahli*, the court hinted that an action outside the workplace might constitute unlawful retaliation under certain circumstances, although the SJC never specifically so held.¹⁴⁵

Rather than applying different standards depending on what type of retaliation case is before the court, the SJC should explicitly adopt one standard that applies to all types of retaliation claims, whether they come under Chapter

140. See *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8 (Mass. 1996) (failing to find adverse employment action without objective evidence of material disadvantage to employment conditions).

141. See *id.* at 6-8 (discussing alleged retaliatory actions taken against *MacCormack*).

142. See *Clifton v. Mass. Bay Transp. Auth.*, 839 N.E.2d 314, 322 (Mass. 2005) (finding unlawful retaliation under section 4(4) for ongoing hostile treatment); *Bain v. City of Springfield*, 678 N.E.2d 155, 160-61 (Mass. 1997) (finding unlawful retaliation under section 4(4A) for threat); see also *supra* notes 119-122 and accompanying text (discussing *Bain* and *Clifton*).

143. See *Clifton*, 839 N.E.2d at 322 (finding unlawful retaliation under section 4(4) for ongoing hostile treatment); *Bain*, 678 N.E.2d at 160-61 (finding unlawful retaliation under section 4(4A) for threat).

144. See *Billings v. Town of Grafton*, 441 F. Supp. 2d 227, 239 (D. Mass. 2006) (recognizing *MacCormack* requires materially disadvantageous change in working conditions to prove adverse employment action); *Clifton*, 839 N.E.2d at 318 (recognizing continuing violation not typical retaliation claim); *Gerety v. Massachusetts*, No. 05-P-448, 2006 WL 1627910, at *5-6 (Mass. App. Ct. June 13, 2006) (unpublished table decision) (denying retaliation claim upon applying *MacCormack* test following sexual discrimination claim). “Because she does not contend that her salary was cut, that she was reclassified downward, that her benefits were reduced, that her office space was altered or that her access to resources was restricted, she cannot show a change in the objective terms and conditions of her employment.” *Gerety*, 2006 WL 1627910, at *5-6.

145. *Sahli v. Bull HN Info. Sys., Inc.*, 774 N.E.2d 1085, 1091-92 (Mass. 2002) (discussing whether lawsuit by employer against employee can constitute retaliation). The SJC did not place the same amount of emphasis on the fact that the action was not related to employment as the lower court did in dismissing the action. See *Sahli v. Bull HN Info. Sys., Inc.*, No. 983372, 2001 WL 716848, at *4 (Mass. Super. Ct. Mar. 16, 2001) (denying retaliation claim because plaintiff had not suffered “adverse employment consequence”), *aff’d*, 774 N.E.2d 1085 (Mass. 2002). Even if it were true that defendant’s filing of the lawsuit against the plaintiff following her claim of discrimination “was an adverse action imposed by the defendant for a nefarious purpose, it does not constitute an adverse employment consequence.” *Id.* at 4. The SJC engaged in an analysis of whether or not the subsequent lawsuit had a legitimate basis in law or fact versus whether the suit was a sham. *Sahli*, 774 N.E.2d at 1091-93. This demonstrates the SJC’s apparent willingness to hold that an adverse action under Chapter 151B is not limited to acts inside the workplace or related to employment, although the court has not yet explicitly held as such. *Id.*

151B section 4(4), section 4(4A), or whether they involve a continuing violation or one isolated act.¹⁴⁶ The standard should clarify that an adverse action is never limited to actions involving an employee's salary, grade, or other objective terms and conditions of employment, but covers acts unrelated to employment and those taken outside the workplace.¹⁴⁷

The majority of unlawful retaliation claims do arise when an employer takes a specific action against an employee that is directly related to his or her employment; however, situations could arise where an employer retaliates against an employee outside the context of his employment that would not be protected under the current Massachusetts standard.¹⁴⁸ For example, an employer could file a counterclaim against an employee claiming discrimination in an effort to intimidate the employee from not pursuing the discrimination claim.¹⁴⁹ While *Sahli* suggested this might be unlawful if the claim were entirely baseless, if a court followed the rigid *MacCormack* standard, filing a counterclaim would not be an adverse employment action.¹⁵⁰ While actions that take place outside of the workplace will represent a minority of retaliation claims, they are no less deserving of protection.¹⁵¹ Consider a bank or restaurant employee who files a discrimination claim and then returns to use the bank or restaurant on his or her personal time; if the employer retaliates against the employee by treating him differently from other customers, the employee may have a retaliation claim.¹⁵² In Massachusetts,

