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Retaliation: Why an Increase in Claims Does Not Mean the Sky Is Falling

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EXECUTIVE SUMMARY

Two decisions by the U.S. Supreme Court appear to open the door wide for employees to charge their employers with retaliation in connection with discrimination accusations. The Court expanded certain aspects of retaliation, which was already the fastest growing cause of action in discrimination law. Despite the Court's rulings, however, no evidence shows that employee plaintiffs are more likely to be successful. In *Crawford v. Metropolitan Government of Nashville* the Supreme Court expanded the definition of opposition, which occurs when an employee resists or otherwise expresses disapproval of the actions of an employer or other employee. The Court decided that opposition could occur if the employee expresses disdain for a practice, even if he or she does not actually complain about it. In the other case, *White v. Burlington Northern*, the Court created a standard for retaliation that expands the proscribed employer actions taken in the wake of a discrimination claim. Burlington Northern moved White from one set of duties to another within her job description, but the Court determined that such an action might discourage an employee from filing a discrimination charge. Thus, the Court determined that the change constituted retaliation. Despite opening the retaliation gate wider and perhaps encouraging more employees to file a complaint, the Court has not necessarily made it easier for plaintiff employees to prevail. This analysis is an outcome of discussions at the 2008 and 2009 Labor and Employment Law Roundtables.

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A member of the advisory board for the Cornell Center for Hospitality Researth, **Gregg Gilman**, J.D., is co-chair of Davis & Gilbert's Labor and Employment practice group. A significant portion of his practice is devoted to various labor and personnel issues, including wage and hour issues, preventive management, terminations, reductions in force, disciplinary measures, employment and termination agreements, executive compensation, harassment investigations, restrictive covenants and employment policies. He represents employers in state and federal courts and before the Equal Employment Opportunity Commission and state and local employment-rights agencies in discrimination cases as well as all other employment litigation. He has also negotiated collective bargaining agreements in the music, restaurant, social services, coal mining equipment and numerous other industries. The creator of *Respect in the Workplace*, an interactive training seminar on preventive management, he is a frequent guest lecturer on labor and employment law issues, presenter at the Cornell Hospitality Conference, panelist at the Legal Roundtable for the Cornell School of Hotel Administration, and author of numerous journal articles.

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Retaliation, the fastest growing cause of action in discrimination law, has gained considerable attention, following two cases decided by the U.S. Supreme Court. The 2006 Supreme Court case, *White v. Burlington Northern*, and the 2009 Supreme Court decision in *Crawford v. Metropolitan Government of Nashville* has made retaliation front-page news. *White* created legal ambiguities that allow plaintiffs' lawyers to posture and leave management lawyers without the tools to adequately render legal advice. *Crawford* expanded the opposition clause, which involves an employee's resistance to a perceived violation of discrimination statutes. While there's no indication that either case should result in more plaintiff victories (nor prevent employers from managing their workforce), the cases will, in all likelihood, lead to a further increase in claims. They also could change some management practices, despite causing no major changes in plaintiffs' abilities to succeed in their claims. Following extensive discussion at the 2008 and 2009 Labor and Employment Law Roundtables, we conducted this analysis to examine the effects of the *White* and *Crawford* cases and explain the law surrounding retaliation. Before we address these issues, however, we examine the statistical increase in retaliation claims and hypothesize why these cases are on the rise.

The Increase in Retaliation Charges over Time

To gain a sense of the remarkable change in retaliation charges, let us first examine whether we can see any trends based on other causes, such as discrimination due to disability or age. As many readers know, employees may not file discrimination charges in federal court without first filing charges of discrimination with either the Equal Employment Opportunity Commission (EEOC) or with an affiliated state agency (commonly referred to as "FEPA"). As a result of this requirement, tracking the percentages of lawsuits alleging violations of anti-discrimination employment statutes may be done by analyzing EEOC or FEPA charge filing statistics. In the 1980s and early 1990s the EEOC and state FEPAs received about the same number of charges each year. FEPA charge data are often difficult to find, but EEOC data are readily available. Those are the data we use here, regarding enforcement of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act. Title VII prohibits employment discrimination on the basis of race, color, religion, national origin, and gender. In the last thirteen years, total employment discrimination charges filed with the EEOC has ranged from a low of 72,000 charges in 1992 to a high of 91,000 in 1994. In 2007, 82,792 charges were filed.[1] Because of this year-to-year fluctuation, using the raw numbers to evaluate which claims are most prevalent is not informative. Instead, we analyze the percentage change in claims filed per year. The largest single year-to-year percentage change is Americans with Disabilities (ADA) claims filed in 1992 and 1993. Only 1.4 percent of the cases filed in 1992 were ADA cases, but that number expanded to 17.4 percent in 1993. This jump is easily explained, because the ADA went into effect in July 1992. Beginning in 1993 the ADA cases have made up between 17.4 percent and 23.1 percent of EEOC filings. Besides disability, the greatest fluctuation in any claim based on a protected class was the 7.2-percentage point differential of ADEA cases filed in 1992 (27.1%) and the cases filed in 1995 (19.9%). In 2005, ADEA cases made up 22.0 percent of the total claims filed.[2] These fluctuations may be the result of random variability. In any event, little in the way of trends can be discerned in these statistics. There is, however, one cause of action that exhibited a dramatic increase that is clearly not random. That cause is retaliation.

In essence, a retaliation claim stems when an employee believes that an employer has acted against the employee in response to the employee's claim on one of the other causes of action, including age or sex discrimination. In 1993, retaliation claims made up 15.3 percent of the total cases brought. By 2007, that percentage more than doubled to

[1] See: EEOC.gov

[2] *Id.*

Retaliation claims have grown steadily in recent years, often as a "tack on" to discrimination complaints.

32.38 percent. Retaliation claims now account for more than a quarter of the EEOC's docket. In fact, unlike any other category, retaliation's percentages did not rise and fall throughout the time period in question. Instead, except for a slight drop from 2001 to 2002 (27.5% to 27.0%), retaliation cases, as a percentage of total cases filed, rose each year.

We need to point out that the increase in the percentage of retaliation cases does not, however, reflect a decrease in the percentages of other cases. The reason for this is that the percentages add up to more than 100, because one individual can allege discrimination under more than one cause. For example, assume that a forty-five year old, African-American woman, who is Jewish and blind, files a charge against a potential employer who failed to hire her. Based on one incident, this individual can allege discrimination based on age, race, sex, religion, and disability. Each theory of discrimination would be listed in the percentages despite the fact that there was only one charge filed. Similarly, the percentages of retaliation claims can rise when employees tack such claims on to existing allegations.

