

4-1-2017

Administrative Leave as an Adverse Action for Title VII Retaliation: New Principles for Liability Call for New Updates to Policy

Zachary R. Cormier

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

Suggested Citation

Zachary R. Cormier, Administrative Leave as an Adverse Action for Title VII Retaliation: New Principles for Liability Call for New Updates to Policy , 37 N. Ill. U. L. Rev. 277 (2017).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact jschumacher@niu.edu.

Administrative Leave as an Adverse Action for Title VII Retaliation: New Principles for Liability Call for New Updates to Policy

ZACHARY R. CORMIER*

*The time has come for employers and their attorneys to recognize that placing an employee on paid administrative leave, pending an investigation (or otherwise), has become a riskier proposition under Title VII of the Civil Rights Act of 1964. Numerous courts have held that a paid administrative leave, in most cases, will not constitute an “adverse employment action” as required by Title VII’s discrimination provision. But herein lies the danger for employers making the decision on a paid administrative leave – such relative security no longer applies to retaliation claims under Title VII. The warnings from federal circuit courts over the past decade of using broad principles to find that a paid administrative leave is a sufficient adverse action under the retaliation provision of Title VII have recently been confirmed by the Ninth Circuit in *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) and by other district courts. Employers must respond accordingly and incorporate modern principles regarding administrative leave into their policies and decision making processes.*

*The current danger is that many employers may still view the potential liability, which comes from placing an employee on paid administrative leave within the relative security that has come from the vast majority of courts finding that such leave does not constitute an adverse employment action for Title VII discrimination claims. *Dahlia* is a wake-up call for employers. Employers and their attorneys must acknowledge the much different (and in many senses lower) standard for finding a sufficient adverse action in a Title VII retaliation claim involving paid administrative leave. This Article will explain the adverse action standard established by the Supreme Court in *Burlington Northern*, 548 U.S. 53 (2006) for retaliation claims under Title VII. This Article will then explore the various factors of an administrative leave which federal circuit and district courts have found are more likely to justify a sufficient adverse action for a retaliation claim. Based upon such case law, this Article will conclude with recommendations regarding how employers should incorporate modern principles regarding administrative leave into their policies and decision making processes.*

* Mr. Cormier would like to recognize his wife, Gina, and three children Tristan, Colby, and Creed for their constant love and support. Mr. Cormier would also like to thank Charles Cormier, Paul Martello, and the NIU Law Review staff for their very thoughtful review of this article.

I.	INTRODUCTION.....	279
II.	THE CRUCIAL DIFFERENCE BETWEEN THE “ADVERSE EMPLOYMENT ACTION” STANDARD FOR TITLE VII DISCRIMINATION AND THE “MATERIALLY ADVERSE ACTION” STANDARD FOR TITLE VII RETALIATION.....	282
	A. DEFINITION OF AN “ADVERSE EMPLOYMENT ACTION” IN THE TITLE VII DISCRIMINATION CONTEXT	282
	B. DISTINCTION IN THE CONTEXT OF TITLE VII RETALIATION.....	284
III.	PAID ADMINISTRATIVE LEAVE USUALLY DOES NOT CONSTITUTE AN ADVERSE EMPLOYMENT ACTION UNDER THE TITLE VII DISCRIMINATION PROVISION.....	286
IV.	WARNINGS FROM FEDERAL CIRCUIT COURTS REGARDING A BROADER FINDING OF A SUFFICIENT ADVERSE ACTION FOR PAID ADMINISTRATIVE LEAVE.....	288
	A. <i>MCCOY V. CITY OF SHREVEPORT</i>	288
	B. <i>STEWART V. MISSISSIPPI TRANSPORTATION COMMISSION</i>	290
	C. <i>MICHAEL V. CATERPILLAR FINANCIAL SERVICES CORPORATION</i>	290
	D. A POTENTIAL SPLIT IN THE SEVENTH CIRCUIT – <i>NICHOLS V. SOUTHERN ILLINOIS UNIVERSITY-EDWARDSVILLE</i>	291
V.	THE NINTH CIRCUIT’S CONFIRMATION OF PAID ADMINISTRATIVE LEAVE AS A POTENTIAL ADVERSE ACTION IN <i>DAHLIA V. RODRIGUEZ</i>	292
VI.	FURTHER PRINCIPLES FROM OTHER DISTRICT COURTS	295
	A. <i>FERRILL V. OAK CREEK-FRANKLIN JOINT SCHOOL DISTRICT</i>	295
	B. <i>OWEN V. CITY OF OKLAHOMA CITY POLICE DEPARTMENT</i>	296
	C. <i>MONICO V. CITY OF CORNELIUS</i>	297
	D. <i>VERGES V. SHELBY COUNTY SHERIFF’S OFFICE</i>	298
	E. <i>CARRIO V. APOLLO GROUP</i>	298
VII.	PRINCIPLES FOR POLICY AND PROCEDURE REGARDING ADMINISTRATIVE LEAVE.....	301
	A. EFFECTS ON FUTURE OPPORTUNITIES AND COLLATERAL PAY	301
	B. PREVENTION OF STIGMA.....	302
	C. DURATION OF THE ADMINISTRATIVE LEAVE.....	304
	D. IT MUST BE PAID LEAVE.....	304
	E. CONSIDERATION OF CONTEXT AND THE EMPLOYEE’S PERSPECTIVE.....	305
VIII.	CONCLUSION.....	305

I. INTRODUCTION

The time has come for employers and their attorneys to recognize that placing an employee on paid administrative leave, pending an investigation (or otherwise), has become a riskier proposition under Title VII of the Civil Rights Act of 1964.¹ Numerous courts have held that a paid administrative leave, in most cases, will not constitute an “adverse employment action” as required by Title VII’s *discrimination* provision.² But herein lies the danger

1. 42 U.S.C. § 2000e (1991).

