Washington and Lee Law Review

Volume 64 | Issue 4 Article 16

Fall 9-1-2007

"You're Fired!" Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim

Anna Ku

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

 Part of the Labor and Employment Law Commons

Recommended Citation

Anna Ku, *"You're Fired!" Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim*, 64 Wash. & Lee L. Rev. 1663 (2007).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/16

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

"You're Fired!" Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim

Anna Ku*

Table of Contents

* Candidate for J.D., Washington and Lee University School of Law, 2008; B.A., University of Virginia, 2005. I would like to thank Professor Dorothy Brown for her endless support and help; Brandon Almond, Charles Capito, and Meredith Abernathy for their insightful comments and edits; and Laura Windsor, Professor Mark Grunewald, and Professor Doug Rendleman for discussing potential Note topics with me. Finally, I owe everything to my wonderful family and fiancé, Chris Thompson.

> Laura Phelan began working as a mechanical assistant in the boiler room of . . . Cook County Hospital . . . .
>
> Phelan's co-workers . . . began subjecting her to various abusive behaviors immediately after she began working there. She was the target of sexually offensive comments and solicitations, sexually offensive touching and displays of pornography. On multiple occasions, Phelan's co-workers told her that, in order to survive in the department, she would need to perform sexual acts.
>
> . . .
>
> In July of 2000, Phelan did not report for work and called in sick . . . [because of] distress over the treatment she had received from her co-workers and the inadequate response from human resources and management. She began seeing a psychiatrist, who diagnosed her as suffering from major depression and post-traumatic stress disorder.[1]

I. Introduction

Phelan later requested a medical absence, but Cook County denied her request.[2] Because of her emotional suffering, Phelan could not return to work, and the hospital subsequently fired her.[3] Although she ultimately convinced the hospital to reverse its termination decision,[4] the district court held that her employer's decision to reinstate her with back pay voided her Title VII claim because the employer's remedial activities sufficiently made her whole.[5]

In 1964, Congress enacted Title VII of the Civil Rights Act[6] to eliminate

---

1. Phelan v. Cook County, 463 F.3d 773, 776–78 (7th Cir. 2006).

2. *Id.* at 778.

3. *Id.*

4. *Id.*

5. *See* Phelan v. Cook County, No. 01 C 3638, 2004 U.S. Dist. LEXIS 21345, at *23 (N.D. Ill. Oct. 24, 2004) (rejecting Phelan's retaliation claim because she did not provide evidence that she suffered an adverse employment action following the reinstatement with back pay).

6. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 42 U.S.C. §§ 2000e–2000e-17 (2000)) (enforcing the right to vote, prohibiting discrimination in public accommodations, and establishing the Equal Employment Opportunity Commission).

discrimination in employment.[7] Section 704 includes an anti-retaliation provision: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the Civil Rights Act]."[8] To make a Title VII retaliation claim,[9] a plaintiff must show that she engaged in a statutorily protected expression, that she suffered a materially adverse action, and that there is a causal relationship between the protected expression and the adverse action.[10]

In June 2006, the Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. White*,[11] which resolved a circuit split and broadened the definition of a "materially adverse action."[12] Later that year, the Seventh Circuit decided a factually similar case, *Phelan v. Cook County*,[13] involving the

---

7. *See* Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 630–31 (2004) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977), which said that the Civil Rights Act's purpose was to do away with discrimination with respect to race, color, religion, sex, or national origin).

8. 42 U.S.C. § 2000e-3 (2000).

9. Title VII encompasses both provisions against discriminatory employment actions, found in 42 U.S.C. § 2000e-2, and retaliation, found in 42 U.S.C. § 2000e-3. This Note questions whether an employer can nullify a lawsuit by reinstating an employee with back pay before the employee files suit. In both types of Title VII actions—discriminatory and retaliatory—where an employer reinstates an employee with back pay prior to a lawsuit, the analysis will be similar. For ease of reading, however, this Note will focus solely on a plaintiff who brings a retaliation claim. Therefore, unless otherwise stated, this Note will refer to Title VII to mean the anti-retaliation provision and not the anti-discriminatory employment practices provision.

10. *See* Eiland v. Trinity Hosp., 150 F.3d 747, 753 (7th Cir. 1998) (describing the elements of a prima facie case for an employment retaliation claim); *see also* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 648 (6th ed. 2003) ("As for the prima facie case . . . three elements [are] generally recognized: (1) plaintiff engaged in protected expression, (2) she suffered an adverse employment action, and (3) there was a causal link between the former and the latter.").

11. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006) (concluding that the term "materially adverse" in retaliation claims refers to actions and harms both related and unrelated to the employment in which a reasonable employee or applicant would be deterred from exercising a statutorily recognized right).

12. *See id.* (adopting the broader standard for materially adverse action, which holds that retaliation is not confined to actions and harms related to employment or that occur at the workplace, and retaliation constitutes actions by employers that would deter a reasonable employee or applicant to exercise a protected right).

13. *See* Phelan v. Cook County, 463 F.3d 773, 778 (7th Cir. 2006) (concluding that the plaintiff's termination constituted retaliation).

reinstatement with back pay of a wrongly terminated plaintiff.[14] Both cases involved alleged discriminatory retaliation. The employers in each case suspended or terminated the employees following a discrimination complaint, then later reinstated the employees with back pay.[15] In *Phelan*, however, the Seventh Circuit answered a question that *Burlington Northern* neglected to address: "[W]hether the fact that [an employer] later reinstated [the plaintiff employee] and awarded her back pay somehow negates her right to pursue her Title VII claims."[16] Although the *Phelan* district court originally concluded that the employee's reassignment and reinstatement from suspension with back pay did not amount to adverse employment actions,[17] the Seventh Circuit reversed and found an actionable claim.[18]

In a litigious society, the answer to the *Phelan* issue—whether to preclude a wrongly terminated[19] employee who is later reinstated with back pay from initiating a lawsuit against her employer—is of utmost importance. The Equal Employment Opportunity Commission (EEOC) alone filed over 75,000 discrimination charges against employers in 2005.[20] One can see why an employer might find the actions of the *Burlington Northern* and *Phelan* employers attractive: Rather than adding fuel to the fire in a contentious workplace, an employer first can remove the complaining employee. Following removal, the employer may investigate the allegations and may reinstate the complaining employee with back pay if the allegations turn out to be false. And by first removing the complaining employee, the employer avoids a potentially tension-filled work environment.

---

14. *See id.* at 776–78 (describing the facts of the case).

15. *See Burlington N.*, 126 S. Ct. at 2409 (recounting the factual background of the case); *Phelan*, 463 F.3d at 776–78 (discussing the facts of the case).

16. *Phelan*, 463 F.3d at 780. The court also phrased the question: "This case examines whether a Title VII plaintiff who is wrongly terminated should be foreclosed from pursuing her claims where her employer eventually reinstates her with back pay." *Id.* at 776.

17. *See* Phelan v. Cook County, No. 01 C 3638, 2004 U.S. Dist. LEXIS 21345, at *12, *23 (N.D. Ill. Oct. 24, 2004) (finding that there was no adverse employment action because Cook County took remedial actions by reinstating Phelan with back pay, that not every unwelcome employment action is an adverse action, and that there was no retaliatory action because there was no adverse employment action).

18. *See Phelan*, 463 F.3d at 776 (reversing the district court's grant of summary judgment on all but one count).

19. This Note will use "terminated employee" and "suspended employee," or "termination" and "suspension" interchangeably.

20. *See* Equal Employment Opportunity Comm'n, EEOC Enforcement Statistics and Litigation, http://www.eeoc.gov/stats/enforcement.html (last visited Feb. 10, 2007) (showing the trend in charges filed by the EEOC in the past fourteen years) (on file with the Washington and Lee Law Review).

This Note examines: (1) whether a terminated employee who later is reinstated with back pay has an actionable Title VII retaliation claim; and (2) if such claim exists, what possible remedies exist at law or equity for the plaintiff. The Note answers the first issue in the affirmative; reinstatement with back pay does not preclude a wrongly terminated employee from initiating a cause of action. Assuming the existence of a cognizable lawsuit, the Note then concludes that the plaintiff may receive punitive, compensatory, and equitable damages.

Part II.A demonstrates how a plaintiff can show the first and third elements of a prima facie case despite an employer's attempt to self-remedy the wrong. This portion of the Note examines the types of protected expression under Title VII and the causal relationship between the protected expression and adverse action. Part II.B applies the *Burlington Northern* standard for a "materially adverse action" and argues that, regardless of a reinstatement with back pay, the wrongly terminated plaintiff suffered an adverse action. Where both *Burlington Northern* and *Phelan* merely suggest emotional harm as a rationale for finding materially adverse action,[21] this Note argues that there is an injury to reputation following a suspension of any kind, as well as professional development loss. The Note also addresses the public policy reasons for allowing this type of plaintiff to have an actionable claim.

Finally, this Note asserts that the wrongly terminated plaintiff has remedies both at law and equity. Part III addresses the missing pieces in *Burlington Northern* and *Phelan*—should there be a remedy under this situation given that the Supreme Court has stated that the primary objective of Title VII "is not to provide redress but to avoid harm"?[22] Assuming the answer to the previous question is yes, Part III explores the possible remedies available to the plaintiff.

II. Prima Facie Title VII Retaliation Claim

In order to establish a prima facie case of retaliation, a plaintiff must show: (1) she "engaged in a statutorily protected expression"; (2) she suffered a materially adverse action; and (3) there was a causal connection between the

21. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417 (2006) (noting that the plaintiff's emotional harm makes the suspension, even when later reinstated with back pay, an adverse action); Phelan v. Cook County, 463 F.3d 773, 781 (7th Cir. 2006) (finding that Phelan's four-month suspension was "certainly enough time [for her] . . . to be measurably injured by the termination, both financially and emotionally, regardless of whether back pay was later awarded").

22. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998).

protected activity and the adverse action.[23] The difference in a retaliation claim between a reinstated employee with back pay and an employee who has not been reinstated lies predominantly in the second element of the prima facie case—whether the plaintiff suffered a materially adverse action. The defendant-employer, who prior to the lawsuit reinstates the employee with back pay, argues that there is no materially adverse action because the employee has not been economically harmed.[24] This will not end the analysis, however, as the plaintiff still must show the first and third components. Because the parties typically do not hotly contest the first and third elements, this Note first will briefly dispose of these factors before proceeding with the second element.

A. First and Third Elements

1. Engaging in a Statutorily Protected Expression

The first element of a Title VII retaliation claim requires proof that the plaintiff engaged in a statutorily protected expression.[25] Often, this element refers to the plaintiff-employee's ability and right to complain or to file a discrimination charge against his employer;[26] but other activities also may constitute a statutorily protected expression.[27] Title VII provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[28]

---

23. *See* Eiland v. Trinity Hosp., 150 F.3d 747, 753 (7th Cir. 1998) (describing the prima facie case for a retaliation claim).

24. *See infra* Part II.B (discussing the second element of a prima facie retaliation claim).

25. *See Eiland*, 150 F.3d at 753 (describing the prima facie case for an employment retaliation claim).

26. *See* Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 223 (2d Cir. 2001) (finding for the plaintiff on the first element because she filed a complaint with the EEOC under the Americans with Disabilities Act).

27. *See* 42 U.S.C. § 2000e-3 (2000) (protecting the right to charge, testify, assist, or participate in any investigation, proceeding, or hearing for discrimination); 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, 222 (2004) ("The most typical type of participation involves the plaintiff filing a discrimination charge against his or her employer, but also includes other activities, such as providing testimony or assisting in an investigation.").

28. 42 U.S.C. § 2000e-3 (2000).

A complaining party may make a formal discrimination charge against her employer if the employer violates any portion of the title;[29] discriminatory charges may be based, among other things, on race, religion, sex, and national origin.[30] Also, an employee may informally testify or otherwise participate in a discrimination charge against her employer.[31] According to Section 706 of the Civil Rights Act, after an employee engages in these statutorily protected activities and the employer retaliates, an employee may take the appropriate administrative steps with the EEOC.[32]

At this stage, the EEOC may take one of the following actions: file a civil suit, issue a right-to-sue letter to the employee and have the employee initiate the lawsuit, or issue a no-cause letter.[33] If the EEOC finds reasonable cause of the charge's validity, the EEOC may take appropriate enforcement action against the employer.[34] The EEOC may file a civil suit itself or give the employee a private cause of action with a right-to-sue letter.[35] Conversely, if the EEOC does not find evidence of discriminatory practices, it will issue a no-cause letter;[36] however, the employee maintains a right to sue because she exhausted her administrative remedies.[37] Similarly, even if the plaintiff has not obtained the EEOC's right-to-sue letter, a court may nevertheless grant some sort of preliminary relief pending the outcome of the EEOC proceeding.[38]

---

29. *See* 42 U.S.C. § 2000e-5 (discussing the ability of the EEOC to enforce employer violations of the discriminatory and retaliation provisions found in Sections 703 and 704 of the Civil Rights Act).

30. *See id.* § 2000e-2 (discussing the protected classes).

31. *See id.* § 2000e-3 (laying out the retaliation provision of Title VII); *id.* § 2000e-5 (granting an employee the right to file a charge through the EEOC for retaliatory actions).

32. *Id.* § 2000e-5.

33. *Id.*

34. *See id.* ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

35. *Id.*

36. *Id.* ("If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.").

37. *See* Wu v. Thomas, 863 F.2d 1543, 1546 (11th Cir. 1989) (noting the EEOC's issuance of no-cause but a right-to-sue letter on the employee's retaliation claim); Rose v. Intertech Group, Inc., No. 4:04CV0143 JLH, 2006 U.S. Dist. LEXIS 92397, at *4–5 (E.D. Ark. Dec. 18, 2006) (noting that the EEOC dismissed the employee's discrimination and retaliation charges with a no cause determination, but the employee then filed suit).

38. *See, e.g.*, Aronberg v. Walters, 755 F.2d 1114, 1115–16 (4th Cir. 1985) (remanding to the district court in order to decide whether to grant plaintiff's application for temporary injunctive relief to preserve the status quo pending a resolution of the suit).

Here, because an employee has a statutorily created right to charge, testify, or assist in a discrimination claim against her employer, as long as the wrongly terminated employee follows the procedure found in Section 706 of the Civil Rights Act, a court will find that the employee has met the first element of the anti-retaliation case.[39] If the employee makes some formal complaint, especially if she files a complaint directly with the EEOC, she has a stronger chance of proving the first element;[40] however, the anti-retaliation statute also protects other less formal employee actions.[41] After the employee exhausts her administrative remedies found in Section 706 with the EEOC, the employee may proceed with a cause of action.[42]

Following the proof of the first element, the employee must show the rest of the prima facie case. In addition to proving a statutorily protected expression, the plaintiff bears the burden of proving a materially adverse action and a causal connection between the expression and the adverse action. Because the second element is the most controversial issue for a wrongly terminated employee reinstated with back pay, this Note will first discuss the third element in the following section before proceeding to the second element in Part II.B.

2. Proving a Causal Relationship

The third component in an anti-retaliation claim requires a showing of a causal relationship between the protected expression and the adverse action.[43] In order to prove this element, the purported adverse action must result from the plaintiff's exercise of her statutorily protected right to make a complaint. The plaintiff can prove this element either through direct or circumstantial evidence.[44] Because direct evidence is often unavailable, the Supreme Court

---

39. *See* Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 223 (2d Cir. 2001) (noting that a plaintiff met the first element of the retaliation claim by establishing evidence that she filed a complaint with the EEOC, as protected by the Americans with Disabilities Act).

40. *See* Savage, *supra* note 27, at 223 (calling the filing of a formal complaint "unquestionably a protected activity").

41. *See* 42 U.S.C. § 2000e-3 (2000) (protecting an employee's right to make a discrimination charge, or to assist, testify, and participate in a charge or investigation of discrimination); Savage, *supra* note 27, at 222 (discussing the types of protected activities).

42. *See* 42 U.S.C. § 2000e-5 (discussing the administrative and procedural steps required before a lawsuit).

43. *See* Eiland v. Trinity Hosp., 150 F.3d 747, 753 (7th Cir. 1998) (describing the elements of a prima facie case for retaliation).

44. *See* ZIMMER, SULLIVAN & WHITE, *supra* note 10, at 648 (noting that retaliation discrimination cases also use the *McDonnell Douglas* test when there is no direct evidence).

has noted that the plaintiff's burden of proving a causal connection is "not onerous"—the plaintiff simply needs to show that the employer acted under circumstances giving rise to an inference of retaliation.[45] "[T]he prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'"[46] After the plaintiff demonstrates the inference of a causal connection, the employer must provide a legitimate motive for retaliation.[47] The plaintiff may rebut this legitimate motive by showing that the employer's alleged legitimate motive was pretext for retaliation.[48] To show causal connection, a plaintiff may, among other things, offer evidence that the employer was unlikely to terminate her for the stated reasons,[49] that the employer consistently discouraged the plaintiff from complaining,[50] or that temporal proximity existed.[51]

Often, a plaintiff can present the inference of a causal relationship by showing a close temporal proximity between the adverse action and the exercise of the plaintiff's right under Title VII.[52] If the employer takes action soon after the plaintiff complains of some discriminatory act, there is a stronger inference that the plaintiff's actions caused the employer to act against the

---

"This [*McDonnell Douglas* test] includes three stages: the plaintiff establishes a prima facie case, the employer articulates a nondiscriminatory reason for its actions, and the plaintiff rebuts by proving pretext." *Id.*; *see also* Justin P. O'Brien, Note, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. REV. 741, 745–46 (2002) (discussing the methods in which a plaintiff can prove a Title VII retaliation claim).

45. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981) (explaining the burden shifting process of a prima facie retaliation case and the plaintiff's burden of proof).

46. *Id.* at 254 (citations omitted).

47. *See* O'Brien, *supra* note 44, at 748 (discussing the process of showing retaliation).

48. *See* Godoy v. Habersham County, No. 2:04-CV-211-RWS, 2006 U.S. Dist. LEXIS 23332, at *47–53 (N.D. Ga. Feb. 8, 2006) (finding that the plaintiff failed to show that the employer's nondiscriminatory reason for terminating the plaintiff—insubordination—was a pretext for unlawful retaliation); *see also* O'Brien, *supra* note 44, at 748 (describing the burden-shifting dance in retaliation claims).

49. *See* Phelan v. Cook County, 463 F.3d 773, 788 (7th Cir. 2006) (noting that the plaintiff introduced evidence that her termination was inconsistent with her satisfactory job performance shortly before termination).

50. *See id.* (noting that the record was full of evidence of warnings by supervisors that Phelan would be reprimanded if she continued to make complaints).

51. *See id.* (noting that a jury could conclude that the time between the plaintiff's protected activity and her termination proved a causal connection).

52. *See* O'Brien, *supra* note 44, at 749 ("[P]erhaps the most important and most common circumstantial evidence of a causal connection is temporal proximity.").

plaintiff.[53] Courts generally agree that although temporal proximity may not be per se sufficient to show a causal connection, it can be and is significant in showing the third element of retaliation.[54] Courts have not agreed, however, on the necessary amount of time needed to constitute sufficient temporal proximity to show causation.[55]

Even though a plaintiff who argues for a cognizable retaliation action despite reinstatement with back pay differs situationally from a plaintiff who claims "normal retaliation," the two types of plaintiffs nonetheless bear the same burden of proving the first and third elements of the retaliation claim. The plaintiffs must show a statutorily protected expression and a causal relationship between that expression and the adverse action. Where the two plaintiffs differ is in the second element—proof of an adverse action.