There are some data to support this argument. Between 1997 and 2007 the percentage of "cases" rose from 163.6 percent to 188.2 percent. In that same time the percentage of retaliation cases rose 9.7 percent.[3] While there are no data to support the position that the increase in the percentage of retaliation claims is fueled by "tack-on" cases, we can infer some effect, and consequently we believe that this is occurring.

The question is why lawyers and employees are tacking on retaliation claims. The obvious answer is: why not? It costs nothing more and it is easy to do in the course of attempting to establish a *prima facie* case of discrimination. For that to occur, petitioning employees must prove: (**1**) they are in a protected class, (**2**) they were qualified to perform the job in question; (**3**) they suffered an adverse employment action, and (**4**) there is evidence of discrimination.[4] If the employee ever complained about any perceived discrimination, he or she can easily tack on a retaliation claim as part of the filing to establish the *prima facie* case.

In addition to these tack-on claims, employees can file allegations when they are not members of a protected class and when the only evidence of discrimination is the timing of an employers' actions. In this instance, retaliation opens the door to a number of arguably less meritorious claims. Many management lawyers will argue that employees make frivolous complaints of discrimination to their employer as a temporary means of establishing job security, particularly when the threat of losing one's job is high. The supposed job security involves the likelihood of a stand-alone retaliation claim, which is the natural outgrowth of such a complaint.

On a more practical level, compared to discrimination, retaliation is easier for employees to identify, juries to understand, and lawyers to get interested in. Discrimination can be subtle. Employees may wonder whether the employer is basing a decision on the employee's protected class or because of a personal dislike or other non-discriminatory reason. Retaliation, by definition, follows a complaint or another clear action, and the employee consequently feels confident in the reason for adverse treatment. In addition, lawyers report that juries are often skeptical about discrimination. Without the "smoking gun" of a specific action or pattern, it is often difficult to convince a jury that the employer's negative feelings about a protected class were so strong that the employer was willing to take a discriminatory action and thereby risk the time, money, and negative publicity associated with a discrimination lawsuit. Alternatively, people understand that employers may be angry with being accused of discrimination, whether falsely or fairly. Because it is easy for employees to identify and juries to understand, plaintiffs' lawyers, who are rational actors that must decide whether to invest their time and money in each case with which they are presented, are often more interested in retaliation cases than other types of discrimination cases. A case where the employee can identify unlawful actions based on an easily understandable unlawful motivation is attractive to such a jury member. Finally, as explained below, retaliation cases are simply easier to prove than traditional discrimination cases.

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[3] *Id.*

[4] See: *Hicks v. St. Mary's Honor Center,* 509 U.S. 502 (1993).

The Law of Retaliation

Under Title VII of the Civil Rights Act of 1964, retaliation claims can arise out of the statute's participation or opposition clause. Retaliation under the participation clause occurs when the employee participates in a Title VII case (or the necessary precursors, such as EEOC investigations). Retaliation under the opposition clause law occurs when an employee "opposes" a perceived Title VII violation. To establish a case under either clause, employees must prove that: (**1**) they engaged in a "protected expression;" (**2**) they were discriminated against, and (**3**) there is a link between the protected expression and the adverse employment action.[5] Each element of the claim is the subject of significant case law, commentary and confusion. In fact, both *Crawford* and *White* address elements of the *prima facie* case. *Crawford* addresses the parameters of the opposition clause. In *White*, the Supreme Court defined the term "discrimination." As with many cases, both *White* and *Crawford* provided some answers, but left a number of issues open. While these cases may seem innocuous, the "losing side," in this case management, followed the typical pattern of reaction to a Supreme Court decision by crying that the sky is falling, a cry echoed by the management bar.[6]

As we explain below, like Chicken Little, commentators who see doom for employers based on these cases have greatly exaggerated their effects. To support this contention, we first explain protected expression and the *Crawford* effect. We then explain "discrimination" and the *White* effect.

A protected expression, for our purpose here, occurs when an employee complains that the employer is violating a discrimination law. This type of complaint can occur under either the participation or the opposition clause. An employee invokes the participation clause when he or she takes part (e.g., as a party or witness) in a Title VII, ADEA, or ADA proceeding (e.g., agency investigation or litigation). The opposition clause applies to situations where the employee's complaint did not come as part of a discrimination proceeding and is, instead, based on an internal complaint or other notification to management. Regardless of which applies, it is important to note that the discrimination at issue does not have to involve the complaining employee. For example, a male employee who testifies at trial or complains to the company that women are being sexually harassed has engaged in a protected expression under the participation or opposition clause. The question, however, remains: what exactly constitutes a protected expression?

In *Payne v. McLemore's Wholesale and Retail Stores*,[7] the Fifth Circuit court addressed the definition of a protected expression. Employee Payne believed that his employer refused to hire people of color into positions where the employees would have to handle money. Payne, who was laid off each year during the summer, joined a civil rights group that picketed in front of the employer's store. After the picketing occurred, the employer did not rehire Payne, who alleged retaliation under the opposition clause. The employer's argument that Payne did not engage in a protected expression was based on two reasons. First, the employer argued that Payne's allegations of racial discrimination were unfounded, and thus there could not be a protected expression. In essence, the employer asserted that employees cannot succeed on a retaliation claim unless they prove that the underlying claim of employment discrimination did, in fact, occur. Second, the employer argued that even if this was not the case, Payne did not engage in a protected expression because picketing is not protected by the retaliation law. The court addressed the first issue fully, but did not really address the second.

Rejecting the employer's first claim, the court held that the employee engaged in a protected expression even if the underlying claim failed and the employer had not, in fact, violated the law. Instead, the court held that employee only needed to have a "good faith, reasonable belief" that the subject of the complaint was true. Looking at why the court made this ruling, we must examine what constitutes a good faith, reasonable belief.

The reason for not requiring a plaintiff to prove that the truth of the underlying claim is that it prevents the chilling effect of possible dismissal for speaking up. If employees are protected only when they can prove that their employer violated the law, employees will be reluctant to use company harassment policies or otherwise complain about discrimination. Since the Supreme Court, numerous other courts, law review articles, and commentators all contend that the key to ending discrimination is employee complaints followed by swift employer action, the chilling effect needs to be avoided. That does not mean, however, that the good faith, reasonable belief standard is not fraught with problems. For the sake of argument, what if Payne's allegation was false, even though Payne believed it to be true?