2. Federal Circuit Courts: *Jones v. SEPTA*, 796 F.3d 323, 326 (3d. Cir. 2015) (agreeing with other “sister courts that a suspension with pay, ‘without more,’ is not an adverse employment action under the substantive provision of Title VII.”); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1007–08 (8th Cir. 2012) (holding that “[p]lacement on paid administrative leave” is not an adverse employment action because it is not a tangible change to a working condition that produces a material employment disadvantage) (citations omitted); *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (“[P]lacing [the employee] on paid leave—whether administrative or sick—was not an adverse employment action.”); *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d. Cir. 2006) (joining other federal circuit courts in holding that “administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action.”); *Singletary v. Missouri Dep’t of Corrs.*, 423 F.3d 886, 891–92 (8th Cir. 2005) (“[F]ind[ing] the reasoning of Fourth, Fifth, and Sixth Circuits persuasive and hold[ing] that [plaintiff] did not suffer an adverse employment action by being placed on administrative leave.”); *Haddon v. Exec. Residence*, 313 F.3d 1352, 1363–64 (Fed. Cir. 2002) (agreeing that a short term suspension without loss of pay to conduct an internal investigation does not constitute an adverse employment action); *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (short term paid leave to conduct investigation did not amount to an adverse employment action).

Federal District Courts by Circuit: First: *Testa v. Town of Madison*, No. 04-185-B-W, 2005 U.S. Dist. LEXIS 44531, at *34–35 (D. Me. Sept. 26, 2005) (“[S]uspension with pay pending an administrative investigation, or ‘administrative leave,’ is generally regarded not to be an adverse employment action.”); Seventh: *Nichols v. S. Ill. Univ.—Edwardsville*, 432 F. Supp. 2d 798, 808 (S.D. Ill. 2006) (“As a matter of law, this Court finds that placing [the plaintiff] on administrative leave with pay is not an adverse employment action.”) (citation omitted); Tenth: *Baker v. City & Cty. of Denver*, No. 14-cv-02468-REB-CBS, 2016 U.S. Dist. LEXIS 504, at *14 (D. Colo. Jan. 5, 2016) (“Several courts of appeal have held that placing an employee on paid administrative leave, especially when there is no presumption of termination, is not an adverse employment action.”) (citations omitted); *Armstead v. Wood*, No. 10-cv-02783-CMA-KMT, 2012 U.S. Dist. LEXIS 83780, at *18–19 (D. Colo. June 15, 2012) (“Being placed on paid leave does not constitute an adverse employment action.”); *Gerald v. Locksley*, 785 F. Supp. 2d 1074, 1117 (D.N.M. 2011) (“Nor was placing [plaintiff] on paid administrative leave an adverse employment action.”) (citations omitted); Eleventh: *Moore v. Miami Dade Cty.*, No. 03-22421-CIV-GOLD/SIMONTON, 2005 U.S. Dist. LEXIS 27245, at *30–32 (S.D. Fla. Sept. 30, 2005) (“The courts have specifically held that a suspension with pay for a short period of time is not an adverse employment action.”) (citations omitted); *Wadibia v. Auburn Univ.*, No. 98-0722-BH-M, 1999 U.S. Dist. LEXIS 14122, at *32 (S.D. Ala. Aug. 26, 1999) (“The Court agrees that [the plaintiff’s] paid leave could not reasonably be considered an adverse employment action so as to trigger federal anti-discrimination

for employers making the decision on a paid administrative leave – such relative security no longer applies to *retaliation* claims under Title VII. The warnings from federal circuit courts over the past decade of using broad principles to find that a paid administrative leave is a sufficient adverse action under the retaliation provision of Title VII have recently been confirmed by the Ninth Circuit in *Dahlia v. Rodriguez*³ and by other district courts. Employers must respond accordingly and incorporate modern principles regarding administrative leave into their policies and decision making processes.

“Not every employment action which can be construed as ‘adverse’ is actionable under . . . Title VII.”⁴ Title VII only prohibits unlawful discrimination to the extent that it causes an actual “adverse employment action,” as defined under the statute.⁵ The “adverse employment action” therefore operates as the technical linchpin of Title VII claims because “without an actionable adverse employment action, there can be no claim for damages for alleged discrimination”⁶

laws.”); Dist. of Columbia: *Bland v. Johnson*, 66 F. Supp. 3d 69, 73 (D.D.C. 2013) (“Unfortunately for [the plaintiff], being placed on paid administrative leave is *not* an adverse employment action sufficient to allege a Title VII discrimination claim”).

3. *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) (en banc).

4. *Ludovico v. Kaiser Permanente*, 57 F. Supp. 3d 1176, 1197 (N.D. Cal. 2014).

5. *See, e.g., Patterson v. Johnson*, 505 F.3d 1296, 1298 (D.C. Cir. 2007) (“Liability for discrimination under Title VII requires an adverse employment action”); *Notter v. N. Hand Protection*, No. 95-1087, 1996 U.S. App. LEXIS 14954, at *36 (4th Cir. June 21, 1996) (Wilkins, J., dissenting) (“Title VII, however, prohibits only adverse employment actions taken for a discriminatory reason”); *Ellis v. New York City Dep’t of Educ.*, No. 07-CV-2042 (FB) (MDG), 2010 U.S. Dist. LEXIS 71672, at *18 (E.D.N.Y. July 16, 2010) (“Title VII prohibits discrimination only insofar as it results in an adverse employment action, that is, an action that effects a ‘materially adverse change in the terms and conditions of employment.’”) (citations omitted).

