No. _____

In The Supreme Court of the United States

CORINA T. ALLEN,

Petitioner,

v.

RADIO ONE OF TEXAS II, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), this Court held that a retaliatory act is sufficiently serious to be unlawful under section 704(a) of Title VII of the Civil Rights Act of 1964 if it "could well dissuade a reasonable worker from" engaging in protected activity. The question presented is as follows:

> Is the issue of whether a retaliatory act could well dissuade a reasonable worker from engaging in protected activity a question for the jury (or other trier of fact) or a question of law for the court?

PARTIES

The parties to this proceeding are set out in the caption.

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Petitioner Corina T. Allen respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 26, 2013.

OPINIONS BELOW

The February 26, 2013 opinion of the Court of Appeals, which is unofficially reported at 2013 WL 703832 (5th Cir. Feb. 26, 2013), is set out at pp. 1a-18a of the Appendix. The March 26, 2013 order of the Court of Appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 41a-42a of the Appendix. The June 9, 2011 Order on Equitable Relief and Other Post-Trial Issues of the District Court for the Southern District of Texas, unofficially reported at 2011 WL 2313210 (S.D.Tex. June 9, 2011), is set out at pp. 30a-40a of the Appendix. The October 28, 2011 Memorandum and Order of the District Court for the Southern District of Texas, which is unofficially reported at 2011 WL 5156688, is set out at pp. 19a-29a of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on February 26, 2013. A timely petition for rehearing and rehearing en banc was denied on March 26, 2013.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

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

Section 1981a(c) of 42 U.S.C. provides in pertinent part:

> If a complaining party seeks compensatory or punitive damages under this section – (1) any party may demand a trial by jury....

STATEMENT OF THE CASE

Under *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), a retaliatory act is sufficiently serious to be unlawful under Title VII if the retaliation "could well dissuade a reasonable worker from making or supporting a charge of

discrimination." 548 U.S. at 57. Since 2006 the lower courts have been sharply divided as to whether the *Burlington Northern* standard is a question to be resolved by a jury or is a question of law for the court. The decision below is among the most recent of several hundred court of appeals' decisions involving that issue.

Allen worked for five years as the General Sales Manager of a Houston radio station owned by Radio One. She was dismissed in late 2007. Shortly after her dismissal, Allen and her attorney wrote to Radio One asking for severance and transition pay, and indicating that Allen was considering filing suit for breach of contract. (App. 3a-4a). Allen took no further action in pursuit of the state law claim raised in those letters. Instead, in June 2008 Allen filed a discrimination charge with the EEOC, alleging that she had been fired because of her gender.[1]

After her dismissal by Radio One, Allen worked for about a year at another Houston radio station. She subsequently formed her own advertising agency, which worked with potential advertisers to develop radio advertisements and then purchased time on local radio stations. As is typical in advertising, Allen's business revenues were based on the value of the advertising time that she bought for her clients.

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[1] The merits of that discrimination claim are no longer at issue. See App. 8a-10a.

In June 2009, while her EEOC charge was still pending, Allen contacted Radio One to purchase advertising time for a client. A Radio One Vice President told Allen that the company would not do business with her, and Radio One continued up until the time of trial to refuse to sell advertising time to businesses represented by Allen.

Allen commenced this action in 2009, alleging that Radio One was refusing to do business with her in retaliation for her EEOC charge. In support of that contention, Allen proved that when Radio One first refused to accept advertising from Allen, the Vice President had candidly explained that he had been "informed by [Radio One's in-house counsel] that we should not do business together due to this pending litigation that you have." (PX 4; see App. 4a, 21a, 25a).[2] At that point in time Allen's discrimination charge was indeed pending before the EEOC. When asked for clarification, the Vice President said "I mean this lawsuit that you have against us." (PX 4). In the wake of this refusal, whenever Allen needed to purchase advertising on Radio One on behalf of a client, she was forced to use another advertising agency as a front so that Radio One would not realize Allen herself was involved. That work-around was costly to Allen because she had to pay that other agency one-third of her commissions in return for its assistance.

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[2] Allen made a recording of these inculpatory remarks, and Radio One does not dispute that these statements were made.

At trial Allen argued that the Vice President's remarks, and other evidence, demonstrated that Radio One had refused to do business with her in retaliation for her EEOC charge. Although Radio One offered other explanations for its actions, a jury returned a verdict in favor of Allen. The jury awarded Allen $6,617.45 for lost income and $10,000 for emotional pain and suffering. (App. 5a). The jury also awarded Allen $750,000 in punitive damages, which the district court reduced to $290,000 because of the statutory cap under Title VII. (*Id*.). The defendant "acknowledge[d] that Plaintiff, based upon the Jury Verdict, [was] entitled to injunctive relief requiring the Defendant to cease refusing to accept radio advertising from the Plaintiff." (App. 31a-32a). The district court issued such an injunction, requiring Radio One to do business with Allen and her firm "on the same commercial terms and conditions and subject to the same policies applicable to other outside agencies.... who tender radio advertising to Radio One...." (App. 34a).

On appeal Radio One argued that its refusal to do business with Allen, even if motivated by a retaliatory purpose, was not sufficiently harmful to be illegal under Title VII. The parties and the appellate court agreed that that question was governed by this Court's decision in *Burlington Northern*. Radio One asserted that "[a]s a matter of law, Allen failed to

establish an adverse employment action."[3] The defendant repeatedly urged the court of appeals itself to apply the *Burlington Northern* reasonable worker standard, and to make a finding that the asserted retaliatory conduct would not have deterred a reasonable employee from filing an EEOC charge. Radio One argued that "a former employee ... would not be reasonably dissuaded from making a discrimination charge because of the possibility that more than a year later, Radio One would choose to refuse a business proposal with [the employee's] company."[4]

In response, Allen contended that the record contained substantial evidence on the basis of which a jury could reasonably conclude that the retaliation was sufficiently serious to deter protected activity.

> [T]he jury heard evidence about why being declared *persona non grata* was important to Allen's context. It heard testimony about the retaliation's interference with her business plans ... It heard about the workaround through [the other advertising agency] that cost one-third of her commissions, while simultaneously making her job more difficult and affecting her ability to serve her clients....

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[3] Principal and Response Brief of Appellee/Cross-Appellant Radio One of Texas II, LLC, 35; see *id.* at 37 ("neither the Supreme Court, the Fifth Circuit, nor any other Circuit has recognized a failure to enter into an arm's-length business relationship with a former employee's separate company over a year after the protected act as a form of retaliation. Such a situation is simply too attenuated to raise an issue under *Burlington*").

[4] *Id.* at 12-13.

> Surely this is the type of "economic retaliation [that] might often operate to induce aggrieved employees quietly to accept substandard conditions."[5]

Allen also objected that Radio One's contentions rested in part on the company's account of why it refused to do business with her, "factual justifications ... which the jury rejected."[6] In light of the jury verdict in her favor, Allen argued, the appellate court should "disregard all evidence favorable to [Radio One] that the jury is not required to believe."[7] "The jury considered both parties' evidence and resolved the conflict against [Radio One]."[8]

Adopting the approach urged by Radio One, the court of appeals made its own determination of whether the retaliation against Allen was sufficiently serious to be unlawful under *Burlington Northern*. "An employer's decision not to do business with a former employee under these attenuated circumstances does not violate Title VII's antiretaliation provision." (App. 16a). "This situation does not satisfy the test for liability enunciated by *Burlington*." (App. 17a). "Radio One's actions fall far short of rising to

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[5] Appellant/Cross-Appellee's Response and Reply Brief, 20 (quoting *Burlington Northern*, 548 U.S. at 73, and *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1960)).

[6] *Id*. at 19.

[7] *Id.* (quoting *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150-51 (2000)).

[8] *Id.* at 20.

th[e] level [of illegality]." (App. 15a). Applying the *Burlington Northern* reasonable worker standard, the court of appeals concluded that under the circumstances of this case "a reasonable employee would *not* be dissuaded from filing an EEOC charge because of the possibility that her former employer might refuse to do business with her separate company ... more than a year after her EEOC filing." (*Id.*) (emphasis in original). The Fifth Circuit indicated that the question before it was one of law. Holding that Radio One's retaliation was unlawful, the court reasoned, "would constitute an impermissible extension of Title VII's protections." (App. 16a).

Allen filed a timely petition for rehearing *en banc*, renewing her objection that it was for the jury, not the appellate court, to determine whether the *Burlington Northern* standard had been met.[9] The court of appeals denied rehearing. (App. 41a-42a).

REASONS FOR GRANTING THE WRIT

Section 704(a) of Title VII of the 1964 Civil Rights Act, like most federal employment statutes, forbids retaliation against employees who file charges or oppose unlawful discrimination. 42 U.S.C. § 2000e-3(a). In *Burlington Northern* this Court held that a retaliatory act is sufficiently serious to be actionable

[9] Plaintiff-Appellant/Cross-Appellee Corina Allen's Petition for Rehearing *En Banc*, at 10-14.

if that act "could well dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 57. A retaliatory action that meets this standard is deemed "materially adverse." 548 U.S. at 68. In the wake of *Burlington Northern*, the courts of appeals are sharply divided and extraordinarily confused about whether application of this standard is a jury issue or a question of law for the courts. The *Burlington Northern* standard is routinely applied by the lower courts to statutes other than Title VII, and the conflict and confusion extend to those statutes as well.

I. THE CIRCUITS ARE DIVIDED AND CONFUSED IN AN EXCEPTIONALLY LARGE NUMBER OF CASES REGARDING WHETHER APPLICATION OF THE REASONABLE WORKER STANDARD IS A JURY ISSUE

A. Confusion Regarding Whether Application of The Reasonable Worker Standard Is A Jury Issue Has Confounded Hundreds of Circuit Court Decisions

Since this Court's 2006 decision in *Burlington Northern*, the issue of whether application of the reasonable worker standard is a jury issue – or a question for the court – has arisen in an extraordinary number of circuit court cases. There have been 269 such decisions in the twelve regional circuit courts, including 31 decisions in the Fifth Circuit

alone. The sheer volume of appellate litigation is virtually unprecedented. We set out in the Appendix to this petition a list of those 269 decisions, organized by circuit. (App. 43a-113a).

There are 56 circuit court decisions which treat application of the reasonable worker standard as a traditional jury issue. Those decisions hold that a jury should resolve a dispute about whether a particular retaliatory act would likely dissuade a person from engaging in legally protected activity, except in those limited circumstances where a reasonable jury could only reach one conclusion. These decisions treat a dispute about how a reasonable worker would act, if aware of the retaliation that would follow, like a dispute in a tort case about what precautions a reasonable person would take to avoid injury to others. Several circuits have adopted model jury instructions expressly embodying the *Burlington Northern* reasonable worker standard.

On the other hand, 171 circuit court decisions assume that the courts – indeed, the appellate courts – are responsible for deciding whether an alleged retaliatory act would dissuade a reasonable worker from engaging in protected activity. Some of these decisions expressly "find" or "conclude" that the retaliatory act at issue would, or would not, have that deterrent effect. Other decisions in this group, after noting that the reasonable worker standard is the test for whether a retaliatory act was "materially adverse," announce that the retaliatory act was, or

was not, materially adverse. In some instances circuit court decisions have developed new subsidiary legal rules delineating specific types of retaliatory actions that are per se permissible.

A third, smaller group of decisions uses a hybrid standard. In these opinions a dispute of historical fact, such as whether a disciplinary action impeded a plaintiff's career prospects, is for the jury, but the court decides whether the facts as determined by the jury meet the *Burlington Northern* standard.

There is no rhyme or reason as to when application of the reasonable worker standard will, and will not, be treated as a jury issue. Appellate decisions never explain why they are taking one course or the other. The choice is of great practical importance, because retaliation claims are far more likely to be deemed sufficiently serious when the court treats application of the reasonable worker standard as a jury issue. (See p. 31, infra). There are in every circuit both decisions treating application of the reasonable worker standard as a jury issue and decisions treating it as a question for the court. A significant number of circuit court judges have written or joined opinions in both lines of cases. Several appellate decisions apply both lines of cases in a single opinion. In other instances it is not possible to divine whether the appellate panel was or was not treating

application of the reasonable worker standard as a jury issue.

B. The Likelihood That Application of The Reasonable Worker Standard Will Be Treated As A Jury Issue Varies Widely by Circuit

Whether a dispute involving the application of the reasonable worker standard will be treated as a jury question depends on the circuit in which a case arises. While no circuit has an entirely consistent rule, some circuits are in practice far more likely than others to deal with the question as a jury issue, resulting in great regional variations in the administration of *Burlington Northern*. For example, panels in the District of Columbia are seven times more likely to treat this as a jury issue than panels in the Eighth Circuit; the other circuits fall somewhere in between.

Proportion of Appellate Decisions Treating Application of the Reasonable Worker Standard As A Jury Issue[10]	
District of Columbia Circuit	53%
Third Circuit	42%
First Circuit	42%
Second Circuit	42%
Ninth Circuit	38%
Tenth Circuit	27%
Fifth Circuit	18%
Eleventh Circuit	14%
Seventh Circuit	13%
Sixth Circuit	13%
Fourth Circuit	13%
Eighth Circuit	7%

First Circuit

In the First Circuit five decisions treat the reasonable worker standard as a jury question. (App.

[10] These calculations do not include decisions that apply several different standards, or adopt a hybrid standard. Inclusion of that small group of decisions, and treating them as holding this is a jury issue, would in some circuits slightly increase the calculated proportion. Similarly, these calculations do not include decisions in which it is not possible to ascertain what standard is being used. Including that group of decisions, and treating them as not holding this is a jury issue, would in some circuits slightly decrease the calculated proportion.

43a-45a). E.g., *Tuli v. Brigham & Women's Hospital*, 656 F.3d 33, 43 (1st Cir. 2011) ("Tuli provided sufficient evidence from which a jury could conclude that the consequences of the [alleged retaliatory action] ... 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (quoting *Burlington Northern*). Seven other decisions resolve that issue as a matter for the court. (App. 46a-47a). E.g., *Alvarado v. Donahue*, 687 F.3d 453, 461(1st Cir. 2012) ("[i]n assessing whether Alvarado can ... show[ ] that he suffered a materially adverse action, *we* ascertain whether.... any actions ... ' ... well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' ... [*O*]*ur* inquiry looks to separate the wheat from the chaff.... *We* do not believe that Alvarado has ... establish[ed] that he suffered a materially adverse action") (quoting *Burlington Northern*) (emphasis added). One case adopts a hybrid rule, holding that ordinarily "whether an employee has suffered a materially adverse employment action capable of supporting claims under Title VII is a question of law for the court," but that "the existence of an adverse employment action may be a question for the jury when there is a dispute concerning the manner in which the action taken affected the plaintiff-employee." *Morales-Vallellanes v. Potter,* 605 F.3d 27, 33 and n.8 (1st Cir. 2010). Five members of the First Circuit have joined both decisions treating this question as a

jury issue and decisions treating it as a question of law for the court.[11]

Second Circuit

In the Second Circuit eleven decisions treat applications of the reasonable worker standard as a jury issue, and fifteen decisions treat it as a question for the court to resolve. (App. 48a-55a). *Compare Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2012) ("the jury could reasonably conclude that [the alleged retaliatory action] ... might well have dissuaded a reasonable police officer from making a complaint of discrimination") *with Chacko v. Dynair Services, Inc.*, 272 Fed.Appx. 111, 113 n.2 (2d Cir. 2008) ("*we* find that under the circumstances this action would not 'have dissuaded a reasonable worker from making or supporting a charge of discrimination'") (quoting *Burlington Northern*) (emphasis added). In 2007 then Judge Sotomayor joined a decision in the latter category. *Chang v. Safe Horizons*, 254 Fed.Appx. 838, 839 (2d Cir. 2007).

Hicks v. Baines, 593 F.3d 159 (2d Cir. 2010), applied a hybrid standard, holding that the "plaintiffs' ... claims, if believed by a jury, constitute 'adverse employment actions'.... A reasonable employee in plaintiffs' position 'may well be dissuaded' from participating in a discrimination investigation ... if he knew that in retaliation, he would be [subjected to

[11] Judges Lynch, Torruella, Selya, Howard, and Boudin.

the alleged retaliatory actions]". 593 F.3d at 170. In *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556 (2d Cir. 2011), the Second Circuit applied both standards in the same opinion. Regarding one retaliatory act, the court itself "h[e]ld that ... the [retaliatory action] was not a material adverse action," 663 F.3d at 570; several paragraphs later the court took the opposite approach, explaining with regard to a different retaliatory action that "no reasonable factfinder could have concluded that [the retaliatory action] was 'the sort of action that would have dissuaded a reasonable employee in [the plaintiff's] position from complaining of unlawful discrimination.'" *Id.* at 571. Ten Second Circuit judges have written or joined both opinions treating application of the reasonable worker standard as a jury issue and opinions treating it as a question for the court to resolve.[12]

Third Circuit

Five Third Circuit decisions treat application of the reasonable worker standard as an issue for the jury. (App. 56a-57a). "We need *only* determine whether there was sufficient evidence to support the jury's finding ... that Costco's ... actions against Ridley were 'materially adverse.'... [W]e conclude that the evidence was sufficient for the jury to find that Costco's actions ... 'well might have dissuaded a reasonable worker

[12] Judges Calabresi, Droney, Feinberg, Hall, Jacobs, Kearse, Lynch, Pooler, Raggi, and Sack.

from making or supporting a charge of discrimination.'" *Ridley v. Costco Wholesale Corp*., 217 Fed.Appx. 130, 136 (3d Cir. 2007) (quoting *Burlington Northern*) (emphasis added). That Circuit has a model jury instruction which embodies the reasonable worker standard.[13] On the other hand, seven Third Circuit decisions treat this as a question to be resolved by the court. (App. 58a-60a). E.g., *McCullers v. Napolitano*, 427 Fed.Appx. 190, 196 (3d Cir. 2011) (per curiam) ("we are not persuaded that [the allegedly retaliatory] actions ... would have dissuaded a reasonable worker from engaging in protected EEO activity"). Judge Rendell, who wrote the opinion in *Ridley* insisting that a court is limited to deciding "only" whether a reasonable jury could resolve a claim in favor of the plaintiff, joined the decision in *McCullers* that rejected a claim because "we are not persuaded" that the reasonable worker standard was met.

Hare v. Potter, 220 Fed.Appx. 120 129, 132-33 (3d Cir. 2007), applied both standards, itself resolving one claim ("we find Hare's failure to be selected [to participate in a program] a 'materially adverse' action") while sustaining another on the narrow ground that a reasonable jury could hold that the reasonable worker standard was satisfied. ("[I]t would not be unreasonable for a jury to conclude that [plaintiff's supervisor] treated Hare more severely than he otherwise would

[13] Third Circuit Model Civil Jury Instruction 5.1.7.

have because of her pressing her EEOC claim [and] that such treatment would deter a reasonable employee from exercising her rights"). Eight members of the Third Circuit have written or joined both opinions treating application of the reasonable worker standard as a jury issue and opinions treating it as a question for the court to resolve.[14]

Fourth Circuit

In the Fourth Circuit only one decision treats the reasonable worker standard as a matter for the jury. *EEOC v. Cromer Food Services, Inc.*, 414 Fed.Appx. 602, 608 (4th Cir. 2011) ("The ... question ... is whether a reasonable jury could find that [the employer's] decision to switch Howard from the second to first shift constituted unlawful retaliation.... Here, a jury could easily conclude that the actions taken [by the employer] were adverse"). Seven other decisions in that circuit assume this is an issue for the court. (App. 61a-63a). For example, in *Parsons v. Wynne*, 221 Fed.Appx. 197 (4th Cir. 2007) (per curiam), which like *Cromer* involved an allegedly retaliatory change in work schedule, the court itself resolved the issue. "Neither her [adverse] performance evaluation nor her removal from the alternative work schedule would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 221 Fed.Appx. at 198 (quoting *Burlington Northern*).

[14] Judges Fuentes, Hardiman, Jordan, McKee, Rendell, Scirica, Stapleton, and Van Antwerpen.

Similarly, in *Pueschel v. Peters,* 340 Fed.Appx. 858, 862 (4th Cir. 2009), the court rejected the retaliation claim because "[*w*]*e* are not convinced that the adversity here was material." (Emphasis added). Judge Gregory, who wrote the opinion in *Cromer*, also wrote the opinion in *Pueschel*. Judge Motz, who joined the opinion in *Cromer*, also joined the opinion in *Parsons*.

Fifth Circuit

In the Fifth Circuit twenty-three decisions (including the decision in the instant case) treat application of the reasonable worker standard as an issue for the court. (App. 65a-70a).[15] Many of those opinions, like the opinion in this case, make express findings as to whether a reasonable worker would be deterred from engaging in protected activity by the retaliatory action in question.[16] All of the judges in the instant

[15] Five Fifth Circuit decisions treat this as a jury issue. (App. 63a-64a).

[16] *Simmons-Myers v. Caesars Entertainment Corp*., 2013 WL 697226 at *4 (5th Cir. 2013) (per curiam) ("The written warnings ... do not constitute materially adverse actions under this standard, nor would they have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' ") (quoting *Burlington Northern*); *Love v. Motiva Enterprises LLC*, 349 Fed.Appx. 900, 904 (5th Cir. 2009) (per curiam) ("The negative comments and the Oral Reminder would not have 'dissuaded a reasonable worker from making or supporting a charge of discrimination' ") (quoting *Burlington Northern*); *LeMaire v. Louisana Dept. of Transportation and Development,* 480 F.3d 383, 390 (5th Cir. 2007) ("LeMaire's suspension is an adverse employment action, as a two-day suspension without pay might have dissuaded a reasonable employee from making a charge of

(Continued on following page)

case had previously written or joined other opinions with such judicial findings.[17] Several Fifth Circuit opinions assume that the lower courts applying *Burlington Northern* are not limited to deciding how a reasonable worker would respond to a particular type of threatened retaliation, but can fashion additional legal rules that interpret *Burlington Northern* or Title VII, a task that obviously only a court – not a jury – could perform. See *King v. Louisiana*, 294 Fed.Appx. 77, 85 (5th Cir. 2008) (per curiam) (alleged retaliatory actions "do not constitute actionable adverse employment actions as ... discrimination.... [e]ven under the broadest conceivable *reading* of *Burlington Northern*") (emphasis added); *Muttathottil v. Mansfield*, 381 Fed.Appx. 454, 458 (5th Cir. 2010) (per curiam) ("Muttathottil contends [that a supervisor's] statement might dissuade a worker from making former complaints.... This *interpretation* of *Burlington Northern* is overbroad") (emphasis added). The Fifth Circuit decision in the instant case is typical of the prevailing practice in that circuit.

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discrimination"); *McCullough v. Kirkum*, 212 Fed.Appx. 281, 285 (5th Cir. 2006) (per curiam) ("These actions are not the sort that would dissuade a reasonable employee from reporting discrimination").

[17] Judge Smith joined the opinions in *Love* and *McCullough*. Judge Barksdale joined the opinion in *LeMaire*. Judge King joined the opinion in *Simmons-Myers*.