Say that the employer in *Payne* offered the money-related job in question to its two most senior employees, both of whom were individuals of color. Say that each of those employees turned the employer down. The employer was disappointed, but believed it was the employees' decision to make and thus offered the position to the third most senior employee, a white employee who accepted the job. Payne,

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[5] See: *Gonzalez v. Ingersoll Milling Mach.*, 133 F.3d 1025

[6] The "sky is falling" response is not limited to employers, the plaintiffs' bar reacts the same way when management prevails.

[7] 654 F.2d 113 (5th Cir. 1981).

however, had no way of knowing how the hiring decision was made. Instead, Payne observed no people of color in positions where the employee handles money, and jumped to a logical, albeit erroneous conclusion: namely, that the two most senior employees, both of whom were African-American, were passed over for the open position in favor of a white employee. Payne notifies the company and the EEOC of his belief that the employer violated the law (thus activating the participation clause). The EEOC investigates, and soon the local newspaper and publishes a front-page story about the investigation. A protest ensues outside the employer's front door, and people hold signs accusing the employer of being a racist. The employer's business suffers, the owners' standing in the community is diminished, and the owners' families are being verbally attacked due to this false accusation. Furious at being maligned, the owners do not wish to continue to employ the individual whose false accusations caused all of this pain and suffering. The owners want to terminate the employee, but the company lawyers advise against that course because the company cannot successfully argue that it should not have to employ this individual. The only thing the company can do is focus on the "good faith, reasonable belief" aspect of the law.

An expression is considered to be in good faith if the employee truly believed that the alleged conduct occurred. An employee has a reasonable belief if (**1**) there is a basis to believe that the alleged conduct did occur; and (**2**) if true, the conduct would violate the law. The second element is often the key in an employer's attempt to have the case dismissed. Employees often file retaliation cases based on their incorrect understanding of the law. For example, say that an employee believes that sexual orientation is protected by federal law and complains that the employer is harassing employees based on their sexual orientation. The employer terminates the employee, and the employee files a retaliation claim. Sexual orientation; however, is not protected by federal law. Thus, even if the employee's actions were in good faith, they were not reasonable because the employer's actions, if true, would not violate the law.[8] A more difficult case occurs when an employee is subjected to a single sexist or racist comment. The law is clear that a single remark will not constitute harassment. Thus, one could argue that a complaint based on single comment could not create a "reasonable belief" for the purposes of protected expression under the retaliation doctrine.

This issue, however, has created a split in the circuits. Some courts contend that since the conduct, if true, could not sustain a claim, the expression is not protected.[9] Other courts recognize that complaining before the conduct rises to the level of being unlawful should be encouraged, and those jurisdictions protect a complaint based on a single incident.[10] Last, at least one court declined to rule on the issue, but held that such an expression was protected because the employer's HR director made it clear that such conduct was against policy and could be unlawful. Thus, good faith, reasonable belief is a defense for employers and a hurdle for employees to clear in opposition-clause cases. It is not however, an issue in participation-clause cases, as we explain next.

As we said, the majority of courts hold that the participation clause protects an employee who participates in any Title VII procedure regardless of the extent of such participation.[11] In fact, the EEOC guidelines state that the protection under the participation clause applies to testifying, assisting, and preparing affidavits in conjunction with a proceeding or investigation under Title VII, ADEA, ADA, or EPA. In other words, an employee who files an EEOC charge or who assists another in filing or preparing such a charge is now in a protected class. This is the case even if the charge is not true, not reasonable, or not even good faith. As the Second Circuit court in *Deravin v. Kerik* stated,[12] the participation clause: "is expansive and seemingly contains no limits." No case illustrates this point better than *Merritt v. Dillard Paper Company*,[13] where the Eleventh Circuit court held that a company could not discharge an employee for his admitted sexual harassment when the admission occurred during Title VII testimony. Because a protected expression under the participation clause need not satisfy the good faith, reasonable belief standard, plaintiffs' lawyers often seek to fit their cases into this clause.

In *Crawford* the plaintiff was questioned as part of an internal sexual harassment complaint brought by another employee. Specifically, a human resource officer of the employer asked the plaintiff if she had ever witnessed any "inappropriate behavior" on the part of one Dr. Hughes, the school district's employee relations director. Crawford responded by stating that in response to her asking Dr. Hughes, "What's up," he grabbed his crotch and said, "You know what's up." Crawford also stated that Dr. Hughes repeatedly put his crotch up to plaintiff's window and, on one occasion, entered plaintiff's office, grabbed her head and pulled it towards his own crotch.

The organization did not discipline the alleged harasser, but soon after it concluded its investigation, the company terminated Crawford for embezzlement. Crawford argued

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8 *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006).

9 *Id.*

10 *Alexander v. Gerhardt Enters., Inc.*, 40 F.3d 187, 195 (7th Cir. 1994).

11 The minority position requires the plaintiff to hold a good-faith belief that the employer violated the law. See *Ficus v. Triumph Group Operations, Inc.*, 24 F. Supp. 2d 1229 (D. Kan. 1998)

12 335 F.3d 203-205 (2nd Cir. 2003)

13 120 F.3d 1181 (11th Cir. 1997)

An employer cannot be liable for retaliation if it did not know that the employee engaged in a protected expression.

that she was terminated in retaliation for cooperating with the company's internal investigation. The company contended that the employee never engaged in a protected expression because: (**1**) she did not assertively oppose the harassment; she merely answered questions by investigators; and (**2**) she did not participate in an EEOC investigation or in litigation. Both the district and circuit courts dismissed the case, holding that to invoke the opposition clause the employee must instigate or initiate the complaint. Moreover the participation clause did not apply because this was simply an internal investigation. The Court had a variety of ways to address this case. It could: (**1**) redefine the opposition clause; (**2**) redefine the participation clause; or (**3**) as it did in *Ellerth,* redefine both clauses and develop a system that would prevent lawyers from trying to fit their cases into the most plaintiff-friendly classification.[14] The Court redefined the opposition clause.

In defining the opposition clause, the *Crawford* Court, as all courts must do, first looked to the statutory language. The statute states: "the opposition clause makes it unlawful…for an employer to discriminate against any employee because he has opposed any practice made…unlawful…by this subchapter." This language does not, however, define the term "oppose." The Court addressed this fact by citing *Perrin v. United States*[15] stating: "The term "oppose," being left undefined by the statue, carries with its ordinary meaning…to resist or antagonize…; to contend against; to confront; resist; withstand." With a definition in hand, the Court could now apply the facts to the law.