6. *Turley v. SCI of Ala.*, 190 F. App’x. 844, 6–7 (11th Cir. 2006). This requirement is shared by other similar civil rights laws such as the Age Discrimination in Employment Act, 29 U.S.C. § 621 and the Americans with Disability Act, 42 U.S.C. § 12101. ADEA: *Farmer v. Campbell Soup Supply Co.*, No. 1:14CV179, 2014 U.S. Dist. LEXIS 55538, at *6 (M.D.N.C. Apr. 22, 2014) (“To the contrary, Title VII and the ADEA require an employee claiming discrimination to show that an adverse employment action occurred ‘because of the employee’s race, sex, or age.’”) (citation omitted); *Harris v. Donahoe*, No. 4:11cv0411 TCM, 2011 U.S. Dist. LEXIS 126535, at *11 (E.D. Mo. Nov. 2, 2011) (“Thus, no matter whether the claim is one under Title VII, the ADEA, the ADA, or for retaliation, a prima facie case requires a showing of an adverse employment action.”); *Cannon v. St. Paul Fire & Marine Ins. Co.*, No. 3:03-CV-2911-N, 2005 U.S. Dist. LEXIS 8249, at *9 (N.D. Tex. May 6, 2005) (“However, even if [the plaintiff] produces direct evidence of discrimination, he must have been subject to an adverse employment action to sue under either Title VII or the ADEA.”) (citations omitted). ADA: *Krocka v. City of Chi.*, 203 F.3d 507, 514 (7th Cir. 2000) (“[T]he ADA only provides protection from adverse employment actions for individuals with disabilities.”) *But see* *Lloyd v. Housing Auth. of Montgomery*, 857 F. Supp. 2d 1252, 1265 (M.D. Ala. 2012) (“Discrimination under the ADA includes not only adverse employment actions but also ‘not making reasonable accommodations’ to a plaintiff’s known disabilities.”).

In the past, the required “adverse employment action” standard for Title VII retaliation claims was considered to be identical to that of the adverse action required for Title VII discrimination claims within a number of federal circuits.⁷ Under this standard, a personnel action was only an “adverse employment action” if it constituted a “materially adverse change in the terms or conditions” of employment.⁸ Like other potential adverse actions considered by courts within this understanding, law regarding how paid administrative leave fell within the adverse action standard was universally applied to discrimination and retaliation claims under Title VII.⁹ This would provide relatively strong security to employers when placing an employee on administrative leave pursuant to an investigation (or otherwise), because the vast majority of courts have held that a paid administrative leave usually does not constitute an adverse employment action.¹⁰

This all changed in 2006 with the Supreme Court’s opinion in *Burlington Northern & Santa Fe Railway Company v. White*.¹¹ The Supreme Court distinguished the required adverse action in a Title VII discrimination claim from that of a Title VII retaliation claim.¹² In summary, a Title VII retaliation claim would no longer be analyzed strictly by whether the adverse action affected some material term of employment, but rather by whether the adverse action would dissuade a reasonable employee from engaging in protected activity such as reporting discrimination.¹³ Until recently, federal circuit courts had mostly only issued relative warnings about broad principles involved with paid administrative leave that would justify such a retaliation claim.¹⁴ The potentially broad exposure for employers regarding paid administrative leave under the new *Burlington Northern* standard for retaliation claims was, however, recently confirmed with the Ninth Circuit’s opinion in *Dahlia v. Rodriguez*.¹⁵

The current danger is that many employers may still view the potential liability which comes from placing an employee on paid administrative leave within the relative security that has come from the vast majority of courts finding that such leave does not constitute an adverse employment action for Title VII discrimination claims. *Dahlia* is a wake-up call for employers. Employers and their attorneys must acknowledge the much different (and in

7. See *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59–61 (2006).

8. *Laster v. City of Kalamazoo*, 746 F.3d 714, 727 (6th Cir. 2014) (citation omitted).

9. See, e.g., *McCoy v. City of Shreveport*, 492 F.3d 551, 559–60 (5th Cir. 2007).

10. See cases cited *supra* note 2.

11. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

12. *Id.* at 67–70.

13. *Id.*

14. See, e.g., *Stewart v. Mississippi Transp. Co.*, 586 F.3d 321, 331 (5th Cir. 2009); *McCoy v. City of Shreveport*, 492 F.3d 551, 554–61 (5th Cir. 2007); *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 595–98 (6th Cir. 2007) (finding an adverse action based upon a “liberal” standard, but not establishing other broad principles as in *Stewart* and *McCoy*).

15. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078–79 (9th Cir. 2013).

many senses lower) standard for finding a sufficient adverse action in a Title VII retaliation claim involving paid administrative leave. This Article will explain the adverse action standard established by the Supreme Court in *Burlington Northern & Santa Fe Railway Company v. White* for retaliation claims under Title VII. This Article will then explore the various factors of an administrative leave which federal circuit and district courts have found are more likely to justify a sufficient adverse action for a retaliation claim. Based upon such case law, this Article will conclude with recommendations regarding how employers should incorporate modern principles regarding administrative leave into their policies and decision making processes.

II. THE CRUCIAL DIFFERENCE BETWEEN THE “ADVERSE EMPLOYMENT ACTION” STANDARD FOR TITLE VII DISCRIMINATION AND THE “MATERIALLY ADVERSE ACTION” STANDARD FOR TITLE VII RETALIATION

A. DEFINITION OF AN “ADVERSE EMPLOYMENT ACTION” IN THE TITLE VII DISCRIMINATION CONTEXT

42 U.S.C. § 2000e-2(a) “sets forth Title VII’s core antidiscrimination provision in the following terms:”

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.¹⁶

16. *Burlington N.*, 548 U.S. at 61–62 (citing 42 U.S.C. § 2000e–2(a) (1991)).

“In the context of a Title VII *discrimination* claim, an adverse employment action is defined as a ‘materially adverse change in the terms or conditions’ of employment.”¹⁷ Specifically, “[a]n adverse employment action ‘constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”¹⁸ Such action must be “a tangible change in working conditions that produces a material employment disadvantage, including but not limited to, termination, cuts in pay or benefits, and changes that affect an employee’s future career prospects, as well as circumstances amounting to a constructive discharge.”¹⁹ A qualifying action “typically ‘inflicts direct economic harm.’”²⁰ Furthermore, “[a]n adverse employment action ‘requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.’”²¹

“However, minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action.”²² “For an employer’s action to be defined as ‘materially adverse’ it must be ‘more disruptive than a mere inconvenience or an alteration of job responsibilities.’”²³ As the Supreme Court has stated on more than one occasion, “Title VII . . . does not set forth ‘a general civility code for the American workplace.’”²⁴ “Mere ‘nastiness’ of colleagues or supervisors, or unprofessional behavior, is likewise not considered adverse employment action”²⁵ Indeed, “[h]urt feelings and bruised egos do not make an action adverse.”²⁶ Simply put, “[a]n adverse employment action is an action that actually adversely affects a term, condition, or benefit of employment.”²⁷

17. *Laster v. City of Kalamazoo*, 746 F.3d 714, 727 (6th Cir. 2014) (citation omitted).