146. See *Clifton*, 839 N.E.2d at 322 (finding unlawful retaliation under section 4(4) for ongoing hostile treatment); *Bain*, 678 N.E.2d at 160-61 (finding unlawful retaliation under section 4(4A) for threat); *Moore-Davis v. Roxbury Multi-Serv. Ctr., Inc.*, No. 044139, 2006 WL 1537518, at *3 (Mass. Super. Ct. Apr. 26, 2006) (finding that even transfer meant to be beneficial can be retaliation under section 4(4)).

147. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414 (2006) (explaining that retaliation under Title VII not limited to actions inside workplace or related to employment). While the majority of actions will still occur inside the workplace and will relate to employment, the standard should protect against all unlawful retaliation, no matter how scarce its occurrence. See *supra* note 15 and accompanying text (considering policy rationale behind anti-retaliation statutes).

148. See *U.S. Supreme Court Gives Employees an Expanded Right to Claim Retaliation*, LAB. & EMP. L. UPDATE (Rubin & Rudman LLP, Boston, Mass.), Sept. 2006, at 1, available at <http://www.rubinrudman.com/Site/Articles/200609-LaELU.pdf> (recognizing most retaliation claims come from adverse employment-related changes, but retaliation has occurred outside workplace).

149. See Loren Gesinsky, *When Is It Retaliatory to Bring a Counterclaim?* *Burlington Increased the Risks to Employers of Filing Such Claims*, 4 NAT'L L.J. 1 (2007) (recognizing possibility that counterclaim against employee is unlawful retaliation following *Burlington Northern*).

150. Compare *Sahli*, 774 N.E.2d at 1089 (suggesting sham counterclaim might be unlawful retaliation), with *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8 (Mass. 1996) (requiring plaintiff to establish adverse action related to terms, conditions, privileges of employment).

151. See *Burlington Northern*, 126 S. Ct. at 2414 (recognizing broad interpretation necessary to ensure purposes of anti-discrimination law).

152. See Maureen Minehan, *Supreme Court Opens Door to More Retaliation Charges*, HR WIRE, Jan. 2, 2007, at 2 (presenting hypothetical bank employee scenario). Under the *Burlington Northern* standard, this scenario would constitute retaliation if a reasonable employee would have found the act to be materially adverse, which means that it would dissuade a reasonable employee from bringing a discrimination claim. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

under the *MacCormack* standard, this employee would not be protected even if the employer's action had the effect of preventing the employee or future employees from pursuing a discrimination claim.¹⁵³

Anti-retaliation statutes seek to protect employees challenging what they perceive to be unlawful discrimination.¹⁵⁴ If unlawful retaliation is limited to actions affecting an employee's salary, grade, or other objective terms and conditions of employment, then some employees who would otherwise challenge unlawful discrimination may remain silent, fearing that they will not be protected.¹⁵⁵ This consequence is in direct contrast to the public policy goal of anti-retaliation statutes.¹⁵⁶

In holding that retaliation is not limited to employment, the *Burlington Northern* Court examined Title VII's anti-discrimination and anti-retaliation provisions, and noted that the modifying clause from the anti-discrimination provision is absent in the anti-retaliation provision.¹⁵⁷ The same is true with the Massachusetts statute.¹⁵⁸ Nowhere in the Massachusetts anti-retaliation provision is retaliation limited to "compensation . . . terms, conditions, or other privileges of employment," the way it is in the anti-discrimination provision.¹⁵⁹ As the Supreme Court made clear, there may be instances in which an employer retaliates against an employee outside the workplace or outside the

153. See *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8 (Mass. 1996) (requiring plaintiff establish adverse action related to terms, conditions, privileges of employment).