Sixth Circuit

In the Sixth Circuit four decisions treat application of the reasonable worker standard as a jury issue, while twenty-six other decisions assume it is a question for the court to resolve. (App. 71a-79a). A number of judges have written opinions on both sides of this issue. For example, in *Austion v. City of Clarksville*, 244 Fed.Appx. 639, 653 (6th Cir. 2007), Judge Batchelder wrote that "the jury could have found that the change in work hours ... 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination,' thus amounting to an adverse action") (quoting *Burlington Northern*). But in *A.C. v. Shelby County Bd. of Ed.*, 711 F.3d 687, 698 (6th Cir. 2012), also written by Judge Batchelder, the court decided the issue itself, holding that the allegedly retaliatory act "would surely be enough to dissuade many reasonable parents from seeking accommodations at school." Judge Gibbons treated this as a jury issue in his opinion in *Miller v. City of Canton*, 319 Fed.Appx. 411, 419, 421 (6th Cir. 2009) ("a jury could find that [the alleged retaliatory act] ... would chill the exercise of First Amendment rights"; "[w]e assume without deciding that a reasonable jury could find that the City's [action] was an adverse action"), but treated it as a question for the court in *Randolph v. Ohio Dept. of Youth Services*, 453 F.3d 724, 736-37 (6th Cir. 2006) (allegedly retaliatory action "constitutes a materially adverse action under Title VII"). Judge Clay has also written opinions on both sides of this issue. *Compare Kyle-Eiland*

v. Neff, 408 Fed.Appx. 933, 941 (6th Cir. 2011) ("Kyle-Eiland has presented evidence sufficient for a reasonable factfinder to conclude that the [allegedly retaliatory action] constituted an adverse employment action") *with Howington v. Quality Restaurant Concepts, LLC*, 298 Fed.Appx. 436, 446 (6th Cir. 2008) (alleged retaliatory action "would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'") (quoting *Burlington Northern*). On several occasions opinions in the Sixth Circuit have applied both rules in the same case. (App. 72a-73a).

Seventh Circuit

The Seventh Circuit has treated application of the reasonable worker standard as a jury issue in three cases, while dealing with it as a question for the court in twenty-one others. (App. 80a-87a). In *Nagle v. Village of Calumet Park*, 554 F.3d 1106 (7th Cir. 2009), that circuit applied both approaches in the same case. The court made its own finding as to the sufficiency of the one alleged retaliatory action: "we find that the [alleged retaliatory action] does not constitute an adverse action." 554 F.3d at 1121. The panel upheld the sufficiency under *Burlington Northern* of a second retaliatory act because "a reasonable jury ... could find that [it] would dissuade a reasonable employee from making or supporting a charge of discrimination." *Id.*

This circuit has taken conflicting approaches regarding what to do if it is not clear (to the court)

whether a retaliatory act satisfies the reasonable worker standard. One opinion holds that such non-obvious cases should be heard by a jury. "[S]ome cases present obvious examples of materially adverse actions being taken against employees.... But there are times when the question is not so obvious.... Because the degree of adversity suffered [in this case] ... was substantially in doubt, the jury was appropriately presented with the issue." *Lewis v. City of Chicago Police Dept.,* 590 F.3d 427, 436 (7th Cir. 2009). In other decisions, however, the Seventh Circuit has dismissed retaliation claims merely because the plaintiff had failed to meet his burden of persuading the court itself that the retaliation met the *Burlington Northern* standard. *Porter v. City of Chicago*, 700 F.3d 944, 957 (7th Cir. 2012) ("we *doubt* that Porter's assignment ... was a materially adverse action for purposes of her retaliation claim") (emphasis added); *Roney v. Illinois Dept. of Transportation*, 474 F.3d 455, 461 (7th Cir. 2007) ("it is *unlikely* that a reasonable employee would view Roney's ... assignment as materially adverse"; "it is *unlikely* that [another alleged retaliatory action] would have deterred a reasonable employee from making a charge of discrimination") (emphasis added).

Eighth Circuit

In the Eighth Circuit only one decision treats application of the reasonable worker standard as a jury issue; fourteen others deal with this as a question for the court. (App. 88a-92a). E.g., *Carpenter v. Con-Way Central Express, Inc*., 481 F.3d 611, 618 (8th

Cir. 2007 ("we find [the mistreatment of the plaintiff] not actionable"); *Devin v. Schwan's Home Service, Inc.*, 491 F.3d 778, 786-88 (8th Cir. 2007) ("[W]e conclude [these retaliatory actions] would not have deterred a reasonable employee from engaging in protected activity"). As in the Seventh Circuit, decisions in the Eighth Circuit repeatedly reject retaliation claims, not based on a finding that the *Burlington Northern* standard has not been met, but merely because the plaintiff had not met his burden of persuading the appellate court. *Fanning v. Potter*, 614 F.3d 845, 850 (8th Cir. 2010) ("We *are not convinced* that an objectively reasonable employee would find the [alleged retaliatory actions] to be a serious hardship that would dissuade her from making a charge of discrimination.") (emphasis added); *Gilbert v. Des Moines Area Community College*, 495 F.3d 906, 917-18 (8th Cir. 2007) (affirming summary judgment for employer) ("[*W*]*e cannot say* the [disciplinary] letter would 'have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (emphasis added).

The Eighth Circuit model jury instructions contain an instruction that defines "materially adverse" to embody the reasonable worker standard.[18] An accompanying comment in the Eighth Circuit Manual of Model Civil Jury Instructions observes that

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[18] Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, 198.

> [i]n appropriate cases, the question of whether a particular action is 'materially adverse' may be decided by the court. *See, e.g.,* ... *Morales-Vallellanes v. Potter*, 605 F.3d 27, 33 (1st Cir. 2010) ("Often, whether an employee has suffered a materially adverse employment action capable of supporting claims under Title VII is a *question of law* for the court"). *See also Hyde v. K.N. Home, Inc.,* 355 Fed.Appx. 266, 268 (11th Cir. 2009) (whether an employment action is adverse is "a *question of fact*, although one still subject to the traditional rules governing summary judgment"); *Bergeron v. Cabral*, 560 F.3d 1, 6 n.1 (1st Cir. 2009) ("the existence of an adverse employment action may be a *question for the jury* where there is a dispute concerning *the manner in which* the action affected the plaintiff-employee").

Id. at 196 (emphases added). The inconsistent standards in the quoted cases illustrate the pervasive confusion in the lower courts.

Ninth Circuit

In the Ninth Circuit, five decisions treat this as an issue for the jury. (App. 92a-93a). E.g., *McBurnie v. City of Prescott*, 2013 WL 951305 at *1 (9th Cir. March 13, 2013) ("The district court concluded as a matter of law that all of the actions taken against McBurnie, short of his discharge, were too trivial to meet the material adversity standard. But from the evidence presented at trial, a reasonable jury could

have concluded otherwise.... Whether these [retaliatory] actions ... were materially adverse under the particular circumstances ... should be decided by a trier of fact"). The Ninth Circuit model jury instructions include an instruction embodying the reasonable worker standard.[19] On the other hand, eight decisions in this circuit treat the question as one for the court. (App. 93a-95a). E.g., *Woods v. Washington*, 475 Fed.Appx. 111, 113 (9th Cir. 2012) ("[plaintiff] did not suffer an adverse action.... *We* cannot say that [the alleged retaliation] 'might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (emphasis added). In a separate opinion in one case Judge Berzon insisted that "the question whether [the retaliatory] actions suffice to establish retaliatory harassment as an adverse employment action would be purely one of law – namely, whether the challenged action 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rispoli v. King County,* 297 Fed.Appx. 713, 716 (9th Cir. 2008) (dissenting opinion) (quoting *Burlington Northern*). Judge Berzon subsequently joined the opinion in *McBurnie*, which treated that question as a jury issue.

[19] Ninth Circuit Model Civil Jury Instruction 10.4A.1.

Tenth Circuit

In the Tenth Circuit, four decisions treat application of the reasonable worker standard as a jury issue, and eleven decisions treat it as a question for the court. (App. 95a-99a). For example, in *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079 (10th Cir. 2007), the court held that "[t]o warrant trial, ... we hold that a plaintiff need *only* show that a jury could conclude that a reasonable employee in Ms. Williams's shoes would have found the defendant's conduct sufficiently adverse that he or she well might have been dissuaded by such conduct from making or supporting a charge of discrimination.") (footnote omitted; emphasis added). 497 F.3d at 1090. On the other hand, *Johnson v. Weld County, Colorado*, 594 F.3d 1202, 1216 (10th Cir. 2010), treated this as a legal issue, rejecting the retaliation claim based on a judicial finding that the governing standard had not been met. The alleged retaliatory acts, the court held, "though surely unpleasant and disturbing, are insufficient to support a claim of retaliation under our case law.... [The retaliatory action] simply does not rise to the level of material adversity necessary to sustain a retaliation claim....") (footnote omitted). Judge Gorsuch wrote the opinions in both *Williams* and *Johnson*.

Eleventh Circuit

In the Eleventh Circuit only four decisions treat application of the reasonable worker standard as a

jury issue, compared to twenty-five decisions dealing with the issue as a question of law for the court. (App. 100a-108a). In four cases panels in the Eleventh Circuit have acknowledged that "*Burlington* ... strongly suggests that it is for a jury to decide whether anything more than the most petty and trivial actions against an employee should be considered 'materially adverse' to him and thus constitute adverse employment actions." *Crawford v. Carroll*, 529 F.3d 961, 972, 974 n.13 (11th Cir. 2008).[20] But none of these four decisions permitted the jury to decide that issue.

Rainey v. Holder, 412 Fed.Appx. 235, 238 (11th Cir. 2011) (per curiam), held that "the jury traditionally should decide whether a defendant's actions are sufficiently adverse." But there is no such tradition in the Eleventh Circuit; to the contrary, juries in that circuit are only rarely permitted to make that determination. In *Rainey* itself the court of appeals "decide[d] whether [the] defendants actions [were] sufficiently adverse." "It is unlikely that, taking into account all of the alleged incidents ... , a reasonable employee, standing in Rainey's shoes, would have felt dissuaded from filing a complaint of discrimination." 412 Fed.Appx. at 238.

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[20] See *Ekokotu v. Federal Express Corp*., 408 Fed.Appx. 331, 337 (11th Cir. 2011) (per curiam) (quoting *Crawford*); *Foshee v. Ascension Health-IS, Inc*., 384 Fed.Appx. 890, 892 (11th Cir. 2010) (per curiam) (quoting *Crawford*); *Burgos v. Napolitano*, 330 Fed.Appx. 187, 190 (11th Cir. 2009) (per curiam) (quoting *Crawford*).

District of Columbia Circuit

In eight cases the District of Columbia Circuit has treated application of the reasonable worker standard as a jury issue. (App. 110a-112a). "Whether a particular adverse action satisfied the materiality threshold is generally a jury question, with our role limited to determining whether, viewing the evidence in the light most favorable to the plaintiff, a reasonable jury could find the action materially adverse." *Rattigan v. Holder*, 643 F.3d 975, 986 (D.C.Cir. 2011). In seven other cases that circuit treated application of that standard as a question for the court. (App. 112a-114a). See *Gaujacq v. EDF, Inc.*, 601 F.3d 565, 578 (D.C.Cir. 2010) ("*we* hold that the verbal statement made by [a company official] did not constitute a materially adverse action") (emphasis added); *compare Czekalski v. Peters*, 475 F.3d 360, 365 (D.C.Cir. 2007) ("Whether a particular reassignment of duties constitutes an adverse action for purposes of Title VII is generally a jury question") *with Baloch v. Kempthorne*, 550 F.3d 1191, 1198 (D.C.Cir. 2008) ("any reassignment of Baloch's duties ... did not itself constitute an adverse employment action for purposes of a discrimination claim"). Six members of the District of Columbia Circuit have either written or joined both lines of decisions.[21]

[21] Judges Edwards, Garland, Ginsburg, Griffith, Henderson and Williams.

III. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE

(1) The question presented is of exceptional importance to the administration of justice. It has arisen in hundreds of appellate cases since this Court's decision in *Burlington Northern*. Few if any certiorari petitions involve such an extraordinarily large body of appellate litigation. The number of district court decisions involving this issue is necessarily far larger. The issue has arisen regarding motions to dismiss, motions for summary judgment, post-trial motions for judgment as a matter of law, and disputes about whether a jury should be permitted to consider this question at trial at all. The potential reach of a definitive decision about this question is as broad as that of *Burlington Northern* itself. The exceptionally large number of litigants affected by this issue weighs heavily in favor of a prompt resolution by this Court of the question presented.

The instant case, like a majority of the cases in which this question has arisen, involves a claimed violation of the anti-retaliation provision of Title VII. That same issue, however, has also arisen with regard to claims of retaliation violating the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the Uniformed Services Employment and Reemployment Rights Act, Title VI, Title IX, section 1981, and the First Amendment. The courts of appeals have applied the *Burlington Northern* reasonable worker standard to claims under all of these provisions. Retaliation claims are

today a significant part of the civil litigation in the federal courts, and remain a substantial portion of all charges received by the EEOC.

This Court has twice granted certiorari to determine whether jury trials are available to resolve claims under the Age Discrimination in Employment Act. *Lorillard v. Pons*, 434 U.S. 575 (1978); *Lehman v. Nakshian*, 453 U.S. 156 (1981). Review is equally warranted regarding the issue in the instant case, which affects disputes under the ADEA, eight other major federal employment statutes, and the First Amendment.

(2) Whether application of the reasonable worker standard is deemed a jury issue will often be outcome determinative. Among the 56 cases in which a disputed retaliatory action was treated as a jury issue, the appellate court in 42 cases – 75% of the total – rejected summary judgment (or judgment as a matter of law), holding that a reasonable jury could conclude that the alleged retaliation satisfied the *Burlington Northern* standard. On the other hand, in the 171 cases in which appellate courts themselves decided whether the *Burlington Northern* standard was met, the result was precisely the opposite; in 142 cases – 83% of the total – the courts found that the alleged retaliation did not meet that standard.

In the First, Third and District of Columbia Circuits, all of the appellate decisions sustaining retaliation claims challenged under *Burlington Northern* are in cases treating the issue as a jury question. Conversely, in the Fourth and Seventh Circuits, all of the

appellate decisions rejecting retaliation claims challenged under *Burlington Northern* were issued in cases that assumed the courts themselves are to apply that standard. In the instant case, once the Fifth Circuit decided to itself determine whether Radio One's retaliation satisfied the *Burlington Northern* standard, there was little chance that Allen's claim would survive; 90% of all Fifth Circuit appeals treating this issue as one for the courts have rejected the retaliation claim in dispute.

A significant number of circuit court decisions holding that a particular act of retaliation did not meet the reasonable worker standard involved disputes which a reasonable jury could well have resolved differently. *McGowan v. City of Eufala*, 472 F.3d 736, 742-43 (10th Cir. 2006), held that the denial of a reassignment from the night shift to day shift "was not materially adverse." *Lushute v. Louisiana, Dept. of Social Services*, 479 Fed.Appx. 553, 555 (5th Cir. 2012) (per curiam), concluded that "chang[ing] [the plaintiff's] work schedule ... from a four day week to a five day week.... would not have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Jackson v. United Parcel Service*, 548 F.3d 1137 (8th Cir. 2008), ruled that a three month delay (three times as long as in *Burlington Northern*) in correcting an improper demotion was not actionable so long as the retaliation victim eventually got back the job in question with back pay. *Couch v. Board of Trustees of Memorial Hospital*, 587 F.3d 1223, 1243-44 (10th Cir. 2009), decided that requiring a plaintiff to undergo psychiatric treatment

would not deter protected conduct. *Lucero v. Nettle Creek School Corp*., 566 F.3d 720, 730 (7th Cir. 2009) concluded that the plaintiff's "reassignment from 12th grade English teacher to 7th grade English teacher would not dissuade a reasonable teacher from bringing a discrimination charge against defendants." *Lapka v. Chertoff*, 517 F.3d 974, 986 (7th Cir. 2008) ruled that "the fact that [a] lower rating prevented [the plaintiff] from [receiving] a merit bonus is not enough to make it a materially adverse action."

(3) The unpredictability of whether appellate courts will treat the reasonable worker standard as presenting a jury issue has created a vexing problem for district judges.

If a district judge treats this as a legal issue, and concludes that the alleged retaliatory action does not meet the *Burlington Northern* standard, there is a substantial likelihood that the decision will be reversed if the circuit court opts instead to treat the question as a jury issue, and thus concludes that the district judge should not have resolved the merits of the issue. That has occurred on repeated occasions. For example, in *Billings v. Town of Grafton*, 441 F.Supp.2d 227 (D.Mass. 2008), the district judge presumed that whether the alleged retaliation met the *Burlington Northern* standard was a question of law, and applied that standard himself. "[T]he facts of Billings' transfer are far removed from those cases where *courts* have found that the plaintiffs did suffer materially adverse actions as a result of a job transfer...." 441 F.Supp.2d at 241 (emphasis added). In

reversing, however, the court of appeals, treated the dispute as a jury issue. "Billings ... came forward with enough objective evidence contrasting her former and current jobs to allow a jury to find a materially adverse employment action." *Billings v. Town of Grafton*, 515 F.3d 39, 53 (1st Cir. 2008).

III. THE DECISION OF THE FIFTH CIRCUIT IS INCORRECT

The manner in which this Court actually resolved the appeal in *Burlington Northern* makes clear that the question in dispute in that case – and here – is a jury issue, not a question of law. The employer in *Burlington Northern* retaliated against the plaintiff by assigning her more onerous work and then suspending her without pay. In upholding the jury verdict in favor of the plaintiff, this Court did not make its own determination that those retaliatory acts could well have dissuaded a reasonable worker from engaging in protected activity. Rather, the Court assessed the sufficiency of the evidence to support that jury verdict.

After summarizing the evidence regarding the plaintiff's new duties, the Court concluded that "[b]ased on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee." 548 U.S. at 71. Similarly, the Court held that "the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one." 548 U.S. at 73. In this respect the Court's decision

was palpably different than that of the Sixth Circuit in *Burlington Northern*; the court of appeals had made its own determination that the retaliatory acts were adverse actions, rather than merely holding that a reasonable jury could so conclude.[22] This Court in *Burlington Northern* cited as a source of the reasonable worker standard the Seventh Circuit decision in *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005). See 548 U.S. at 68. That Seventh Circuit decision had treated application of the reasonable worker standard as a jury issue.[23]

Judge Gleeson correctly explained why it makes particular sense to treat application of the reasonable worker standard as a jury issue.

> [T]hough jury findings are always entitled to great deference, it is hard to conjure a context in which they deserve it more than in this one. The Supreme Court has emphasized that the determination of whether challenged conduct meets the materially adverse standard is especially fact-intensive. In *Burlington Northern*, it stated that "the significance of any given act of retaliation will often depend upon the particular circumstances.... The real social impact of workplace behavior

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[22] *White v. Burlington Northern & Santa Fe Rwy. Co.*, 364 F.3d 789, 802-03 (6th Cir. 2003) (en banc).

[23] 420 F.3d at 662-63 ("A jury could find that the Department set out to exploit a known vulnerability [of the plaintiff] and did so in a way that caused a significant (and hence actionable) loss.").

> often depends on a constellation of surrounding circumstances....” 548 U.S. at 69.... Retaliation claims thus implicate a broad remedial provision, violations of which are determined only after a searching review of all aspects of the challenged actions and the wider context in which they occurred in order to determine the “real social impact of workplace behavior.” Jurors are obviously better suited to determining the social impact of contemporary workplace behavior than are judges. [Judicial resolution of this question] not only usurps the proper role of the jury but substitutes for that body a factfinder with significant, perhaps even disabling, institutional limitations.

Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 580 (2d Cir. 2011) (Gleeson, J., dissenting).

Treating application of the reasonable worker standard as a jury issue is particularly appropriate in Title VII retaliation cases. Here, as in *Burlington Northern* itself, the plaintiff sought compensatory and punitive damages. In such cases the statute expressly provides that either party is entitled to a jury trial. 42 U.S.C. § 1981a(c). In light of the often dispositive importance of this issue in retaliation cases, the statutory jury trial right would often be of little significance in Title VII retaliation cases if it did not include a jury trial of the reasonable worker issue. Interpreting *Burlington Northern* and section 1981a to accord a right to a jury trial of this issue avoids what would otherwise be a serious constitutional problem.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING WHETHER APPLICATION OF THE REASONABLE WORKER STANDARD IS A QUESTION FOR THE JURY OR FOR THE COURT

This case presents a classic example of an appellate court assuming the authority to apply the reasonable worker standard, rather than permitting a jury to do so. The Fifth Circuit unabashedly made its own determination of whether Allen had satisfied the *Burlington Northern* standard. "Simply stated, a reasonable employee would *not* be dissuaded from filing an EEOC charge because of the possibility that her former employer might refuse to do business with her separate company...." (App. 15a) (emphasis in original). The opinion below is at best an expression by the members of the appellate court of their personal views about how a potential charging party would react if told of the retaliation that would follow. A court obviously could not make that type of determination in a tort case (in which a jury was requested) regarding what type of care a reasonable defendant would have taken. (E.g., "a reasonable driver would not be dissuaded from driving over 30 m.p.h. because of the possibility that children might be playing in the street").

The Fifth Circuit in this case treated the decision in *Burlington Northern* as inviting further legal elaboration, rather than as actually establishing a standard to be applied by a jury to the circumstances of each particular case. Instead of explaining why it

thought the retaliation in this case would have had no significant deterrent effect, the appellate court objected that Allen's claim was a "novelty in comparison" to the post-employment retaliation in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). (App. 15a). It held that "the ... conclusion" that this type of retaliation is illegal under Title VII "would constitute an impermissible extension of Title VII's protections." (App. 16a). That is some sort of interpretation of the statutory text, not an application of the reasonable worker standard established by this Court in *Burlington Northern*. This does not even purport to be a discussion of the possible deterrent effect of the retaliation in this case, and certainly not an assessment of how a reasonable jury might resolve that fact-bound issue.

In the instant case it is of controlling importance whether the Fifth Circuit should have limited its inquiry to whether a reasonable jury could conclude that the retaliation in this case could well dissuade a reasonable worker from filing a Title VII charge. The jury in this case found that the retaliation had already caused $16,617 in damages. In addition, that retaliation was continuing when the case went to trial in 2011; Radio One was still refusing to do business with Allen, and the trial judge was forced to issue a detailed injunction to end the practice. (34a). A reasonable jury assuredly could conclude that the $16,617 in damage, together with the prospect that Radio One would forever refuse to deal with Allen

and her advertising firm, would deter a reasonable person from filing a charge with the EEOC.

Although the decision in the instant case is not officially reported, it is the most recent of more than two dozen similar Fifth Circuit decisions treating application of the reasonable worker standard as a question for the court. (App. 65a-70a). All of the officially reported decisions in the Fifth Circuit have treated this issue as a matter for resolution by the court.[24] The Fifth Circuit, for whatever reason, almost always declines to designate for official publication its decisions applying the *Burlington Northern* standard; of the 31 such Fifth Circuit decisions, only 3 have been officially reported. It would thus be particularly inappropriate to deny review of a Fifth Circuit decision on this issue because the court of appeals in this case – as in 90% of all Fifth Circuit decisions on this issue – preferred that its opinion not be published. (See App. 1a note *).