18. *Id.* (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

19. *Jackman v. Fifth Judicial Dist. Dep’t of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013) (citation omitted).

20. *Laster*, 746 F.3d at 727 (citation omitted).

21. *Id.*

22. *Id.*

23. *James v. Hyatt Regency Chi.*, 707 F.3d 775, 782 (7th Cir. 2013) (citation omitted).

24. *Burlington N.*, 548 U.S. at 68 (citing *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

25. *Carlucci v. Kalsched*, 78 F. Supp. 2d 246, 256 (S.D.N.Y. 2000) (citation omitted); *see also Sethi v. Narod*, 12 F. Supp. 3d 505, 528 (E.D.N.Y. 2014) (“‘[U]nprofessional and boorish’ treatment does not amount to an adverse employment action.”) (citation omitted).

26. *Targonski v. City of Oak Ridge*, No. 3:11-CV-269, 2012 U.S. Dist. LEXIS 99693, at *18 (E.D. Tenn. July 18, 2012) (citation omitted).

27. *Brand v. North Carolina Dep’t of Crime Control & Pub. Safety*, 352 F. Supp. 2d 606, 614 (D.N.C. 2004) (citations omitted).

Importantly, “[a]dverse employment actions do not include ‘interlocutory or mediate decisions having no immediate effect upon employment conditions,’ . . . or ‘trivial discomforts endemic to employment’”²⁸ An employee’s “perceived threat of discharge or any disciplinary action is insufficient to establish adverse employment action.”²⁹ “[T]he employee is obliged ‘not to assume the worst, and not to jump to conclusions too fast.’”³⁰ An employee suffers no adverse employment action if his or her claim is the result of a speculative conclusion that termination would have been inevitable.³¹

B. DISTINCTION IN THE CONTEXT OF TITLE VII RETALIATION

42 U.S.C. § 2000e-3(a) “sets forth Title VII’s antiretaliation provision in the following terms”:

It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.³²

In *Burlington Northern & Santa Fe Railway Company v. White*, the Supreme Court settled a widespread circuit split regarding what level of employment action could give rise to a retaliation claim under Title VII.³³ The Supreme Court reasoned that the language and purpose of Title VII’s “antiretaliation provision, unlike the substantive [anti-discrimination] provision, is not limited to discriminatory actions that affect the terms and conditions of employment.”³⁴ The Supreme Court concluded that “Title VII’s substantive [anti-discrimination] provision and its antiretaliation provision are not coter-

28. *Id.* (citations omitted).

29. *Mullins v. U.S. Bank, N.A.*, No. C2-05-1002, 2007 U.S. Dist. LEXIS 51654, at *26–27 (S.D. Ohio July 17, 2007) (citation omitted).

30. *Id.* (citation omitted).

31. *Id.* (citation omitted).

32. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (citing 42 U.S.C. § 2000e-3(a) (1991)).

33. *See Burlington N.*, 548 U.S. at 59–61.

34. *Id.* at 64 (citation omitted).

minous” and therefore that “[t]he scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”³⁵

The Supreme Court ultimately held that the Title VII antiretaliation claim still requires some substantial act by the employer.³⁶ “The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.”³⁷ Specifically, the employment action must have been of sufficient “seriousness” such that a “plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”³⁸

Similar to Title VII anti-discrimination jurisprudence, the Supreme Court chose the phrasing “*material adversity*” because the Court believed it was “important to separate significant from trivial harms.”³⁹ Again, similar to Title VII anti-discrimination jurisprudence, “[a]n employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.”⁴⁰ Title VII’s anti-retaliation provision only prohibits “employer actions that are likely ‘to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers” – “normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.”⁴¹

The Supreme Court further explained that it referred to the “reactions of a *reasonable* employee” because the Court believed that the anti-retaliation provisions standard for “judging harm” must be an “objective” one, which could be judicially administrable.⁴² An objective standard for retaliation “avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.”⁴³ The Supreme Court’s goal for such objectivity in the standard for the required employment action was the same goal it had for other areas of Title VII jurisprudence, including Title VII’s primary anti-discrimination provision.⁴⁴ Like all Title

35. *Id.* at 67.

36. *Id.* at 67–70.

37. *Id.* at 67.

38. *Burlington N.*, 548 U.S. at 67–68.

39. *Id.* at 68.

40. *Id.* (citation omitted).

41. *Id.* (citation omitted).

42. *Id.* at 68–69.

43. *Burlington N.*, 548 U.S. at 67–68.

44. *Id.* at 69.

VII analysis, the required employment action must be viewed from the “reasonable” employee’s perspective, within the context of the situation at hand.⁴⁵

A number of courts have continued to refer to the required adversity of the action under a Title VII retaliation claim as an “adverse employment action”; however, many courts have labeled the required adverse action for a retaliation claim instead as a “materially adverse action” to note the “appropriate” distinction between the *prima facie* standard set by the *Burlington Northern* Court for such claims.⁴⁶

III. PAID ADMINISTRATIVE LEAVE USUALLY DOES NOT CONSTITUTE AN ADVERSE EMPLOYMENT ACTION UNDER THE TITLE VII DISCRIMINATION PROVISION

The Second, Third, Fourth, Fifth, Sixth, Eighth, and Federal Circuit have held that paid administrative leave is not an adverse employment action.⁴⁷ Though the First, Seventh, Tenth, and Eleventh Circuits have not ruled definitively on the issue, the district courts in those circuits have overwhelmingly held that paid administrative leave does not constitute an adverse employment action.⁴⁸

45. *Id.* at 69–70.