The question for the Court was whether the plaintiff's answers to the questions posed by the human resource officer met the Court's definition of "oppose." The Court held that these answers did constitute opposition because the plaintiff gave an: "ostensibly disapproving account of sexually obnoxious behavior." According to the Court, "Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as resist[ant] or antagoni[stic] to Hughes." At first blush, this holding does not seem especially problematic. An employee who responds to a question about the existence of reprehensible behavior by giving an account of said behavior is protected as if she had complained initially. There are, however, two problems with this holding from an employer's perspective: (**1**) did the court expand the definition of the opposition clause?; and (**2**) how does an employee separate the opposing employer from the co-conspirator?

One can argue that the Court's holding expanded the definition of the term "oppose" to include passive conduct. For example, the Court stated that "countless people were known to oppose slavery before Emancipation…without writing public letters, taking to the streets, or resisting the government." Furthermore, the Court stated that a supervisor who refused to terminate an employee in violation of Title VII had opposed an unlawful practice. While these statements are dicta,[16] and not the holding of the case, they are cause for concern. Can an employer be liable for retaliation against an employee whom the employer did not know had opposed an unlawful practice? If so, this case could be an employer's worst nightmare. However, close analysis reveals that employers need not despair.

First, in his concurrence, Justice Alito states that this case does not hold that employees are protected even where these employees do not openly express their opposition to an allegedly unlawful practice. Instead, Alito rightly states that the Court has not addressed this issue. Second, it is also well-settled law that vague complaints will not constitute a protected expression. For example there are numerous cases where employees failed to satisfy their burden because of lack of specificity. In fact, employees failed to make a claim, in the following three instances: (**1**) in a sex case the em-

[14] *Burlington Industries, Inc. v. Ellerth,* 123 F.3d 490. In *Ellerth* the question before the court was whether certain conduct was either *quid pro quo* sexual harassment or hostile environment. At the time, employers were always liable for *quid pro quo*, but were liable for hostile environment only if the company knew or should have known about the harassment. The Court rejected the distinction and set a new standard for liablity in sexual harassment.

[15] 44 U.S. 37 (1979).

[16] Dicta is language in a judicial opinion that may explain the holding, but is not the holding of the case. While courts may rely on dicta, they are not bound by such comments.

ployee claimed to be picked on but did not state a reason;[17] (**2**) where the employee's letter of complaint about management did not use the words sex or gender and instead stated that all members of the faculty were mistreated;[18] and (**3**) in a race case where the employee complained of a "good ol' boy" atmosphere.[19] Because these cases do not conflict with *Crawford*, they are still good law and should not be affected by the new holding.

Finally, it is clear that an employer cannot be liable for retaliation if it did not know that the employee engaged in a protected expression. Thus, an employee who never communicates opposition would not be protected. Employers should find comfort in this fact, as there is a long history of employees found to have engaged in protected expressions that were not the traditional complaints to management or to the EEOC. For example, in *Worth v. Tyer*,[20] the Seventh Circuit held that an employee's police report alleging that the company's main decision maker touched the employee's breast while she was in her office constituted a protected expression. Similarly, a complaint made by woman to a fellow employee about sexual harassment was classified as a protected expression after the accused found out and threatened to get even.[21] The rarity of such cases is due to the difficulty in proving that the employer knew of the complaint and took an employment action based on it.

Trying to assess whether the "opposing" employee was really in opposition or was a co-conspirator is an outgrowth of *Crawford*, but is not something that should cause concern. An employee who complains is clearly opposing. Conversely, an employee who responds to a question may or may not be in opposition to the conduct. For instance, the plaintiff in *Crawford* responded to Hughes's comments by telling him to: "bite me" and "flipping him a bird." The employer argued that the plaintiff was not opposing because she was taking part in the objectionable behavior. The Court held that this was a factual question for the jury. While a factual question for the jury often means huge attorneys' fees for employers, this holding is not that problematic. Employers can solve this issue by asking the employees how they felt about the conduct and why they did not complain. In addition, the employer needs to investigate the interaction fully and interview any individual with knowledge of the employees' conduct. An employer who determines that the employee was participating in the harassment, rather than opposing it, cannot be liable. The law requires intent to establish retaliation against employees. Thus, it is not unlawful to terminate someone for engaging in unacceptable behavior. This is the case even if the employee is not a co-conspirator, but has "opposed" in an unclear or unacceptable manner.

For example, in *Cruz v. Coach Stores, Inc.*, [22] the employee slapped her co-worker in the face after he made extremely inappropriate sexual remarks. The harasser then put the employee in a head lock. The employer lawfully terminated both employees. Similarly, employees were not protected when they: (**1**) called a discriminating supervisor incompetent and a political hack;[23] (**2**) opposed perceived discrimination by engaging in workplace confrontations that caused disruption;[24] and (**3**) took confidential files to support a discrimination claim.[25] In addition, employees were not protected when they picketed the employer's workplace and threatened the employer's well being.

Commentary on *Crawford* will likely be to the effect that retaliation is now an easier claim to file. In fact, there are already several post-*Crawford* cases that could be read to support this proposition. For example, in *Demers v. Adams House of Northwestern Florida,*[26] the plaintiff was denied a requested a maternity leave. In denying the leave, the plaintiff's supervisor explained that her boss, Malone, the regional manager, stated that the problem with pregnant women is that you did not know whether they would return. Plaintiff stated she would discuss this with Malone. The Court held that in the Eleventh Circuit asking for a leave is not a protected expression, but accepted the plaintiff's argument that her statement that she would discuss the denial and the rationale behind it with Malone constituted a protected expression. In *Riscili v. Gibson Guitar*[27] the plaintiff, an openly gay man, was told that a supervisor was mocking the plaintiff by standing behind him and making exaggerated motions as plaintiff was carrying on a conversation. The next day the plaintiff received a phone call from another supervisor who wished to discuss the incident. Plaintiff stated that he would handle it. When plaintiff later filed a retaliation lawsuit the company argued that there was no protected expression. Again, the court held that despite the lack of a formal complaint, the plaintiff made his objection clear to the employer.

Both of these cases support our contention that while *Crawford* defined the opposition clause and may have even expanded its definition, there is no real effect for employers. Despite the Eleventh Circuit's case law, we would never rec-

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17 *Sitar v. Ind. Dep't of Transportation*, 344 F3d 720 (7th Cir. 2003).