B. Second Element as the Difference Maker: Has the Plaintiff Suffered an Adverse Action?

1. Burlington Northern *and a New Outlook on the Meaning Behind "Materially Adverse" Employment Actions*

A defendant-employer likely will argue that a plaintiff does not have a cause of action, basing its argument on the purported lack of any adverse employment action.[56] The second element of a Title VII retaliation claim seeks proof that the plaintiff suffered a materially adverse action.[57] Title VII forbids an employer from "discriminat[ing] against" an employee because the latter made a charge, testified, assisted, or participated in a Title VII proceeding;[58] however, the statute does not define the phrase "discriminate against."[59] Consequently, courts have created the judicial threshold of "materially adverse

53. *See id.* (stating the rationale behind the inference of temporal proximity).

54. *See id.* (citing different court interpretations of temporal proximity).

55. *See id.* ("Additionally, although no jurisdiction has adopted a bright line test for determining the amount of time that is probative of a causal connection, courts recognize that a very short interval between protected activity and adverse action is highly probative of a causal connection.").

56. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417 (2006) ("Second, Burlington argues that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay.").

57. *See* Eiland v. Trinity Hosp., 150 F.3d 747, 753 (7th Cir. 1998) (describing the elements of a prima facie case for employment retaliation).

58. *See* 42 U.S.C. § 2000e-3 (2006) (describing the anti-retaliation provision).

59. *Id.*

action" or "tangible employment action" to define Title VII's "discriminate against" clause.[60] By adopting this threshold, courts hope to prevent employees from bringing frivolous claims.[61] The Sixth Circuit commented on the need for this standard: "If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasures."[62]

Even with this judicial threshold of "materially adverse" for Title VII claims, prior to *Burlington Northern*,[63] the circuits disagreed over the definition of "materially adverse action."[64] In *Burlington Northern*, Burlington hired Sheila White as a track laborer but assigned her to operate a forklift instead when she arrived.[65] After experiencing alleged sexual harassment from her supervisor, White complained to Burlington officials.[66] That same day, Burlington reassigned her to standard track laborer tasks.[67] White then filed a complaint with the EEOC.[68] Burlington suspended White for insubordination, but following a hearing, Burlington reinstated White with back pay.[69]

Despite being reinstated with back pay, White brought a retaliation suit against Burlington.[70] Justice Breyer recognized the issue before the Court:

> The Courts of Appeals have come to different conclusions about the scope of [the Civil Rights Act's] anti-retaliation provision, particularly the reach of its phrase "discriminate against." Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?[71]

---

60. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (citing cases requiring a "tangible employment action" to satisfy a Title VII claim).

61. *See* Bowman v. Shawnee State Univ., 220 F.3d 456, 462 (6th Cir. 2000) (noting that employment actions that are *de minimus* are not actionable under Title VII).

62. Primes v. Reno, 190 F.3d 765, 767 (6th Cir. 1999).

63. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417–18 (2006) (finding that the plaintiff was materially and adversely harmed by the employer's retaliatory actions).

64. *See id.* at 2410–11 (citing previous case law's definition of "discriminate against").

65. *Id.* at 2409.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 2408.

To solve this split, the Supreme Court adopted a reasonable person standard to determine whether a wrongly terminated employee suffered a materially adverse action.[72] Specifically, a plaintiff must show that a reasonable employee would have found the challenged action to be materially adverse, meaning that it "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[73] Applying this standard, the Supreme Court held that Burlington's thirty-seven day suspension of White, even though Burlington reinstated her with back pay, constituted retaliation.[74] The Court noted that a reasonable person in the plaintiff's position would consider the reassignment and the suspension to be materially adverse.[75]

The Court acknowledged that certain circuits required a close relationship between the retaliatory action and employment—that the disputed employment action must adversely change the terms and conditions of the employment.[76] Other circuits adopted an even more restrictive approach, requiring an "ultimate employment decision," such as termination or denying leave.[77] However, the Court opted for the standard adopted by the Seventh and D.C. Circuits: The plaintiff must show that the "'employer's challenged action would have been material to a reasonable employee'" in that it would "'dissuade a reasonable worker from making or supporting a charge of discrimination.'"[78]

In reaching its decision, the *Burlington Northern* Court first compared the language in the anti-discrimination provision with the anti-retaliation provision of the Civil Rights Act; it concluded that Congress did not intend to limit the anti-retaliation provision to effects on the terms or conditions of employment.[79]

---

72. *See id.* at 2409 (concluding that the anti-retaliation provision does not confine the action and harms it forbids to those related to the employment and that an action must be materially adverse to a reasonable employee).

73. *Id.* at 2415 (citation omitted).

74. *Id.* at 2416.

75. *Id.* at 2417.

76. *See id.* at 2410 (describing the test used in the Third, Fourth, and Sixth Circuits).

77. *See id.* (describing the test used in the Fifth and Eighth Circuits).

78. *Id.* at 2411, 2415 (citations omitted).

79. *See id.* at 2411–12 (noting the linguistic differences between the anti-discrimination and anti-retaliation provisions). The Court stated:

> The underscored words in the [anti-discrimination] provision—"hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee"—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision.

Id.; *see also id.* at 2412 (concluding that Congress likely intended to differentiate between the anti-discrimination and anti-retaliation provisions of the Civil Rights Act because the former seeks to prevent injury to individuals based on their status while the latter seeks to prevent

The more expansive standard adopted by the Court allows the plaintiff to lay out the elements of a prima facie case broadly, because she may include both retaliation within and outside the scope of employment. Although the Court did not address the public policy behind this decision, the policy rationale is self-evident. A restrictive definition would produce unusual results. An employer could retaliate in nonemployment contexts but would be barred from retaliating within the scope of employment. For example, an employer could threaten the employee with bodily harm, which would not involve a material change in the terms and conditions of employment, but an employer could not retaliate by cutting the employee's wages, even though the former is arguably more retaliatory than the latter.

Second, the Court noted that the adverse action must be material.[80] Justice Breyer expounded on the meaning of materially adverse action by incorporating an objective standard.[81] The Court adopted this standard because it is "judicially administrable . . . [and] avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[82] The context of the employment and the nature of the challenged action are integral in utilizing the objective standard.[83] For example, a change in an employee's work schedule may not be materially adverse for most employees, but for a single mother with young children this would be an adverse action.[84]

Applying the objective standard, the *Burlington Northern* Court found no merit in the employer's claim that "'it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full back pay' to be unlawful."[85] Burlington's behavior caused emotional harm that reinstatement and back pay alone could not remedy because White and her family had to live thirty-seven days without knowing if she would return to work.[86] A reasonable person in White's situation would be deterred from

---

injury to individuals based on their conduct).

80. *See id.* at 2415 ("We speak of *material* adversity because we believe it is important to separate significant from trivial harms.").

81. *See id.* (adopting the reasonable employee standard).

82. *Id.*

83. *See id.* (noting the importance of context in anti-retaliation cases).

84. *See id.* (citing the example in *Washington v. Illinois Department of Revenue*, 420 F.3d 658 (7th Cir. 2005), of a working mother being materially and adversely affected by a change in her work schedule). Tailoring this "reasonable person," however, turns an objective standard into a subjective one.

85. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417 (2006) (citations omitted).

86. *See id.* at 2417 (describing the plaintiff's emotional injuries).

challenging workplace discrimination if an employer acted like the employer in *Burlington Northern*.[87] Under this scenario, one can hardly imagine how such employer action could be construed as anything but materially adverse.

A potential risk with the materially adverse standard still remains. Instead of analyzing each fact scenario, lower courts may look at previous decisions and automatically adopt the earlier, narrow holdings. For example, the *Burlington Northern* decision that a thirty-seven day suspension followed by reinstatement with back pay has been interpreted by some lower courts to mean that reinstatement with back pay always constitutes a materially adverse employment action.[88] Courts must refrain from turning the *Burlington Northern* flexible "circumstances" test into a rigid rule. While a wrongly terminated employee who is later reinstated with back pay is not precluded from filing a cause of action, a court should still use the *Burlington Northern* materially adverse test to determine if the plaintiff in question has a cause of action.

2. *The State of Current Law Pertaining to the Preclusion of an Employee's Retaliation Claim*

In *Burlington Northern*, the Court suggested but did not hold that a wrongly terminated employee has a cognizable cause of action if the employer reinstates the employee with back pay prior to the initiation of the lawsuit. The *Burlington Northern* Court did not, however, specifically address this issue. Rather, the Court's purpose was to resolve the circuit split on the meaning of "materially adverse."[89]

In a factually similar case to *Burlington Northern*, the Seventh Circuit in *Phelan v. Cook County*[90] posed the issue at hand: "[W]hether the fact that [the employer] later reinstated [the employee] and awarded her back pay somehow

87. *See id.* ("Many reasonable employees would find a month without a paycheck to be a serious hardship. . . . [and] an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.").

88. *See, e.g.*, Randolph v. Ohio Dep't of Youth Servs., 453 F.3d 724, 737 (6th Cir. 2006) (concluding that because the employer terminated the plaintiff and reinstated her with 70% back pay, this was analogous to the plaintiff in *Burlington Northern* such that the case at issue involved a materially adverse action).

89. *See Burlington N.*, 126 S. Ct. at 1210–11 (discussing the circuit split on the meaning behind "discriminate against" and "materially adverse," and granting certiorari to resolve the issue).

90. Phelan v. Cook County, 463 F.3d 773, 788 (7th Cir. 2006) (holding that a reasonable finder of fact could find that the plaintiff's termination was retaliatory even with reinstatement and back pay).

negates her right to pursue her Title VII claims."[91] The plaintiff there was Laura Phelan, a mechanical assistant in the boiler room of Cook County Hospital.[92] Phelan complained to her supervisor and met with Human Resources about sexual and racial harassment while at work.[93] The hospital gave her two options: reassignment as a medical assistant or termination.[94] She opted for the reassignment but continued to be harassed.[95] Phelan missed months of work due to the emotional distress, and Cook County terminated her employment "due to the absences."[96] Following the fifty-eight day termination, Cook County reinvestigated and reinstated the plaintiff with back pay.[97] The Seventh Circuit reversed the district court's grant of summary judgment that Phelan was not subject to adverse employment action.[98] The circuit court concluded that a reinstatement with back pay after lengthy suspension does not bar a Title VII claim in light of the recent *Burlington Northern* decision and because of public policy reasons.[99]

The court determined that Phelan's reinstatement with back pay did not preclude her from bringing a cause of action under Title VII because the adverse action requirement sought to provide a reasonable limit for the types of actionable conduct.[100] Recognizing the Supreme Court's *Burlington Northern* decision earlier that year that *suspension* without pay (even with reinstatement and back pay) was an adverse action, the Seventh Circuit concluded that reinstatement after *actual termination* surely must be materially adverse.[101]

---

91. *Id.* at 780.