46. *McNorton v. Georgia Dep’t. of Transp.*, 619 F. Supp. 2d 1360, 1373 (N.D. Ga. 2007) (citations omitted).

47. *Jones v. SEPTA*, 796 F.3d 323, 326 (3d. Cir. 2015) (agreeing with other “sister courts that a suspension with pay, ‘without more,’ is not an adverse employment action under the substantive provision of Title VII.”); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1007–08 (8th Cir. 2012) (holding that “[p]lacement on paid administrative leave” is not an adverse employment action because it is not a tangible change to a working condition that produces a material employment disadvantage) (citations omitted); *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (“[P]lacing [the employee] on paid leave – whether administrative or sick – was not an adverse employment action.”); *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006) (joining other federal circuit courts in holding that “administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action.”); *Singletary v. Missouri Dep’t of Corr.*, 423 F.3d 886, 891–92 (8th Cir. 2005) (“[F]ind[ing] the reasoning of Fourth, Fifth, and Sixth circuits persuasive and hold[ing] that [plaintiff] did not suffer an adverse employment action by being placed on administrative leave.”); *Haddon v. Exec. Residence*, 313 F.3d 1352, 1363–64 (Fed. Cir. 2002) (agreeing that a short term suspension without loss of pay to conduct an internal investigation does not constitute an adverse employment action); *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (short term paid leave to conduct investigation did not amount to an adverse employment action).

48. First: *Testa v. Town of Madison*, No. 04-185-B-W, 2005 U.S. Dist. LEXIS 44531, at *34–35 (D. Me. Sept. 26, 2005) (“[S]uspension with pay pending an administrative investigation, or ‘administrative leave,’ is generally regarded not to be an adverse employment action”); Seventh: *Nichols v. S. Ill. Univ.–Edwardsville*, 432 F. Supp. 2d 798, 808 (S.D. Ill. 2006) (“As a matter of law, this Court finds that placing [the plaintiff] on administrative leave

The general rationale behind these holdings is that “[a] paid suspension pending an investigation of an employee’s alleged wrongdoing does not fall under any of the forms of adverse action mentioned by Title VII’s substantive provision. That statute prohibits discrimination in hiring, firing, and ‘compensation, terms, conditions, or privileges of employment.’”⁴⁹ “A paid suspension is neither a refusal to hire nor a termination, and by design it does not change compensation.”⁵⁰ “Nor does it effect a ‘serious and tangible’ alteration of the ‘terms, conditions, or privileges of employment,’ . . . because ‘the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer’s disciplinary policies in appropriate circumstances.’”⁵¹ “An ‘adverse employment action is a tangible change in working conditions that produces a material employment disadvantage’ . . . Placement on paid administrative leave pending an investigation does not meet this standard.”⁵² Since such material terms of employment are generally not effected by a paid administrative leave, the subjective intent of the investigation is not relevant.⁵³

Importantly however, a number of courts, especially in the District of Columbia, have expressly conditioned the general holding that paid administrative leave is not considered to be an adverse employment action upon the

with pay is not an adverse employment action.”) (citation omitted); Tenth: *Baker v. City & Cty. of Denver*, No. 14-cv-02468-REB-CBS, 2016 U.S. Dist. LEXIS 504, at *14 (D. Colo. Jan. 5, 2016) (“Several courts of appeal have held that placing an employee on paid administrative leave, especially when there is no presumption of termination, is not an adverse employment action.”) (citations omitted); *Armstead v. Wood*, No. 10-cv-02783-CMA-KMT, 2012 U.S. Dist. LEXIS 83780, at *18–19 (D. Colo. June 15, 2012) (“Being placed on paid leave does not constitute an adverse employment action.”); *Gerald v. Locksley*, 785 F. Supp. 2d 1074, 1117 (D.N.M. 2011) (“Nor was placing [plaintiff] on paid administrative leave an adverse employment action.”) (citations omitted); Eleventh: *Moore v. Miami Dade Cty.*, No. 03-22421-CIV-GOLD/SIMONTON, 2005 U.S. Dist. LEXIS 27245, at *30–32 (S.D. Fla. Sept. 30, 2005) (“The courts have specifically held that a suspension with pay for a short period of time is not an adverse employment action.”) (citations omitted); *Wadibia v. Auburn Univ.*, No. 98-0722-BH-M, 1999 U.S. Dist. LEXIS 14122, at *32 (“The Court agrees that [the plaintiff’s] paid leave could not reasonably be considered an adverse employment action so as to trigger federal anti-discrimination laws.”); Dist. of Columbia: *Bland v. Johnson*, 66 F. Supp. 3d 69, 73 (D.D.C. 2014) (“Unfortunately for [the plaintiff], being placed on paid administrative leave is *not* an adverse employment action sufficient to allege a Title VII discrimination claim . . .”).

49. *Jones*, 796 F.3d at 326 (citing U.S.C. § 2000e–2(A)(1)).

50. *Id.*

51. *Id.* (first citing *Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004); and then quoting *Joseph*, 465 F.3d at 91).

52. *Pulczynski*, 691 F.3d at 1007–08 (first quoting *Chappell v. Bilco Co.*, 675 F.3d 1110, 1117 (8th Cir. 2012); and then citing *Singletary v. Missouri Dep’t of Corr.*, 423 F.3d 886, 891–92 (8th Cir. 2005)).