154. See *supra* note 15 and accompanying text (outlining public policy stimulus for anti-retaliation statutes).

155. See Joel A. Kravets, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statute*, 4 U. PA. J. LAB. & EMP. L. 315, 369 (2002) (recognizing Hobson's choice for plaintiff if adverse action requirement insufficient). Kravets recognized that if the adverse standard is not sufficient to protect employees, the employee is faced with the choice of enduring the discrimination or reporting it while still having to suffer retaliatory conduct because the adverse action requirement does not cover substantial forms of retaliation. *Id.* This will chill the employee's desire to pursue a discrimination claim. *Id.* The same analysis applies under Massachusetts law; if the standard is not sufficient to protect employees from unlawful retaliation, then individuals will be hesitant to pursue discrimination claims, and the goals of the statute will not be met. See 14 Mass. Prac. § 5.16 (Howard J. Alperin et al. 2005) (acknowledging importance of protecting employees from workplace retaliation). Disparate standards in state and federal courts would likely lead to forum shopping, an undesirable occurrence. See Seyfarth, *supra* note 126, at 4 (recognizing difference between Massachusetts and federal standards following *Burlington Northern*). "Had [the *Burlington Northern*] . . . facts been presented under Massachusetts law, a state court might have reached a different result." *Id.* at 3-4; see also Todd C. Berg, *U.S. Supreme Court Rules Title VII Retaliation Not Limited to Workplace Conduct*, MICH. LAW. WKLY., July 17, 2006, at 4 (discussing forum shopping following *Burlington Northern*). "Practitioners may care to 'think twice before removing a discrimination claim to federal court if there is a chance that a retaliation claim will be asserted.'" Berg, *supra* (quoting Christopher M. Treiblock, labor and employment law attorney in Detroit, Mich.).

156. See *supra* note 15 and accompanying text (explaining public policy goal of anti-retaliation statutes).

157. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411-14 (2006) (analyzing anti-discrimination and anti-retaliation provisions).

158. Compare MASS. GEN. LAWS ch. 151B, § 4(1) (2004) (setting forth anti-discrimination provision), with MASS. GEN. LAWS ch. 151B, § 4(4) (2004) (setting forth anti-retaliation provision).

159. See *supra* note 158 (noticing difference between two provisions).

scope of employment.¹⁶⁰ If the *MacCormack* standard continues to be the controlling test for finding an adverse action, many of these instances will not be protected despite the statute's clear language that retaliation is not limited in the same manner as discrimination.¹⁶¹

Although Chapter 151B is similar to its federal counterpart in terms of language, it provides broader protection for employees because of section 4(4A), which has no federal analogue.¹⁶² The inclusion of section 4(4A) demonstrates the legislature's intent to provide broad protection against retaliation.¹⁶³ Moreover, the court's decision in *Bain* shows its willingness to extend the definition of an adverse action from the *MacCormack* test.¹⁶⁴ Therefore, the SJC should adopt a new standard whereby the finding of an adverse action is not limited to acts affecting an employee's salary, grade, or other objective terms and conditions of employment, whether the claim is brought under section 4(4A) or 4(4).¹⁶⁵ Further, the court should provide, as the Supreme Court did, that retaliation is not limited to employment actions or actions that occur inside the workplace.¹⁶⁶

B. Level to Which Harm Must Rise

1. Material Adversity Requirement

Both the Massachusetts courts and the federal courts require that the harm suffered must rise to the level of being materially adverse.¹⁶⁷ Both standards

160. *Burlington Northern*, 126 S. Ct. at 2412 (recognizing employer may retaliate by taking actions not directly related to employment or by causing harm outside workplace).

161. *See* Seyfarth, *supra* note 126, at 4 (hypothesizing that *Burlington Northern* facts would not result in liability under *MacCormack* standard).

162. *See* MASS. GEN. LAWS ch. 151B, § 4(4A) (2004) (providing liability under state law, which does not have federal counterpart). *Compare* MASS. GEN. LAWS ch. 151B, §§ 4(1), 4(4) (2004) (setting forth unlawful discrimination and retaliation under state law), with 42 U.S.C. §§ 2000e-2(a)(1), 3(a) (2006) (proscribing federal anti-discrimination and anti-retaliation provisions).

163. *See* MASS. GEN. LAWS ch. 151B, § 4(4A) (2004).

164. *See supra* text accompanying notes 104-111 (demonstrating how section 4(4A) provides broader protection than Title VII); *supra* note 119 and accompanying text (recognizing threat adverse action under section 4(4A)).