92. *Id.* at 776.

93. *Id.* at 776–77.

94. *Id.* at 777.

95. *Id.*

96. *Id.* at 777–78.

97. *Id.* at 778.

98. *Id.* at 776.

99. *See id.* at 780–81 ("[W]e decline to endorse a rule that would allow employers to escape liability by merely reinstating the aggrieved employee months after termination, whenever it becomes clear that the employee intends to pursue her claims in court."). The Seventh Circuit went on to say, "Such a rule could create an unintended economic incentive for employers to reinstate an employee who files a discrimination suit as means to avoid Title VII penalties whenever the costs of reinstating the employee are lower than the employer's exposure [to] suit." *Id.* at 780.

100. *See id.* at 780–81 ("We believe that [reinstatement with back pay does not negate the right to pursue Title VII claims], since the only purpose of the adverse employment action requirement is to provide a reasonable limiting principle for the type of conduct actionable under the statute.").

101. *See id.* at 781 ("If a suspension that ends in reinstatement and reimbursement can constitute an adverse employment action, it follows that reinstatement and reimbursement do

Regardless of the reinstatement with back pay, Phelan's four-month termination "measurably injured" her both financially and emotionally.[102] Phelan presented evidence of gender-related comments and assaults by co-workers, and the "suspicious timing" of her termination after her complaint was sufficient evidence for a reasonable person to believe the action was materially adverse.[103]

Other courts, however, have concluded that reinstatement negates any adverse employment, thereby precluding the plaintiff from initiating a retaliation claim.[104] In *Lumhoo v. Home Depot USA, Inc.*,[105] the district court held that Home Depot did not engage in an adverse employment action because it reinstated the plaintiff following an investigation into his termination.[106] Home Depot hired the plaintiffs, both minorities, as order pullers and truck drivers.[107] The head of the lumber department, Duffy, yelled at them, alleging that damage had been done to the lumber, and wrongly accused one of the plaintiffs of failing to wear a seatbelt on the forklift.[108] Duffy then proceeded to call the plaintiffs racially derogatory names.[109] The plaintiffs spoke with another supervisor about the incident, and that supervisor later obtained permission from the manager of the store to fire one of the plaintiffs.[110] Following an investigation, Home Depot reinstated the terminated plaintiff and offered "full back pay, the same salary and benefits, and the same seniority status."[111]

---

not bar a finding of adverse employment action where there was an actual termination, which is a more serious action than suspension.").

102. *See id.* (concluding that the plaintiff's prolonged termination harmed her adversely).

103. *See id.* at 781–82 (describing the plaintiff's evidence of material adverse action).

104. *See, e.g.*, Pennington v. City of Huntsville, 261 F.3d 1262, 1267 (11th Cir. 2001) (describing the precedent of precluding a retaliation cause of action if an employer already reinstated the employee with back pay). The court noted:

> The caselaw in this area indicates that the decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, is not an adverse employment action. But when an employee loses pay or an employment benefit from a delayed promotion, courts have held that the employment action is not adverse only when the action is rescinded and backpay is awarded.

Id.

105. *See* Lumhoo v. Home Depot USA, Inc., 229 F. Supp. 2d 121, 144 (E.D.N.Y. 2002) (rejecting the plaintiff's retaliation claim).

106. *See id.* at 144 ("Plaintiffs have failed to allege an adverse employment action sufficient to a make out a prima facie case of retaliation.").

107. *Id.* at 127.

108. *Id.* at 128.

109. *Id.*

110. *Id.* at 129.

111. *Id.* at 139 (explaining how the plaintiffs failed to establish a materially adverse

For the plaintiffs' discrimination and retaliation claims, the district court held that the wrongly terminated plaintiff's reinstatement negated any adverse employment action.[112] The court called the plaintiff's termination a "mediate action that was ultimately reversed by [the plaintiff's] reinstatement."[113] Home Depot also removed any reference to the termination from the plaintiff's file;[114] thus, the plaintiff would not suffer any future harm.

Similarly, in *Dobbs-Weinstein v. Vanderbilt University*,[115] the Sixth Circuit concluded that the employer-university did not take a materially adverse action when the dean refused to grant tenure to the plaintiff-professor.[116] The court first noted that tenure decisions in the academic context differed from the normal employment context.[117] Tenure decisions are particularly complex, such that there are usually grievance procedures to appeal intermediate decisions.[118] Because of these procedures, the court held that the dean's decision did not constitute an adverse employment action; his say was not final and therefore was not an "ultimate" employment decision.[119] If the court allowed the plaintiff's claim, such a holding would encourage litigation.[120] Finally, the Sixth Circuit did not find the plaintiff's claim for emotional and professional reputation damages convincing; rather, the court noted that the claim was too speculative to be a judicially recognizable cause of action.[121]

The *Lumhoo* and *Dobbs-Weinstein* courts, therefore, concluded that reinstatement with back pay precludes a plaintiff's cause of action, because the plaintiff cannot sufficiently prove the second prong of the retaliation claim—a materially adverse action. On the other hand, *Phelan* clearly suggests that

---

employment action).

112. *Id.* at 140, 144.

113. *Id.* at 139.

114. *See id.* (giving further evidence of Home Depot's remedy of the termination).

115. *See* Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 546 (6th Cir. 1999) (holding that the plaintiff, an associate professor at Vanderbilt University, did not have a cause of action for retaliation because the university eventually did grant the plaintiff tenure and back pay).

116. *See id.* at 546 ("[The plaintiff] has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII.").

117. *See id.* at 545 (citing case law differentiating tenure and employment settings).

118. *See id.* (explaining the differences in the tenure system).

119. *See id.* (finding that the dean's decision was not an "ultimate employment decision").

120. *See id.* at 546 ("To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.").

121. *See id.* at 545 n.3 (rejecting the plaintiff's claim for emotional and professional reputational harm).

certain disputable adverse action exists. Although *Burlington Northern* does not specifically address the issue, *Burlington Northern*'s definition of "materially adverse" and its similar fact scenario to *Phelan* significantly contribute to the finding of a retaliation claim.

3. *Is* Phelan *the Right Decision?*

With the differing views on whether a reinstated employee has a legal action, hinging on whether the reinstatement with back pay fully compensates the employee, a proper analysis must examine: (1) other sources of injuries that reinstatement and back pay do not address, thus constituting a materially adverse action; and (2) public policy concerns. An employer likely will argue that a cognizable cause of action does not exist because the employer has restored the plaintiff-employee's original position by virtue of reinstatement and back pay, and, thus, the plaintiff has not suffered any adverse harm.[122] Is this, however, an accurate depiction? Is the employee materially and adversely affected even if she receives reinstatement and back pay?

As noted in *Burlington Northern*, the employer's argument ignores the noneconomic harms of suspension or termination, even if there is subsequent reinstatement with back pay. In *Burlington Northern*, the Court described the plaintiff and her family's emotional harm:

> White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused. Indeed, she obtained medical treatment for her emotional distress.[123]

Without job certainty, an employee is likely to suffer from emotional pains, which the Supreme Court viewed as sufficient for finding a materially adverse action. Further, the 1991 Amendments to the Civil Rights Acts specifically provide for damages for emotional harms, allowing compensatory damages awards for: "future pecuniary losses, emotional pain, suffering, inconvenience,

122. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417 (2006) ("Burlington argues that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay.").

123. *Id.*

mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[124] The statute thus recognizes noneconomic harms.

In other contexts, courts have held that monetary remedies are not sufficient to compensate for emotional injuries. In *Campbell v. State Farm Mutual Automobile Insurance Co.*,[125] the Utah Court of Appeals concluded that even if a defendant insurance company eventually pays a claim in full against the insured, it does not necessarily foreclose the insured from bringing a bad faith suit.[126] The court rejected the insurance company's assertion that, because the insured plaintiffs did not suffer any economic harm (following the insurance company's payment of a claim), the plaintiffs did not have an actionable bad faith suit.[127] Specifically, the court noted that the economic damages were not the only cognizable damages.[128] The court concluded: "Eventual payment of the excess judgment does not compensate the insured for emotional injury, damages to the insured's reputation and credit rating, any punitive damages awarded against the insured, or any other legally cognizable injury . . . . Nor does it 'cure' the insurer's earlier wrongful conduct."[129]

---

124. 42 U.S.C. § 1981a (2000).

125. *See* Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130, 139 (Utah Ct. App. 1992) (holding that an insurer's payment of an excess judgment does not negate a plaintiff's suit for a breach of the duty of good faith), *rev'd on other grounds*, 538 U.S. 408 (2003). In *Campbell*, the Campbells tried to pass six cars on a two-lane highway and caused an accident. *Id.* at 132. The injured parties initially sued the Campbells—the latter being insured by State Farm. *Id.* For three years following the plaintiffs' judgment, State Farm refused to pay more than its policy limits, an amount that was significantly lower than the judgment. *Id.* at 135. The plaintiffs and the Campbells then initiated a bad faith suit against State Farm. *Id.* The court dismissed the suits when State Farm paid the excess judgments following an appellate court's decision to affirm the plaintiffs' first judgment. *Id.* The Campbells, however, still decided to initiate the present bad faith action against State Farm. *Id.* State Farm argued, and the trial court agreed, that the court should grant summary judgment because it already paid the entire judgment against the Campbells such that the Campbells were never subject to any liability, i.e., the Campbells were not economically harmed. *Id.* at 136. The Court of Appeals of Utah reversed the decision and held that State Farm's eventual payment of the excess judgment and the lack of any economic harm to the Campbells did not foreclose the Campbells' bad faith suit. *Id.* at 139. The court noted that the Campbells suffered nonpecuniary damages, including injury to reputation, credit rating, and emotional distress. *Id.*

126. *See id.* at 139 ("[W]e conclude . . . that an insurer's eventual payment of an excess judgment does not necessarily vitiate the insured's cause of action for breach of the duty of good faith.").