53. *See, e.g., Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 626 (6th Cir. 2013).

assumption that the leave was brief.⁵⁴ As such, some courts have held even under Title VII discrimination claims that an administrative leave will be considered an adverse employment action if it extends past a brief period.⁵⁵

IV. WARNINGS FROM FEDERAL CIRCUIT COURTS REGARDING A BROADER FINDING OF A SUFFICIENT ADVERSE ACTION FOR PAID ADMINISTRATIVE LEAVE

A. *MCCOY V. CITY OF SHREVEPORT*

In *McCoy*, the plaintiff was a female officer that had made a number of very emotional statements about her belief that African American officers were treated differently in the police department after her complaint about workplace harassment was denied by the city.⁵⁶ The plaintiff eventually became so upset that she relieved herself of duty to “see her doctor about the emotional distress that she was experiencing.”⁵⁷ The plaintiff’s supervising officer ordered plaintiff to turn in her firearm and then eventually placed her on administrative leave with another order for the plaintiff to turn in her badge.⁵⁸ In addition to alleging a constructive discharge, the plaintiff asserted that her administrative leave constituted an adverse employment action.⁵⁹

54. *Akosile v. Armed Forces Ret. Home*, 938 F. Supp. 2d 76, 91 (D.D.C. 2013) (“Placement on administrative leave for a short period of time without loss in pay or benefits in order to investigate an allegation of wrongdoing generally does not constitute an adverse employment action.”); *Lopez v. Miami-Dade Cty.*, No. 03-20943-Civ-Hoeveler/Bandstra, 2004 U.S. Dist. LEXIS 20687, at *13 (S.D. Fla. July 13, 2004) (“This Court recognizes the possibility that Plaintiff has suffered an adverse employment action based on the length of his paid administrative leave.”); *Boykin v. England*, No. 02-950 (JDB), 2003 U.S. Dist. LEXIS 13350, at *14, n. 5 (D.D.C. July 16, 2003) (“[C]ase law suggests that an employee’s placement on paid administrative leave for a limited period does not constitute an adverse employment action.”) (citations omitted); *Dickerson v. Sectek, Inc.*, 238 F. Supp. 2d 66, 79 (D.D.C. 2002) (“In similar circumstances, a number of courts have found that when an employee is placed on paid administrative leave or suspended pending an internal investigation, that decision does not constitute adverse employment action, at least when the suspension is relatively brief.”) (citations omitted).

55. *Richardson v. Petasis*, No. 13-00826 (RC), 2015 U.S. Dist. LEXIS 163484, at *71–72 (D.D.C. Dec. 15, 2015) (71–72 (D.D.C. 2005) (holding that administrative leave of thirty-nine days was longer than a number of other cases where the administrative leave was not considered an adverse employment action) (citing *Brown v. Georgetown Univ. Hosp. Medstar Health*, 828 F. Supp. 2d 1, 9 (D.D.C. 2011) (“[S]uspension of eleven days”); *Dickerson v. SecTek, Inc.*, 238 F. Supp. 2d 66, 78–79 (D.D.C. 2002) (“[S]uspension of less than one month.”)).

56. *McCoy v. City of Shreveport*, 492 F.3d 551, 554–55 (5th Cir. 2007).

57. *Id.* at 555.

58. *Id.*

59. *Id.* at 557.

The *McCoy* court noted that it had “historically held that, for all Title VII claims, ‘[a]dverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating.’”⁶⁰ Under that former standard, “the district court properly held that placing [the plaintiff] on paid leave—whether administrative or sick—was not an adverse employment action.”⁶¹ The court explained, however, that the Supreme Court “abrogated” this approach in *Burlington Northern* as to Title VII “retaliation” claims and required that the court apply an analysis that “defines an adverse employment action as any action that ‘might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”⁶²

Since the Fifth Circuit’s standard for an adverse employment action in the discrimination context remained intact, the *McCoy* court held that plaintiff’s leave did not amount to an adverse employment action for the Title VII discrimination claim.⁶³ The “retaliation claims” related to the leave, however, required a “closer look post-*Burlington Northern*.”⁶⁴ The court explained that “the mere fact that [the plaintiff] was placed on *paid* administrative leave does not necessarily mean that she did not suffer an adverse employment action.”⁶⁵ The court provided that even if the leave was paid, “placement on administrative leave may carry with it both the stigma of the suspicion of wrongdoing and possibly significant emotional distress.”⁶⁶ Furthermore, “[i]nstances of administrative leave can also negatively affect an [police] officer’s chances for future advancement.”⁶⁷ The court held that it was “at least a close question whether [the employer’s] placing [plaintiff] on paid administrative leave constituted an adverse employment action under the *Burlington Northern* standard.”⁶⁸ Though the *McCoy* court announced such principles, it did not reach a conclusion on the point as it held that the plaintiff’s retaliation claim based upon administrative leave otherwise failed because there was insufficient evidence to prove pretext.⁶⁹

60. *Id.* at 559.

61. *McCoy*, 492 F.3d at 559.

62. *Id.*

63. *Id.* at 559–60.

64. *Id.* at 560.

65. *Id.*

66. *McCoy*, 492 F.3d at 561.

67. *Id.*

68. *Id.*

69. *Id.*

B. *STEWART V. MISSISSIPPI TRANSPORTATION COMMISSION*

In *Stewart*, the plaintiff was placed on a three-week administrative leave.⁷⁰ The Fifth Circuit in *Stewart* held that the plaintiff's administrative leave "would not dissuade a reasonable employee from making a charge of discrimination."⁷¹ The court provided something of a warning along with this holding, however, as it explained that "[p]lacing an employee on paid administrative leave . . . cannot be said to be a 'petty slight.'"⁷² The court noted that "[i]ndeed, depending on the circumstances, it may range from a completely benign measure to one that stigmatizes an employee and causes significant emotional distress."⁷³ "Forced leave may even affect an employee's opportunities for future advancement."⁷⁴ The court established that this was a rule of context – "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters."⁷⁵

The *Stewart* court explained that "[t]he context here demonstrates that [the plaintiff] suffered no adverse impact as a result of being placed on leave" because the plaintiff "continued to receive her salary," "was not requested to use any accumulated leave time," and "[o]nly three weeks later, [the plaintiff] was reinstated with the same salary."⁷⁶ It was important to the court that there could have been no stigma attached to the leave – "[t]here was no suggestion that the leave was the result of any fault on [plaintiff's] part, such as might carry a stigma in the workplace."⁷⁷ As such, "[plaintiff's] administrative leave was not, under these circumstances, an adverse action."⁷⁸

C. *MICHAEL V. CATERPILLAR FINANCIAL SERVICES CORPORATION*

In *Michael*, the Sixth Circuit emphasized that "the Supreme Court recently held that a plaintiff's burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination context."⁷⁹ "A materially adverse employment action in the retaliation context consists of any action that 'well might have dissuaded a

70. *Stewart v. Mississippi Transp. Comm'n*, 586 F.3d 321, 331 (5th Cir. 2009).