165. *See* Brief of Petitioner-Appellant at 36-41, *King v. City of Boston*, No. 06-P-1013 (Mass. App. Ct. Dec. 1, 2006), 2006 WL 4015654 (relying on *Burlington Northern* as justification for broader interpretation of adverse action under Chapter 151B). This case is currently pending before the Massachusetts Court of Appeals; in its brief, the petitioner highlights the deficiency in the current interpretation of the Massachusetts adverse action standard. *Id.* If it reaches the SJC, this case will provide the court with its first opportunity to reexamine the state's adverse action requirement following *Burlington Northern*, thereby enabling the court to clarify that retaliation is not limited to employment or actions that occur in the workplace. *See id.*

166. *See supra* text accompanying notes 154-161 (demonstrating problems with Massachusetts standard through comparison with *Burlington Northern*).

167. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415-16 (2006) (discussing material adversity requirement); *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8 (Mass. 1996) (requiring plaintiff to establish adverse employment action that materially disadvantaged him).

are viewed objectively to ensure that minor harms and petty annoyances are not litigated and pursued in court.¹⁶⁸ The two standards, however, differ in how they define a materially adverse action.¹⁶⁹ In *Burlington Northern*, the Court defined “materially adverse” as such actions that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”¹⁷⁰ In Massachusetts, however, for an action to be materially adverse, an employee must provide “objective evidence that he had been disadvantaged in respect to salary grade, or other objective terms and conditions of employment.”¹⁷¹

The Supreme Court’s test demonstrates that Congress enacted the anti-retaliation provision to provide “broad protection from retaliation.”¹⁷² Its purpose is to provide employees with direct access to statutory remedial mechanisms.¹⁷³ Thus, any action, which is substantial enough to deter a reasonable employee from pursuing a charge of discrimination, should be unlawful because such actions would prevent access to relief.¹⁷⁴ The Massachusetts standard is inadequate compared to the Supreme Court’s interpretation because it focuses solely on the type of harm suffered to decide whether it is sufficiently materially adverse.¹⁷⁵ Under the Massachusetts

168. See *Burlington Northern*, 126 S. Ct. at 2415 (acknowledging reporting discrimination does not shield employee from petty slights or minor annoyances at work); *Gu v. Boston Police Dep’t*, 312 F.3d 6, 14-15 (1st Cir. 2002) (denying retaliation under Title VII and Chapter 151B). “Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.” *Gu*, 312 F.3d at 14-15 (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)); see also Brief of Defendant-Appellee at 38, *King v. City of Boston*, No. 06-2145 (Mass. App. Ct. Feb. 28, 2007), 2007 WL 921834 (realizing similarity between federal and state objective standards).

169. See *infra* notes 170-171 and accompanying text (comparing Supreme Court’s interpretation with SIC’s interpretation of material adversity).

170. *Burlington Northern*, 126 S. Ct. at 2415 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2005)) (internal quotation marks omitted) (defining materially adverse action).

171. *Gu*, 312 F.3d at 14 (recognizing adverse action must materially change conditions of plaintiff’s employment).

172. *Burlington Northern*, 126 S. Ct. at 2414 (recognizing broad protection from retaliation furthers Title VII’s primary objective).

173. See *supra* note 21 and accompanying text (discussing anti-retaliation provision’s purpose).

174. See *supra* note 15 and accompanying text (outlining purpose of anti-retaliation statutes).

175. See *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8 (Mass. 1996) (denying retaliation because salary, grade, or other objective terms and conditions of employment not disadvantaged). “MacCormack simply offered no substantial evidence to show that he had suffered any real harm, as opposed to his subjective feelings of disappointment and disillusionment,” which is why he did not establish his *prima facie* case of retaliation. *Id.* at 9; see *Gu v. Boston Police Dep’t*, 312 F.3d 6, 14 (1st Cir. 2002) (recognizing material changes sufficient to constitute adverse action). “Material changes include ‘demotions, disadvantageous transfers or assignments, refusals to promote, negative job evaluations and toleration of harassment by other employees.’” *Gu*, 312 F.3d at 14 (quoting *Hernandez-Torres v. Intercont’l Trading, Inc.*, 158 F.3d 43, 47 (1st Cir. 1998)). In *Gu*, the plaintiffs brought claims of retaliation under both Title VII and Chapter 151B. *Id.* at 8. The court, despite finding that the plaintiffs lost some of their supervisory authority, did not conclude that they had suffered a materially adverse action because the reorganization resulting in the loss of authority did not accompany a decrease in salary or grade. *Id.* at 14-15. Had the court used *Burlington Northern*’s test for a materially adverse action (i.e., would the loss of supervisory authority have possibly dissuaded a reasonable worker in the plaintiff’s position from pursuing a charge of discrimination?), then it may have reached a

standard, the focus is not on whether the retaliatory act would have a chilling effect that would prevent an employee from pursuing a claim of discrimination; instead, the standard focuses on a rigid set of factors that the court has decided must be affected to find an adverse action.¹⁷⁶ The current approach does not provide employees with as broad protection from retaliation as the federal standard now does.¹⁷⁷ The restrictive nature of the Massachusetts standard is elucidated through an examination of the *Burlington Northern* standard's focus on the context of the retaliatory action.¹⁷⁸