[24] *Stewart v. Mississippi Transp. Comn'n*, 586 F.3d 321, 332-33 (5th Cir. 2009); *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 485-86 (5th Cir. 2008); *LeMaire v. Louisiana Dept. of Transp. & Development,* 480 F.3d 383, 390 (5th Cir. 2007).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[Filed on February 26, 2013]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-20781

CORINA T. ALLEN,

Plaintiff-Appellant
Cross-Appellee,

v.

RADIO ONE OF TEXAS II, L.L.C.,

Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
No. 4:09-CV-4088

Before KING, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Primarily at issue is the district court's denying judgment as a matter of law (JML) for the following jury finding: after it terminated plaintiff, defendant retaliated unlawfully against her by refusing to start doing business with her 18 months after that termination; the refusal occurred a year after she engaged in protected conduct by filing a post-termination, sex-discrimination charge against defendant. Corina Allen sued Radio One of Texas II, L.L.C., for sex discrimination and retaliation under Title VII, 42 U.S.C. § 2000e *et seq.,* and the Texas Commission on Human Rights Act (TCHRA), TEXAS LAB.CODE §§ 21.001-21.556. (Because TCHRA is intended to correlate with Title VII, the same analysis is applied for each claim. *Ysleta Indep. Sch. Dist. v. Monarrez,* 177 S.W.3d 915, 917 (Tex.2005).)

Allen challenges the summary judgment for Radio One on the discrimination claim. Seeking JML, Radio One contests the verdict in favor of Allen on the retaliation claim and resulting awarded damages, including punitive damages. Radio One also contests the district court's denying attorney's fees for its breach-of-contract claim, for which it was awarded summary judgment.

Regarding Allen's sex-discrimination claim, the adverse summary judgment contained in the opinion and order entered 20 April 2011, *Allen v. Radio One of Tex. II, L.L.C.,* 2011 WL 1527972, is AFFIRMED; and, except for the denial of attorney's fees for Radio One's breach-of-contract summary judgment, the judgment in favor of Allen, entered 9 June 2011, *Allen v. Radio*

One of Tex. II, L.L.C., 2011 WL 2313210, is VACATED, with the remaining judgment RENDERED for Radio One.

I.

Radio One employed Allen as general sales manager of KBXX, its Houston, Texas, radio station, from September 2002 until December 2007. In 2007, Vice President and General Manager Douglas Abernethy (Allen's supervisor) received numerous complaints concerning Allen's attitude toward, and treatment of, her subordinates and co-workers. Disciplinary action was taken after the first complaint; thereafter, Employee Relations Manager Gloria Celestin conducted an investigation of the complaints, interviewing several of Allen's subordinates. They responded: Allen was "mean spirited", vengeful, a bully, vicious, and intimidating. One stated Allen was "the most horrible sales manager [she] had worked for in over 25 years". Allen was soon fired. At no point during her employment with Radio One did Allen dispute the accuracy of any complaints, nor contend she was the subject of sex discrimination.

After her termination, Allen twice threatened Radio One with litigation. Within three weeks of her termination, a letter from Allen, and another from her attorney, demanded $112,500 in severance and transition pay, and stated they "hope[d]" to settle the claims "without resorting to costly and time-consuming arbitration or other legal proceedings".

These threats dealt only with claimed breach of contract; neither letter complained of sex discrimination. Nevertheless, in June 2008, nearly seven months after Allen's termination from Radio One, she filed a charge with the Equal Employment Opportunity Commission (EEOC) and the Texas Workforce Commission, claiming sex discrimination.

Also in June 2008, around the time Allen filed her claims, she was hired as a sales manager for CBS Radio – a direct competitor of Radio One. She was terminated in May 2009.

Shortly thereafter (June 2009), Allen began her own company to sell radio advertising time to businesses. In seeking to do business with Radio One, she recorded a telephone conversation with Abernethy, who stated (supposedly at the direction of in-house counsel Sundria Ridgley): Radio One would not do business with her "due to this pending litigation that you have". This conversation occurred nearly 18 months after Allen's termination from Radio One, and approximately one year after filing her EEOC charge.

The "pending litigation" referred to in the recorded conversation was her charge with the EEOC, as well as her attorney-backed, unresolved breach-of-contract threats. It was not until late August 2009 that Allen received a right-to-sue letter from the EEOC, issued in the light of its inability to determine Allen was the subject of Title VII discrimination. She then filed this action in state court – later removed to

federal court – claiming both sex discrimination and retaliation.

During discovery, Allen produced confidential Radio One documents she had retained after termination, in violation of her employment agreement. As a result, Radio One counterclaimed for breach of contract. Although summary judgment was awarded Radio One for its breach-of-contract claim and against Allen's sex-discrimination claim, it was denied against her retaliation claim.

At trial in May 2011, a jury found in favor of Allen on her retaliation claim and awarded: $6,617.45 for loss of income; $10,000 for emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life; and $750,000 in punitive damages. During trial, Radio One was denied JML.

In June 2011, the district court held a hearing on post-trial issues and: reduced punitive damages to $290,000, to bring the compensatory and punitive damages under the $300,000 statutory cap; awarded Allen the resulting $306,617.45, as well as $333,652.59 in attorney's fees; and enjoined Radio One from refusing to accept business from Allen or her company. The court further determined Radio One: was made whole on its breach-of-contract claim and not entitled to equitable relief; and should be denied attorney's fees on that claim, ruling the fees' request waived.

After final judgment, Radio One filed a renewed motion for JML, as well as motions for a new trial

and remittitur; Allen moved for a trial on the sex-discrimination claims. All post-judgment motions were denied.

II.

Allen challenges the summary judgment against her sex-discrimination claim. Radio One contests, *inter alia,* the denials: of attorney's fees for its breach-of-contract claim; and of JML against Allen's retaliation claim, including Allen's awards for loss of income, and emotional and punitive damages. (Because we grant JML, these awards are vacated as a result and, therefore, need not be discussed. The same is true for Radio One's related evidentiary issues and new-trial motion.)

A.

Allen claims Radio One discriminated because of her sex through both termination and failure to promote. Summary judgment was granted against each theory. Essentially for the reasons stated in the district court's extremely comprehensive and detailed order, entered 20 April 2011, 2011 WL 1527972, and as discussed below, summary judgment was proper.

Summary judgment is reviewed *de novo,* applying the same standard as the district court. *E.g., Vaughn v. Woodforest Bank,* 665 F.3d 632, 635 (5th Cir.2011) (internal citation omitted). Summary judgment shall be granted if movant shows there is no

genuine dispute of material fact and movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(a). If the record, viewed in the light most favorable to non-movant, could not lead a rational trier of fact to decide in non-movant's favor, summary judgment is appropriate. *Kelley v. Price-Macemon, Inc.,* 992 F.2d 1408, 1413 (5th Cir.1993).

Discrimination under Title VII occurs if an employer, *inter alia,* terminates or fails to promote an employee based on a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). Because Allen fails to present direct evidence for her discrimination claim, the well-known *McDonnell Douglas* burden-shifting framework is employed. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Plaintiff must first establish a *prima facie* case of discrimination; the burden then shifts to defendant-employer to "articulate a legitimate, non-discriminatory reason" for the adverse employment action; if met, the inference of discrimination is removed, and the burden returns to plaintiff to establish either: the proffered reason is merely pretext for discrimination; or, the reason, while true, is but one reason for the adverse employment action, and another motivating factor is plaintiff's protected characteristic. *Vaughn,* 665 F.3d at 636 (internal citation omitted).

Pretext can be established either "through evidence of disparate treatment", or by showing the "proffered explanation is false or unworthy of credence". *Laxton v. Gap Inc.,* 333 F.3d 572, 578 (5th Cir.2003) (internal quotation marks and citation

omitted). Disparate treatment requires proof that employer treated similarly situated employees differently for "nearly identical conduct". *Vaughn,* 665 F.3d at 637. Alternatively, a nondiscriminatory explanation is "unworthy of credence if it is not the real reason for the adverse employment action". *Laxton,* 333 F.3d at 578.

Under the mixed-motive or motivating-factor theory described above, plaintiff's making a sufficient showing shifts the burden "to the employer to show that the adverse employment decision would have been made regardless of the characteristic". *Black v. Pan Am. Lab., L.L.C.,* 646 F.3d 254, 259 (5th Cir.2011).

1.

For Allen's wrongful-termination theory, instead of contesting Allen's *prima facie* case, Radio One offered evidence of Allen's poor treatment of her colleagues as a nondiscriminatory reason for termination. In response, Allen claims this reason is pretextual; she also claims her termination was motivated by her protected characteristic.

a.

Regarding pretext, Allen relies upon both disparate treatment and the justification for her termination's being unworthy of credence.

i.

For disparate treatment, "the misconduct for which the plaintiff was discharged [must be] nearly identical to that engaged in by other employees". *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.,* 245 F.3d 507, 514 (5th Cir.2001) (quotations omitted). Along that line, Allen contends a male employee was treated more favorably after complaints were filed pertaining to his behavior.

Although Allen and the male employee were both reprimanded for their treatment of colleagues, their similarities end there. The male employee was the target of a single, anonymous complaint received over the company's email tip line, whereas numerous complaints were recorded about Allen. Human Resources' investigation of the male employee revealed mostly positive reports, as distinguished from the numerous negative interviews concerning Allen. In addition, although Allen never denied the substantive claims filed against her, the male employee denied the complaints concerning him.

ii.

Alternatively, Allen attempts to establish pretext by showing Radio One's justification for termination was false or unworthy of credence. *See Laxton,* 333 F.3d at 578. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson*

Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Allen fails to create the requisite genuine dispute of material fact concerning Radio One's reason for her termination.

b.

For her mixed-motive or motivating-factor theory, Allen points to Abernethy's general behavior to demonstrate her termination was motivated by sex-based animus. Allen's assertions, however, that Abernethy referred to one woman as a "diva" and another as "difficult," and that he previously fired two women, fall far short of creating the requisite genuine dispute of material fact. Allen offers no evidence of animus toward her. Moreover, at no point during her employment with Radio One did Allen contend she was the subject of sex discrimination; neither of the above-described two post-termination demand letters to Radio One claimed sex discrimination; and she waited approximately seven months after termination before filing her EEOC charge.

2.

For her failure-to-promote theory, Allen maintains Abernethy discriminated by refusing to promote her to director of sales to oversee sales at various Radio One stations in the area. Again, Radio One did not challenge Allen's *prima facie* case, presenting instead two legitimate non-discriminatory reasons: the position did not exist at the time Allen was

employed by Radio One; and Bob MacKay, who eventually filled the position, was objectively more qualified than Allen. As with Allen's wrongful-termination theory, she bears the burden to show either: Radio One's reasons were pretextual; or her sex was a motivating factor. *Laxton,* 333 F.3d at 578.

Allen claims Radio One's first justification is false and, thus, pretext. She offers inconclusive evidence, asserting the position opened the day after she was terminated, and Abernethy had the authority to create the position before then. For Radio One's second justification, Allen is unable to offer evidence creating a genuine dispute of material fact on whether MacKay was not more qualified. *See Celestine v. Petroleos de Venezuella SA,* 266 F.3d 343, 356-57 (5th Cir.2001).

B.

Radio One contends the district court erred in denying JML against Allen's retaliation claim. Although Allen contends otherwise, the basis on which JML is requested was preserved in district court. (Radio One also challenges the court's denying summary judgment against retaliation. Because this claim was decided in a jury trial on the merits, we cannot review the summary-judgment decision. *E.g., Gonzalez v. Fresenius Med. Care N. Am.,* 689 F.3d 470, 474 n. 3 (5th Cir.2012) ("[O]rders denying summary judgment are not reviewable on appeal where final judgment adverse to the movant is rendered on

the basis of a subsequent full trial on the merits".) (citing *Johnson v. Sawyer,* 120 F.3d 1307, 1316 (5th Cir.1997))).

Denial of JML is reviewed *de novo. E.g., Nassar v. Univ. of Tex. Sw. Med. Ctr.,* 674 F.3d 448, 452 (5th Cir.2012), *cert. granted,* ___ U.S. ___, 133 S.Ct. 978, 184 L.Ed.2d 758 (2013). All reasonable inferences and credibility determinations are viewed in the light most favorable to Allen, and JML is appropriate "only if the evidence points so strongly and so overwhelmingly in favor of [Radio One] that *no reasonable juror* could return a contrary verdict". *Id.* at 452-53 (emphasis added) (internal quotation marks and citation omitted).

In preserving the right to trial by jury in a civil action, the Seventh Amendment states, *inter alia:* "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law". U.S. Const. amend. VII. Although common law advocated this deference to juries, "[a] jury verdict cannot stand without an evidentiary basis, and thus a judgment on a verdict entered in the absence of sufficient evidence[ ] . . . poses an error of law reversible under common law without a constitutional dilemma". 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FED. STANDARDS OF REVIEW § 3.01 (4th ed.2010); *see* FED.R.CIV.P. 50; *see, e.g., Weisgram v. Marley Co.,* 528 U.S. 440, 449-57, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000); *see generally Baltimore & Carolina Line v.*

Redman, 295 U.S. 654, 656-61, 55 S.Ct. 890, 79 L.Ed. 1636 (1935).

In that vein, JML, pursuant to Federal Rule of Civil Procedure 50, provides a protective buffer against an objective, unreasonable jury. "If[, during trial,] the court does not grant a motion for [JML] made under Rule 50(a), . . . the movant may file a renewed motion" post-verdict, FED.R.CIV.P. 50(b), on which the court is to "disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it", FED.R.CIV.P. 50(b) advisory committee notes, 1991 amend. The court applies the same standard provided under Rule 50(a) to evaluate a Rule 50(b) motion: JML should be granted if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party". FED.R.CIV.P. 50(a). "While a verdict may be sustained by 'reasonable inferences' from the evidence as a whole, plainly unreasonable inferences or those which amount to mere speculation or conjecture do not suffice." *McConney v. City of Houston,* 863 F.2d 1180, 1186 (5th Cir.1989) (citations omitted).

"As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. *See* 28 U.S.C. § 1291. The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations." *Salve Regina Coll. v. Russell,* 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (applying *de novo* review to district court's determination of state law).

Such independent review, therefore, "in entertaining a motion for a judgment as a matter of law", requires the court to review "all of the evidence in the record". *Reeves,* 530 U.S. at 150. Applying these principles, the jury's verdict cannot stand.

Title VII prohibits retaliation: an employer may not "discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge . . . in an investigation, proceeding, or hearing under this subchapter". 42 U.S.C. § 2000e-3(a). A *prima facie* claim of retaliation requires Allen to prove: "(1) she engaged in protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse employment action". *Turner v. Baylor Richardson Med. Ctr.,* 476 F.3d 337, 348 (5th Cir.2007). Whether Radio One's not doing business with Allen constitutes actionable retaliation is analyzed in the light of *Burlington Northern & Santa Fe Railway Company v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The *Burlington* Court identified the broad scope of what constitutes an adverse employment action in a legitimate retaliation claim: "[T]he antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace". *Id.* at 57. The Court properly constricted this scope, however, through an objective-reasonableness standard: "[T]he [antiretaliation] provision covers those (and only those) employer

actions that would have been materially adverse to a reasonable employee. . . . [T]he employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination". *Id.* Radio One's actions fall far short of rising to this level.

As *Burlington* emphasized, "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters". *Id.* at 69. This principle's application to Allen's claim speaks volumes. Simply stated, a reasonable employee would *not* be dissuaded from filing an EEOC charge because of the possibility that her former employer might refuse to do business with her separate company: more than a year after her EEOC filing; 18 months after her termination for cause and twice threatening her former employer with contract litigation; and after working for a direct competitor.

The Supreme Court has long allowed claims for retaliation by former employees against former employers for post-employment adverse employment actions. *Robinson v. Shell Oil Co.,* 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). But here, the remoteness in time between the protected act (EEOC charge) and the employer action (refusing to do business), in conjunction with the unusual circumstances, confirms its novelty in comparison. *E.g., id.* at 339 (holding former employee could sue former employer for post-employment actions allegedly in retaliation for filing EEOC charge, where filing and employer's action occurred shortly after termination).

Allen was fired 18 months before the claimed retaliatory action, and filed her EEOC charge nearly a year before such action. An employer's decision not to do business with a former employee under these attenuated circumstances does not violate Title VII's anti-retaliation provision; the contrary conclusion would constitute an impermissible extension of Title VII's protections.

All of this underscores the importance of causation. As our court has stated, "[t]he ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision". *Long v. Eastfield Coll.,* 88 F.3d 300, 305 n. 4 (5th Cir.1996); *see also Smith v. Xerox Corp.,* 602 F.3d 320, 338 (5th Cir.2010) (Title VII retaliation claimants are "require[d] . . . to demonstrate but-for causation" to prevail). Taking a lesson from tort law, proof of causation "excludes only those links that are too remote, purely contingent, or indirect". *Staub v. Proctor Hosp.,* ___ U.S. ___, ___, 131 S.Ct. 1186, 1192, 179 L.Ed.2d 144 (2011) (internal quotations, citation, and alteration omitted). This situation presents such an impermissible link. Allen's termination 18 months prior to the telephone conversation, and her filing an EEOC charge nearly a year before that conversation, present too attenuated a time frame for legal causation. "Injuries have countless causes, and not all should give rise to legal liability". *CSX Transp., Inc. v. McBride,* ___ U.S. ___, ___, 131 S.Ct. 2630, 2637, 180 L.Ed.2d 637 (2011).

Any injury Allen claims to have suffered falls within that category.

In other words, there will be "obvious" situations that meet *Burlington,* and others that "will almost never do so". *Thompson v. N. Am. Stainless, LP,* ___ U.S. ___, ___, 131 S.Ct. 863, 868, 178 L.Ed.2d 694 (2011). This situation does not satisfy the test for liability enunciated by *Burlington.*

C.

Radio One challenges being denied attorney's fees for its successful breach-of-contract claim. After granting Radio One summary judgment on that claim, the district court ruled "[t]he nature and extent of the equitable relief and any other remedies will be determined after trial". Thereafter, Allen and Radio One filed their joint pretrial order, which did not include Radio One's attorney's-fees request. Post-trial, the court ruled Radio One waived the right to recover those fees "by omitting such a claim from its portion of the Joint Pretrial Order".

Rulings concerning pre-trial orders are reviewed for abuse of discretion. *Flannery v. Carroll,* 676 F.2d 126, 130 (5th Cir.1982). "Because of the importance of the pre-trial order in achieving efficacy and expeditiousness upon trial in the district court, appellate courts are hesitant to interfere with the court's discretion in creating, enforcing, and modifying such orders. District courts are encouraged to construe pre-trial orders narrowly without fear of reversal." *Id.*

at 129 (citations omitted). "Once the pretrial order is entered, it controls the course and scope of the proceedings under Federal Rule of Civil Procedure 16(e) [governing final pretrial conference and orders], and if a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint." *Elvis Presley Enters., Inc. v. Capece,* 141 F.3d 188, 206 (5th Cir.1998).

Without citing precedent, Radio One contends the pretrial order does not govern because the district court had earlier ruled "equitable relief *and other remedies* will be determined after trial". (Emphasis added.) Because we decline to interfere with the district court's interpretation of the pretrial order, and there is no dispute that Radio One failed to raise the fees issue in it, the court did not abuse its discretion.

III.

For the foregoing reasons, the summary judgment against Allen's sex-discrimination claim, contained in the opinion and order entered 20 April 2011, is AFFIRMED; and, except for the denial of attorney's fees for Radio One's breach-of-contract summary judgment, the judgment entered 9 June 2011 is VACATED, with the remaining judgment RENDERED for Radio One.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CORINA T. ALLEN, Plaintiff, v. RADIO ONE OF TEXAS II, LLC, Defendant.	§ § § § § § § § §	CIVIL ACTION NO. H-09-4088

ORDER DENYING MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND FOR NEW TRIAL

EWING WERLEIN, JR., District Judge.

After a three day trial, the Jury on May 19, 2011, returned a Verdict in favor of Plaintiff Corina T. Allen ("Allen") on all controlling questions regarding Allen's Title VII retaliation claim; and the Court, having subsequently received and considered additional evidence and arguments of the parties on June 7, 2011, regarding the equitable relief sought by the parties, rendered on June 9, 2011 its Order on Equitable Relief and Other Post-Trial Issues (Document No. 139). Final Judgment was entered on June 9, 2011. Now pending are Defendant Radio One of Texas II, LLC's Renewed Motion for Judgment as a Matter of Law, and, in the alternative, Motion for New Trial and/or Remittitur (Document No. 153), and Plaintiff Corina T. Allen's Motion for New Trial Regarding Gender Discrimination Claims (Document No. 154).

Legal Standards

A motion for judgment as a matter of law should be granted if there is no "legally sufficient evidentiary basis for a reasonable jury to find for a party." *Pineda v. United Parcel Service, Inc.,* 360 F.3d 483, 486 (5th Cir.2004) (citing FED. R. CIV. P. 50(a)). "A court should grant a post-judgment motion for judgment as a matter of law only when the facts and inferences point so strongly in favor of the movant that a rational jury could not reach a contrary verdict." *Allstate Ins. Co. v. Receivable Fin. Co., L.L.C.,* 501 F.3d 398, 405 (5th Cir.2007) (internal quotations omitted). When evaluating the sufficiency of the evidence, the Court views all evidence and draws all inferences in the light most favorable to the verdict. *Id.*

"A party is entitled to a new trial when the jury verdict is against the great weight of the evidence." *Deloach v. Delchamps, Inc.,* 897 F.2d 815, 820 (5th Cir.1990). When a jury verdict results from passion or prejudice, a new trial, not remittitur, is the proper remedy; damage awards that are merely excessive, however, are subject to remittitur. *Wells v. Dallas Indep. Sch. Dist.,* 793 F.2d 679, 683-84 (5th Cir.1982). A denial of a motion for new trial is subject [sic] review only for abuse of discretion. *King v. Exxon Co., U.S.A.,* 618 F.2d 1111, 1115 (5th Cir.1980).

Radio One's Motions

Radio One seeks judgment as a matter of law, raising several points that are considered below:

1. Contrary to Radio One's argument, there was legally sufficient evidence to support the Jury's rejection of Radio One's proferred non-retaliatory reason for refusing to accept advertising from Plaintiff and finding that Radio One's motivating reason for refusing the advertising was because she had filed an EEOC charge against the company. Allen presented substantial evidence of retaliation, including evidence that Radio One's Vice President and General Manager of its Houston office told Plaintiff that his company would not do business with Allen because of her litigation against it.[1] The Jury heard Abernethy's voice on a recorded telephone call telling Allen that Radio One's counsel (referring to its associate general counsel Sundria Ridgley at Defendant's corporate offices in Maryland), had told him not to do business with Allen because of Allen's pending litigation against Radio One.[2] The only action that Allen had against Radio One was her Title VII claim pending in the E.E.O.C., and Ridgley herself had signed Radio One's response to Allen's EEOC claim. In addition to other evidence of retaliation, the audiotape itself is ample evidence from which a rational jury could conclude that Radio One retaliated against Allen for commencing a Title VII action against it.

2. Allen may recover damages for the harm that Radio One committed, because she is a "person[ ]

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[1] *See* Document No. 147 at 51-52 (Abernethy Tr.).