71. *Id.* at 332.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Stewart*, 586 F.3d at 332. (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006)).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Michael v. Caterpillar Fin. Serv. Corp.*, 496 F.3d 584, 595–96 (6th Cir. 2007) (citing *Burlington N.*, 548 U.S. at 67–69).

reasonable worker from making or supporting a charge of discrimination.”⁸⁰ “This more liberal definition permits actions not materially adverse for purposes of an anti-discrimination claim to qualify as such in the retaliation context.”⁸¹ Under this “liberal” standard, the court held that two days of paid administrative leave, when coupled with a ninety-day performance plan, met the “relatively low bar” for stating a *prima facie* material adverse action for Title VII retaliation.⁸²

Though the bar for stating such a claim was described as low, the *Michael* court explained that “[r]egarding whether the pending investigation was sufficient to warrant [the plaintiff’s] brief placement on paid leave, this court has upheld the employer’s action in numerous cases in which employees have been placed on paid leave pending investigations of complaints against them.”⁸³ The court denied the plaintiff’s claim because the employer had legitimate reasons for placing the plaintiff on leave and the showing of pretext by the plaintiff was not sufficient.⁸⁴

D. A POTENTIAL SPLIT IN THE SEVENTH CIRCUIT – *NICHOLS V. SOUTHERN ILLINOIS UNIVERSITY-EDWARDSVILLE*

In *Nichols*, the plaintiff was a police officer that had been involved in an incident where he had to restrain an unstable woman who attempted to enter a busy street of traffic.⁸⁵ The plaintiff was placed on “paid administrative leave pending the results of two fitness-for-duty psychological examinations.”⁸⁶ The plaintiff was on administrative leave for three months.⁸⁷ The plaintiff was placed back on fulltime, active duty once the psychological examinations were completed.⁸⁸ The plaintiff claimed that the psychological examinations and paid leave were administered in retaliation for claims that the plaintiff had made regarding race discrimination within the police department.⁸⁹

In analyzing whether the plaintiff had “suffered a materially adverse action,” the Seventh Circuit emphasized that plaintiff did “not claim that his position, salary, or benefits were impacted by the paid administrative leave”

80. *Id.* at 596.

81. *Id.*

82. *Id.*

83. *Id.* at 597 (first citing *Scott v. Metro. Health Corp.*, 234 F. App’x 341, 349 (6th Cir. Apr. 3, 2007) and then citing *Peltier v. United States*, 388 F.3d 984, 988–89 (6th Cir. 2004)).

84. *Michael*, 496 F.3d at 597–98.

85. *Nichols v. S. Ill. Univ.–Edwardsville*, 510 F.3d 772, 779 (7th Cir. 2007).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

and that the police department “reinstated him to active duty upon receiving the results of his fitness-for-duty psychological examinations.”⁹⁰ The *Nichols* court joined the rationale of pre-*Burlington Northern* holdings from the Fourth, Fifth, and Eighth Circuit Courts, which had all held that “paid administrative leave pending the conclusion of an investigation” was not a material adverse action.⁹¹ The court found that paid administrative leave simply was not “materially adverse.”⁹²

V. THE NINTH CIRCUIT’S CONFIRMATION OF PAID ADMINISTRATIVE LEAVE AS A POTENTIAL ADVERSE ACTION IN *DAHLIA V. RODRIGUEZ*

Dahlia was a First Amendment retaliation case involving an extreme set of facts. Plaintiff Angelo Dahlia was a police officer for the Burbank Police Department.⁹³ Dahlia was assigned to take part in an investigation of an armed robbery of a local café.⁹⁴ Dahlia witnessed acts of police misconduct by other high-ranking officers on the case almost immediately after the investigation into the armed robbery began.⁹⁵

On the day after the robbery took place, Dahlia witnessed another high-ranking officer assigned to the case grab a suspect by the throat and point his gun “under the suspect’s eye, saying, ‘How does it feel to have a gun in your face motherf[***]er.’”⁹⁶ This high-ranking officer observed Dahlia looking on in “disbelief.”⁹⁷ On that same evening, Dahlia overheard another high-ranking officer slapping or hitting a different suspect behind the closed doors of an interrogation room.⁹⁸ Dahlia would continue to overhear other officers on the case physically assault witnesses and suspects.⁹⁹ Dahlia was then excluded from participating in the investigation by these higher ranking officers as such officers took control of the investigation.¹⁰⁰ When Dahlia reported his concerns about the misconduct to a supervising officer, the supervising officer told Dahlia to “quit his sniveling.”¹⁰¹ After further beatings and police misconduct, Dahlia reported his concerns again to this supervising officer to

90. *Nichols*, 510 F.3d at 786.

91. *Id.* at 786–87 (first citing *Breaux v. City of Garland*, 205 F.3d 150, 157–58 (5th Cir. 2000); then citing *Singletary v. Missouri Dep’t of Corr.*, 423 F.3d 886, 891–92 (8th Cir. 2005); and then citing *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001)).

92. *Nichols*, 510 F.3d at 787.

93. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1063 (9th Cir. 2013) (en banc).

94. *Id.*

95. *Id.* at 1063–64.

96. *Id.*

97. *Id.*

98. *Dahlia*, 735 F.3d at 1064.