2. Context of the Alleged Retaliatory Act

The Court in *Burlington Northern* highlighted that the context in which retaliation occurs matters because the significance of any given act will depend on the particular circumstances.¹⁷⁹ The Court's new standard requires a finding that the retaliatory action would have dissuaded a reasonable employee from complaining of discrimination.¹⁸⁰ This does not change the test into a subjective one, but the test does become a fact-based inquiry rather than a question of law.¹⁸¹ By focusing on a reasonable employee from the plaintiff's perspective (something that is lacking from the Massachusetts standard), the Supreme Court's standard does introduce a subjective component to the equation.¹⁸² For example, if an employer changed the schedule of an employee who previously filed a charge of discrimination, but the employee's salary and work responsibilities remained the same, that may not be a materially adverse action under the Massachusetts standard; however, by focusing on the context of the retaliatory act, it might be a materially adverse act under the *Burlington Northern* standard if such an act would likely dissuade a reasonable worker

different result. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

176. See *Gu*, 312 F.3d at 14 (recognizing material changes sufficient to constitute adverse action); *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8 (Mass. 1996) (denying retaliation because salary, grade, or other objective terms and conditions of employment not disadvantaged). "Material changes include demotions, disadvantageous transfers, or assignments, refusals to promote, negative job evaluations and toleration of harassment by other employees." *Gu*, 312 F.3d at 14 (quoting *Hernandez-Torres*, 158 F.3d at 47).

177. Compare *supra* note 170 and accompanying text (outlining federal standard), with *supra* note 171 and accompanying text (outlining state standard).

178. See *infra* Part III.B.2 (summarizing *Burlington Northern*'s focus on context and absence of such from Massachusetts standard).

179. *Burlington Northern*, 126 S. Ct. at 2415 (qualifying objective materially adverse requirement with emphasis on context).

180. *Id.* at 2416 (defending its newly articulated test). "By focusing on . . . the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id.*

181. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2416 (2006) (preferring general standard to bright-line test). "[T]he significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 2415-16.

182. See *supra* text accompanying notes 80-85 (discussing subjective element of test); *supra* note 175 and accompanying text (outlining Massachusetts standard and its focus).

from pursuing a charge of discrimination.¹⁸³ While a schedule change may make little difference to a young professional with few familial obligations, such a change could be devastating to a parent who needs to pick up children after school.¹⁸⁴ Massachusetts courts have recognized that subjective feelings of disillusionment and disappointment do not rise to the level of an adverse action.¹⁸⁵ While the standard should not protect hurt feelings and minor annoyances, it should recognize, as the Supreme Court did, that “an act that would be immaterial in some situations is material in others.”¹⁸⁶

Such recognition is unlikely to greatly increase the number of retaliation claims brought under Chapter 151B because the test is still an objective one.¹⁸⁷ Rather, it means that more cases will survive summary judgment and proceed to a jury trial.¹⁸⁸ This does not mean that employers will now have to know

183. See *Burlington Northern*, 126 S. Ct. at 2415 (providing example of how context matters in finding adverse action).

184. See *id.* (stressing damaging effect of schedule change to mother with school age children).

185. See *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 8 (Mass. 1996) (dismissing plaintiff’s claim as subjective feeling of disappointment).