[2] *See id.* at 31.

aggrieved": the retaliation was directed at Allen, not her company. 42 U.S.C. § 2000e-5(f)(1); *see also Thompson v. N. Am. Stainless, LP,* ___ U.S. ___, ___, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011) ("[T]he term 'aggrieved' in Title VII incorporates [the zone of interests] test, enabling suit by any plaintiff with an interest 'arguably [sought] to be protected by the statutes,' while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." (internal quotations omitted)).

Radio One relies on *Bellows v. Amoco Oil Co.,* 118 F.3d 268, 276 (5th Cir.1997) and *Searcy v. Houston Lighting & Power Co.,* 907 F.2d 562 (5th Cir.1990), *cert. denied,* 498 U.S. 970, 111 S.Ct. 438, 112 L.Ed.2d 421 (1990), to argue that Allen's injury was to her company and not to her, and therefore she has no standing to sue. However, in those actions, the companies' principals had no individual claim against the defendants. In contrast, here it was Allen individually, not her company, who filed the EEOC charge alleging unlawful discrimination by Radio One when it fired her, and the evidence was quite sufficient for the jury to find that Radio One's retaliation was directed at Allen personally.[3] *See Thompson,* 131 S.Ct. at 870 (holding that "hurting [plaintiff] was the unlawful act by which the employer punished [plaintiff's fiancee]" and thus plaintiff was in the "zone of

[3] *See* Document No. 146 at 142:4-16.

interests" of those affected by defendant's retaliation). Besides, the retaliation began before Allen ever formed her wholly owned S corporation. There is no merit in Radio One's contention that Allen lacked standing under Title VII.

3. There is sufficient evidence to support the Jury's finding that Allen sustained emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life, for which the Jury awarded damages in the amount of $10,000. Allen testified that Radio One's retaliation against her lengthened her work days and caused her continuing anxiety, sleeplessness, loss of appetite, and weight loss.[4] Allen further testified that the retaliation caused a disruption in her social life, interference with friendships, and ongoing depression.[5] Unlike *Patterson v. P.H.P. Healthcare Corp.,* 90 F.3d 927 (5th Cir.1996), where the plaintiff testified only that he felt "frustrated," "hurt," "angry," and "paranoid," without any physical injury being claimed, Allen testified to physical harm sustained as a result of the emotional distress caused by Radio One's retaliation. *See Forsyth v. City of Dallas, Texas,* 91 F.3d 769, 774 (5th Cir.1996); *E.E.O.C. v. WC & M Enterprises, Inc.,* 496 F.3d 393, 402 (5th Cir.2007) (quoting *Vadie v. Miss. State Univ.,* 218 F.3d 365, 376 (5th Cir.2000)).

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[4] *See* Document No. 146 at 52:23-53:2, 53:4-17, 70:17-71:12.

[5] *See id.* at 71:18-72:11.

4. There is ample evidence to support the Jury's findings of damages. "[T]he size of the award [for pain and suffering] is within the province of the jury, so long as the award is not impermissibly affected by 'passion or prejudice.'" *Schexnayder v. Bonfiglio,* 167 F. App'x 364, 366 (5th Cir.2006) (unpublished op.) (citing *Green v. Adm'rs of Tulane Educ. Fund,* 284 F.3d 642, 660-61 (5th Cir.2002)). In light of the quantum of proof offered by Allen and described above, an award of only $10,000 for her emotional pain and suffering was within the province of the Jury, not a product of passion or prejudice.

The Jury's finding of $6,617.45 for Plaintiff's loss of income is also supported in the evidence. Radio One challenges only $2,363.50 of that total award, contending Allen did not prove lost opportunity damages in that amount. The dispute centers on Radio One's refusal to do business with Allen on a "club remote" package. The Court finds there was sufficient evidence for a jury to conclude that because Radio One refused to communicate directly with Allen, she lost $2,363.50 on the club remote package.[6]

There is also legally sufficient evidence to support an award of punitive damages against Radio One. Indeed, there was evidence that it acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Allen presented direct evidence

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[6] *See* Document No. 146 at 66:1-69:3.

that Radio One "discriminate[d] in the face of a perceived risk that its actions will violate federal law." *See Smith v. Xerox Corp.,* 602 F.3d 320, 336 (5th Cir.2010). That proof included the fact that Radio One was well aware of its obligation not to retaliate; the company's Vice President for Human Resources, Jacqueline Kindall, testified to such. Abernethy, the company's Vice President and General Manager in Houston, testified that he too was aware of the prohibition on retaliating against an employee who makes a Title VII claim. Nonetheless, Abernethy told Allen in the tape-recorded telephone call that he had sought advice from Radio One's associate general counsel, Sundria Ridgley, who instructed Abernethy not to do business with Allen due to Allen's litigation against Radio One. It was Ridgley who had signed the response Radio One had filed in the E.E.O.C. to Allen's Title VII discrimination claim. The Jury could well infer from this tape-recorded phone call, in which Abernethy implicated Radio One's associate general counsel, that the retaliation was known and directed from the highest levels of the company and that Radio One retaliated "in the face of a perceived risk that its actions will violate federal law." *Xerox,* 602 F.3d at 335. Moreover, when asked by the Court during voir dire examination of the jury panel to introduce those at Defendant's counsel table, Radio One's lead counsel introduced Ridgley as "an in-house counsel with Radio One." Allen during her testimony also identified Ridgley in the courtroom at Radio One's counsel table. Radio One, however, never called Ridgley to testify to deny that she had given

to Abernethy the instructions that Abernethy related to Allen in their tape-recorded phone call. Without even considering the nuances of the uncalled witness rule and whether it might have applied, one must expect that the Jury observed what was patently obvious, namely, that Radio One rested its defense with Radio One's accused ultimate decision-maker – to whom the retaliation was specifically attributed – still sitting in the courtroom at Defendant's table without providing a word of testimony in her own or her company's defense.[7] There was ample evidence from which a rational jury could find that Radio One's managers and supervisors possessed the requisite subjective intent to retaliate and willfully did so, knowing that such actions were unlawful.

The Court also finds no merit in Defendant's contention that the punitive damage award should be reduced below the statutory cap to prevent a due process violation. In a Title VII case, the Fifth Circuit

[7] Radio One evidently chose to rely on Abernethy's trial testimony that he was not truthful to Allen in the phone call when he attributed to Ridgley those retaliation instructions. Once a witness sets about impeaching himself, of course, his entire credibility is seriously undermined. All the more so here, given that Allen – who had worked with Abernethy not only at Radio One but also previously at Cox Radio – testified that she tape recorded her phone call to Abernethy because she "thought he would lie about the conversation later." Given the tangled web that Abernethy had spun and the Jury's duty to judge the credibility of witnesses and the weight to be given their testimony, the Jury may have thought it all the more damning that Ridgley herself sat mute.

has affirmed punitive damage awards up to the statutory cap, even when no other damages were awarded by a jury. *See Abner v. Kansas City S. Ry. Co.,* 513 F.3d 154, 163 (5th Cir.2008) (affirming punitive damages award of $125,000 per plaintiff where there were no compensatory damages in Title VII case and holding that "preventing juries from awarding punitive damages when an employer engaged in reprehensible discrimination without inflicting easily quantifiable physical and monetary harm would quell the deterrence that Congress intended in the most egregious discrimination cases under Title VII"); *see also Cush-Crawford v. Adchem Corp.,* 271 F.3d 352, 359 (2d Cir.2001) ("In Title VII cases, however, the statutory maxima capping punitive damage awards strongly undermine the concerns that underlie the reluctance to award punitive damages without proof of actual harm.").

In assessing whether the amount of the award is reasonable "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 1599, 134 L.Ed.2d 809 (1996). Factors which a court considers in determining the degree of reprehensibility in a defendant's conduct are "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an

isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585 (2003). Here, the retaliation was especially brazen, with Abernethy directly informing Allen that Radio One would not do business with her because of her pending litigation, and that he was acting on the instructions of the company's associate general counsel. Additionally, there was evidence that Radio One's retaliation against Allen not only was deliberate but also was prolonged, lasting over two years, and that it continued *even as the trial was ongoing.* In sum, there is ample evidence from which the Jury could find that Radio One's conduct was reprehensible. The evidence fully supported an award of punitive damages.

The Court reduced the Jury's award of $750,000 in punitive damages to $290,000, to conform to the statutory cap. The Court finds that a punitive damages award of $290,000 is not excessive under the facts of this case viewed in the light most favorable to the verdict, and a further remittitur is not required.

5. The Court has carefully considered all of Radio One's additional arguments in support of its alternative motion for a new trial and finds that they are without merit. The Jury Verdict is not against the great weight of the evidence. Moreover, in a previous Order the Court both ruled that Radio One waived any right to recover attorney's fees on its contract claim and also carefully crafted the scope of equitable

relief awarded to Plaintiff. The Court finds no need to revisit those issues here.

Allen's Motion for New Trial

Allen moves for a new trial regarding her gender discrimination claims, reurging many of the arguments that the Court considered, and rejected. After further careful review, the Court finds its prior ruling should not be set aside.

Order

Based on the foregoing, it is hereby

ORDERED that Defendant Radio One of Texas II, LLC's Renewed Motion for Judgment as a Matter of Law, and, in the alternative, Motion for New Trial and/or Remittitur (Document No. 153) and Plaintiff Corina T. Allen's Motion for New Trial Regarding Gender Discrimination Claims (Document No. 154) are in all things DENIED.

The Clerk will enter this Order and send copies to all counsel of record.

SIGNED at Houston, Texas, on this 28th day of October, 2011.

s/ Ewing Werlein, Jr.
Ewing Werlein, Jr.
United States District Judge

[Entered on June 9, 2011]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CORINA T. ALLEN, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-09-4088
RADIO ONE OF TEXAS II, LLC, Defendant.	§	

ORDER ON EQUITABLE RELIEF AND OTHER POST-TRIAL ISSUES

On the 7th day of June, 2011, the Court received testimony and heard the arguments and authorities presented by counsel for Plaintiff Corina T. Allen and Defendant Radio One of Texas II, LLC ("Radio One"), regarding equitable relief sought by the parties, and also heard the parties on all other post-trial issues with respect to the entry of a Final Judgment.

Plaintiff's Damages

The parties are agreed and have stipulated (Document No. 131, at 3) that pursuant to 42 U.S.C. § 1981a(b)(3)(D), the Jury's Verdict awarding to Plaintiff $750,000 for punitive damages must be reduced to $290,000, which together with the $10,000 awarded by the Jury for Plaintiff's emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment

of life, will comply with the statutory cap of $300,000 applicable to Defendant. Accordingly, based on the Verdict as modified in accordance with law, Plaintiff Corina T. Allen will be awarded damages for lost income in the amount of $6,617.45, plus $300,000 for statutorily capped additional damages found by the Jury, for a total of $306,617.45. This sum, plus the amount of attorney's fees found hereinbelow, will be the total monetary award adjudged for Plaintiff in the Final Judgment.

Plaintiff's Equitable Relief

Plaintiff urges the Court not only to enjoin Defendant from engaging in further retaliation against Plaintiff by refusing to deal with and to accept radio advertising from her or her agency, but also to order affirmative action in the form of requiring Radio One to provide to Plaintiff specific commercial benefits for a period of three years. For examples [sic], she requests the Court to require Defendant to provide to Plaintiff radio advertising rate discounts of 20% from the gross average unit rates for which Defendant sells radio advertising to others, to provide to Plaintiff guaranteed rate cards for certain kinds of radio advertising with a "minimum discount of 20%," to observe other commercial practices designed to benefit only Plaintiff, and to require Defendant to verify to Plaintiff from its records the discounts to which Plaintiff would become entitled for a period of three years. Defendant acknowledges that Plaintiff, based upon the Jury Verdict, is entitled to injunctive relief

requiring Defendant to cease refusing to accept radio advertising from Plaintiff and to deal with her on the same commercial terms and conditions as others in her field, but that she should not be provided future more favorable commercial treatment than other outside advertising agents and/or agencies.

Plaintiff Corina T. Allen testified at the post-trial hearing that she is asking for favorable discounts (in addition to her regular commissions) for a period of three years in order to remediate the adverse impact that she claims she and her business sustained for two years at the hands of Defendant, which, she says, prevented her from growing her business and reputation as an urban radio advertising specialist. Moreover, she states that she fears further retaliation by Defendant, even from its highest levels, and fears that Defendant will give her less favorable pricing than other agents, not negotiate in good faith, delay its responses to her, and refuse to give her "uniform pricing" on a gross basis, especially with respect to club packages.

Defendant points out that Plaintiff has not identified any other outside radio advertising sales agency such as Plaintiff's that receives the favorable treatment that Plaintiff seeks, and that it is customary for sellers and purchasers of radio advertising often to negotiate for rates and other considerations. Defendant also argues that Plaintiff had full opportunity at the trial to present evidence of any additional economic damages or business losses that she sustained as a proximate cause of Defendant's retaliation, and

that it is not appropriate to award an add-on to Plaintiff's actual loss of income that the Jury found in its Verdict. Indeed, Plaintiff testified that her new business in two years' time produced $1.5 million in radio advertising, of which her agency earned customary commissions of 15%, which would appear quite successful for an upstart business with no employees other than Plaintiff, an office in her home, and no proof of any material capital investment. Indeed, on this record it would be highly speculative, to say the least, for the Court to find that Plaintiff's business and reputation have suffered quantifiable losses for which future commercial benefits should be awarded in addition to her recovery of proven damages.

The Court has carefully considered the evidence and the parties' arguments – portions of which are referred to above – and is of the opinion that the following injunctive relief, together with the damages awarded by the Jury, will make Plaintiff whole and fairly provide to Plaintiff all relief to which she is entitled on a going-forward basis:

Defendant Radio One of Texas II, LLC, including its subsidiaries, parents (which includes Radio One, Inc.), and affiliates, and their officers, agents, servants, employees, and attorneys (the "Enjoined Parties"), shall be permanently restrained and enjoined from refusing to accept radio advertising tendered by Corina T. Allen or on behalf of a client by Corina T. Allen and/or any business entity in which she serves as an owner, member, shareholder, partner, or in a similar capacity, including but not limited to Radio

Results Specialists, LLC, on the same commercial terms and conditions and subject to the same policies applicable to other outside agencies and/or agents who tender radio advertising to Radio One of Texas II, LLC and/or any of its subsidiaries, parents, or affiliates. "[T]o accept advertising tendered individually by Corina T. Allen . . . on the same commercial terms and conditions and subject to the same policies applicable to other outside agencies and/or agents," as that language is used in this Injunction, also means that the Enjoined Parties shall accord to Corina T. Allen the same favorable treatment that the Enjoined Parties provide to other outside agencies and/or agents, which includes but is not limited to regularly accepting and returning telephone calls; responding to all other forms of communication (including voicemails, telephone messages, and emails); responding to Requests for Proposals; participating in meetings; advising of Defendant's capabilities available to advertisers; negotiating in good faith; providing prices on the same gross basis for all products for which prices are quoted on a gross basis to other advertisers, agencies and/or agents; providing the standard agency discount that is provided to other agencies and/or agents; providing accurate information on rate card and/or sell-out status; and otherwise adhering to the usual good business practices regularly employed by Radio One of Texas II, LLC to attract and to obtain radio advertising business from other agency/agent relationships.

Attorney's Fees

Pursuant to 42 U.S.C. § 2000(e)-5(k), the Court finds that Plaintiff Corina T. Allen is entitled to recover reasonable attorney's fees from Defendant for that portion of the case upon which Plaintiff prevailed, namely the retaliation claim. Plaintiff and Defendant have mutually agreed and stipulated that the amount of Plaintiff's reasonable attorney's fees for that portion of the case upon which Plaintiff prevailed, through June 2, 2011, are as follows:

Dow Golub Remels & Beverly, L.L.P.	$273,272.59
Law Offices of Thomas H. Padgett, Jr.	59,380.00
Total	$332,652.59

Plaintiff also requests additional fees through the hearing conducted on June 7, 2011, but provided no evidence to support an additional amount. The Court, having read the submissions filed since June 2nd, and having observed counsel for Plaintiff in Court, finds from the circumstantial evidence that an additional award of $1,000 is warranted to compensate Plaintiff for her attorney's fees from June 2, 2011 to the date of Final Judgment. Accordingly, a Judgment will be entered in favor of Plaintiff for an award of $333,652.59 in reasonable attorney's fees. This sum, plus the damages award made by the Jury and modified hereinabove, will result in a total monetary recovery for Plaintiff, inclusive of attorney's fees, of $640,270.04.

Defendant's Equitable Relief

Defendant seeks equitable relief based on the summary judgment entered in its favor that Plaintiff breached her employment contract with Radio One for the year September 23, 2006 to September 22, 2007, by failing to return to Radio One immediately upon her December 6, 2007 separation from Radio One certain "confidential information" that had been delivered to her during the contract term. Plaintiff through her counsel has now delivered to Defendant's counsel all of the original Radio One documents that were the subject of Radio One's breach of contract counterclaim, including all of those documents in Defendant's Trial Exhibit No. 27. Defendant's counsel acknowledges having received those documents, but vaguely seeks others, without being able to identify any specifically, and Defendant further seeks an accounting from Ms. Allen of all the confidential information and other Radio One property in her possession and/or control.

As observed earlier in this Order, Ms. Allen testified at the June 7th hearing and was cross-examined by Defendant's counsel. The Court finds from a preponderance of the evidence that at the time Defendant took her oral deposition, Ms. Allen delivered to her own counsel all Radio One confidential information and other documents that she had in her possession, even including Radio One's obligatory post-termination notice to her as a former employee advising her of her COBRA rights. Ms. Allen further testified, and the Court finds from a preponderance of

the evidence, that in the intervening period since her deposition was taken, she relocated her office in her home and, when she did so, once again had occasion thoroughly to examine the documents in her possession, and that she found no other Radio One documents.

The Court finds from a preponderance of the evidence that Ms. Allen has no confidential information or other property of Radio One in her possession or subject to her control, and this finding obviates any need for injunctive relief to require her to perform what she already has fully performed.[1] The Court further finds from a preponderance of the evidence that Ms. Allen never used the confidential information in her possession after she was discharged by Radio One and, in fact, she credibly testified at trial that she did not even know that the materials were in her possession until she searched for Radio One documents at the request of her counsel in order to comply with Defendant's discovery request. Defendant could identify no damages that it sustained from Plaintiff's technical breach of her employment contract. Accordingly, the Court finds that while Defendant is entitled to judgment that Plaintiff breached the employment

[1] The remaining copies of Radio One's documents are in the custody of Plaintiff's counsel, who holds them under an Agreed Protective Order, and, upon the judgment in this case becoming final, Plaintiff's counsel will either return them to Defendant or destroy them, whichever may be required by the Agreed Protective Order.

contract as found in the Memorandum and Order granting summary judgment, Plaintiff's previous return of all of Radio One's confidential information and property to Radio One, and the fact that she did not use the confidential information after she was terminated, renders unnecessary any injunctive or other equitable relief against her. Defendant already has been made whole on its counterclaim.

Attorney's Fees for Defendant

As set forth above, the Court found that Plaintiff breached the terms of her contract as described in the Memorandum and Order signed April 20, 2011. Defendant suffered no damages as a result of the breach, but prayed for reasonable attorney's fees and costs, and "such other relief, equitable or legal, that this Court may deem just and proper under the circumstances." (Counterclaim at 14). The Court ruled in its summary judgment Order that "[r]emaining for trial are Allen's retaliation claim and, following trial, determination of the equitable remedies to which Radio One is entitled by reason of Allen's breach of her employment contract." The Court never mentioned attorney's fees, although Defendant now points to an earlier sentence not in the Order but in the Memorandum, at page 26, which stated: "The nature and extent of the equitable relief and *any other remedies* will be determined after trial." Defendant argues that the Court's reference to "other remedies" means attorney's fees for Defendant.

Regardless, a week after the Court issued its Memorandum and Order granting summary judgment, Plaintiff and Defendant on April 27, 2011, filed their Joint Pretrial Order. In the Joint Pretrial Order, Defendant made no claim for attorney's fees for itself although it did list as a contested proposition of law "[w]hether and to what extent Plaintiff is entitled to attorney's fees." Plaintiff therefore argues that Defendant waived its own prior claim for attorney's fees.

In retrospect, after having heard all of the trial evidence and the additional evidence at the June 7th hearing, it appears that Defendant's counterclaim for breach of Plaintiff's employment contract regarding Radio One's "confidential information" was pretty much a tempest in a teapot, amounting to nothing more than a technical violation. The "confidential information" such as it was, was dated and grew more stale each day. It was useless to Plaintiff and never used by her after her termination, and for a long time she was unaware it was in her possession. Defendant's counterclaim bears the marks of a claim that Radio One would not have filed as a lawsuit but for the fact that the discharged employee had filed against Radio One a Title VII suit for discrimination and for retaliation, and Radio One, upon discovering a technical even if inconsequential claim against Plaintiff, evidently chose to instruct its attorneys to sue her in return.

Whether a party should be rewarded with "reasonable" attorney's fees for instructing its attorney to file a "sue them back" counterclaim, however, need

not be decided. The Court finds that Defendant waived any right to recover attorney's fees by omitting such a claim from its portion of the Joint Pretrial Order filed a week after the Court granted Defendant's Motion for Summary Judgment on its counterclaim. *See Elvis Presley Enterprises v. Capese*, 141 F.3d 188, 206 (5th Cir.1998). For this reason, Defendant's request for attorney's fees will be denied.

Conclusion

The Court will separately render Final Judgment based upon the Verdict of the Jury, the Order on Summary Judgment signed April 20, 2011, and the findings made in this Order on Equitable Relief and Other Post-Trial Issues.

The Clerk will enter this Order, providing a correct copy to all parties of record.

s/ Ewing Werlein, Jr.
Ewing Werlein, Jr.,
United States District Judge

[Entered March 26, 2013]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-20781

CORINA T. ALLEN,
Plaintiff-Appellant Cross-Appellee

v.

RADIO ONE OF TEXAS II, L.L.C.,
Defendant-Appellee Cross-Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Rhesa Barksdale
United States Circuit Judge

Judge Haynes did not participate in the consideration of the rehearing en banc.

APPELLATE DECISIONS APPLYING THE *BURLINGTON NORTHERN* "REASONABLE WORKER" STANDARD

The decisions set out below concern appeals regarding whether one or more alleged retaliatory acts satisfied the reasonable worker standard. Except as noted, the listed decisions concern retaliation claims under Title VII. Where a decision involved several claims, the summary of the disposition of the case concerns the disputed retaliation claim. The judges joining the opinion are set out at the end of each summary.