127. *See id.* (concluding that the insurance company's payment of excess judgment against the plaintiff did not foreclose the plaintiffs' current bad faith suit against the insurance company).

128. *See id.* (setting forth the plaintiffs' potential injuries).

129. *Id.* at 140.

The *Campbell* court listed "damages to . . . reputation" in addition to emotional damages as types of nonpecuniary injuries;[130] similarly, there may be a negative connotation and stigma related to a suspension or termination. Depending on the specific type of employment, the reputational harm from a suspension or termination may be exacerbated. For example, in the medical context, a reinstated doctor may lose patients who worry or believe the doctor's suspension/termination was warranted.

In *Lumhoo*, the employer specifically recognized this potential "stigma harm" and sought to remedy it by erasing all records of the termination.[131] Although the court in *Lumhoo* did not accept this stigma argument, finding instead that the employer fully remedied the situation, it applied a rule for materially adverse employment action that was ultimately narrower than the Supreme Court's *Burlington Northern* standard. In order to show adverse action, the *Lumhoo* court required the plaintiff to show that the action "created a materially significant disadvantage."[132] According to the court, this had to relate to the employment.[133] The court juxtaposed the general employment discrimination statute, 42 U.S.C. § 2000e-2, which includes this language of adverse action relating to the employment context, into the meaning of the retaliation statute, 42 U.S.C. § 2000e-3, which makes no mention of the relation to the employment context.[134] The Supreme Court explicitly rejected mixing the discrimination and the retaliation statutes in the *Burlington Northern* decision.[135] Although *Lumhoo* is still technically good law, if the court applied the broader definition of "materially adverse" set forth in *Burlington Northern*, the *Lumhoo* court likely would have found the stigma harm to be an adverse employment action.

---

130. *See id.* (naming potential sources of injuries).

131. *See* Lumhoo v. Home Depot USA, Inc., 229 F. Supp. 2d 121, 129 (E.D.N.Y. 2002) ("[Employer] reinstated [plaintiff's] employment . . . [and] paid [plaintiff] for the three week period of his termination and removed all documents concerning his termination from Company records.").

132. *Id.* at 138 (citations omitted).

133. *See id.* (adopting the Second Circuit test that the plaintiff suffers an adverse employment action if she endures a materially adverse change in the terms of the conditions of employment).

134. *See id.* (citing 42 U.S.C. § 2000e-2 when discussing the retaliation statute).

135. *See* Burlington N. & Santa Fe. Ry. Co. v. White, 126 S. Ct. 2405, 2411–12 (2006) ("The underscored words in the [anti-discrimination] provision—'hire,' 'discharge,' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee'—explicitly limit the scope of that provision to [employment] actions . . . . No such limiting words appear in the anti-retaliation provision."); *see id.* at 2412 (inferring congressional intent from the differences in wording between the anti-discrimination and anti-retaliation provisions).

Furthermore, even if an employer like Home Depot erases all records of termination, a plaintiff may still have a cause of action for reputational harm; a plaintiff's co-workers, family members, and the community may still believe that there was merit behind the suspension/termination. Judge Moore, in her *Dobbs-Weinstein* dissenting opinion,[136] wrote, "This court has recognized that in making a plaintiff whole it often will be appropriate to award prejudgment interest and damages for emotional harm. Similarly, a successful Title VII plaintiff should be compensated for reputational damage especially when it impacts her employment or her future employability and advancement."[137]

Even though the plaintiff cannot argue for traditional economic damages if she is reinstated with back pay, she may be able to argue that her employer deprived her of career growth during the period of her suspension/termination. In other words, she suffered professional losses during the time of her unemployment. This professional harm argument is closely related to the reputational harm argument, but the damage is not the same. Judge Moore describes the reputational damages as creating a stigma that may affect an employee's future career;[138] however, the professional development argument broadens this idea. The professional damage argument asks, "If the plaintiff had not been suspended, what would the differences between her skills and research developments be with where she is now?" For example, a chemist may argue that his one-month suspension set back his research three months

136. Note that the *Dobbs-Weinstein* court rested its decision largely on the purported differences between tenure and normal employment contexts. *See* Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 545 (6th Cir. 1999) (noting the differences between tenure and normal employment settings). The court reached its conclusion that the plaintiff did not suffer an adverse action when the dean refused her tenure because she still had an option to appeal the decision; thus the court did not consider the dean's decision to be ultimate employment action. *Id.* at 545–46. Yet the court grossly misinterpreted the tenure versus employment distinction; even "normal" employers most likely have grievance procedures for appealing a supervisor's decisions. *See* Phelan v. Cook County, 463 F.3d 773, 778 (7th Cir. 2006) (discussing the plaintiff's decision to appeal the result of a hearing to terminate the plaintiff); Lumhoo v. Home Depot USA, Inc., 229 F. Supp. 2d 121, 129 (E.D.N.Y. 2002) (noting how the Human Resources Manager reinstated the plaintiff with back pay following the plaintiff's supervisor's decision to terminate the plaintiff). Even without specific mention of grievance procedures, other courts have not distinguished between tenured and non-tenured employees. *See* Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 409 (5th Cir. 2000) (affirming the district court's ruling that Tulane did retaliate against a tenured professor, although reducing the punitive damages amount as excessive). In light of the grievance procedures provided by many employers, the 1991 Civil Rights Act Amendments, and the *Burlington Northern* decision, *Dobbs-Weinstein* likely is questionable as good law.

137. Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 547 (6th Cir. 1999) (Moore, J., dissenting) (citations omitted).

138. *See id.* (Moore, J., dissenting) (discussing the possibility of professional reputational harm).

due to retesting, etc. A boiler-room mechanic who missed a week of training due to suspension may argue that she lost a month's worth of work because she could not do the work for lack of training, and her employer could not create a make-up training session until much later. Applying the *Burlington Northern* standard, a reasonable employee may be dissuaded from exercising a statutorily protected action if she knows that her professional development will take a hit.

In other non-Title VII cases, courts have held that recovery may be possible for lost future income or professional development potential.[139] In one such case where an employer demoted an employee, the latter argued that there was a due process violation and specifically pointed to future income and professional development potential as sources of property interests.[140] One federal district court has noted, "A demotion usually comes with an immediate loss of pay and status, and may result in a loss of future income and professional development potential."[141] Similarly, a wrongly terminated plaintiff later reinstated can argue that courts have recognized the existence of professional development losses as a cognizable interest and harm. Even though a reinstated employee does not suffer any tangible economic injury, she can still single out emotional damages and lost future wages. Because the reinstatement with back pay does not fully compensate for these injuries, a *Phelan*-type answer, allowing the plaintiff to pursue a cause of action, is probably correct.

Finally, a reinstated plaintiff with back pay can also make a public policy argument. Public policy is contravened if an employer could discriminate/retaliate against an employee and then avoid a lawsuit simply by reinstating the employee with back pay. The *Phelan* court noted:

> [A] rule that prevented the finding of an adverse employment action where the terminating or suspending employer later reinstated the employee would "allow[] an employer unilaterally to cut off the employee's claims for other damages, which have been explicitly authorized by Title VII since the Civil Rights Act of 1991, such as interest on the back pay, attorney's fees, emotional suffering, and punitive damages."[142]

---

139. *See e.g.*, Evans v. Morgan, 304 F. Supp. 2d 1100, 1104 (W.D. Wis. 2003) (finding that the loss in future earnings and professional development constitutes a deprivation of a property interest).

140. *See id.* at 1103–04 (describing the facts of the case and finding a sufficient property interest); *see also* Greenlee v. Bd. of Med., 813 F. Supp. 48, 54–55 (D.D.C. 1993) (recognizing the plaintiff's attempt to seek damages for lost wages and professional development losses, but rejecting the claim because the medical board had rational reasons to deny the plaintiff's application for a medical license).

141. *Evans*, 304 F. Supp. 2d at 1103.

142. Phelan v. Cook County, 463 F.3d 773, 781 (7th Cir. 2006) (citations omitted).

If the court allowed the employer to bypass liability by precluding the employee from initiating a lawsuit, the result would conflict with the goals of the Civil Rights Act of making an employee whole and deterring employers from discriminating.[143] Public policy alone justifies a court to reach a *Phelan* holding, thereby giving an employee the right to sue. Whether the plaintiff uses a public policy or nonpecuniary harms rationale, however, the plaintiff must still convince the court that an appropriate remedy exists for her recognized legal claim.

III. Available Remedies

After the plaintiff passes the hurdle of a prima facie case, the court must decide what type of remedy is appropriate. A plaintiff, however, should not confuse the presence of a remedy as an indication that she necessarily has a cause of action; conversely, a plaintiff does have to show a cognizable claim before she justifies a particular remedy.[144] Courts generally have broad discretion to award damages in Title VII cases,[145] but the plaintiff must demonstrate the necessity for a specific type of remedy. Economically, the plaintiff has been made whole by the employer so the plaintiff faces an uphill battle to convince the court to award compensatory damages, yet alone any other type of damages.

A. Section 1981a Statutorily Available Remedies

One weapon in the plaintiff's arsenal is the Civil Rights Act itself. The Civil Rights Act reflects Congress's intent to treat employment discrimination

---

143. *See* Hardin v. Straub, 490 U.S. 536, 539 (1989) (recognizing that the chief goals of the Civil Rights Act are compensation and deterrence).

144. *See* Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 546 (6th Cir. 1999) (rejecting the plaintiff's argument that her claim for emotional distress and professional reputation damages means that her claim for retaliation is viable and calling the line of argument as placing "the cart before the horse").