186. *Burlington Northern*, 126 S. Ct. at 2416 (quoting *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)); see *Billings v. Town of Grafton*, 441 F. Supp. 2d 227, 240-41 (D. Mass. 2006) (applying Massachusetts standard to deny retaliation and finding complaints arose out of subjective disappointment). The court acknowledged that the employer transferred the plaintiff to a less prestigious position. *Billings*, 441 F. Supp. 2d at 240-41. Citing *MacCormack’s* prohibition on subjective feelings of disappointment and disillusionment, however, the court called the difference “objectively slight.” *Id.* In this case, the court does not appear to follow the subjective component of *Burlington Northern*, but escapes compulsion to do so because Massachusetts has not highlighted this component for finding retaliation under Chapter 151B. *Id.* If the standard did so, then maybe this “objectively slight” difference in prestige may have resulted in a different outcome for the plaintiff. See *Burlington Northern*, 126 S. Ct. at 2417 (holding reassignment adverse based on “reasonable person in plaintiff’s position” standard); *Billings*, 441 F. Supp. at 240-42 (holding reassignment not retaliatory despite decrease in prestige).

187. See Mayer, *supra* note 30, at 1 (recognizing objective test curtails expected increase in retaliation claims under Title VII). If the SJC were to adopt the same objective standard, the same would likely happen in Massachusetts. *Id.*; see Weitzman & Schwartz, *supra* note 30, at 1 (realizing retaliation claims did not increase in six months following *Burlington Northern*).

188. See White, *supra* note 87, at 535 (predicting new difficulty for employers to win summary judgment under *Burlington Northern* test); Tyree P. Jones, Jr., Annotation, *Litigation Strategy: Summary Judgment, Including Views from the Bench*, 745 PLI/LIT 785, 794 (2006) (predicting *Burlington Northern* reduces likelihood employer will succeed on summary judgment). A summary judgment motion properly disposes of a matter when there is no genuine issue of material fact. FED. R. CIV. P. 56(c) (providing for judgment as matter of law if there is no genuine issue of material fact). Under the *Burlington Northern* standard, what constitutes a materially adverse action to a reasonable employee must be determined. Jones, *supra*, at 464. This is a factual dispute that must be analyzed on a case-by-case basis, therefore making summary judgment a less effective method for defense counsel to obtain disposition of claims. Jones, *supra*, at 495. For this reason, employers in Massachusetts continue to argue that *MacCormack* is the controlling test for finding an adverse action in the state, rather than the *Burlington Northern* standard. See Defendant’s Proposed Jury Instructions, *McConney v. Worcester*, No. 03CV-11920-JLA, 2007 WL 617266, at *6 (D. Mass. Jan. 22, 2007) (citing *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1, 7 (1996)). The instructions read:

[F]or the plaintiff to establish that she suffered an adverse employment action, [she] must prove . . . by a fair preponderance of the evidence that she has been materially disadvantaged in respect to salary, grade, or objective terms and conditions of employment. Subjective feelings of

every little detail about their employees, as some have contended.¹⁸⁹ There are, however, some issues that need to be resolved if the SJC adopts this standard and turns the inquiry into a fact-based determination by focusing on the context of the specific act.¹⁹⁰ The main issues will be determining how much information an employer must have about its employees and the extent of the employer's duty of inquiry.¹⁹¹ The SJC will develop the answers to these questions over time should the court adopt this approach.¹⁹² Regardless of how the SJC resolves these issues, transforming the issue into a fact-based inquiry should serve to deter employers from taking actions against employees who have engaged in protected activity.¹⁹³ Currently, the Massachusetts standard for assessing whether an adverse action has occurred does not emphasize that the analysis should be from the perspective of a reasonable employee in the plaintiff's position.¹⁹⁴ In failing to do so, the state is missing a golden opportunity to expand protection for employees and fight unlawful discrimination.¹⁹⁵

While the SJC is not bound by *Burlington Northern*, the court should seize the opportunity to clarify its standard and ensure that Massachusetts employees receive adequate protection from unlawful retaliation.¹⁹⁶ Many commentators have predicted that the Supreme Court's standard will apply to other federal statutes containing anti-retaliation provisions, indicating that the same may occur with state statutes containing anti-retaliation provisions.¹⁹⁷ In the past,

disappointment and disillusionment concerning an employment action do not constitute an adverse employment action.

Id.

189. See *Is Action Retaliatory? Examine the Context*, BUS. LEGAL REP., July 7, 2006 (arguing employers will need increased knowledge of employees).

190. See Weitzman & Schwartz, *supra* note 30, at 1 (recognizing "context" questions are factual and raise many issues).

191. See Taylor, *supra* note 50, at 588-89 (discussing potential issues for employers in determining whether action would be materially adverse).

192. See Schnapper, *supra* note 79, at 9 (realizing factual issues need further judicial elaboration before consensus developed).