18 *Albrechtsen v. Brd of Regents,* 309 F. 3d 433 (7th Cir. 2002).

19 *Pool v. VanRheen*, 297 F. #d 889 (9th Cir. 2002).

20 276 F.3d. 249 (7th Cir. 2001).

21 See: *O'Neal v. Ferguson Construction Co*., 237 F.3d 1248 (10th Cir. 2001).

22 202 F.3d 997 (7th Cir. 2000).

23 *Miller v. AM. Familey Mut. Ins. Co.*, 203 F. 3d 1253.

24 *Matima v. Celli*, 228 F.3d 68 (2nd Cir. 2000).

25 *Niswander v. Cincinnati Ins., Co*., 2007 WL 1189350 (N.D. Ohio 2007).

26 2009 US App. Lexis 5844 (11th Cir. 2009).

27 605 F.supp. 2nd 558 (SD NY 2009).

ommend firing a woman who was denied a maternity leave. Similarly, even prior to *Crawford* we would have considered someone who was mocked because of their protected class[28] as having engaged in a protected expression regardless of whether they formally complained or contended they would address the situation privately. Courts have long protected employees who complained of disorderly conduct through a variety of avenues, *Crawford* simply codified this type of holding. Moreover, the potential problems associated with *Crawford* can be mitigated with documentation and sound legal advice regarding questions and actions that occur during a sexual harassment investigation.

Finally, we believe that *Crawford* could have been far worse from the employer's standpoint. As stated above, under the participation clause the employee need not have a good faith, reasonable belief that the employer violated a discrimination law. The *Crawford* Court could have expanded the participation clause to include internal company complaints. If that had been the case, employees on the verge of losing their jobs could have been protected and ensured their jobs by knowingly making frivolous complaints of discrimination. Because the *Crawford* Court did not address the limits of the participation clause, it is still an open question as to whether the participation clause covers internal company complaints. Employers should check the law in their jurisdictions to see whether their circuit has weighed in on the issue. We believe that absent circuit law to the contrary, federal courts will analyze internal complaints under the *Crawford* standard and not the participation clause.

White Expanded the Meaning of Discrimination

The second element of any retaliation case is proving that the employee was discriminated against. The term "discriminated" had created a split among the circuits. The Fifth and Eight Circuits held that the term discrimination meant that the employee suffered some "ultimate" employment decision, like a failure to be hired or a termination of employment. On the other hand, the Third, Fourth, and Sixth Circuits held that the alleged retaliation must simply yield an adverse effect on the terms, conditions, or benefits of employment.

In *White*, the company hired Sheila White, a "track laborer," with Gang 321 in the Maintenance of Way Department at its Tennessee Yard. The job was not a glamorous one; it entailed track replacement and removal, transportation of materials, cutting brush, and clearing litter and cargo spills. White, however, had experience working a forklift, which led Burlington Northern's road master, Marvin Brown, to assign her to forklift duty shortly after her arrival. This became White's primary responsibility, even though she continued to perform some track laborer tasks.

Three months into the job, White complained to Brown about the sexual harassment White experienced at the hands of her immediate supervisor, Bill Joiner. She complained that Joiner would tell White, the only female member of Gang 321, that the railroad was no place for women to work. After an internal investigation, Brown informed White that Joiner had been suspended for ten days and ordered to attend a sexual harassment training session. At the same time, Brown relieved White of her forklift duties, explaining that a "more senior man" should have the "less arduous and cleaner job," according to the terms of their collective bargaining agreement. Apparently, her coworkers had also complained about her assignment.

In the months that followed, White filed three retaliation charges with the EEOC. Each alleged that, in response to White's harassment and discrimination complaints, Brown subjected her to adverse actions. First, he removed White from the forklift. He then placed her "under surveillance" and monitored her daily activities. Finally, Brown suspended White, allegedly for insubordination, during the Christmas season after she had a disagreement with another supervisor. The company later determined, through its internal grievance procedures, that White had *not* been insubordinate and awarded her back pay for thirty-seven days.

White eventually filed a Title VII action in federal court after exhausting her administrative remedies.[29] A jury found in White's favor and awarded her $43,500 in damages. The district court then denied Burlington's post-trial motion for judgment as a matter of law on the retaliation claims. On appeal, a divided Sixth Circuit panel reversed that judgment, but the full Court of Appeals subsequently vacated the panel's decision and affirmed the district court, with each of the judges voting to uphold the initial judgment. They disagreed, however, as to what standard to apply in addressing the issue of discrimination.

In December 2005, the Supreme Court granted *certiorari* to resolve the aforementioned circuit split on the adverse action issue. To do so, the Court had to decide two things: (**1**) does the law only forbid those retaliatory actions that are related to employment or the workplace?; and (**2**) how harmful must a retaliatory action be to subsequently fall within the provision's scope?

On the first question, Burlington and the Solicitor General, as *amicus curiae*, argued in favor of the standard requiring a link between the adverse action and the terms, conditions, or status of employment. They contended that Title VII's anti-retaliation provision should be read *in pari materia* with the anti-discrimination provision, which only protects an individual from employment-related discrimination. Justice Breyer, writing the majority opinion, disagreed

[28] Sexual orientation is protected in New York State.

[29] Administrative remedies refer to filing with the EEOC or a state agency.

in light of the linguistic differences between the different sections of the law. He then shifted the Court's inquiry from whether the two provisions should be construed together to whether Congress intended the variations to make a legal difference. Justice Breyer also noted the presumption that Congress acts "intentionally and purposely" in its disparate inclusions and exclusions.

The *White* majority first observed that the substantive provision and anti-retaliation provision seek different things. One aims to prevent injury to individuals based on who they are (i.e., substantive differences such as sex or race). The other aims to prevent harm to individuals based on what they do (i.e., their conduct). The court then remarked that the substantive provision's basic objectives would be achieved if all employment-related discrimination miraculously ended, while the anti-retaliation's objectives would not. Because an employer can take retaliatory action not directly related to employment, or cause harm outside the workplace, the majority voiced its concern for the act's enforcement—or lack thereof—under a strict regime. It reasoned that a broad interpretation of §704(a) would help to assure the cooperation of employees in filing complaints and acting as witnesses, whereas a limited construction would fail to maintain "unfettered access to statutory remedial mechanisms." The majority concluded—in no uncertain terms—that Title VII's substantive and anti-retaliation provisions are not coterminous, and therefore the latter cannot be read to only cover retaliatory acts related to employment.