First Circuit

Jury Issue (5 decisions; 4 decisions sustaining disputed claim)

Agusty-Reyes v. Dept. of Education, 601 F.3d 45, 56 (1st Cir. 2010) ("A reasonable jury could conclude that the intensification of [the supervisor's] harassment, following Agusty's several reports . . . and culminating in the sexual assault, met th[e] [*Burlington Northern*] requirement.") (reversing summary judgment for defendant) (Lynch, Torruella and Selya)

Billings v. Town of Grafton, 515 F.3d 39, 54 (1st Cir. 2008) ("Billings . . . came forward with enough objective evidence contrasting her former and current jobs to allow a jury to find a materially adverse employment action. A jury could find that, as a result of the transfer, Billings occupied an objectively less prestigious job, reporting to a lower ranked supervisor,

enjoying much less contact with the Board, the Town, and members of the public, and requiring less experience and fewer qualifications. . . . [A] jury could also find that the [new] position likely requires Billings to pay union dues and subjects her to union-associated mechanisms . . . (which threatens to cap her earning capacity), and punching a time card.") (reversing summary judgment for defendant) (Lynch, Cyr and Howard)

Lockridge v. University of Maine Sys., 597 F.3d 464, 473 (1st Cir. 2010) ("[W]e cannot see how one could find that the denial of Lockridge's request could 'dissuade a reasonable worker from making or supporting a charge of discrimination'" (quoting *Burlington Northern*) (affirming summary judgment for defendant) (Howard, Torruella and Boudin)

Pérez-Cordero v. Wal-Mart Puerto Rico, Inc., 656 F.3d 19, 32 (1st Cir. 2011) ("[A] reasonable jury could conclude that [the plaintiff's supervisor's] discriminatory harassment escalated in response to Pérez-Cordero's complaints. . . . A reasonable jury could interpret [subsequent reprisals] as both another increase in the severity of [the supervisor's] retaliation and a weightier deterrent to subsequent complaints.") (reversing summary judgment for defendant) (Lipez, Torruella and Ripple)

Tuli v. Brigham & Women's Hosp., 656 F.3d 33, 42 (1st Cir. 2011) ("Tuli provided sufficient evidence from which a jury could conclude that the consequences of the obligatory counseling ordered by the Hospital . . .

'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' . . . Obligatory counseling is not a typical adverse action but the impact here could be deemed sufficient by the jury *if* the action was prompted by a retaliatory motive.") (italics in original; quoting *Burlington Northern*) (affirming jury verdict for plaintiff) (Boudin, Lynch and Lipez)

Hybrid Standard (1 decision; 0 decisions sustaining disputed claim)

Morales-Vallellanes v. Potter, 605 F.3d 27, 33, 33 n.8, and 37-39 (1st Cir. 2010), *cert. denied,* 131 S.Ct. 978 (2011) ("Often, whether an employee has suffered a materially adverse employment action capable of supporting claims under Title VII is a question of law for the court. . . . [T]he existence of an adverse employment action may be a question for the jury when there is a dispute concerning the manner in which the action taken affected the plaintiff-employee . . . we conclude that the selective enforcement of breaks policy fails to rise to [the] level of actionable retaliation. . . . [w]e hold that this temporary rotation of Morales's . . . duties . . . fails to qualify as an adverse employment action. . . . Morales's temporary reassignment is a far cry from those situations where we have found actionable retaliation. . . . [W]e hold the temporary rotation of . . . duties . . . does not qualify as materially adverse. . . . We conclude that this alteration of rest days was insufficient to dissuade a reasonable employee from filing or supporting a charge

of discrimination.") (reversing verdict for plaintiff) (Torruella, Baldock and Howard)

Non-Jury Issue (7 decisions; no decisions sustaining disputed claim)

Ahern v. Shinseki, 629 F.3d 49, 56-57 (1st Cir. 2010) ("[A] minor delay in timing is not, in the circumstances of this case, significant enough to constitute a materially adverse action. . . . ("[W]e hold that this temporary interruption was not a materially adverse action.") (affirming summary judgment for defendant) (Selya, Lynch and Thompson)

Alvarado v. Donahoe, 687 F.3d 453, 461 (1st Cir. 2012) ("In assessing whether Alvarado can . . . show[ ] that he suffered a materially adverse action, we ascertain whether . . . any actions . . . 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' . . . [O]ur inquiry looks to separate the wheat from the chaff. . . . We do not believe that Alvarado has . . . establish[ed] that he suffered a materially adverse employment action. . . .") (quoting *Burlington Northern*) (affirming summary judgment for defendant) (Rehabilitation Act) (Torruella, Lynch and Selya)

Bhatti v. Trustees of Boston University, 659 F.3d 64, 73 (1st Cir. 2011) ("[T]hese reprimands were . . . not materially adverse and therefore not actionable.") (affirming summary judgment for defendant) (Thompson, Selya and Howard)

Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 20 (1st Cir. 2006) ("We turn to the retaliatory action alleged by Carmona and test it against the revised standard.") (affirming summary judgment for defendant) (Rehabilitation Act and Americans With Disabilities Act) (Hansen, Selya and Lynch)

Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17, 42, 45 (1st Cir. 2011) ("[W]e fail to see how the transfer [of the plaintiff's assistant] constituted a materially adverse action. . . . [T]he retaliatory harassment was "upsetting, but not severe; mildly humiliating, but not physically threatening.") affirming summary judgment for defendant) (Torruella, Lynch and Siler)

Gómez-Pérez v. Potter, 452 Fed.Appx. 3, 8-9 (1st Cir. 2011) "[T]hese pre-disciplinary personnel actions did not rise to the level of material adversity."; harassment by other workers did not "amount to materially adverse employment actions.") (affirming summary judgment for defendant) (Stahl, Lynch and Torruella)

Sánchez-Rodríguez v. AT&T Mobility P.R., Inc., 673 F.3d 1, 15 (1st Cir. 2012) (explaining it "is not the case here" that the employer's action would have deterred protected activity) (affirming summary judgment for defendant) (Torruella, Boudin and Dyk)

Second Circuit

Jury Issue (11 decisions; 7 decisions sustaining disputed claim)

Boland v. Town of Newington, 304 Fed.Appx. 7, 9-20 (2d Cir. 2008) (ADEA) ("Boland has not offered evidence from which a jury could reasonably find that the [employer's action] produced the requisite injury or harm.") (affirming summary judgment for employer) (Feinberg, Leval and Cabranes)

Cunningham v. New York State Dept. of Labor, 326 Fed.Appx. 617, 621 (2d Cir. 2009) (First Amendment) ("[P]laintiff must present evidence sufficient to create a genuine triable issue as to whether the [*Burlington Northern* standard was met]." (quoting *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 209. (2d Cir. 2006)) (Winter, Cabranes and Sack) (vacating for application of *Burlington Northern* standard)

Kaytor v. Electric Boat Corp., 609 F.3d 537, 556 (2d Cir. 2010) ("[T]here are genuine issues of fact to be tried as to whether the Company's treatment of Kaytor . . . 'well might have dissuaded a reasonable worker from making' those complaints.") (quoting *Burlington Northern*) (reversing summary judgment for employer) (Kearse, Cabranes and Hall)

Kercado-Clymer v. City of Amsterdam, 370 Fed.Appx. 238, 242 (2d Cir. 2010) (First Amendment) ("A reasonable trier of fact could find that the [defendant' actions] could all dissuade a reasonable worker from

making or supporting a charge of discrimination.") (holding on other grounds that defendant was entitled to qualified immunity) (Winter, Katzmann and Rakoff)

Kessler v. Westchester County Dep't. of Soc. Servs., 461 F.3d 199, 209-10 (2d Cir. 2006) (ADEA) ("[A] rational factfinder could permissibly infer that a reasonable employee in the position of [the plaintiff] could well be dissuaded from making a charge of discrimination if doing so would result in [the alleged retaliatory actions].") (reversing summary judgment for employer) (Kearse, Feinberg and Raggi)

Lore v. City of Syracuse, 670 F.3d 127, 164 (2d Cir. 2012) ("the jury could reasonably conclude that [the alleged retaliatory action] . . . might well have dissuaded a reasonable police officer from making a complaint of discrimination. . . .") (upholding jury finding of unlawful retaliation) (Kearse, Sack and Lynch)

Millea v. Metro-North R.R., 658 F.3d 154, 165 (2d Cir. 2011) (Family and Medical Leave Act) ("[A] reasonable jury could conclude that the [employer's action] constitutes retaliation under the proper jury instruction. . . .") (holding improper jury instruction with *Burlington Northern* standard was harmful error) (Jacobs, Hall and Scheindlin)

Ragusa v. Malverne Union Free Sch. Dist., 381 Fed.Appx. 85, 90 (2d Cir. 2010) (ADA) ("[A] reasonable jury could conclude that . . . [the employer's alleged retaliatory action] caused [the plaintiff] the requisite 'injury or harm.' ") (quoting Hicks v. Baines,

593 F.3d 159, 165 (2d Cir. 2010)) (reversing summary judgment for employer) (Raggi and Hall)

Rivera v. Rochester Genesee Reg'l Transp. Auth., 702 F.3d 685, 699-700 (2d Cir. 2012) ("[N]o reasonable jury could conclude that these acts . . . might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"; "A reasonable jury could find . . . that [the supervisor's] threat would 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming jury verdict for one plaintiff, overturning jury verdict for another plaintiff) (Lohier, Kearse and Droney)

Wrobel v. County of Erie, 211 Fed.Appx. 71, 73 (2d Cir. 2007) (First Amendment) ("A factfinder might well conclude that the defendants' [actions] . . . would be sufficient to dissuade a reasonable worker from asserting his First Amendment rights.") (overturning dismissal of complaint) (Calabresi, Cabranes and Korman)

Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 227 (2d Cir. 2006), *cert. denied*, 549 U.S. 1342 (2007) (First Amendment) ("We simply do not believe . . . that a jury could conclude that [the retaliatory action] would deter an individual of ordinary firmness, situated similarly to Zelnik, from exercising his free speech rights. . . .") (affirming summary judgment for employer) (Miner, Pooler and Rakoff)

Hybrid Standard (1 decision; 1 decision sustaining disputed claim)

Hicks v. Baines, 593 F.3d 159, 170 (2d Cir. 2010) ("[P]laintiffs' . . . claims, if believed by a jury, constitute 'adverse employment actions'. . . . A reasonable employee in plaintiffs' position 'may well be dissuaded' from participating in a discrimination investigation . . . if he knew that in retaliation, he would be [subjected to the alleged retaliatory actions].") (reversing summary judgment for employer) (Jacobs and Cabranes)

Both Standards Applied in the Same Case (1 decision; 1 decision sustaining disputed claim)

Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 570-71 (2d Cir. 2011) ("we . . . hold that . . . the [retaliatory action] was not a material adverse employment action."; "[N]o reasonable factfinder could have concluded that [the retaliatory action 'was the sort of action that would have dissuaded a reasonable employee in [the plaintiff's] position from complaining of unlawful discrimination.") (affirming decision overturning jury verdict) (Chin and Katzmann)

Non-Jury Issue (15 decisions; 3 decisions sustaining disputed claim)

Avillan v. Donahoe, 483 Fed.Appx. 637, 638 (2d Cir. 2012) ("These actions are not 'materially adverse.'") (affirming summary judgment for employer) (Jacobs, Chin and Droney)

Byrne v. Telesector Res. Group, Inc., 339 Fed.Appx. 13, 17 (2d Cir. 2009) ("[supervisor's actions] did not adversely affect the conditions of Byrne's employment in a material way. . . .") (affirming summary judgment for employer) (Raggi, Livingston and Korman)

Chacko v. DynAir Services, Inc., 272 Fed.Appx. 111, 113 n. 2 (2d Cir. 2008) ("[W]e find that under the circumstances this action would not 'have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (McLaughlin, Straub and Pooler)

Chang v. Safe Horizons, 254 Fed.Appx. 838, 839 (2d Cir. 2007) (The alleged retaliatory actions "do not constitute 'materially adverse' actions in the view of a 'reasonable employee.' . . . [The supervisor's] conduct . . . does not constitute action that 'would have dissuaded a reasonable worker from bringing a discrimination charge.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Feinberg, Sotomayor and Parker)

Cristofaro v. Lake Shore Central School Dist., 473 Fed.Appx. 28, 31 (2d Cir. 2012) ("[W]e conclude that the alleged retaliation does not rise to the level of an adverse employment action. . . . No reasonable employee would have been deterred from making or supporting a charge of discrimination based on [the alleged retaliation].") (affirming summary judgment for employer) (Sack, Raggi and Droney)

Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 721 (2d Cir. 2010) ("We agree with the district court . . . that [employer's action] did not constitute an adverse employment action against Fincher.") (affirming summary judgment for employer) (Sack, Livingston and Lynch)

Leifer v. New York State Division of Parole, 391 Fed.Appx. 32, 35 (2d Cir. 2010) (affirming summary judgment for employer) (alleged retaliatory conduct "did not result in a 'materially adverse' employment action that would 'dissuade[ ] a reasonable worker from making . . . a charge of discrimination.'") (quoting *Burlington Northern*) (Hall, Straub and Eaton)

Lewis v. City of Buffalo Police Dep't., 311 Fed.Appx. 417, 421 (2d Cir. 2009) (alleged retaliatory "action would not dissuade a reasonable worker in plaintiff's situation from making or supporting a charge of discrimination.") (affirming summary judgment for employer) (Raggi, Hall and Lynch)

Mullins v. City of New York, 626 F.3d 47, 54 (2d Cir. 2010) (Fair Labor Standards Act) ("There is . . . little doubt the evidence considered by the district court was sufficient to support the court's finding that the NYPD's action . . . disadvantaged Appellees.") (upholding preliminary injunction) (Pooler, Katzmann and Hall)

Patane v. Clark, 508 F.3d 106, 116 (2d Cir. 2007) ("These allegations surely meet *Burlington Northern*'s standard. Any reasonable employee that believed her employers would engage in [the alleged retaliatory

actions] if she engaged in Title VII protected activity would think twice about doing so.") (reversing dismissal of complaint) (Calabresi, Wesley and Brieant)

Roncallo v. Sikorsky Aircraft, 447 Fed.Appx. 243, 245-46 (2d Cir. 2011), *cert. denied*, 132 U.S. 1813 (2012) ("We conclude that . . . [the alleged retaliatory action] does not constitute a materially adverse employment action.") (affirming summary judgment for employer) (Sack, Katzmann and Wesley).

Uddin v. City of New York, 316 Fed.Appx. 4, 6 (2d Cir. 2008) (supervisor's "conduct 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination. . . .") (quoting *Burlington Northern*) (reversing summary judgment for employer) (Jacobs, Cabranes and Vitaliano)

Warren v. Goord, 2008 WL 5077004, at *2 (2d Cir., Nov. 26, 2008) (Americans With Disabilities Act) (alleged retaliatory transfer of inmate "did not constitute an adverse action" under *Burlington Northern* standard) (affirming summary judgment for employer) (Straub, Sack and Wesley)

Witkowich v. United States Marshals Serv., 424 Fed.Appx. 20, 22 (2d Cir. 2011) (ADEA) ("[T]he allegedly retaliatory acts of which he complains did not constitute adverse actions under the ADEA, as the acts of which he complains would not 'have dissuaded a reasonable employee in his position from complaining of unlawful discrimination.'") (quoting *Kessler*, 461 F.3d at 209) (affirming summary judgment for employer) (Kearse, Lynch and Wallace)

Wrobel v. County of Erie, 692 F.3d 22, 31 (2d Cir. 2012) (alleged retaliatory actions constitute "*de minimis* slights and . . . '[are] unlikely to deter a person of ordinary firmness from th[e] exercise [of First Amendment rights]'") (quoting *Zelnik*, 464 F.3d at 226) (First Amendment) (affirming summary judgment for employer) (Jacobs and Pooler)

Standard Unclear (6 decisions; 1 decision sustaining disputed claim)

Brown v. Paulson, 236 Fed.Appx. 654, 655 (2d Cir. 2007) (rejecting claim)

Douglass v. Rochester City School Dist., 2013 WL 2257831 (2d Cir., May 22, 2013) (rejecting claim)

Faul v. Potter, 355 Fed.Appx. 527, 530 (2d Cir. 2009) (sustaining claim)

Mauskopf v. District 20 of New York City Dep't. of Ed., 299 Fed.Appx. 100, 101 (2d Cir. 2008) (ADEA) (rejecting claim)

Spector v. Board of Trustees of Community Tech Colleges, 316 Fed.Appx. 18, 21 (2d Cir. 2009) (rejecting claim)

Timothy v. Our Lady of Mercy Medical Center, 233 Fed.Appx. 17, 21 (2d Cir. 2007) (rejecting claim)

Third Circuit

Jury Issue (5 decisions; 3 decisions sustaining disputed claim)

Anderson v. General Motors, No. 08-2540, 2009 WL 237247, at *4 (3d Cir. Feb. 3, 2009) ("no reasonable juror could conclude that [the employer's action] would dissuade a reasonable worker from pursuing his claim or filing a new one.") (affirming summary judgment for employer) (Fisher, Jordan and Van Antwerpen)

Moore v. City of Philadelphia, 461 F.3d 331, 346, 348 (3d Cir. 2006), *cert. denied sub nom. McKenna v. City of Philadelphia*, 132 U.S. 1918 (2012) ("A reasonable jury could conclude that William's supervisors took actions against him that might well dissuade a reasonable worker from filing or supporting a charge of discrimination."; "[A] reasonable jury could conclude that [the disputed] transfer . . . is the kind of action that might dissuade a police officer from making or supporting a charge of unlawful discrimination within his squad."; "[A]reasonable jury might well conclude that this pattern of harassment might dissuade a reasonable worker from bringing or supporting a charge of discrimination.") (reversing summary judgment for employer) (Stapleton, Fuentes and Alarcon)

Ridley v. Costco Wholesale Corp., 217 Fed.Appx. 130, 136 (3d Cir. 2007) ("We need only determine whether there was sufficient evidence to support the jury's finding . . . that Costco's . . . actions against Ridley were 'materially adverse.' . . . We conclude that the

evidence was sufficient for the jury to find that Costco's actions . . . 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming jury verdict for employer) (Rendell, Sloviter and Irenas)

Sanders v. Nicholson, 316 Fed.Appx. 161, 165 (3d Cir. 2009) ("[T]he factfinder could . . . accept Sanders' testimony that a promise of continued employment was made to him and that the VA reneged only after he charged his employer with discrimination.") (reversing summary judgment for employer) (McKee, Scirica and Smith)

Swain v. City of Vineland, 457 Fed.Appx. 107, 111-112 (3d Cir. 2012) ("Even viewing these incidents in the light most favorable to [plaintiff], none – singly or in combination – is significant enough to have dissuaded a reasonable worker from opposing discrimination. . . . [N]o reasonable factfinder could conclude that Swain was retaliated against. . . .") (affirming summary judgment for employer) (Barry, Hardiman and Slomsky)

Both Standards Applied in The Same Case (2 decisions; 1 decision sustaining disputed claim)

Hare v. Potter, 220 Fed.Appx. 120, 129, 132-33 (3d Cir. 2007) ("[W]e find Hare's failure to be selected [to participate in a program] a 'materially adverse' action"; "[T]here is competent evidence from which a jury could reasonably find the Post Office's actions . . .

were motivated out of retaliatory animus and created a hostile work environment."; "it would not be unreasonable for a jury to conclude that [plaintiff's supervisor] treated Hare more severely than he otherwise would have because of her pressing her EEOC claim [and] that such treatment would deter a reasonable employee from exercising her rights. . . ."") (reversing in part summary judgment for employer) (Van Antwerpen, Fuentes and Siler)

DiCampli v. Korman Communities, 257 Fed.Appx. 497, 501 (3d Cir. 2007) (Family and Medical Leave Act) ("the mere fact that the [allegedly retaliatory transfer] would have required a change in location and a longer commute is not sufficient to constitute an adverse action. . . . [W]e are unable to conclude that the proposed transfer . . . was so materially adverse as to deter a reasonable employee in DiCampli's position from exercising her FMLA rights."; insufficient evidence of retaliatory purpose to sustain plaintiff's claim "[e]ven if we were inclined to find that a reasonable trier of fact could find that the transfer . . . was an adverse action. . . .") (affirming summary judgment for employer) (Hardiman, McKee and Chagares)

Non-Jury Issue (7 decisions; 0 decisions sustaining disputed claim)

Allen v. National Railroad Passenger Corp., 228 Fed.Appx. 144, 148 (3d Cir. 2007) ("The actions that Allen alleges . . . simply do not rise to the level of

material adversity.") (affirming summary judgment for employer) (Ambro, McKee and Stapleton)

Estate of Oliva v. New Jersey Dept. of Law and Public Safety, 604 F.3d 788, 799 (3d Cir. 2010) (section 1981) ("The district court rejected Oliva's claim with respect to the first transfer because it caused him only a trivial harm. . . . We agree with the District Court. . . .") (affirming summary judgment for employer) (Greenberg, McKee and Barry)

Hanani v. N.J. Dep't of Envtl. Prot., 205 Fed.Appx. 71, 80 (3d Cir. 2006) (assignment of additional duties "does not rise to the level of material adversity") (affirming summary judgment for employer) (Siler, Barry and Van Antwerpen)

Kasper v. County of Bucks, 2013 WL 563342, at *5 (3d Cir., Feb. 15, 2013) (Family and Medical Leave Act) ("[T]he District Court properly determined that the disciplinary measure was not of such severity that it might dissuade a reasonable worker from taking FMLA leave.") (affirming dismissal of complaint) (Garth, Hardiman and Stark)

McCullers v. Napolitano, 427 Fed.Appx. 190, 196 (3d Cir. 2011) (per curiam) ("[W]e are not persuaded that [the allegedly retaliatory] actions . . . would have dissuaded a reasonable worker from engaging in protected EEO activity.") (affirming summary judgment for employer) (Rendell, Chagares and Aldisert)

Peace-Wickham v. Walls, 409 Fed.Appx. 512, 523 (3d Cir. 2010) ("We . . . conclude that Peace-Wickham's

allegations . . . do not amount to an adverse employment action."; other "allegations . . . cannot show that the [employer's allegedly retaliatory actions] . . . 'might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.") (affirming summary judgment for employer) (Van Antwerpen, Jordan and Hardiman)

Scofienza v. Verizon Pennsylvania, Inc., 307 Fed.Appx. 619, 622, 624 (3d Cir. 2008) ("we find that the [disciplinary action] did not constitute an adverse employment action. . . ."; "[T]hese actions . . . are insufficient to create a triable issue.") (Family and Medical Leave Act) (affirming summary judgment for employer) (Hardiman, Scirica and Fuentes)

Standard Unclear (3 decisions; 0 decisions sustaining disputed claim)

Morrison v. Carpenter Technology Corp., 193 Fed.Appx. 148, 154 (3d Cir. 2006)

Sykes v. Pennsylvania State Police, 311 Fed.Appx. 526, 529 (3d Cir. 2008)

Tarr v. Fedex Ground, 398 Fed.Appx. 815, 821 (3d Cir. 2010)

Fourth Circuit

Jury Issue (1 decision; 1 decision sustain disputed claim)

Equal Employment Opportunity Commission v. Cromer Food Services, Inc., 414 Fed.Appx. 602, 608-09 (4th Cir. 2011) ("The . . . question . . . is whether a reasonable jury could find that [the employer's] decision to switch Howard from the second to first shift constituted unlawful retaliation. . . . [The employer] argues . . . that its decision to transfer was not adverse; it does *not* claim that there was no causal connection between the two. . . . Here, a jury could easily conclude that the actions taken [by the employer] were adverse.") (reversing summary judgment for employer) (italics in original) (Gregory, Motz and King)

Non-Jury Issue (7 decisions; 4 decisions sustaining disputed claim)

Darveau v. Detecon, Inc., 515 F.3d 334, 343 (4th Cir. 2008) (Fair Labor Standards Act) ("Darveau has [sufficiently] alleged such [a materially adverse] action [under the *Burlington Northern* standard] here. . . .") (reversing dismissal of retaliation claim for failure to state a claim) (Motz, Gregory and Floyd)

Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011) ("The district court concluded that Hoyle's reassignment . . . ' . . . does not constitute an actionable adverse employment action.' We disagree. . . . [Such an] action[ ] might have dissuaded a reasonable worker from advancing a charge of discrimination.")