193. See Minehan, *supra* note 152, at 3 (arguing "reasonable employee" standard means employers must be vigilant in prohibiting retaliation).

194. See *supra* note 175 and accompanying text (describing Massachusetts standard).

195. See *supra* notes 185-186 (describing Massachusetts standard and lack of subjective considerations).

196. See *supra* note 89 and accompanying text (recognizing while not bound, SJC may look to federal interpretation for guidance); see also *infra* note 198 and accompanying text (observing Massachusetts strays from federal precedent to give discrimination victims broader rights). Some are already predicting that the SJC will adopt *Burlington Northern* with respect to retaliation claims under Chapter 151B. See Brief of Defendant-Appellant at 49, *Billings v. Town of Grafton*, No. 06-2145 (1st Cir. Nov. 16, 2006), 2006 WL 4482198 (arguing SJC would likely adopt *Burlington Northern*).

197. See Marcia Coyle, *A New World for Retaliation Claims: High Court Shifts Balance of Power in the Workplace*, NAT'L L.J., June 26, 2006, at 1, Col. 3 (recognizing far-reaching effects of *Burlington Northern* decision). "There are about 80 federal statutes with anti-retaliation provisions 'My assumption is this decision will control all of them.'" *Id.* (quoting Eric Schnapper, University of Washington School of Law, who assisted White's counsel, Donald A. Donati); see also *Devin v. Schwan's Home Serv., Inc.*, No. 04-4555

when the SJC has declined to follow federal interpretations of Title VII while interpreting Chapter 151B, it has always done so to provide Massachusetts residents with broader protection than that received at the federal level.¹⁹⁸ If the retaliation standard is limited, this precedent is reversed, as the Massachusetts courts would be holding employees to a higher standard of proof in showing retaliation than the federal courts.¹⁹⁹

IV. CONCLUSION

To provide adequate protection for Massachusetts employees, the legal standard for an adverse action under Massachusetts law must protect employees who oppose discrimination and challenge illegal conduct. The current standard falls short of protecting all retaliation victims and fails to meet the goal of the statute. The SJC should clarify its standard by adopting the first part of *Burlington Northern* and provide that retaliation is not limited to the workplace or an employee's salary, grade, or other objective terms and conditions of employment. The court should also adopt the second part of the Supreme Court's holding and recognize that an adverse action under Massachusetts law is a harmful action that would have dissuaded a reasonable worker from pursuing a discrimination charge under Chapter 151B. Lastly, by highlighting, as the Supreme Court did, that the context in which the challenged retaliatory act took place is essential to the analysis, the state will have a sufficient standard for eradicating unlawful retaliation and discrimination in employment. Given Massachusetts's reputation for leading the nation in promulgating and enforcing anti-discrimination laws, it is time for the SJC to update its standard and give a voice to all employees who challenge discriminatory practices and are then unlawfully retaliated against.

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(RHK/AJB), 2006 WL 2590611, at *10 (D. Minn. Sept. 8, 2006) (applying *Burlington Northern* standard to retaliation claim under Minnesota Human Rights Act); Gary D. Friedman & Jonathan A. Shiffman, *Burlington: Setting Standard to Cut Out Weak Retaliation Claims*, 236 N.Y. L.J. 4 (2006) (predicting New York will adopt *Burlington Northern* standard in interpreting New York City Human Rights Law); Berg, *supra* note 155 (predicting Michigan state courts will follow *Burlington Northern* reasoning); *Supreme Court Provides Broad Interpretation of Title VII's Prohibition Against Retaliation*, EMP. L. ALERT (Nixon Peabody LLP, Boston, Mass.), June 26, 2006, at 2-3, available at http://www.nixonpeabody.com/publications_detail3.asp?ID=1411 (predicting *Burlington Northern* standard extended to ADA, ADEA, FMLA, Sarbanes-Oxley Act, and more).

198. See 45 Mass. Prac. § 8.5 (Scott C. Moriearty et al. 2007) (indicating Massachusetts's desire to ensure laws protect victims of discrimination when straying from federal precedent).

199. See Seyfarth, *supra* note 126, at 3-4 (cautioning that under Massachusetts law, facts of *Burlington Northern* would not lead to actionable retaliation); *supra* note 126 and accompanying text (collecting cases where *MacCormack* standard was required to prove adverse action).