The Supreme Court then turned its attention to the level of harm needed to make an instance of retaliation actionable. The majority held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in the context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." In adopting this standard set forth by the Seventh and D.C. Circuits, the majority highlighted three aspects: materiality, reasonableness, and context. It spoke of material adversity since "petty slights, minor annoyances, and simple lack of good manners" will normally not deter an employee from relying on Title VII's remedial mechanisms. It spoke of a reasonable employee because the standard for judging harm must be objective to avoid a plaintiff's "unusual subjective feelings." Finally, the majority phrased the standard in general terms because "the significance of any given act of retaliation will often depend upon the particular circumstances." To illustrate, the majority noted that a supervisor's refusal to invite an employee to lunch is normally a trivial, non-actionable slight. To retaliate, however, by excluding the same employee from a weekly training lunch that "contributes significantly" to his or her professional advancement might well deter a reasonable employee from complaining about discrimination and would therefore be unlawful.

Applying the new standard to White's case, the majority concluded that there was a sufficient evidentiary basis to support the jury's verdict on her retaliation claims. It rejected Burlington's contention that the reassignment could not constitute retaliation where the former and present job duties fall within the same job description. It likewise rejected Burlington's argument that the suspension could not constitute retaliation because White was ultimately reinstated with back pay. The majority determined in both instances that a reasonable employee—having to choose between the loss of a paycheck near Christmas or relegation to less desirable tasks and withholding a discrimination complaint—might well have taken the latter route.

Justice Alito concurred in the Supreme Court's judgment, but disagreed with the majority's interpretation of §704(a).[30] In his view, the new standard had no basis in the statutory language and would only lead to practical problems and perverse results. He criticized the majority test where it implied an inverse relationship between the severity of the original act of discrimination that prompted the retaliation and the degree of protection afforded to the victim. He believed a victim of severe discrimination would not easily be dissuaded from filing a charge, whereas a victim of much milder discrimination would be dissuaded on account of the costs involved. Justice Alito also faulted the majority's conception of a "reasonable worker" and its use of a "loose and unfamiliar" causation standard. In short, he would have read §§703(a) and 704(a) together and required an adverse effect on the "terms, conditions, or benefits of employment."[31]

Predictably, the plaintiffs' bar declared victory and the management bar whined that the sky had fallen. Unlike *Crawford*, there has been sufficient time to examine the effects of *White v. Burlington Northern*. Below we state that while some courts have relied on the new holding as a basis for pro-employee decisions, the sky has not fallen and the effect of the case is limited.

Few Pro-Employer Decisions in the Wake of *White*

To be sure, a number of courts have explicitly recognized that *White* expanded the scope of adverse actions in Title VII retaliation claims.[32] Courts have likewise reversed prior judgments, specifying that acts once deemed insufficient to satisfy the second *prima facie* element are now actionable.

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[30] Justice Alito took his seat on the bench on Jan. 31, 2006; the Court decided *White* less than five months later on June 22, 2006.

[31] *Id.* at 2422.

[32] *See, e.g.: Michael*, 2007 U.S. App. LEXIS 18154, at 17; *Hare*, 220 Fed. Appx. at 127 n.4; *Brockman*, 217 Fed. Appx. at 206 n.3; *McCullough v. Kirkum*, 212 Fed. Appx. 281, 285 (5th Cir. 2006).

By themselves, the petty annoyances of the workplace do not automatically constitute discrimination or retaliation.

For example, in *Walsh v. Irvin Stern's Costumes*,[33] the defendant allegedly threatened to accuse the plaintiff of a crime and seek criminal charges against her unless she withdrew her discrimination complaint. The court initially dismissed the plaintiff's retaliation claims because the defendant's actions "did not adequately bear a nexus" to her employment. After *White*, however, the court reinstated the claims, noting that *White* specifically abrogated the Third Circuit's restrictive standard and that a threat to accuse the plaintiff of a criminal offense could "certainly be construed as 'materially adverse' to her." Similarly, in *Hare v. Potter*[34] the Third Circuit reversed the district court's decision and accepted the plaintiff's argument that exclusion from a career management program that was "designed to train and fast-track employees with leadership skills into management-level positions" would dissuade a reasonable employee from making a charge of discrimination.

These two holdings are prime examples of cases that were dismissed prior to *White*, but were now viable. One could look at these cases as prime examples of the major effects of *White* and conclude that the case changed the legal landscape of retaliation law. Alternatively, one can see two cases that, even prior to *White*, could likely give rise to retaliation claims. Moreover, we contend that these two situations are the types of actions that employers *should* be liable for. Making it unlawful to respond to an accusation of sexual harassment by threatening to arrest employees or to exclude an employee from a training program is a reasonable legal conclusion regardless of the precise parameters of the "adverse action." This does not mean, however, that *White* did not give employers cause for concern. Employers were concerned that the other elements of the *prima facie* case would become easier to prove and that standard practices like performance improvement plans, the proverbial "cold shoulder," and other seemingly minor actions would suddenly become actionable. However, such has not been the case.

But the Sky Is Not Falling

The first-generation of post-*White* results include a widespread rejection of misguided attempts by plaintiffs to liberalize the *prima facie* case. Courts have firmly rejected change in analysis for the protected activity and causation elements of the *prima facie* case.[35] Courts have also declined to categorize the "ordinary tribulations of the workplace" as adverse actions, notwithstanding §704(a)'s expanded coverage of acts unrelated to employment.[36]

In rejecting a number of post-*White* cases, courts have focused on the other elements of the *prima facie* case in one of two ways. First, some courts do not examine the second element of the *prima facie* case where the plaintiff fails to satisfy the first element, namely, that the plaintiffs engaged in protected activity.[37] For example, in *DeHar v. Baker Hughes Oilfield Operationist*, the plaintiff argued that because she was "closely related to or associated with" another black employee, she could share in his protected activity (a charged filed with, but later dismissed by the EEOC). She also alleged that a denial of sick leave and the opening of an "investigative file" amounted to an adverse action under Title VII. The Fifth Circuit concluded that it did not need to address the sufficiency of these challenged actions because, as a matter of law, the plaintiff could not claim the protected activity as her own.

The second approach courts used in the post-*White* world was to assume that the challenged acts do constitute adverse actions under *White*, but to deny plaintiffs' claims because they failed to prove the third element—causation.[38]

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[33] 2006 U.S. Dist. LEXIS 57398, at 6-7 (E.D. Penn. 2006).