(affirming on other grounds summary judgment for employer) (Davis, Duncan and Wynn)

Mascone v. American Physical Society, Inc., 404 Fed.Appx. 762, 765 (4th Cir. 2010) (per curiam) ("the district court did not err in rejecting this claim") (affirming summary judgment for employer) (Agee, Wynn and Hamilton)

Parsons v. Wynne, 221 Fed.Appx. 197, 198 (4th Cir. 2007) (per curiam) ("Neither her [adverse] performance evaluation nor her removal from the alternative work schedule would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Williams, Michael and Motz)

Prince-Garrison v. Maryland Dept. of Health and Mental Hygiene, 317 Fed.Appx. 351, 355 (4th Cir. 2009) (per curiam) (reversing district court's dismissal on grounds that alleged reprisals did not meet *Burlington Northern* standard; see 526 F.Supp. 2d 550 (D.Md. 2007))) (Gregory, Shedd and Hamilton)

Pueschel v. Peters, 340 Fed.Appx. 858, 862 (4th Cir. 2009) ("We are not convinced that the adversity at issue here was material, given that we do not believe that Pueschel was entitled to the type of assistance or leave that she requested.") (affirming summary judgment for employer) (Gregory, Michael and King)

Wells v. Gates, 336 Fed.App'x 378, 384-85 (4th Cir. 2009) (per curiam) (first retaliatory act "would not

dissuade a reasonable worker from participating in protected conduct:"; second retaliatory act "did not constitute a materially adverse employment action."; regarding third retaliatory act, "we cannot say that a reasonable worker would not be dissuaded from engaging in protected conduct by [employer's action]. . . . To this extent, we disagree with the conclusion of the district court.") (affirming, in part on other grounds, summary judgment for employer) (Motz, Agee and Schroeder)

Fifth Circuit

Jury Issue (5 decisions; 3 decisions sustaining disputed claim)

Anthony v. Donahoe, 460 Fed.Appx. 399, 404 (5th Cir. 2012) (per curiam) ("Under all the circumstances of Anthony's case, a reasonable person would not conclude that her assignment to Port Allen would have dissuaded a reasonable worker from making charges of discrimination.") (affirming summary judgment for employer) (King, Jolly and Graves)

Donaldson v. CDB, Inc., 335 Fed.Appx. 494, 507 (5th Cir. 2009) (per curiam) ("[T]he new, *Burlington Northern* standard makes clear that a genuine issue of material fact exists for whether the [retaliatory] conduct against Donaldson . . . was such that it 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination'.") (quoting *Burlington*

Northern) (reversing summary judgment for employer) (Barksdale, Dennis and Elrod)

Fallon v. Potter, 277 Fed.Appx. 422, 429 (5th Cir. 2008) (per curiam) ("We are persuaded that Fallon's evidence presents a genuine fact issue as to whether [his supervisor's] statements would have discouraged a reasonable employee from continuing to pursue EEO claims. . . .") (reversing summary judgment for employer) (footnote omitted) (Higginbotham, Benavides and Dennis)

McArdle v. Dell Products, L.P., 293 Fed.Appx. 331, 337-38 (5th Cir. 2008) (per curiam) (Family and Medical Leave Act) ("Whether a reasonable employee would view the challenged action as materially adverse involves questions of fact generally left for a jury to decide. . . . In this case, a jury could certainly conclude the potential loss of $20,000 in annual compensation was materially adverse.") (reversing summary judgment for employer) (Barksdale, Benavides and Dennis)

McMorris v. Louisiana State Penitentiary, 261 Fed.Appx. 662, 663 (5th Cir. 2008) (per curiam) ("[A] rational jury could not find that the supervisor's alleged threat was so harmful that it 'could well dissuade a reasonable worker from making or supporting a charge of discrimination'.") (quoting *Burlington Northern*) (Wiener, Garza and Benavides)

Non-Jury Issue (23 decisions; 2 decisions sustaining disputed claims)

Allen v. Radio One of Texas II, LLC, 2013 WL 703832 (Feb. 26, 2013) (King, Smith and Barksdale)

Aryain v. Wal-Mart Stores Texas LP, 534 F.3d 473, 485-86 (5th Cir. 2008) ("As a matter of law, these allegations do not rise to the level of material adversity. . . . [W]e do not believe that Wal-Mart's act of transferring Aryain . . . to [a different] department . . . would dissuade a reasonable person from making or supporting a discrimination charge. . . . This [disputed] assignment would not dissuade a reasonable employee from making or supporting a charge of discrimination. . . . Aryain's allegations with regard to her break schedule fail, as a matter of law, to rise to the level of material adversity") (affirming summary judgment for employer) (Garza, Jolly and Reavley)

Browning v. Southwest Research Institute, 288 Fed.Appx. 170, 178-79 (5th Cir. 2008) ("[W]e are certain that Browning's . . . rotation out of the . . . position . . . would not dissuade a reasonable worker from making or supporting a charge of discrimination. . . . [W]e are also certain that this alleged threat would not dissuade a reasonable worker from making or supporting a charge of discrimination.") (affirming summary judgment for employer) (Jolly, Jones and Garwood)

DeHart v. Baker Hughes Oilfield Operations, Inc., 214 Fed.Appx. 437, 442 (5th Cir. 2007) (per curiam) ("Under the facts before us, we conclude that the

written warning to DeHart would not 'have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Jolly, Higginbotham and Dennis)

Grice v. FMC Technologies Inc., 216 Fed.Appx. 401, 407 (5th Cir. 2007) (per curiam) ("The allegedly retaliatory incidents of which Grice complains . . . do not appear to be the sort of actions that would dissuade a reasonable employee from reporting discrimination") (affirming summary judgment for employer) (DeMoss, Stewart and Prado)

Hernandez v. Johnson, 2013 WL 657697 at *4-6 (5th Cir. Feb. 22, 2013) (per curiam) ("[T]he loss of a personally assigned vehicle is not a materially adverse action. . . . We decline to find that this kind of petty annoyance [regarding travel vouchers] is a material adverse action. . . . [Plaintiff's supervisor's] single statement that was not even a direct threat was not a materially adverse employment action. . . . We also reject Hernandez's suggestion that these events considered cumulatively are an adverse employment action.") (affirming summary judgment for employer) (Stewart, Davis and Clement)

Holloway v. Dept. of Veterans Affairs, 309 Fed.Appx. 816, 820 (5th Cir. 2009) (per curiam) ("[T]he district court correctly found that [plaintiff's supervisor's] statement was insufficient to constitute a 'materially adverse' employment action. . . .") (affirming summary judgment for employer) (Garwood, Dennis and Prado)

King v. Louisiana, 294 Fed.Appx. 77, 85 (5th Cir. 2008) (per curiam) ("unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as . . . retaliation. . . . Even under the broadest conceivable reading of *Burlington Northern*, the only conduct remotely actionable . . . that a reasonable employee would have found to be materially adverse, is the undesirable work assignment; the missed salary increase because of an average evaluation; and her 'constructive discharge.'") (affirming summary judgment for employer) (Jolly, Benavides and Haynes)

LeMaire v. Louisiana Dept. of Transportation and Development, 480 F.3d 383, 390 (5th Cir. 2007) ("LeMaire's suspension is an adverse employment action, as a two-day suspension without pay might have dissuaded a reasonable employee from making a charge of discrimination.") (reversing summary judgment for employer) (Prado and Barksdale)

Love v. Motiva Enterprises LLC, 349 Fed.Appx. 900, 904 (5th Cir. 2009) (per curiam) ("The negative comments and the Oral Reminder would not have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Reavley and Smith, Dennis concurring as to retaliation claims)

Lushute v. Louisiana, Dept. of Social Services, 479 Fed.Appx. 553, 555 (5th Cir. 2012) (per curiam)

(Family and Medical Leave Act) ("The change in Lushute's work schedule . . . from a four day week to a five day week. . . . would not have dissuaded a reasonable worker from making or supporting a charge of discrimination.") (affirming summary judgment for employer) (Higginbotham, Davis and Elrod)

Magiera v. City of Dallas, 389 Fed.Appx. 433, 437 and n. 4 (5th Cir. 2010) (per curiam) ("[T]he first three acts of alleged retaliation fail to satisfy the materiality standard."; "Accordingly, we conclude that Magiera did not suffer a materially adverse action when she was sent home from work")) (affirming summary judgment for employer) (Davis, Smith and Haynes)

McCullough v. Kirkum, 212 Fed.Appx. 281, 285 (5th Cir. 2006) (per curiam) ("These actions are not the sort that would dissuade a reasonable employee from reporting discrimination.") (affirming summary judgment for employer) (Smith, Wiener and Owen)

Mitchell v. Snow, 326 Fed.Appx. 852, 856 (5th Cir. 2009) ("The district court's finding – that an employment review lower than Mitchell expected would not have dissuaded a reasonable employee from asserting discrimination – is correct.") (affirming summary judgment for employer) (Smith, Stewart and Southwick)

Muttathottil v. Mansfield, 381 Fed.Appx. 454, 458 (5th Cir. 2010) (per curiam) (supervisor's objection that plaintiff had "filed too many EEO complaints" not actionable; "Muttathottil contends this statement might dissuade a worker from making former

complaints. . . . This interpretation of *Burlington Northern* is overbroad. . . . [W]e interpret § 704(a) to prohibit threatened or actual retaliatory *action*, not mere speech") (italics in original) (affirming summary judgment for employer) (Jolly, Garza and Miller)

Ogden v. Potter, 397 Fed.Appx. 938, 939 (5th Cir. 2010) (per curiam) ("A single denial of leave is not an adverse employment action . . . because a reasonable employee would not have found the action to be materially adverse.") (affirming summary judgment for employer) (Reavley, Dennis and Clement)

Peace v. Harvey, 207 Fed.Appx. 366, 369 (5th Cir. 2006) ("[T]hese incidents . . . fail the *Burlington Northern* standard") (affirming summary judgment for employer) (Davis, Barksdale and Benavides)

Pryor v. Wolfe, 196 Fed.Appx. 260, 263 (5th Cir. 2006) (per curiam) ("Pryor's complaint . . . that he was deprived of earned compensation in retaliation for filing an EEOC complaint . . . would constitute an adverse employment action") (footnote and emphasis omitted) (reversing summary judgment for employer) (King, Davis and Owen)

Roberts v. Unitrin Specialty Lines Ins. Co., 405 Fed.Appx. 874, 879 (5th Cir. 2010) (per curiam) ("[T]he transfer of some of [plaintiff's] job duties [to another worker] is not an adverse employment action under these circumstances. . . .") (affirming summary judgment for employer) (Higginbotham, Smith and Haynes)

Sabzevari v. Reliable Life Ins. Co., 264 Fed.Appx. 392, 396 (5th Cir.) (per curiam), *cert. denied,* 555 U.S. 821 (2008) ("[D]enial of the lateral transfer [requested by plaintiff] is not a materially adverse employment action. . . .") (affirming summary judgment for employer) (Jones, Wiener and Clement)

Simmons-Myers v. Caesars Entertainment Corp., 2013 WL 697226 at *4 (5th Cir., February 26, 2013) (per curiam) ("The written warnings . . . do not constitute materially adverse actions under this standard, nor would they have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (King, Clement and Higginson)

Smith v. Harvey, 265 Fed.Appx. 197, 202 (5th Cir. 2008) (per curiam) ("[T]he incidents Smith describes were not sufficiently harmful that they would dissuade a reasonable worker from making or supporting a charge of discrimination.") (affirming summary judgment for employer) (Jolly, Dennis and Prado)

Stewart v. Mississippi Transp. Comm'n, 586 F.3d 321, 332-33 (5th Cir. 2009) ("As a matter of law, the latter three of these allegations do not rise to the level of material adversity. . . . Stewart's administrative leave was not, under these circumstances, an adverse action. . . . Stewart's. . . . reassignment, although imposing more work, carried greater responsibility and would not dissuade a reasonable employee from charging discrimination.") (affirming summary judgment for employer) (Jones, Prado and Haynes)

Standard Unclear (3 decisions; 0 decisions sustaining disputed claims)

Johnson v. TCB Construction Co., Inc., 334 Fed.Appx. 666, 671 (5th Cir. 2009) (per curiam) (affirming summary judgment for employer) (Wiener, Dennis and Clement)

Stingley v. Den-Mar Inc., 347 Fed.Appx. 14, 19 (5th Cir. 2009) (per curiam), *cert. denied*, 130 S.Ct. 1888 (2010) (affirming summary judgment for employer) (Davis, Garza and Prado)

Thomas v. Kent, 401 Fed.Appx. 864, 866 (5th Cir. 2010) (per curiam) (affirming summary judgment for employer) (Davis, Wiener and Dennis)

Sixth Circuit

Jury Issue (4 decisions; 4 decisions sustaining disputed claim)

Austion v. City of Clarksville, 244 Fed.Appx. 639, 653 (6th Cir. 2007) ("[T]he jury could have found that an adverse employment action occurred. . . . The jury could have found that the change in work hours . . . 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination,' thus amounting to an adverse action.") (quoting *Burlington Northern*) (upholding jury verdict) (Batchelder, Merritt and Heyburn)

Galeski v. City of Dearborn, 435 Fed.Appx. 461, 470 (6th Cir. 2011) ("A reasonable jury could find that

any of the above listed actions could have deterred Galeski from further complaining about sexual harassment.") (affirming on other grounds summary judgment for employer) (Keith, Clay and Cook)

Kyle-Eiland v. Neff, 408 Fed.Appx. 933, 941 (6th Cir. 2011) ("Kyle-Eiland has presented evidence sufficient for a reasonable factfinder to conclude that the [allegedly retaliatory action] constituted an adverse employment action.") (affirming on other grounds summary judgment for employer) (Clay, Daughtrey and White)

Miller v. City of Canton, 319 Fed.Appx. 411, 419, 421 (6th Cir. 2009) (First Amendment) ("[A] reasonable jury could find that [the harm caused by the alleged retaliatory act] would constitute a hardship for the average officer and would chill the exercise of First Amendment rights."; "We assume without deciding that a reasonable jury could find that the City's [action] was an adverse action. . . .") (reversing in part and affirming in part on other grounds summary judgment for employer)) (Gibbons, White and Tarnow)

Both Standards Applied in the Same Opinion (2 decisions; 1 decision sustaining disputed claim)

Hill v. Nicholson, 383 Fed.Appx. 503, 512-13 (6th Cir. 2010) ("Viewing [the supervisor's] conduct in its totality, a reasonable jury could find that Hill suffered an adverse employment action. . . . [W]e conclude that [the supervisor's actions] amounted to an 'adverse

employment action.'") (reversing summary judgment for employer) (Moore, Martin and Siler)

Hunter v. Secretary of the United States Army, 565 F.3d 986, 996-97 (6th Cir. 2009) ("We conclude that no reasonable jury would find these allegedly retaliatory acts so adverse that they would dissuade a reasonable employee from making a charge of discrimination. . . . [W]e conclude that . . . [another alleged retaliatory action] simply does not rise to the level of a materially adverse employment action.") (affirming on other grounds summary judgment for employer) (Gilman, Guy and Cook)

Non-Jury Issue (26 decisions; 12 decisions sustaining disputed claim)

A.C. v. Shelby County Bd. Of Ed., 711 F.3d 687, 698 (6th Cir. 2012) (Rehabilitation Act and Americans With Disabilities Act) (allegedly retaliatory act "would surely be enough to dissuade many reasonable parents from seeking accommodations at school.") (reversing summary judgment for defendant) (Batchelder, Keith and Martin)

Arnold v. City of Columbus, 2013 WL 628447 at *5 and *6 (6th Cir., Feb. 20, 2013) (certain alleged retaliatory actions did not "constitute adverse employment actions"; another alleged retaliatory action "constitutes an adverse employment action"; another alleged retaliatory action "qualifies as an adverse employment action") (affirming in part on other grounds

summary judgment for employer) (Siler, White and Reeves)

Blizzard v. Marion Technical College, 698 F.3d 275, 290 (6th Cir. 2012), *cert. denied*, 2013 WL 1217957 (May 13, 2013) (alleged retaliatory action "was not a materially adverse employment action for the purposes of Blizzard's retaliation claim.") (affirming summary judgment for employer) (Reeves, Siler and White)

Cecil v. Louisville Water Co., 301 Fed.Appx. 490, 501 (6th Cir. 2008) ("Many of the retaliatory acts Cecil alleges are insufficient to constitute materially adverse actions."; certain alleged retaliatory acts "strike us as . . . 'petty slights or minor annoyances.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (McKeague, Kennedy and Sutton)

Jordan v. City of Cleveland, 464 F.3d 584, 596 (6th Cir. 2006) (alleged retaliatory action "would more than amply qualify as a materially adverse action as to any reasonable employee for Title VII purposes.") (affirming jury verdict for plaintiff) (Shadur, Moore and Gibbons)

Coleman v. Arc Automotive, Inc., 255 Fed.Appx. 948, 953 (6th Cir. 2007) ("It cannot reasonably be argued that those [allegedly retaliatory] circumstances would have dissuaded a reasonable worker from asserting Title VII protections."; allegedly retaliatory action "cannot be considered materially adverse"; allegedly retaliatory actions "simply would not have dissuaded a reasonable employee from asserting Title VII

protections.") (affirming summary judgment for employer) (Rogers, Merritt and McKeague)

Finley v. City of Trotwood, 503 Fed.Appx. 449, 454 (6th Cir. 2012) ("The district court correctly decided that [plaintiff's] first two claimed acts of retaliation are not materially adverse actions under federal or state law. . . . Her other examples also fall short.") (affirming summary judgment for employer) (Cook, Siler and Steeh)

Halfacre v. Home Depot, U.S.A., Inc., 221 Fed.Appx. 424, 433 (6th Cir. 2007) (alleged retaliatory acts, if they occurred and had the alleged effect, "are . . . materially adverse") (remanding case for further discovery) (Cole, Sutton and Cook)

Howington v. Quality Restaurant Concepts, LLC, 298 Fed.Appx. 436, 447 (6th Cir. 2008) (alleged retaliatory action "would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (reversing summary judgment for employer) (Clay, Kethledge and Oliver)

James v. Metropolitan Government of Nashville and Davidson County, 243 Fed.Appx. 74, 79 (6th Cir. 2007), *cert. denied*, 552 U.S. 1140 (2008) (allegedly retaliatory actions "would not have dissuaded a reasonable person from filing a Title VII claim.") (reversing jury verdict) (Mills, Gilman and Cook)

Jones v. Johanns, 264 Fed.Appx. 463, 469 (6th Cir. 2007) ("[w]e conclude that [allegedly retaliatory

actions] do not constitute a materially adverse action under the *Burlington Northern* standard. These are not the types of actions that 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' . . . [W]e do not find that these [actions] would dissuade a reasonable employee from making or supporting a charge of discrimination.") (quoting *Burlington Northern*) (affirming summary judgment for employer) (O'Malley, Rogers and Cook)

Kurtz v. McHugh, 423 Fed.Appx. 572, 579 (6th Cir. 2011) ("While petty, juvenile, and annoying, we agree with the district court that a reasonable employee would not find [the allegedly retaliatory action] materially adverse. . . .") (affirming summary judgment for employer) (Guy, Clay and McKeague)

Lahar v. Oakland County, 304 Fed.Appx. 354, 358-59 (6th Cir. 2008) (per curiam) (Age Discrimination in Employment Act) (alleged retaliatory actions "do not rise to the level of a *materially* adverse action because they would not have influenced a reasonable employee's decisionmaking process.") (emphasis in original) (affirming summary judgment for employer) (Batchelder, Clay and Sutton)

Michael v. Caterpillar Financial Services Corp., 496 F.3d 584, 596 (6th Cir. 2007) ("The retaliatory actions alleged by Michael . . . appear to meet this relatively low bar [of constituting a materially adverse actions].") (affirming on other grounds summary judgment for employer) (Gilman, Clay and McKeague)

Perkins v. Harvey, 368 Fed.Appx. 640, 648 (6th Cir. 2010) (per curiam) (allegedly retaliatory act "standing alone, is not one that is 'sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination.' ") (affirming summary judgment for employer) (Keith, Boggs and Griffin)

Pettit v. Steppingstone, Center for the Potentially Gifted, 429 Fed.Appx. 524, 532-33 (6th Cir. 2011) (Fair Labor Standards Act) (allegedly retaliatory act "cannot constitute adverse action."; other alleged retaliatory acts "do not qualify as materially adverse.") (Stranch, Martin and Thapar)

Randolph v. Ohio Dept. of Youth Services, 453 F.3d 724, 736-37 (6th Cir. 2006) (allegedly retaliatory action "constitutes a materially adverse action under Title VII . . . ") (reversing summary judgment for employer) (Gibbons, Clay and Steeh)

Russell v. Ohio, Dept. of Administrative Services, 302 Fed.Appx. 386, 393-94 (6th Cir. 2008) ("[a] reasonable employee would not be dissuaded from making a charge of discrimination by the knowledge that her employer might . . . respond . . . in a manner not fully to the employee's liking.") (affirming summary judgment for employer) (Rogers, Norris and Kethledge)

Sanford v. Main Street Baptist Church Manor, Inc., 327 Fed.Appx. 587, 599 (6th Cir. 2009) ("[t]he incidents taken together might dissuade a reasonable worker from making or supporting a discrimination charge.") (reversing summary judgment for employer) (Oliver); see 327 Fed.Appx. at 604 (Clay, J.,

concurring and dissenting) ("I would allow a jury to decide the extent to which Sanford suffered tangible job detriments. . . .")