145. *See* Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 AM. U. L. REV 339, 344–45 (1986) (explaining the Court's discretion in awarding damages in Title VII cases). She states:

> The [Civil Rights] Act, consistent with the broad purposes of [T]itle VII, provides courts with broad powers to fashion adequate remedies for discrimination. It specifically authorizes courts to award injunctive relief, monetary relief, affirmative action relief, and attorney's fees. Additionally, the Act permits courts to fashion any other equitable relief that the court deems appropriate.

Id.

claims differently than the run-of-the-mill civil suit.[146] Before the 1991 amendments, a wrongfully terminated employee like Phelan only had access to equitable remedies, predominantly back pay.[147] Therefore, prior to the 1991 amendments, being already reinstated with back pay, Phelan would not have a remedy. In 1991, Congress expanded Title VII by adding an amendment to the Civil Rights Act, 42 U.S.C. § 1981.[148] The current Act provides for a wide range of remedies, including compensatory and punitive damages (limited to statutory caps), for a plaintiff who succeeds on an anti-retaliation claim:

> In an action brought by a complaining party under . . . the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section . . . 704 [anti-retaliation] . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [enforcement provisions], from the respondent.[149]

The statutory language, "against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact)," suggests that a plaintiff must show some kind of intentional discriminatory action by the employer to have a right to a remedy under the Civil Rights Act.

The problem, however, is the ambiguity and lack of specificity of remedies in the Civil Rights Act.[150] May a court award a type of remedy that is not

---

146. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 258 (3d ed. 2005) (reflecting on Congress's intent in enacting the Civil Rights Act). They state:

> The remedial provisions of Title VII . . . reflect congressional intent that employment discrimination disputes should not be handled like other civil disputes. On the one hand, the statute[] encourage[s] a victim of employment discrimination to pursue claims like a "private attorney general" to vindicate the public interest in eradicating discrimination. On the other hand, the statute[] provide[s] limited judicial remedies . . . but have since been expanded . . . .

Id.

147. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533 (1999) (referencing the limited remedies in the pre-1991 Civil Rights Act).

148. *See* ROTHSTEIN ET AL., *supra* note 146, at 258–59 (describing the evolution of Title VII remedies and noting that Congress added an amendment expanding remedies via 42 U.S.C. § 1981 with specific reference to Title VII).

149. 42 U.S.C. § 1981a (2000).

150. *See* 42 U.S.C. §§ 1981a, 2000e-5 (granting punitive, compensatory, and equitable damages to discrimination claims but providing very little insight on the meaning behind the three types of damages).

expressly included or precluded in the Civil Rights Act? Without specific types of remedial actions, courts may be reluctant to award a novel remedy.

In the First Amendment retaliation context, the Supreme Court in *Bush v. Lucas*[151] addressed the issue of whether or not to fashion a remedy when a federal right has been violated and Congress has provided a less than complete remedy for the wrong.[152] The Supreme Court assumed that the employer retaliated against the plaintiff and violated his First Amendment rights,[153] and that the civil service remedies were not as effective as individual damage remedies to fully compensate the plaintiff.[154] Congress neither expressly authorized nor expressly precluded the creation of the remedy the plaintiff sought—namely punitive damages, emotional and dignitary harms, and attorney's fees.[155] Grounding its decision on the history of civil service remedies and on the comprehensive and elaborate administrative system for appeals in the civil service context, the Court rejected the plaintiff's argument for a full and complete nonstatutorily based remedy.[156] The Court noted that Congress provided a carefully crafted step-by-step procedure for disputes in the civil service such that the Court should not disrupt the system.[157] Further, the Court stated that Congress was in a better position than the judiciary to change the available remedies.[158]

Similar to the First Amendment situation, the employer facing a retaliation claim may argue that a court should be cautious in reading into the text of the Civil Rights Act and fashioning new remedies that are neither explicitly mentioned nor precluded. Although there are many factual parallels between the *Bush* First Amendment employment retaliation case and a *Phelan* discriminatory employment retaliation case, the history and the statutes governing each case is very distinct. The civil service regulations govern a narrow group of people,[159] whereas the Civil Rights Act governs the vast majority of employers.[160] The former give a detailed process of appeals and

151. *See* Bush v. Lucas, 462 U.S. 367, 389–90 (1983) (refusing to create a new judicial remedy when the statute was silent).

152. *Id.* at 372–73.

153. *Id.* at 372.

154. *Id.*

155. *Id.* at 373.

156. *Id.* at 388–90.

157. *Id.* at 390–91.

158. *Id.* at 389.

159. *Id.* at 382–85.

160. *See* 42 U.S.C. § 2000 (2000) (defining employers subjected to the requirements of Title VII).

procedures to ensure that a plaintiff has several options to petition for review of an adverse decision.[161] In enacting the civil service statutes, Congress carefully thought through various avenues for full compensation; there is thus a better argument that Congress alone should fashion any new remedies.[162] On the other hand, the Civil Rights Act gives broad discretion to courts to rectify discriminatory retaliation because Congress recognized that the purpose behind the statute was twofold: (1) to compensate the plaintiff and (2) to deter discriminatory conduct.[163] Specifically, the phrase "other equitable relief" in Section 706(g) of the Civil Rights Act states Congress's intent "'to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible.'"[164] A court, therefore, should not reject a type of remedy simply because the remedy is not specifically mentioned in the Civil Rights Act. However, a court must be cautious and balance the goals of the Civil Rights Act to deter and compensate with the potential danger that awarding damages may encourage unnecessary litigation.[165]

1. Punitive Damages

One category of damages the Civil Rights Act explicitly recognizes is punitive damages.[166] The 1991 amendments to the Civil Rights Act loosely define punitive and compensatory damages.[167] The statute allows for punitive

---

161. *See* Bush v. Lucas, 462 U.S. 367, 387–88 (1983) (reviewing the civil service appeals process).

162. *See id* at 381–88 (discussing the legislative history of the civil service statutes and regulations).

163. *See* Hardin v. Straub, 490 U.S. 536, 539 (1989) (recognizing that the chief goals of the Civil Rights Act are compensation and deterrence).

164. Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976) (citations omitted); *see also* Douglas M. Staudmeister, *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U. L. REV. 189, 198–99 (1996) (describing the inadequacy of the Civil Rights Act pre-1991). He states:

> Congressional supporters also recognized the inadequacy of the remedial scheme under Title VII. . . . [N]o matter how egregious the discrimination, victims were [prior to the 1991 Amendments] unable to recover compensatory damages despite the emotional suffering, physical pain, and related medical expenses that can accompany such stigmatizing treatment.

Id.

165. *See* Staudmeister, *supra* note 164, at 200–02 (discussing the arguments against awarding compensatory damages and recognizing the reality of increased EEOC claims following the passage of the 1991 amendments).

166. *See* 42 U.S.C. § 1981a (2000) (naming punitive damages as a type of remedy).

167. *See id.* (noting the conditions plaintiff must show for punitive damages, listing

damages if "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[168]

The plaintiff should note, however, that the fact-finder will consider the statutory caps in determining the actual amount of the punitive damage award.[169] The EEOC and courts thus agree that, in general, Title VII punitive damages should rarely be exorbitant.[170] Additionally, there may also be due process limits on punitive damages.[171] Regardless of these potential constraints, a plaintiff may recover punitive damages if she can show that the employer maliciously or recklessly discriminated against her by a preponderance of the evidence.[172]

Although a discrimination case (rather than an anti-retaliation case), in *Kolstad v. American Dental Ass'n*,[173] the Supreme Court elucidated on employment discrimination-based punitive damages.[174] In *Kolstad*, the Court

---

compensatory damage exclusions, and setting limits for punitive and compensatory damage recovery).

168. *Id.* Additionally, there is some argument that an employee bringing a discrimination charge may recover punitive damages without recovering any compensatory damages. *See generally* Christy Lynn McQuality, Note, *No Harm, No Foul?: An Argument for the Allowance of Punitive Damages Without Compensatory Damages Under 42 U.S.C. § 1981a*, 59 WASH. & LEE L. REV. 643 (2002).

169. *See* 42 U.S.C. § 1981a (outlining the compensatory and punitive damages cap depending on the size of the employer).

170. *See* EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 528 (7th Cir. 2001) (discussing the court's ability and obligation to keep the trial within "sensible bounds" in determining punitive damages).

171. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion."); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

172. *See* 42 U.S.C. § 1981a (2000) ("A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) (plurality opinion) ("Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence.").

173. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534–35 (1999) (holding that egregious conduct is not necessary to meet the requirements for punitive damages).

174. *See id.* at 534–35 (holding that an employer's conduct does not necessarily need to be egregious to entitle a plaintiff to punitive damages under the Civil Rights Act).

determined that a plaintiff does not need to show that an employer committed a particularly egregious discriminatory act in order to receive jury instructions for punitive damages. In its analysis, the majority acknowledged that the wording for punitive damages in the Civil Rights Act—"discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual"—suggested a two-tiered standard of liability.[175] The Court, however, rejected the conclusion that a plaintiff must show egregious behavior by the employer in order to receive jury instructions for punitive damages.[176] Because the terms "malice" and "reckless indifference" usually refer to a state of mind, egregious conduct may be evidence of mental state; but, a plaintiff may show the employer's state of mind without a showing of egregious conduct.[177] The Court concluded that an employer must know that it is violating a federal law, rather than just knowing that it is discriminating, to find a condition for "malice" or "reckless indifference."[178]

Further, in keeping with Title VII's prophylactic objective, the *Kolstad* Court provided limitations on vicarious liability. The Court decided that an employer will not be liable for punitive damages for the discriminatory acts of its agents if the employer made a "good-faith effort to comply with Title VII."[179] To successfully launch a discrimination claim against her employer, a plaintiff must show that the discriminating agent acted in a managerial capacity in the scope of her employment.[180]

---

175. *See id.* at 534 (noting that the congressional intent of the 1991 amendment was to limit punitive damage awards to a subset of cases involving intentional discrimination, thus requiring an additional demonstration to make out a claim for punitive damages).