[34] 220 Fed. Appx. 120, 128 (3d Cir. 2007)

[35] *See, e.g., Dean v. Kraft Foods N. Am., Inc.*, 2007 U.S. Dist. LEXIS 16911, at 18 (E.D. Penn. 2007); *Rodriguez v. Union Pac. Corp.*, 2006 U.S. Dist. LEXIS 57011, at 3 (D. Neb. 2006).

[36] See, e.g., *Nugent v. St. Luke's/Roosevelt Hosp. Ctr.*, 2007 U.S. Dist. LEXIS 28274, at 30 (S.D.N.Y. 2007); *Simmons v. Boeing Co.*, 2006 U.S. Dist. LEXIS 65527, at 39-40 (M.D. Ga. 2006).

[37] *See: DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. Appx. 437, 441 (5th Cir. 2007); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 205 Fed. Appx. 858, 861 (2d Cir. 2006).

[38] *See, e.g.: Devin v. Schwan's Home Servs., Inc.*, 2007 U.S. App. LEXIS 16017, at 17 (8th Cir. 2007); *McLaurin v. City of Jackson Fire Dep't*, 217 Fed. Appx. 287, 288 (5th Cir. 2006).

In *Devin*, for example, the plaintiff deliverywoman was not assigned a "route builder," who should have accompanied her on her route and obtained new business by soliciting the homes of non-customers. The plaintiff argued that this failure constituted an adverse action in retaliation for her complaints about disparate treatment. While the Eighth Circuit first noted the limited record on the value of such help, it rejected the plaintiff's retaliation claim on the ground that no inference of a causal connection could be drawn between the arguably adverse action and the plaintiff's complaints to the human resources director. [39]

Focusing on other elements of the *prima facie* course allows courts to sidestep the true holding of *White* and to avoid analyzing the Supreme Court's new interpretation. This resulted because plaintiffs, apparently encouraged by the prospect of *White* opening the floodgates to expanded claims, filed claims where the "discrimination" at issue pushed the limits of the Court's new relaxed standard. The initial holdings of the courts show a consistent pattern: (**1**) employees fail to appreciate that while the standard is relaxed, they still must prove that they suffered "material adversity"; and (**2**) courts will not turn normal workplace interactions into actionable discrimination. Instead, courts continually cite the Supreme Court's direction to "separate significant from trivial harms" in the discussion of each case.[40] In *Nugent*, the plaintiff social worker complained about her supervisor's sexist and denigrating comments. The plaintiff was then reprimanded for failing to process patient discharge forms, arriving late for work, and skipping a meeting to go Christmas shopping. The plaintiff then retired (to preempt termination) and filed suit, alleging "nasty looks" and "angry silences" as alleged discrimination at work. The district court quickly dismissed such her claims, holding that, "without more, [these] are not materially adverse actions." In *Juarez*, the female plaintiff, a Hispanic dental assistant, complained that a dentist propositioned her for sex during a business trip. Thereafter, several coworkers pulled away and began to treat her coldly. While the court conceded that it was "no doubt unpleasant for [the plaintiff] to face snide comments and the cold shoulder," it concluded that these minor annoyances were not actionable under Title VII and the *White* standard. In *Billings*, the female plaintiff worked as a secretary for the town administrator, who allegedly stared at her breasts with some regularity. After making various sexual harassment complaints and filing suit, the plaintiff continued to work with the administrator despite his cold-shoulder treatment. The court perceived this as a "normal response to a naturally awkward situation, [and] not a material adverse action." It further commented, "It is unrealistic to think, even under the best of circumstances, that parties on the opposite sides of litigation would not interact with each other somewhat more formally or stiffly."

Of course, to read *White* as a categorical rejection of all retaliation claims based in part on cold-shoulder treatment would be careless and inaccurate. The majority stressed the importance of context in analyzing whether challenged actions cross the materiality threshold. One must look at the "constellation of surrounding circumstances, expectations, and relationships" to truly grasp the "social impact of workplace behavior."[41] Hence, the Court preferred "a legal standard that speaks in general terms rather than specific prohibited acts."[42]

In fact, some courts have recognized the cold shoulder as part of a larger list of evils capable, perhaps, of dissuading a reasonable employee from making or supporting a charge of discrimination. For example, in *Moss v. Wal-Mart Stores, Inc.*, [43] three female plaintiffs complained to their general manager about sexual advances and unfair treatment from their supervisor. The three later filed an EEOC complaint. At trial, one of the plaintiffs argued that she suffered an adverse action when (**1**) Wal-Mart allowed the supervisor to prepare her "below-average" evaluation despite the fact that he had been replaced; (**2**) management shunned her and singled her out from her coworkers following the complaint; (**3**) she did not get a hat received by the rest of her coworkers; and (**4**) her supervisor declined to offer her the additional hours offered to other employees. The court first noted that any one of these actions, taken alone, would not constitute an adverse action. However, in denying Wal-Mart's motion for summary judgment, the court concluded that, taken together, these incidents of disparate treatment might have dissuaded a reasonable employee from reporting a charge of discrimination. The *Billings* Court,[44] by comparison, concluded that incidents accompanying the cold-shoulder treat-

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39 Other courts have used an *a fortiori* approach—stating that the second element is not at issue since the challenged acts previously satisfied one of the more restrictive standards. See, e.g., *Grother v. Union Pac. R.R. Co.,* 2006 U.S. Dist. LEXIS 77044, at 10 (S.D. Tex. 2006); *Rodriguez*, 2006 U.S. Dist. LEXIS 57011, at 4. These courts have likewise rejected the plaintiffs' argument where they have failed to prove a causal connection between the protected activity and the alleged retaliation. In *Grother*, for example, the plaintiff moved for reconsideration of his retaliation claims after the Supreme Court decided *White*. 2006 U.S. Dist. LEXIS 77044, at 8. However, the district court accepted his negative performance evaluation as an adverse action in its original memorandum and opinion, and thereafter did not reexamine the matter. See *id.* at 10-11.

40 *White*, 126 S. Ct. at 2415*; see, e.g., Nugent*, 2007 U.S. Dist. LEXIS 28274, at 30; *Juarez v. Utah Dep't of Health*, 2006 U.D. Dist. LEXIS 69005, at 40-41 (D. Utah 2006); *Billings v. Town of Grafton*, 441 F. Supp. 2d 227 (D. Mass. 2006).

41 *White*, 126 S. Ct. at 2415.

42 *Id.*

43 *See, e.g.: Moss v. Wal-Mart Stores, Inc.*, 2007 U.S. Dist. LEXIS 19057, at 38 (E.D. La. 2007).