Schramm v. LaHood, 318 Fed.Appx. 337, 346 (6th Cir. 2009) (per curiam), *cert. denied*, 130 S.Ct. 2090 (2010) (alleged retaliatory action "might well deter a reasonable individual from engaging in [protected] activity. . . .") (affirming on other grounds summary judgment for employer) (McKeague, Griffin and Weber)

Spence v. Donahoe, 2013 WL 628524 at *10-11 (6th Cir., Feb. 21, 2013) (affirming summary judgment for employer) (allegedly retaliatory act "would not dissuade a reasonable person from making or supporting a charge of disability discrimination."; "We also do not believe that [another allegedly retaliatory action] constitutes an adverse action. . . .") (White, Siler and Daughtrey)

Szeinbach v. Ohio State University, 493 Fed.Appx. 690, 694 (6th Cir. 2012) (one percent salary-increase differential "constitute[s] a significant change in employment status" and thus a materially adverse action) (quoting *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402-03 (6th Cir. 2008)) (reversing summary judgment for employer)) (White, Stranch and Farris)

Taylor v. Geithner, 703 F.3d 328, 338, 339 (6th Cir. 2013) ("[T]he written reprimands here would not have dissuaded a reasonable worker from making a claim of discrimination."; "Taylor's averment that she applied for and was rejected from fifty-two positions

is plainly an adverse employment action under binding precedent.") (reversing in part summary judgment for employer)) (Moore and Merritt)

Vaughn v. Louisville Water Co., 302 Fed.Appx. 337, 348 (6th Cir. 2008) ("Many of the retaliatory acts Vaughn alleges are insufficient to constitute materially adverse actions."; "Several of Vaughn's other allegedly retaliatory acts to not rise to the level of a materially adverse action."; particular allegedly retaliatory actions "would not have dissuaded a reasonable worker from filing a charge.") (affirming summary judgment for employer) (McKeague, Sutton and Kennedy)

Watson v. City of Cleveland, 202 Fed.Appx. 844, 855 (6th Cir. 2006) ("Under the circumstances in this case, Watson was not subject to an adverse employment action. . . . In context, these [allegedly retaliatory] actions would not dissuade a reasonable employee from invoking the protections of Title VII.") (affirming summary judgment for employer) (Gibbons, Boggs and Griffin)

Wharton v. Gorman-Rupp Co., 309 Fed.Appx. 990, 998 (6th Cir. 2009) (allegedly retaliatory action "qualifies as a materially adverse employment action. . . . [Such a retaliatory action] is likely to dissuade any reasonable worker from making or supporting a charge of discrimination.") (reversing summary judgment for employer) (Griffin, Suhrheinrich and Kethledge)

Standard Unclear (4 decisions; 0 decisions sustaining disputed claim)

Deters v. Rock-Tenn Co., Inc., 245 Fed.Appx. 516, 528-31 (6th Cir. 2007) (affirming summary judgment for employer)

Garner v. Cuyahoga County Juvenile Court, 554 F.3d 624, 640 (6th Cir. 2009) (affirming in relevant part summary judgment for employer)

Kessler v. Riccardi, 363 Fed.Appx. 350, 356 (6th Cir. 2010) (affirming in relevant part summary judgment for employer)

Rodriguez-Monguio v. Ohio State University, 499 Fed.Appx. 455, 467 (6th Cir. 2012) (affirming summary judgment for employer)

Seventh Circuit

Jury Issue (3 decisions; 3 decisions sustaining disputed claim)

Lewis v. City of Chicago Police Dep't, 496 F.3d 645, 655 (7th Cir. 2007) ("Lewis has provided sufficient evidence in the record that [the employer's] retaliatory action is such that a 'reasonable employee would be dissuaded from engaging in the protected activity.' . . . As required in reviewing a summary judgment, we must credit Lewis's competent evidence. . . .") (reversing summary judgment for employer) (Kanne, Wood and Williams);

O'Neal v. City of Chicago, 588 F.3d 406, 409 and 410 (7th Cir. 2009) ("testi[mony] that repetitive reassignments 'would negatively affect [one's] ability to be promoted. . . .' . . . raise[d] an issue of fact with regard to [the allegedly retaliatory] transfers being adverse employment actions.") (reversing summary judgment for employer) (Bauer, Wood and Williams)

Pantoja v. American NTN Bearing Mfg. Corp., 495 F.3d 840, 849 (7th Cir. 2007) ("Taking the facts in the light most favorable to Pantoja, there is enough in the record here for a factfinder to conclude that these warnings were materially adverse.") (reversing summary judgment for employer) (Wood, Easterbrook and Williams)

Both Standards Applied in the Same Opinion (2 decisions; 2 decisions sustaining disputed claim)

Nagle v. Village of Calumet Park, 554 F.3d 1106, 1121 (7th Cir. 2009) ("we find that the [first alleged retaliatory action] does not constitute an adverse action"; "a reasonable jury . . . could find that [the second alleged retaliatory action] would dissuade a reasonable employee from making or supporting a charge of discrimination.") (affirming summary judgment for employer, in part on other grounds) (Williams, Flaum and Evans)

Benuzzi v. Board of Ed. Of the City of Chicago, 647 F.3d 652, 666 (7th Cir. 2011) ("[one alleged retaliatory action] undoubtedly satis[fies] the materially adverse standard. . . . Equally clear is that [the second alleged

retaliatory act] does not. . . . Whether the [third and fourth alleged retaliatory acts] were materially adverse present much closer questions that will be best resolved by a jury. . . . We leave that question for a jury to assess in the first instance. . . .") (affirming summary judgment for employer on one claim; reversing summary judgment on three claims) (Tinder, Wood and Flaum)

Non-Jury Issue (21 decisions; 2 decisions sustaining disputed claim)

Allen v. American Signature, Inc., 272 Fed.Appx. 507, 511 (7th Cir.), *cert. denied*, 555 U.S. 893 (2008) (alleged retaliatory acts "do not rise to the 'materially adverse' level") (affirming summary judgment for employer) (Posner, Wood and Evans)

Arizanovska v. Wal-Mart Stores, Inc., 682 F.3d 698, 704 (7th Cir. 2012) ("We find that she has suffered a materially adverse employment action. . . .") (affirming summary judgment on other grounds) (Easterbrook, Bauer and Chang)

Breneisen v. Motorola, Inc., 512 F.3d 972, 980, 982 (7th Cir. 2008) ("[W]e cannot conclude that [one alleged retaliatory action] was not an adverse employment action or materially adverse action. . . . The district court erred in granting. . . . summary judgment"; "most of the alleged actions are too trivial to be actionable"; [alleged retaliatory action] does not amount to a materially adverse action") (affirming summary judgment for employer on one claim; reversing

summary judgment for employer on another claim) (Williams, Bauer and Wood)

Brown v. Advocate South Suburban Hospital, 700 F.3d 1101, 1107-08 (7th Cir. 2012) ("We do not think this sort of behavior constitutes a materially adverse employment action."; "[W]e are confident that the [allegedly retaliatory actions] were not materially adverse"; "we do not think that [the alleged retaliatory actions] would dissuade a reasonable person from complaining of discrimination.") (affirming summary judgment for employer) (Kanne, Posner and Sykes)

Cain v. Locke, 483 Fed.Appx. 276, 281 (7th Cir. 2012) (alleged retaliatory harassment does not "meet the standard for a materially adverse action. . . . [It] would not dissuade a reasonable employee from making a charge of discrimination.") (affirming summary judgment for employer) (Posner, Sykes and Tinder)

Cole v. Illinois, 562 F.3d 812, 816-17 (7th Cir. 2009) (Family and Medical Leave Act) (the alleged retaliatory action "did not constitute an adverse action that would cause a reasonable employee to forego exercising her rights under the FMLA"; alleged retaliatory conditions "would not dissuade a reasonable person from exercising her rights"; "we conclude that [the allegedly retaliatory] require[ment] . . . was not a materially adverse action.") (affirming summary judgment for employer) (Manion, Evans and Tinder)

Crews v. City of Mt. Vernon, 567 F.3d 860, 869-70 (7th Cir. 2009) (Uniformed Services Employment and

Reemployment Rights Act) ("Applying the 'materially adverse' standard to Crews's claim, it is clear that Crews suffered no actionable retaliation."; alleged retaliatory actions "are not severe enough to be actionable retaliation."; "[W]e do not see how [the alleged retaliatory action] would dissuade a 'reasonable employee' from asserting his USERRA rights") (affirming summary judgment for employer) (Tinder, Manion and Evans)

Harper v. C.R. England, Inc., 687 F.3d 297, 306 n. 31 (7th Cir. 2012) ("We . . . do not believe that a reasonable employee would be discouraged from filing a Title VII complaint as a result of the [allegedly retaliatory] actions taken against Mr. Harper.") (affirming summary judgment for employer) (Ripple, Rovner and Coleman)

Henry v. Milwaukee County, 539 F.3d 573, 586-87 (7th Cir. 2008) ("We agree with the district court that the alleged incidents . . . will not create such deterrence. . . . [T]hese incidents do not rise to the level of an adverse action under the anti-retaliation provision of Title VII. . . .") (affirming summary judgment for employer) (Ripple, Easterbrook and Rovner)

Jordan v. Chertoff, 224 Fed.Appx. 499, 502 (7th Cir. 2007) ("[N]o reasonable employee could have found any action of which she complains materially adverse.") (affirming summary judgment for employer) (Bauer, Manion and Williams)

Lapka v. Chertoff, 517 F.3d 974, 986 (7th Cir. 2008) ("[T]he fact that the lower rating prevented her from

a merit bonus is not enough to make it a materially adverse action.") (affirming summary judgment for employer) (Cudahy, Easterbrook and Sykes)

Lucero v. Nettle Creek School Corp., 566 F.3d 720, 730 (7th Cir. 2009) ("Lucero's reassignment from 12th grade English teacher to 7th grade English teacher would not dissuade a reasonable teacher from bringing a discrimination charge against defendants, as required by *Burlington*. No reasonable employee would see her reassignment as materially adverse.") (affirming summary judgment for employer) (Flaum, Bauer and Evans)

Matthews v. Wisconsin Energy Corp. Inc., 534 F.3d 547, 559 (7th Cir. 2008) (alleged retaliatory action "does not constitute an adverse employment action" and would not "have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming in relevant part summary judgment for employer) (Flaum, Ripple and Rovner)

Palermo v. Clinton, 437 Fed.Appx. 508, 511 (7th Cir. 2011) ("Those comments are not sufficient to dissuade a reasonable employee from filing a discrimination claim.") (affirming summary judgment for employer) (Bauer, Sykes and Hamilton)

Porter v. City of Chicago, 700 F.3d 944, 957 (7th Cir. 2012) ("[W]e doubt that Porter's assignment . . . was a materially adverse action for purposes of her retaliation claim. . . . [W]e do not think the treatment Porter received would dissuade a reasonable worker from

seeking an accommodation [for her religious views].") (affirming summary judgment for employer) (Bauer, Posner and Wood)

Roney v. Illinois Dept. of Transportation, 474 F.3d 455, 461 (7th Cir. 2007) ("[I]t is unlikely that a reasonable employee would view Roney's [allegedly retaliatory] assignment as materially adverse."; "[I]t is unlikely that [the second alleged retaliatory action] would have deterred a reasonable employee from making a charge of discrimination."; "Roney's remaining claims of retaliation . . . also fall short of constituting a materially adverse action.") (affirming summary judgment for employer) (Williams, Easterbrook and Flaum)

Schmidt v. Canadian National Rwy. Corp., 232 Fed.Appx. 571, 575 (7th Cir. 2007) ("even if [certain types of retaliatory actions, including hitting the employee] could ever deter that employee from engaging in a protected activity, in this case, they do not rise to the level of a materially adverse action.") (affirming summary judgment for employer) (Easterbrook, Posner and Evans)

Smith v. Sebelius, 484 Fed.Appx. 38, 42 (7th Cir. 2012) ("Such actions generally do not constitute adverse actions of the type likely to dissuade protected activity, . . . and Smith offers no reason to believe that her case is extraordinary.") (affirming summary judgment for employer) (Cudahy, Wood and Sykes)

Stephens v. Erickson, 569 F.3d 779, 790 (7th Cir. 2009) ("The district court addressed these claims . . .

and determined that they were not materially adverse actions. We agree . . . "; alleged retaliatory act "is not an actionable harm"; asserted retaliatory isolation "is not the type of harm that Title VII contemplates, nor would it dissuade a reasonable employee from complaining of discrimination.") (affirming summary judgment for employer) (Kanne, Wood and Sykes)

Thomas v. Potter, 202 Fed.Appx. 118, 119 (7th Cir. 2006), *cert. denied*, 551 U.S. 1146 (2007) ("Thomas's assertion that the shift change was undesirable or inconvenient to him does not rise to the level of harm sufficiently serious to 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Posner, Wood and Evans); see 145 Fed.Appx. 182 (7th Cir. 2005)

Whigum v. Keller, Crescent Co., 260 Fed.Appx. 910, 913 (7th Cir. 2008) (allegedly retaliatory assignments "would not dissuade a reasonable employee from pursuing a claim of discrimination.") (affirming summary judgment for employer) (Posner, Flaum and Evans)

Standard Unclear (3 decisions; 0 decisions sustaining disputed claim)

Hoppe v. Lewis University, 692 F.3d 833, 842 (7th Cir. 2012) (affirming summary judgment for employer)

Metzger v. Illinois State Police, 519 F.3d 677, 683 (7th Cir. 2008) (affirming summary judgment for employer)

Szymanski v. County of Cook, 468 F.3d 1027, 1031 (7th Cir. 2006) (affirming summary judgment for employer)

Eighth Circuit

Jury Issue (1 decision; 0 decisions sustaining disputed claim)

Stewart v. Independent School Dist. No. 186, 481 F.3d 1034, 1046 (8th Cir. 2007) (ADA and ADEA) ("no reasonable jury could find that the [employer's action] is the type of response that could 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.' ") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Melloy, Loken and Lay)

Non-Jury Issue (14 decisions; 1 decision sustaining disputed claim)

Carpenter v. Con-Way Central Express, Inc., 481 F.3d 611, 618 (8th Cir. 2007) ("we find [the mistreatment of the plaintiff] not so severe and pervasive as to create a hostile work environment. The effect of the conduct [was] . . . not actionable") (affirming summary judgment for employer) (Bye, Loken and Shepherd)

Clegg v. Arkansas Dept. of Correction, 496 F.3d 922, 929 (8th Cir. 2007) (USERRA) ("After reviewing the record and applying the standard set forth in *Burlington Northern*, we agree with the district court's determination that Ms. Clegg failed to demonstrate that she suffered an adverse employment action.") (affirming summary judgment for employer) (Hansen, Colloton and Gruender)

Devin v. Schwan's Home Service, Inc., 491 F.3d 778, 786-88 (8th Cir. 2007) ("[A]ny harm from this incident . . . cannot meet the *White* standard. . . . [W]e conclude [these retaliatory actions] would not have deterred a reasonable employee from engaging in protected activity. . . . We conclude a reasonable employee would not have been dissuaded from engaging in protected activity because of the [allegedly retaliatory] meeting") (affirming summary judgment for employer) (Bye, Smith and Beam)

Fanning v. Potter, 614 F.3d 845, 850 (8th Cir. 2010) ("We are not convinced that an objectively reasonable employee would find the [alleged retaliatory actions] to be a serious hardship that would dissuade her from making a charge of discrimination.") (affirming summary judgment for employer) (Colloton, Bye and Arnold)

Gilbert v. Des Moines Area Community College, 495 F.3d 906, 917-18 (8th Cir. 2007) (affirming summary judgment for employer) ("The district court determined that although Gilbert's demotion constituted an adverse employment action, the remaining events

did not. We agree. . . . [W]e cannot say the [disciplinary] letter would 'have dissuaded a reasonable worker from making or supporting a charge of discrimination.' . . . [The College President's action] would not have deterred a reasonable employee from engaging in protected activity.") (quoting *Burlington Northern*) (Riley, Hansen and Melloy)

Helton v. Southland Racing Corp., 600 F.3d 954, 961 (8th Cir. 2010) (per curiam) ("Ms. Helton . . . has not demonstrated a materially adverse action against her.") (affirming summary judgment for employer) (Loken and Benton)

Higgins v. Gonzales, 481 F.3d 578, 590-91 (8th Cir. 2007) ("Applying the new standard [in *Burlington Northern*], we find Higgins has not met her burden. . . . [W]e cannot conclude that move [from Rapid City to Pierre] was materially adverse.") (affirming summary judgment for employer) (Bye, Colloton and Benton)

Hill v. City of Pine Bluff, Ark., 696 F.3d 709, 715 (8th Cir. 2012) (First Amendment) ("We agree with the district court there was clearly no such chilling effect in this case.") (affirming summary judgment for employer) (Loken, Gruender and Benton)

Jackson v. United Parcel Service, Inc., 548 F.3d 1137, 1143 (8th Cir. 2008) (" . . . UPS's actions would not have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' ") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Shepherd, Bye and Beam)

Lisdahl v. Mayo Foundation, 633 F.3d 712, 722 (8th Cir. 2011) (USERRA) ("Applying the material adversity standard to the claims of [the plaintiffs], the actions of which [the plaintiffs] complain do not rise to the level of actionable retaliation.") (affirming summary judgment for employer) (Benton, Smith and Beam)

Recio v. Creighton University, 521 F.3d 934, 940-41 (8th Cir. 2008) ("[W]e must determine whether any of the actions challenged here 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' . . . Most of the allegations . . . fall short of those which this court has previously found lacking. . . . [Alteration of plaintiff's work schedule] does not 'meet the significant harm standard set forth in *Burlington Northern*.'") (quoting *Burlington Northern* and *Clegg*) (affirming summary judgment for employer) (Shepherd, Loken and Wollman)

Vajdl v. Mesabi Academy of Kidspeace, Inc., 484 F.3d 546, 552 (8th Cir. 2007) (" . . . [N]o reasonable worker would likely be dissuaded from making or supporting a charge of discrimination based upon the Academy's . . . [alleged retaliation].") (affirming summary judgment for employer) (Smith, Murphy and Hansen)

Weger v. City of Ladue, 500 F.3d 710, 726-27 (8th Cir. 2007) (" . . . Chief['s] . . . directives were not materially adverse. . . . [S]upervisor['s] [actions] . . . did not satisfy *Burlington Northern*'s materially adverse standard . . . ") (affirming summary judgment for

employer) (Shepherd, Loken concurring, and Bye concurring and dissenting in part)

Young-Losee v. Graphic Packaging Int'l., Inc., 631 F.3d 909, 913 (8th Cir. 2011) ("Being fired for making a discrimination complaint – even if rescinded after two days – might well dissuade a reasonable employee from making a complaint of harassment.") (reversing summary judgment for employer) (Benton, Bye and Riley)

Ninth Circuit

Jury Issue (5 decisions; 3 decisions sustaining disputed claim)

Alvarado v. Federal Express Corp., 384 Fed.Appx. 585, 589 (9th Cir. 2010) ("A jury could conclude that th[e] [retaliatory] actions, taken in their totality, would dissuade a reasonable worker from making or supporting a charge of discrimination") (affirming jury verdict for plaintiff) (Reinhardt, W. Fletcher and N.R. Smith)

Luox v. Maire, 337 Fed.Appx. 695, 697 (9th Cir. 2009) ("a reasonable jury could not find [that the retaliatory actions] were 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Goodwin, Kleinfeld and Ikuta)

McBurnie v. City of Prescott, 2013 WL 951305 at *1 (9th Cir., March 13, 2013) (First Amendment) ("The district court concluded as a matter of law that all of the actions taken against McBurnie, short of his discharge, were too trivial to meet the material adversity standard. But from the evidence presented at trial, a reasonable jury could have concluded otherwise. . . . Whether these [retaliatory] actions . . . were materially adverse under the particular circumstances . . . should be decided by a trier of fact") (reversing summary judgment for employer) (Schroeder, Kleinfeld and Berzon)

Sillars v. Nevada, 385 Fed.Appx. 669, 671 (9th Cir. 2010) ("No reasonable factfinder could conclude that Sillars suffered any conditions that amount to a materially adverse action") (affirming summary judgment for employer) (Rymer, Fisher and Ripple)

Swinnie v. Geren, 379 Fed.Appx. 665, 668 (9th Cir. 2010) ("Because there is a genuine issue of material fact as to whether the [retaliatory actions] would have dissuaded a reasonable person from engaging in protected activity, . . . the retaliation claim based on [that activity] should have gone to the jury") (reversing summary judgment for employer) (Wardlaw, Gould and Mills)

Non-Jury Issue (8 decisions; 1 decision sustaining disputed claim)

Clayton v. Donahoe, 461 Fed.Appx. 574, 576 (9th Cir. 2011) ("these [alleged retaliatory] occurrences do not

constitute 'adverse actions' that would dissuade a reasonable employee from pursuing an EEO complaint . . . ") (affirming summary judgment for employer) (D.W. Nelson, Gould and Ikuta)

Clemente v. Oregon Dept. of Corrections, 315 Fed.Appx. 657, 658-59 (9th Cir. 2009) (" . . . none of the . . . actions that Clemente alleges were retaliatory would have dissuaded a reasonable worker from making a charge of discrimination . . . ") (affirming summary judgment for employer) (Paez, Rawlinson and Collins)

Emeldi v. University of Oregon, 673 F.3d 1218, 1225-26 (9th Cir. 2012), republished as amended, 698 F.3d 715 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 1997 (2013) (Title IX) ("A reasonable person would find these events 'materially adverse' insofar as they 'might have dissuaded such a person from complaining of discrimination . . . ") (reversing on other grounds summary judgment for defendant) (R. Gould and Paez)

Gonzalez v. National Railroad Passenger Corp., 376 Fed.Appx. 744, 747 (9th Cir. 2010) (" . . . [the alleged retaliatory] behavior, although unpleasant, does not rise to the level of an adverse employment action . . . ") (affirming summary judgment for employer) (Tashima, Fisher and Berzon)

Grimsley v. Charles River Laboratories, Inc., 467 Fed.Appx. 736, 738 (9th Cir. 2012) (ADEA) ("Charles River's [actions] did not constitute a materially adverse employment action.") (affirming summary judgment for employer) (McKeown, Clifton and Bybee)

Hellman v. Weisberg, 360 Fed.Appx. 776, 778-79 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 3518 (2010) ("[retaliatory actions of coworkers] did not rise to the level of an adverse employment action"; "[supervisor's] reprimand did not rise to the level of adverse employment action") (affirming summary judgment for employer) (Tashima, Graber and Bybee)

Novak-Scott v. City of Phoenix, 358 Fed.Appx. 782, 782 (9th Cir. 2009) ("[plaintiff] did not suffer the type of significant harm that would dissuade a reasonable worker from making or supporting a charge of discrimination.") (affirming summary judgment for employer) (Rymer, Tashima and Leighton)

Woods v. Washington, 475 Fed.Appx. 111, 113 (9th Cir. 2012) (" . . . [plaintiff] did not suffer an adverse action. . . . We cannot say that [the alleged retaliation] 'might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Fernandez, Paez and Gwin)

Tenth Circuit

Jury Issue (4 decisions; 3 decisions sustaining disputed claim)

Barone v. United Airlines, Inc., 355 Fed.Appx. 169, 184 (10th Cir. 2009) (" . . . a reasonable jury could conclude that a reasonable employer in such circumstances might well have been dissuaded from making or supporting a charge of discrimination . . . ")

(reversing summary judgment for employer) (Briscoe, Tymkovich and Holmes)

Bertsch v. Overstock.com, 684 F.3d 1023, 1029 (10th Cir. 2012) ("Was the threat of reassignment . . . a sort of demotion . . . ? . . . [A] dispute exists if the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'. . . . [A] jury *could*, on this evidence, find in [plaintiff's] favor . . . ") (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)) (emphasis in original) (reversing summary judgment for employer) (Kelly, Murphy and Hartz)

Wheeler v. BNSF Rwy. Co., 418 Fed.Appx. 738, 750 (10th Cir. 2011) ("there is no evidence in the record from which a jury could reasonably find that [the] position [plaintiff sought in] Topeka was objectively more desirable or advantageous than a . . . position in Lincoln."; "We are not persuaded . . . that a jury could reasonably conclude that these actions were 'materially adverse'. . . .") (affirming summary judgment for employer) (Briscoe, Ebel and Tymkovich)