176. *See id.* at 534–35 (rejecting the approach of the D.C. Circuit).

177. *See id.* at 535 (discussing the requirement for a particular state of mind).

178. *See id.* at 536–37 ("There will be circumstances where intentional discrimination does not give rise to punitive damages liability . . . . [T]he employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful.").

179. *See id.* at 545 (describing the Court's intent to keep in line with the purpose of Title VII by departing from the Restatement's scope of employment rules).

180. *See id.* at 545–46 (discussing the need of the plaintiff to show managerial capacity of the discriminating agent while acting in the scope of employment); *see also* Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 405 (5th Cir. 2000) (elucidating on the burden to show a managerial capacity). The court stated:

> [T]he employee must satisfy an additional requirement as set out in this recent articulation of the necessary showing to obtain punitive damages under Title VII: the requirement of agency. Relevant to this case, the evidence must support a finding that the malfeasing agent served in a "managerial capacity" and committed the wrong while "acting in the scope of employment."

Id.

Applying the *Kolstad* standard for punitive damages to reinstated employees with back pay, the plaintiff may argue for punitive damages upon a showing of "malice" or "reckless indifference" by her employer. Although she does not need to show particularly egregious conduct, such a showing will support the plaintiff's claim of the requisite employer mental state.[181] In particular, employers in retaliation cases may have difficulty showing that they lacked the requisite malicious or reckless mental state. The employer is often already on notice that it is violating some kind of law or company policy—the first element of the prima facie case for retaliation is that the employee engaged in a statutorily protected activity, like filing an EEOC complaint.[182] Thus, when the employer learns of the employee's complaint and takes adverse action, the employer knows that it is violating anti-discriminatory law/policy. The employer then may not argue that it did not subjectively know that he was violating a law by retaliating against the employee even if he knew that the discriminatory acts were prohibited; there is a stronger claim of a "malicious" or "reckless" mental state for a retaliation claim than for a pure discrimination allegation. Finally, in order to receive punitive damages from the employer, the plaintiff must also show that the retaliating managerial agent did not act contrary to the employer's own efforts to comply with Title VII.[183] Even if the plaintiff cannot prove this extra element of malice or reckless disregard, however, she may still convince the court to award compensatory damages.

2. Compensatory Damages

Whereas punitive damages seek to deter employers and provide retribution for plaintiffs, compensatory damages provide redress for a plaintiff's "concrete loss[es]."[184] A finding of compensatory damages does not require a showing of a malicious or reckless mental state; however, because the language of the

---

181. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535 (1999) (rejecting a requirement to show egregious conduct while noting its importance in showing the employer's state of mind).

182. *See* 42 U.S.C. § 2000e-3 (2000) (prohibiting retaliation for filing, testifying, assisting, or participating in a discrimination charge); *see also* Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 223 (2d Cir. 2001) (noting that the plaintiff meets the first element of the retaliation claim by filing an EEOC complaint).

183. *See Kolstad*, 527 U.S. at 545–46 (recognizing that the employer cannot be liable for the acts of its managers if the managers' discriminatory actions are contrary to the employer's efforts to comply with Title VII).

184. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003) (noting the differences between the purposes of punitive and compensatory damages) (citations omitted).

statute includes the parenthetical, "not an employment practice that is unlawful because of its disparate impact,"[185] the award of compensatory damages still requires a finding of intentional discrimination. Unlike the definition of punitive damages, however, the statute provides more concrete examples of compensatory damages:

> Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act. . . . [Compensatory damages may include damages] for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . .[186]

The Civil Rights Act also specifically mentions types of damages for emotional harm (emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life) as forms of compensatory damage.[187] When an employer terminates/suspends an employee, even if the employer later reinstates the employee with back pay, the employee suffers emotional harm through the uncertainty of her career. In *Burlington Northern*, the Court specifically highlighted the plaintiff's emotional suffering arising out of the uncertainty of her suspension.[188] The plaintiff, however, must do more than just testify that she was angry and upset as a result of the retaliatory actions.[189] She should elaborate on

---

185. 42 U.S.C. § 1981a(a)(1) (2000).

186. *Id.* § 1981a(b)(2)–(3).

187. *See id.* § 1981a(b)(3) (establishing limits for compensatory damages, including damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses); *see also* Staudmeister, *supra* note 164, at 223–24 (discussing cases where the EEOC awarded damages to compensate for "embarrassment, humiliation, loss of consortium, and harm to the complainant's marital and family relationships"). Note, however, that emotional damages are inherently more difficult to argue than traditional compensatory damages because emotional damages require assigning a monetary value to intangible pain and suffering. *See* Staudmeister, *supra* note 164, at 194 (noting the difficulty of assessing emotional damages).

188. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417 (2006).

189. *See* Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 409 (5th Cir. 2000) (describing the failure of the plaintiff's evidence to prove emotional harms). The court stated:

> [T]he only evidence submitted to the jury concerning Rubinstein's emotional state resulting from the 1997 pay-raise denial is Rubinstein's own testimony that he was angry and moody as a result of not receiving a raise. However, as this Court has noted "hurt feelings, anger and frustration are part of life." As no other evidence was offered to establish the emotional impact of this retaliatory act, [the plaintiff is not entitled to damages for emotional harm].

Id. (quoting Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 940 (5th Cir. 1996)).

the actual emotional stress as White did in *Burlington Northern*,[190] or show that she sought medical treatment for her emotional distress.[191]

The statute also implies that a plaintiff may have a right to damages for professional development and reputational losses. According to the 1991 amendments, compensatory damages may include damages for future pecuniary losses and nonpecuniary losses.[192] Although the majority disagreed, the *Dobbs-Weinstein* dissent specifically argued: "This court has recognized that in making a plaintiff whole it often will be appropriate to award . . . [compensation] for reputational damage especially when it impacts on her employment or her future employability and advancement."[193] Similarly, the Seventh Circuit found room in the Civil Rights Act for lost future earnings damages.[194] Any type of reputational damage caused by employer discrimination harms a plaintiff's future earnings capacity.[195] First, the court linked lost future earnings to an injury to professional standing, character, and reputation.[196] Second, the court noted that the loss of future earnings is usually a common law tort remedy that requires a showing that "'[the plaintiff's] injuries have narrowed [her] range of economic opportunities available.'"[197] To accomplish this, "'a plaintiff must show that [the] injury caused a diminution in [her] ability to earn a living.'"[198]

---

190. *See Burlington N.*, 126 S. Ct. at 2417 ("White described to the jury the physical and emotional hardship that 37 days of having 'no income, no money' in fact caused. ('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.')") (citations omitted).

191. *See id.* (noting that the plaintiff obtained medical treatment for her emotional distress); *see also* Phelan v. Cook County, 463 F.3d 773, 778 (7th Cir. 2006) (placing importance on the fact that the plaintiff began seeing a psychiatrist who diagnosed the plaintiff as suffering from major depression and post-traumatic stress disorder, which caused the plaintiff to seek a medical leave of absence).

192. *See* 42 U.S.C. § 1981a(b)(3) (2000) (listing types of compensatory damages when discussing the limitation caps).

193. Dobbs-Weinsten v. Vanderbilt Univ., 185 F.3d 542, 547 (6th Cir. 1999) (Moore, J., dissenting) (citations omitted).

194. *See* Williams v. Pharmacia, Inc., 137 F.3d 944, 946 (7th Cir. 1998) (affirming the award to a plaintiff with an actionable claim for retaliation to receive front pay and lost future earnings as damages).

195. *See id.* at 952–53 (relating the goal of Title VII to make a plaintiff whole with damages for reputational harm).

196. *See id.* at 952 (noting the characterization of lost future earnings as an intangible nonpecuniary loss by analogizing the lost earnings to reputational injuries).

197. *Id.* (quoting McKnight v. Gen. Motors Corp., 973 F.2d 1366, 1370 (7th Cir. 1992)).

198. *Id.* (quoting McKnight v. Gen. Motors Corp., 973 F.2d 1366, 1370 (7th Cir. 1992)).

Using the same line of argument, a plaintiff reinstated with back pay may be able to convince a court to award lost future earnings due to professional development or reputational losses. The weakness of this argument, however, lies in the lack of precedent for awarding professional losses and the difficulty in showing a tangible loss. The *Dobbs-Weinstein* majority specifically rejected the professional development loss argument because of the injury's speculative nature.[199] The EEOC also has rejected similar loss of opportunity and damage to career claims in the past.[200] To overcome this hurdle, the plaintiff must argue that due to the termination or suspension, there was a period of time where she was unable to further her career development.[201] Specifically, the lost time stifled her professional learning such that it narrowed her future job opportunities. For example, if the plaintiff was a first-year associate in a law firm, a suspension during training week will not sufficiently be made whole simply by reinstating the junior associate with back pay alone. If the law firm only offers this training once a year, the lack of training will limit the types of tasks that the young lawyer can perform for that year. The suspension, even if erased from firm records, may also ruin the lawyer's reputation such that no partner or client is willing to let her participate in matters.

A plaintiff, therefore, can argue for compensatory damages. These damages will compensate her for emotional, reputational, and professional development injuries. Whether a plaintiff can convince the court to award compensatory damages, she may additionally argue for equitable relief.

B. Section 706(g) Remedies and Injunctive Relief

Although the 1991 amendments added the right to receive compensatory and monetary damages, these amendments did not change the plaintiff's right to equitable relief under Section 706(g) of the Civil Rights Act.[202] Congress

---

199. *See* Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 546 (6th Cir. 1999) (rejecting the plaintiff's claim for emotional and professional reputational harm).

200. *See* Staudmeister, *supra* note 164, at 224 (citing the EEOC's rejection of lost opportunity and damage to career claims because they were "'too speculative' due to the many variables unrelated to the agency's action that affect the nature of [] opportunities and the course of [a] career").

201. *See id.* at 225 (stating that a successful claim for lost opportunity and damage to career would require "sufficient proof of injury and linkage").