44 441 F. Supp. 2d at 241

ment did not constitute adverse action—whether considered individually or as a whole. There, the alleged retaliatory acts included: (**1**) the plaintiff's ban on social interaction with the selectmen's assistant during office hours; (**2**) an order to avoid the selectmen's office; (**3**) criticism about the plaintiff's job performance; and (**4**) a reprimand for opening confidential mail.

The Supreme Court reiterated in *White* that Title VII does not set forth "a general civility code for the American workplace."[45] It also proclaimed that §704(a) does not protect an individual from all forms of retaliation. The lower courts have therefore recognized that certain behavior continues to be non-actionable under §704(a) even with the adoption of a more lenient standard, including "personality conflicts at work that generate antipathy."[46] As a result, we have seen an increase in the number of cases in which the plaintiffs, perhaps emboldened by a misreading of *White*, fail to convert inconsequential conduct into actionable retaliation. In *Toland v. Potter*,[47] a female postal worker who witnessed a car accident, asked her supervisor to forward an email to other offices highlighting the importance of seat belts. The supervisor neither acknowledged the email nor passed it on. Around the same time, the supervisor sent out an email congratulating several employees who had received compliments from postal customers on a call-in radio show. The supervisor did not include the plaintiff in the email, even though she was one such employee. The plaintiff later filed suit, alleging that such omissions were retaliatory in nature. The court held, however, that the plaintiff suffered—at the most—a petty slight or minor annoyance, and that no reasonable jury could conclude that the plaintiff satisfied *White*'s standard. In *Simmons*, the plaintiff alleged retaliation based on eighteen separate acts, including her rejection from volunteer committees and the deletion of her unread emails to management, which followed her various complaints about coworkers. The court responded with strong rebuke, noting that "every single complaint" the plaintiff made pertained to "bickering, personality conflicts," her "unapproachable demeanor," and her "extreme sensitivity to any negative feedback whatsoever." The court then concluded that the plaintiff's decision to report what she perceived as discriminatory behavior did not immunize her from the petty slights and minor annoyances "that all employees experience at work."

Legitimate Warnings and Evaluations Are Not Actionable

In *Nugent*, the plaintiff accused her supervisor of creating a retaliatory hostile environment through a "paper trail" of written warnings and "intense scrutiny." The plaintiff, however, admitted to committing the infractions for which she was warned. She also failed to demonstrate that other employees who engaged in similar behavior were not disciplined. Therefore, the court concluded that the plaintiff did not, as a matter of law, establish a retaliatory hostile environment.

In *Michael*[48] the plaintiff's subordinates and immediate supervisor lodged various complaints against her. The department manager then gave the plaintiff an option: she could either stay at her current position and be placed on a 90-day performance plan or accept a lateral assignment to a different position with the same pay and benefits. The plaintiff chose the former, claiming later that such discipline was actually retaliation for her complaint of racial discrimination. With specific reference to the more lenient adverse action standard of *White*, the Sixth Circuit determined that the plaintiff did establish a *prima facie* case of retaliation. However, it also accepted the defendant's legitimate, non-retaliatory reasons for the discipline, noting that the extensive documentation pointed to an "honest belief" in a "reasonably informed" decision to take action. It also highlighted the fact that the defendant's HR department prepared the performance plan—not the plaintiff's manager. The court concluded that the plaintiff, with nothing more than contrary assertions, failed to show unlawful retaliation.

Conclusion

Technically, *White* and *Crawford* expanded the definition and scope of retaliation, making it easier for plaintiffs to file retaliation cases. While there was an expected spike in the number of retaliation claims filed after *White*—and we expect another one after *Crawford*—neither case will cause major problems for employers who are cognizant of the law, document their actions well, and obtain legal advice when dealing with any employee who has made a claim of discrimination. Employers who follow these basic procedures will protect themselves from future litigation and can avoid the potential pitfalls inherent in any expansion in employees' ability to succeed on legal claims. ■

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[45] Quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

[46] See, e.g.*: Higgins v. Gonzales*, 481 F.3d 578, 589-90 (8th Cir. 2007)

[47] See, e.g.*: Toland v. Potter*, 2007 U.S. Dist. LEXIS 42153 (D. Kan. 2007)*; Simmons*, 2006 U.S. Dist. LEXIS 65527.

[48] See: 2007 U.S. App. LEXIS 18154, at 5, 8.

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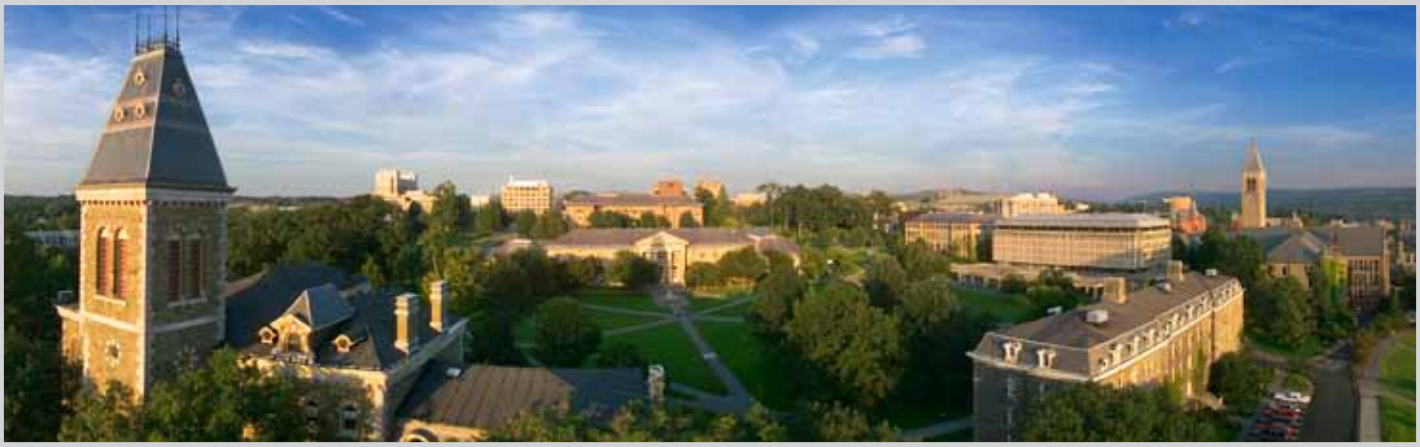

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