Williams v. W.D. Sports, N.M., Inc., 497 F.3d. 1079, 1090 (10th Cir. 2007) ("To warrant trial, . . . we hold that a plaintiff need only show that a jury could conclude that a reasonable employee in Ms. Williams's shoes would have found the defendant's conduct sufficiently adverse that he or she well might have been dissuaded by such conduct from making or supporting a charge of discrimination.") (footnote omitted) (reversing summary judgment for employer) (Gorsuch, Kelly and Ebel)

Non-Jury Issue (11 decisions; 1 decision sustaining disputed claim)

Allstate Sweeping, LLC v. Black, 706 F.3d 1261, 1268 (10th Cir. 2013) (" . . . [certain] retaliatory actions would not support a retaliation claim because they were not severe enough to deter a reasonable person from claiming discrimination.") (reversed and remanded for entry of summary judgment) (Hartz, Baldock and Gorsuch)

Couch v. Board of Trustees of Memorial Hosp. of Carbon County, 587 F.3d 1223, 1242 (10th Cir. 2009) (First Amendment) (" . . . we cannot conclude that the [employer's] action would be likely to deter a reasonable employee from speaking.") (affirming summary judgment for employer) (Ebel, Tacha and Hartz)

Fox v. Nicholson, 304 Fed.Appx. 728, 734 (10th Cir. 2008) ("[plaintiff's reassignment of duties] . . . does not constitute a materially adverse action . . . ") (affirming summary judgment for employer) (O'Brien, McConnell and Tymkovich)

Hennagir v. Utah Dept. of Corrections, 587 F.3d 1255, 1266 (10th Cir. 2009) (ADA) ("It defies logic to conclude that a reasonable worker facing termination might be dissuaded from complaining about that threatened termination because [of the allegedly retaliatory action] . . . ") (affirming summary judgment for employer) (Lucero, Briscoe and Seymour)

Johnson v. Weld County, *Colorado*, 594 F.3d 1202, 1216-1217 (10th Cir. 2010) (alleged retaliatory actions

"though surely unpleasant and disturbing, are insufficient to support a claim of retaliation under our case law. . . . [Retaliatory action] simply does not rise to the level of material adversity necessary to sustain a retaliation claim, as we previously recognized in *Garrison v. Gambro, Inc.,* 428 F.3d 933, 939 (10th Cir. 2005).") (footnote omitted) (other citations omitted) (affirming summary judgment for employer) (Gorsuch, McKay and Holmes)

Keller v. Crown Cork & Seal USA, Inc., 491 Fed.Appx. 908, 914 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 1586 (2013) (alleged retaliatory actions " . . . do not rise to materially adverse actions sufficient to support a claim of retaliation.") (affirming summary judgment for employer) (O'Brien, Hartz and Anderson)

McGowan v. City of Eufala, 472 F.3d 736, 742-43 (10th Cir. 2006) (denial of assignment from night shift to day shift " . . . was not materially adverse.") (affirming summary judgment for employer) (Tymkovich, McConnell and Anderson)

Reinhardt v. Albuquerque Public Schools Bd. of Ed., 595 F.3d 1126, 1133 (10th Cir. 2010) (Rehabilitation Act and First Amendment) (" . . . we think a reasonable employee might have been dissuaded from advocating for special education students knowing that her workload and salary would be reduced.") (reversing summary judgment for employer) (Kelly, Tacha and Holloway)

Samuels v. Potter, 372 Fed.Appx. 906, 908 (10th Cir. 2010) (" . . . we must ask whether the [physical] contact might well have dissuaded a reasonable worker from complaining about discrimination.") (affirming summary judgment for employer) (Lucero, Porfilio and Murphy)

Semsroth v. City of Wichita, 555 F.3d 1182, 1186 (10th Cir. 2009) ("[W]ould a reasonable employer be dissuaded from making a complaint if she knew that [the employer would retaliate in the manner alleged]? We agree with the district court that the answer to this inquiry is no.") (affirming summary judgment for employer) (McKay, Murphy and Anderson)

Somoza v. University of Denver, 513 F.3d 1206, 1219 (10th Cir. 2008) (" . . . it cannot be said that [the alleged retaliatory actions] aggregate to produce material and adverse actions against these Appellants.") (affirming summary judgment for employer) (Holloway, Lucero and Tymkovich)

Standard Unclear (3 decisions; 0 decisions sustaining disputed claim)

Juarez v. Utah, 263 Fed.Appx. 726, 737 (10th Cir. 2008) (affirming summary judgment for employer)

Paloni v. City of Albuquerque Police Dept., 212 Fed.Appx. 716, 720-21 (10th Cir. 2006) (affirming summary judgment for employer)

Steele v. Kroenke Sports Enterprises, LLC, 264 Fed.Appx. 735, 743-45 (10th Cir. 2008) (affirming summary judgment for employer)

Eleventh Circuit

Jury Issue (4 decisions; 3 decisions sustaining disputed claim)

Brown v. Metropolitan Atlanta Rapid Transit Auth., 261 Fed.Appx. 167, 175 (11th Cir. 2008) ("We believe a jury could conclude that had Brown known that his complaint of discrimination would lead to . . . [the alleged retaliatory action] . . . he would have been dissuaded from making a complaint, as would any other reasonable person.") (reversing summary judgment for employer) (Fay, Edmondson and Carnes)

Howell v. Compass Group, 448 Fed.Appx. 30, 36 (11th Cir. 2011) (per curiam) ("The jury was free to find that the Performance Improvement Plan amounted to a disciplinary action. . . . [T]hat finding was enough to support the jury's conclusion that an adverse action was taken against Howell. . . .") (affirming jury verdict for plaintiff) (Dubina, Carnes and Sands)

Kurtts v. Chiropractic Strategies Group, Inc., 481 Fed.Appx. 462, 467-68 (11th Cir. 2012) (per curiam) ("A jury crediting Kurtts's account . . . reasonab[ly] . . . could conclude that CSG's response 'might deter a reasonable employee' from lodging a complaint about harassment' ") (quoting *Crawford v. Carroll*, 529 F.3d 961, 974 (11th Cir. 2008)) (reversing summary

judgment for employer) (Wilson, Anderson and Higginbotham)

Watson v. Alabama Farmers Cooperative, Inc., 323 Fed.Appx. 726, 739 (11th Cir. 2009) (ADEA) (per curiam) ("[W]e do not believe that Watson has produced sufficient evidence for a reasonable jury to conclude that Watson's assignment [from Bells, Tennessee] to Donaldsonville [Louisiana] constitutes a materially adverse employment action.") (affirming summary judgment for employer) (Dubina, Black and Pryor)

Other (1 decision; 0 decisions sustaining disputed claim)

Rainey v. Holder, 412 Fed.Appx. 235, 238 (11th Cir. 2011) (per curiam) ("While the jury traditionally should decide whether a defendant's actions are sufficiently adverse, 'petty and trivial' actions by the defendant are not sufficiently adverse. . . . Rainey failed to show adverse action. It is unlikely that, taking into account all of the alleged incidents . . . , a reasonable employee, standing in Rainey's shoes, would have felt dissuaded from filing a complaint of discrimination.") (citing *Crawford*) (affirming summary judgment for employer) (Tjoflat, Edmondson and Pryor)

Non-Jury Issue (25 decisions; 3 decisions sustaining disputed claim)

Bothwell v. RMC Ewell, Inc., 278 Fed.Appx. 948, 952 (11th Cir. 2008) (per curiam) (ADEA) (" . . . the district

court correctly held that [the alleged retaliatory act] was not an action that a reasonable employee would find to be materially adverse.") (affirming summary judgment for employer) (Tjoflat, Black and Carnes)

Bowers v. Board of Regents of the University System of Georgia, 2013 WL 563180 at *4 (11th Cir., Feb. 15, 2013) (per curiam) (Title IX and Title VI) ("The district court determined correctly that Bowers's allegations . . . were not sufficiently adverse to state a retaliation claim. Such acts would not dissuade a reasonable person from pursuing a claim of discrimination.") (affirming dismissal of complaint) (Carnes, Barkett and Edmondson)

Burgos v. Napolitano, 330 Fed.Appx. 187, 191 (11th Cir. 2009) (per curiam) (Rehabilitation Act) ("We conclude from the record . . . that [the alleged retaliatory action] was not a materially adverse action. . . . [N]o reasonable employee would have found [the employer's action] a materially adverse action") (affirming summary judgment for employer) (Dubina, Black and Barkett)

Burgos-Stefanelli v. Secretary, U.S. Dept. of Homeland Security, 410 Fed.Appx. 243, 247 (11th Cir. 2011) (per curiam) (Rehabilitation Act) (" . . . the actions of DHS did not constitute materially adverse actions . . . ") (affirming summary judgment for employer) (Tjoflat, Black and Anderson)

Byrd v. Auburn Univ. Montgomery, 268 Fed.Appx. 854, 856 (11th Cir. 2008) (per curiam) (" . . . a reasonable employee would not have . . . been dissuaded

from making or supporting a charge of discrimination . . . ") (affirming summary judgment for employer) (Anderson, Black and Hull)

Cabrera v. Secretary, Dept. of Transportation, 468 Fed.Appx. 939, 942 (11th Cir. 2012) (per curiam) ("We agree with the district court's conclusion that Cabrera did not suffer an adverse action. . . . [The alleged retaliatory act] . . . is not the type of material and substantial action that would dissuade an employee from filing a complaint with the EEOC") (affirming summary judgment for employer) (Wilson, Martin and Kravitch)

Cain v. Geren, 261 Fed.Appx. 215, 217 (11th Cir. 2008) (per curiam) (alleged retaliatory act " . . . is not actionable under Title VII. . . .") (affirming summary judgment for employer) (Black, Marcus and Wilson)

Crawford v. Carroll, 529 F.3d 961, 972, 974 (11th Cir. 2008) (" . . . the district court erred when it held that [the alleged retaliatory act] did not constitute an adverse employment action . . . "; " . . . we have no doubt but that Crawford suffered a materially adverse action. . . . Such conduct by an employer clearly might deter a reasonable employee from pursuing a pending charge of discrimination or making a new one.") (reversing in relevant part summary judgment for employer) (Rodgers, Birch and Fay)

Dar Dar v. Associated Outdoor Club, Inc., 201 Fed.Appx. 718, 723 n. 3 (11th Cir. 2006) (per curiam), *cert. denied*, 553 U.S. 1033 (2008) ("The district court did not explicitly address Dar Dar's claim that [the

employer's act] was an adverse action. It was not.") (affirming summary judgment for employer) (Dubina, Carnes and Hull)

Dixon v. Palm Beach County Parks and Recreation Dept., 343 Fed.Appx. 500, 502-03 (11th Cir. 2009) (per curiam), *cert. denied*, 130 S.Ct. 2108 (2010) (" . . . allegedly retaliatory acts were not adverse employment actions . . . ") (affirming summary judgment for employer) (Tjoflat, Edmondson and Black)

Entrekin v. City of Panama City Florida, 376 Fed.Appx. 987, 995 (11th Cir. 2010) (per curiam) (certain employer actions "are not adverse employment actions"; other employer actions "also are not adverse employment actions, because they . . . would not dissuade a reasonable worker from making or supporting a charge of discrimination"; other employer actions "also did not constitute adverse employment actions; another employer action "did not constitute an adverse action"; two employer actions were actionable because "it is likely that [the actions] would dissuade a reasonable worker from making or supporting a charge of discrimination") (affirming, in part on other grounds, summary judgment for employer; holding that only one of several alleged retaliatory actions was actionable under *Burlington Northern*) Edmondson, Birch and Fay)

Foshee v. Ascension Health-IS, Inc., 384 Fed.Appx. 890, 892-93 (11th Cir. 2010) (per curiam) (Family and Medical Leave Act) ("Ascension Health's actions did not have a materially adverse effect upon Foshe")

(affirming summary judgment for employer) (Dubina, Carnes and Marcus)

Freytes-Torres v. City of Sanford, 270 Fed.Appx. 885, 893-94 (11th Cir. 2008) (per curiam) (first retaliatory action "cannot satisfy this element"; second retaliatory act "is not actionable under *White*") (affirming in relevant part summary judgment for employer) (Edmondson, Birch and Wilson)

Gibbs-Matthews v. Fulton County School Dist., 429 Fed.Appx. 892, 894 (11th Cir. 2011) (per curiam) ("We find no reversible error in the district court's determination that a reasonable employee would not be dissuaded from filing an EEOC charge [due to an alleged retaliatory act]. . . .") (affirming summary judgment for employer) (Edmondson, Barkett and Anderson)

Gray v. City of Jacksonville, Fla., 492 Fed.Appx. 1, 10 (11th Cir. 2012) (per curiam) ("We are hard pressed to fathom how [the employer's acts] could in any way be deemed 'adverse'. . . .") (Marcus, Wilson and Pryor)

Hall v. Dekalb County Gov't, 503 Fed.Appx. 781, 790 (11th Cir. 2013) (per curiam) (the alleged retaliatory act "was not an action that might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Carnes, Barkett and Fay)

Hawkins v. Potter, 316 Fed.Appx. 957, 962 (11th Cir. 2009) (per curiam) ("[W]e agree with the district court that the employment actions relied upon by Hawkins

do not constitute actionable adverse conduct.") (affirming summary judgment for employer) (Black, Barkett and Kravitch)

Jarvis v. Siemens Medical Solutions USA, Inc., 460 Fed.Appx. 851, 858 (11th Cir. 2012) (per curiam) ("Jarvis argues that his placement on the PIP, being assigned extra duties, and denial of training constituted adverse actions. We disagree.") (affirming summary judgment for employer) (Tjoflat, Edmondson and Fay)

Leatherwood v. Anna's Linens Co., 384 Fed.Appx. 853, 858 (11th Cir. 2010) (per curiam) ("It appears that Leatherwood . . . suffered an adverse employment actions [sic], because, viewed cumulatively, [the alleged retaliatory acts] . . . likely would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming summary judgment for employer on other grounds) (Edmondson, Birch and Fay)

Rademakers v. Scott, 350 Fed.Appx. 408, 413 (11th Cir. 2009) (per curiam) (neither of the actions complained of " . . . were materially adverse actions . . . ") (affirming summary judgment for employer) (Carnes, Marcus and Pryor)

Reeves v. DSI Security Services, Inc., 395 Fed.Appx. 544, 547 (11th Cir. 2010) (per curiam) (one alleged retaliatory act " . . . did not rise to the level of a materially adverse action . . . "; another alleged retaliatory act " . . . is not conduct that would deter a reasonable person from filing a charge with the Equal

Employment Opportunity Commission."; other alleged retaliatory acts " . . . do not rise to the level of an adverse action.") (affirming summary judgment for employer) (Black, Carnes and Pryor)

Saunders v. Emory Healthcare, Inc., 360 Fed.Appx. 110, 116 (11th Cir. 2010) (per curiam), *cert. denied*, 131 S.Ct. 1473 (2011) (alleged retaliatory action " . . . does not rise to the level of actionable retaliation . . . ") (affirming summary judgment for employer) (Tjoflat, Wilson and Anderson)

Shannon v. Postmaster General of the United States Postal Service, 335 Fed.Appx. 21, 26 (11th Cir. 2009) (per curiam) (Rehabilitation Act) ("Shannon alleges that . . . [employer's allegedly retaliatory acts] . . . all constituted adverse actions related to his protected expression. We disagree. Shannon has not demonstrated the existence of an adverse action.") (affirming summary judgment for employer) (Birch, Hull and Kravitch)

Siler v. Hancock County Bd. of Ed., 272 Fed.Appx. 881, 883 (11th Cir. 2008) (per curiam) (employer's action " . . . was not an 'adverse action' such that it reasonably would have dissuaded an employee from filing a complaint . . . ") (affirming summary judgment for employer) (Barkett, Fay and Antoon)

Stone v. Geico General Ins. Co., 279 Fed.Appx. 821, 823 (11th Cir. 2008) (per curiam) (ADEA) (" . . . a reasonable employee would not consider [employer's action] to be materially adverse.") (affirming in part

summary judgment for employer) (Edmondson, Black and Farris)

Standard Unclear (10 decisions; 0 decisions sustaining disputed claim)

Bradley v. Pfizer, Inc., 440 Fed.Appx. 805, 809 (11th Cir. 2011) (per curiam) (ADEA) (affirming summary judgment for employer)

Chapman v. U.S. Postal Service, 442 Fed.Appx. 480, 484 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S.Ct. 1624 (2012) (affirming summary judgment for employer)

Ekokotu v. Federal Express Corp., 408 Fed.Appx. 331, 339 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S.Ct. 420 (2011) (affirming summary judgment for employer)

Luna v. Walgreen Co., 347 Fed.Appx. 469, 473 (11th Cir. 2009) (per curiam) (affirming summary judgment for employer)

Morales v. Georgia Dept. of Human Resources, 446 Fed.Appx. 179, 183-84 (11th Cir. 2011) (Rehabilitation Act and Title VII) (per curiam) (affirming summary judgment for employer)

Morton v. Astrue, 380 Fed.Appx. 892, 895 (11th Cir. 2010) (per curiam) (affirming summary judgment for employer)

Myers v. Central Florida Investments, Inc., 237 Fed.Appx. 452, 457 n. 3 (11th Cir. 2007) (per curiam),

cert. denied, 128 S.Ct. 1445 (2008) (affirming in part summary judgment for employer)

Rutledge v. Suntrust Bank, 262 Fed.Appx. 956, 959 (11th Cir. 2008) (per curiam) (state law claim) (affirming summary judgment for employer)

Tarmas v. Secretary of the Navy, 433 Fed.Appx. 754, 763 (11th Cir. 2011) (per curiam) (affirming summary judgment for employer)

Williams v. Apalachee Center, Inc., 315 Fed.Appx. 798, 800 (11th Cir. 2009) (per curiam) (affirming summary judgment for employer)

District of Columbia Circuit

Jury Issue (8 decisions; 8 decisions sustaining disputed claim)

Czekalski v. Peters, 475 F.3d 360, 365 (D.C. Cir. 2007) ("Whether a particular reassignment of duties constitutes an adverse action for purposes of Title VII is generally a jury question.") (reversing summary judgment for employer) (Garland, Rogers and Silberman)

Geleta v. Gray, 645 F.3d 408, 412 (D.C. Cir. 2011) ("We think a reasonable jury could find that Geleta's transfer was a materially adverse employment action.") (reversing summary judgment for employer) (Griffith, Ginsburg and Henderson)

Mogenhan v. Napolitano, 613 F.3d 1162, 1166 (D.C. Cir. 2010) (" . . . [Mogenhan] . . . proffered evidence from which a reasonable jury could find that the [employer] retaliated against her in ways that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' . . . Two of Mogenhan's proffers – perhaps alone, but certainly in combination – suffice. . . .") (quoting *Burlington Northern*) (Rehabilitation Act) (reversing summary judgment for employer) (Garland, Henderson and Edwards)

Patterson v. Johnson, 505 F.3d 1296, 1299 (D.C. Cir. 2007) (" . . . [W]e assume that the sharp reduction in supervisory responsibilities . . . could support a jury's finding that such a transfer 'could well dissuade a

reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (affirming jury verdict; not applying standard) (Williams, Randolph and Brown)

Pardo-Kronemann v. Donovan, 601 F.3d 599, 607-08 (D.C. Cir. 2010) ("Where, as here, the plaintiff alleges retaliation based on a reassignment, the fact-finder must compare the position the plaintiff held before the transfer to the one he holds afterwards. . . . The question . . . is whether a reasonable jury could conclude that the transfer from the former [position] to the latter [position] was adverse. . . . [W]e think a reasonable jury could conclude that the transfer qualifies as an adverse employment action.") (reversing summary judgment for employer) (Tatel and Rogers)

Rattigan v. Holder, 643 F.3d 975, 986 (D.C. Cir. 2011) (*see* 689 F.3d 764, 773 (D.C. Cir. 2012) ("Whether a particular adverse action satisfied the materiality threshold is generally a jury question, with our role limited to determining whether, viewing the evidence in the light most favorable to the plaintiff, a reasonable jury could find the action materially adverse") (remanding for jury trial regarding whether retaliatory act met *Burlington Northern* standard) (Tatel and Rogers)

Verijona v. Gonzales, 466 F.3d 122, 124 (D.C. Cir. 2006) (per curiam) (" . . . [A] reasonable jury could find that the prospect of . . . an investigation [of the sort that was directed against the plaintiff] could

dissuade a reasonable employee from making or supporting a charge of discrimination . . . ") (reversing summary judgment for employer) (Tate, Brown and Edwards)

Weber v. Battista, 494 F.3d 179, 186 (D.C. Cir. 2007) (" . . . [A] reasonable jury could conclude that [the plaintiff's] loss 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern*) (reversing summary judgment for employer) (Ginsburg, Sentelle and Edwards)

Non-Jury Issue (7 decisions; 0 decisions sustaining disputed claim)

Baird v. Gotbaum, 662 F.3d 1246, 1250 (D.C. Cir. 2011) ("The district court found that none of the acts, or the failure to remedy them, was sufficient under the controlling standard. . . . [W]e agree. We do not believe that the [employer's actions] would have persuaded a reasonable employee to refrain from making or supporting charges of discrimination.") (affirming summary judgment for employer) (Williams, Rogers and Garland)

Baloch v. Kempthorne, 550 F.3d 1191, 1197 (D.C. Cir. 2008) (" . . . [A]ny reassignment of Baloch's duties . . . did not itself constitute an adverse employment action for purposes of a discrimination claim.") (affirming summary judgment for employer) (Kavanaugh, Griffith and Williams)

Cochise v. Salazar, 377 Fed.Appx. 29, 30 (D.C. Cir. May 24, 2010) (per curiam) ("none of these incidents . . . constitutes a materially adverse action") (affirming summary judgment for employer) (Henderson, Rogers and Garland)

Gard v. United States Dept. of Education, 2011 WL 2148585 at *1 (D.C. Cir., May 25, 2011) (per curiam) (" . . . [the employer's] conduct . . . was not something that would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination,' and thus it was not 'materially adverse action.' ") (quoting *Burlington Northern*) (affirming summary judgment for employer) (Ginsburg, Rogers and Griffith)

Gaujacq v. EDF, Inc., 601 F.3d 565, 578 (D.C. Cir. 2010) (" . . . [W]e hold that the verbal statement made by [a company official] did not constitute a materially adverse action.") (affirming summary judgment for employer) (Edwards, Henderson and Williams)

Porter v. Shah, 606 F.3d 809, 818 (D.C. Cir. 2010) ("The [2003 highly critical] interim assessment [of the plaintiff's job performance] . . . was not a materially adverse action."; "[T]he [2004] negative assessment together with the [imposition of a Personal Improvement Plan] constituted a material adverse action.") (affirming summary judgment for employer regarding one claim, and reversing summary judgment for employer on another claim) (Henderson, Rogers and Garland)

Taylor v. Solis, 571 F.3d 1313, 1321 (D.C. Cir. 2009) (criticism by supervisor "was not a materially adverse

action."; additional work requirements "'[did] not rise to the level of adverse action necessary to support a claim.'"; denial of recommendation for new position "would not have dissuaded a reasonable employee from coming forward.") (quoting *Stewart v. Evans,* 275 F.3d 1126, 1135 (D.C. Cir. 2002)) (affirming summary judgment for employer) (Ginsburg and Henderson)