202. *See* 42 U.S.C. § 2000e-5(g) (2000) (describing equitable relief under the Civil Rights Act); *see also* Sharkey v. Lasmo, 214 F.3d 371, 375–76 (2d Cir. 2000) (concluding that a Title VII plaintiff may have both compensatory and equitable damages); McQuality, *supra* note 168, at 644, 647–50 ("This right to compensatory and punitive damages represents a significant departure from the remedies previously available under Title VII, which limited recovery to

originally provided these equitable remedies to promote reconciliation between employer and employee and to make the employee "whole."[203] Section 706(g) provides for injunctive and other equitable relief:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.[204]

Although an employer who wrongly terminated an employee may partially self-remedy the employee's harm by reinstating the employee with back pay, an employee may still be able to make a colorable argument for further equitable relief. If the specific equitable remedy the plaintiff seeks is not explicitly mentioned in Section 706(g), the plaintiff does face a *Bush*-like problem of convincing the court to award a remedy that is neither expressly included nor precluded by the statute.[205] The *Bush* problem, however, is slightly less burdensome given the phrase "which may include, but is not limited to" preceding the list of equitable relief in Section 706(g).

Further, because one purpose of Title VII is to make a plaintiff whole, a plaintiff may argue that reinstatement with back pay does not put her in the same position as pre-termination. A plaintiff may, for example, argue for retroactive seniority. The Supreme Court held that although not necessarily a matter of course, victims of employment discrimination should receive retroactive seniority relief.[206] A court also has discretion to invent some other type of injunctive relief. Relying on the goal of Title VII to prevent and deter

---

remedies such as back-pay and an injunction for reinstatement.").

203. McQuality, *supra* note 168, at 647–48 ("[The Civil Rights Act] marked a tremendous advance in the area of civil rights, yet facilitating mediation between employers and employees remained a primary policy objective of Congress. This policy objective, along with the goal of making victims of employment discrimination 'whole,' fueled the enactment of Title VII.").

204. 42 U.S.C. § 2000e-5(g)(1) (2000).

205. *See supra* Part III.A (discussing the potential difficulty in arguing for a remedy that is not specifically mentioned in the statute).

206. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 767–68 (1976) (emphasizing the need for awards of seniority). The Court stated:

> A concomitant award of the seniority credit [the plaintiff] presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority . . . [h]e will perpetually remain subordinate to persons who, but for the illegal discrimination, would have in respect to entitlement to these benefits his inferiors.

Id.

future employer violations, at least one court has fashioned a remedy to enjoin a discriminating employer from continuing its current application process.[207] That court ordered the employer to notify all applicants of their right to priority consideration for certain jobs.[208]

In other contexts, a court will decide the appropriateness of the remedy. For example, in a typical retaliation lawsuit, a court may decide that reinstatement is not the most appropriate remedy if the terminated employee and employer have a history of strained relations.[209] If an employer has a policy of first suspending, then reinstating with back pay, a court may enjoin the employer from applying the policy. Using general principles of equity, and not constrained by the language of the statute, a court may award injunctive and equitable relief. If a court does not award any monetary or equitable relief, however, the plaintiff may still break even by convincing the court to grant nominal damages, attorney's fees, and administrative costs.

C. Nominal Damages, Attorney's Fees, and Administrative Costs

Despite a plaintiff's failure to show the degree of injury necessary for the award of compensatory, punitive, or equitable damages, a court may still award nominal damages.[210] Nothing, however, requires a court to award nominal damages.[211] Even if the court awards nominal damages and shows employer liability, the downsides of nominal damages are: (1) the plaintiff has relatively little monetary compensation to show for her employer's discriminatory actions; and (2) because of the small monetary award, the plaintiff's likelihood of receiving attorney's fees diminishes. The Supreme Court, in contexts outside of Title VII discrimination and retaliation charges, has held that a

---

207. *See id.* at 751 (recalling the district court's final judgment).

208. *Id.*

209. *See* Szymanski v. County of Cook, 468 F.3d 1027, 1028 (7th Cir. 2006) (discussing an earlier district court award of front and back pay in lieu of reinstatement due to the employment relationship where the employee had previously sued her employer ten times).

210. *See* Katz v. Dole, 709 F.2d 251, 253 n.1 (4th Cir. 1983) ("In addition, even if she does not regain her job, Katz might be entitled to nominal damages and attorney's fees."); *see also* Joshi v. Fla. State Univ., 646 F.2d 981, 991 n.33 (5th Cir. 1981) ("[T]he trial court should consider whether she might be entitled to other relief, if only nominal damages, which would carry with it attorneys fees.").

211. *See* Gibbons v. Bair Found., No. 5:04CV2018, 2006 U.S. Dist. LEXIS 49596, at *5 (N.D. Ohio July 20, 2006) ("The Court holds that federal case law does not support Plaintiff's contention that a finding of liability requires an award of nominal damages.").

prevailing party who receives nominal damages does not have a right to receive attorney's fees.[212]

Typically, any prevailing party (plaintiff or defendant) may request court costs under Rule 54(d) of the Federal Rules of Civil Procedure.[213] These court costs usually refer to charges incident to the judgment but not from liability.[214] To further elucidate on the nature of court costs, 28 U.S.C. § 1920 gives clear examples: clerk and marshal fees, court reporter fees for any transcripts necessary for the use in the case, printing and witness fees, docket fees, and court-appointed expert and personnel fees.[215] The presumption in favor of granting court fees for the prevailing party also exists in Title VII retaliation cases.

Prior to an appeal to the Seventh Circuit challenging the district court's grant of summary judgment to the defendant in *Phelan v. Cook County*,[216] the clerk awarded the defendant costs for transcripts that were necessarily obtained.[217] Similarly, a *Phelan*-type plaintiff who has been reinstated with back pay may request the court to grant certain types of court and administrative costs. This request, however, is separate and independent from the request for attorney's fees.

Under the American rule, without express statutory authorization, court costs do not include attorney's fees and therefore each party must pay its own

---

212. *See* Farrar v. Hobby, 506 U.S. 103, 115 (1992) ("In some circumstances, even a plaintiff who formally 'prevails' . . . should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.").

213. *See* FED. R. CIV. P. 54 (describing the types of judgment costs available to the prevailing party).

214. *See* BLACK'S LAW DICTIONARY 372 (8th ed. 2004) (defining "court costs").

215. *See* 28 U.S.C. § 1920 (2000) (describing the types of fees that the clerk may tax).

216. *See* Phelan v. Cook County, No. 01 C 3638, 2005 U.S. Dist. LEXIS 14640, at *6 (N.D. Ill. July 20, 2005) (mem.) (granting in part the plaintiff's motion challenging the clerk's award of costs for the defendants). In *Phelan*, after the district court granted summary judgment to the defendants, the defendants filed a bill of costs in the amount of $10,043.95, which the clerk granted. *Id.* at *1. The plaintiff filed a motion arguing that although costs for transcripts and court reporter fees are usually recoverable, some of the transcripts were not necessarily obtained by the defendants. *Id.* at *3. The defendants failed to use the challenged transcripts in connection with its summary judgment motion. *Id.* The plaintiff's motion also contested the calculation of costs for the transcripts, because the transcripts were not supposed to exceed the regular copy rate established by the Judicial Conference of the United States. *Id.* at *4–5. The court agreed that the defendants bore the burden of showing that the transcripts were necessarily obtained, but the defendants here failed. *Id.* at *4. Similarly, the clerk taxed costs for the transcripts at a higher copy rate than allowed by the Judicial Conference. *Id.* at *5. The court, therefore, granted the plaintiff's motion in part. *Id.* at *6.

217. *See id.* at *6 (granting the plaintiff's motion challenging excessive transcript costs but denying the plaintiff's motion related to court reporter fees).

legal fees.[218] Here, however, the Civil Rights Act specifically allows for attorney's fees: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs . . . ."[219] Often, the "degree of success achieved in the lawsuit" is a factor in determining the reasonableness of attorney's fees.[220]

The plaintiff, therefore, may also argue for the court to award these nominal damages, attorney's fees, and administrative costs in addition to any compensatory, equitable, or punitive damages. The difficulty for the reinstated with back pay employee is the showing of economic harm; the employer has already self-remedied the economic injury through the reinstatement with back pay. Because of the diminished claim for economic damages, a court may be reluctant to award monetary or equitable relief out of concern for giving the plaintiff a windfall. Even if a court does not award compensatory, punitive, or equitable damages, however, a wrongly terminated employee still may make an argument for nominal damages and collateral costs.

IV. Conclusion

Despite conflicting case law, a court should not preclude a wrongly terminated employee from pursuing a legal cause of action simply because her employer has already reinstated her with back pay. The reinstatement with back pay does not fully compensate the employee for any professional development losses or emotional harms. Further, a holding that an employer's self-remedy through reinstatement with back pay is sufficient provides a peculiar result that frustrates the goals of the Civil Rights Act. If an employer can simply avoid legal repercussions by reinstating an employee with back pay, employers will not be deterred from committing discriminatory acts. The employer will simply retaliate in order to send a message to the employee to not make similar discriminatory allegations in the future, but will make sure to reinstate the employee with back pay before the employee launches a lawsuit.

---

218. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser. Under this 'American Rule,' we follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.'" (citations omitted)).

219. 42 U.S.C. § 2000e-5(k) (2000).

220. *See* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 805 (6th Cir. 2004) (affirming the district court's award of 80% of White's attorney's fees because she was the prevailing party at trial).

Finally, with a valid cause of action, a court may use a broad range of statutory and equitable remedies to achieve the Civil Rights Act's goals of deterrence and compensation to make the plaintiff whole. Punitive damages and carefully crafted equitable remedies like injunctions achieve the deterrence goal. Compensatory damages, including professional development losses and emotional damages, advance the Civil Rights Act's goal to make a harmed individual whole again. Even without punitive or compensatory damages, however, the plaintiff may win a moral victory through nominal damages which still recognize the employer's liability. By holding that an employee may move forward with a retaliation claim and recognizing the possible remedies, a court stays true to the goals of the Civil Rights Act—to deter discriminatory conduct and to make a plaintiff whole.