99. *Id.*

100. *Id.*

101. *Id.*

no avail.¹⁰² In fact, this same supervising officer ignored a third complaint from Dahlia regarding the police misconduct on the investigation.¹⁰³

The department's internal affairs division eventually opened an internal investigation into the conduct involved in the investigation.¹⁰⁴ Other officers monitored Dahlia closely and threatened him not to tell the internal affairs investigators anything about what Dahlia had seen.¹⁰⁵ The officers continued these intimidation tactics throughout the course of Dahlia's three interviews with the internal affairs investigators.¹⁰⁶ Such officers further threatened Dahlia if he were to participate in an expected investigation by the Federal Bureau of Investigations regarding the same conduct.¹⁰⁷ The harassment against Dahlia culminated with one of the high-ranking officers threatening to put a "case" on Dahlia and have him thrown in jail.¹⁰⁸ Dahlia eventually reported this particular incident to the Burbank Police Department President who passed the report along to the Burbank City Manager.¹⁰⁹ As a result of this report, Dahlia was interviewed by the Los Angeles Sheriff's Department.¹¹⁰ During his meeting with the Sheriff's Department, Dahlia reported the officers' "misconduct, threats, intimidation and harassment."¹¹¹ "Four days later, Dahlia was placed on administrative leave pending discipline."¹¹²

Among other claims based upon California state law, Dahlia brought a claim for First Amendment retaliation under 42 U.S.C. § 1983.¹¹³ In addition to harm caused by the harassment, Dahlia claimed harm from "denial of employment opportunities" and "denial of continued employment."¹¹⁴ The United States District Court for the District of California dismissed Dahlia's claims in part because "placement on paid administrative leave is not an adverse employment action."¹¹⁵ The Ninth Circuit Court's original panel opinion on the appeal disagreed with such holding and the Court voted for a re-hearing *en banc*.¹¹⁶

Much of the *Dahlia* court's opinion was devoted to deciding whether Dahlia's claim was invalid because his speech was pursuant to his public

102. *Id.*

103. *Dahlia*, 735 F.3d at 1064.

104. *Id.*

105. *Id.*

106. *Id.* at 1064–65.

107. *Id.* at 1065.

108. *Dahlia*, 735 F.3d at 1065.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Dahlia*, 735 F.3d at 1065.

114. *Id.*

115. *Id.* at 1066.

116. *Id.*

duties.¹¹⁷ In turn, much of the attention from other courts and scholars is focused on this point. However, the *Dahlia* court also provided a very important holding as to whether paid administrative leave can form the basis of a retaliation claim.¹¹⁸

The *Dahlia* court reversed the district court and held that “under some circumstances, placement on administrative leave can constitute an adverse employment action.”¹¹⁹ The *Dahlia* court began its analysis by setting forth Ninth Circuit law on First Amendment retaliation.¹²⁰ “‘To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden.’”¹²¹ As the *Dahlia* court explained, “[I]n *First Amendment* retaliation cases ‘[t]he goal is to prevent, or redress, actions by a government employer that ‘chill the exercise of protected’ *First Amendment* rights.’”¹²² “[T]he proper inquiry is whether the action is ‘reasonably likely to deter employees from engaging in protected activity.’”¹²³ Notably, this is the same standard that the Supreme Court had established in *Burlington Northern* for retaliation claims under Title VII – the employment action must have been of sufficient “seriousness” such that a “plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”¹²⁴ Indeed, “[i]n determining what constitutes an adverse employment action, the standard used for Title VII claims is ‘the functional equivalent’ of the standard for *First Amendment* claims.”¹²⁵

The *Dahlia* court explained that Dahlia’s “administrative leave [could have prevented Dahlia] from taking the sergeant’s exam, required [Dahlia] to forfeit on-call and holiday pay, and prevented [Dahlia] from furthering his investigative experience”¹²⁶ The *Dahlia* court held that such effects of

117. *Id.* at 1068–78.

118. *Dahlia*, 735 F.3d at 1078–79.

119. *Id.* at 1078.

120. *Id.*

121. *Id.* (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003)).

122. *Id.* at 1078 (citation omitted).

123. *Dahlia*, 735 F.3d at 1078 (The *Dahlia* court also cited *Coszalter* holding that “if the plaintiffs in this case can establish that the actions taken by the defendants were ‘reasonably likely to deter [them] from engaging in protected activity [under the *First Amendment*],’ they will have established a valid claim under § 1983”) (citing *Coszalter*, 320 F.3d at 976).

124. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–68 (2006).

125. *Maya v. Leprino Foods Co.*, No. 1:12-CV-1479 AWI GSA, 2014 U.S. Dist. LEXIS 35651, at *61 (E.D. Cal. Mar. 17, 2014) (citing *Coszalter*, 320 F.3d at 976).

126. *Dahlia*, 735 F.3d at 1079.

Dahlia’s administrative leave, if proven, would constitute an “adverse employment action” because the “inability to take a promotional exam, loss of pay and opportunities for investigative experience, as well as the general stigma resulting from placement on administrative leave appear ‘reasonably likely to deter employees from engaging in protected activity.’”¹²⁷

VI. FURTHER PRINCIPLES FROM OTHER DISTRICT COURTS

A. *FERRILL V. OAK CREEK-FRANKLIN JOINT SCHOOL DISTRICT*

In *Ferrill*, the plaintiff was an elementary school principal.¹²⁸ After a number of complaints from teachers about the plaintiff, administrators sought consultants to work with the plaintiff on her managerial skills.¹²⁹ The plaintiff did not cooperate with these consultants.¹³⁰ The administration decided not to roll over the plaintiff’s contract after the close of her second year.¹³¹ The plaintiff had submitted her own complaints to administration regarding insensitivity towards herself (as an African American) and African American students.¹³² The administration placed the plaintiff on paid administrative leave.¹³³ The plaintiff eventually accepted a job at another school district.¹³⁴

The plaintiff alleged that the administration’s decisions regarding the plaintiff’s contract and paid administrative leave were retaliatory actions for her complaints of insensitivity.¹³⁵ The *Ferrill* court emphasized that “[t]he showing a plaintiff must make to set out an adverse employment action required for a retaliation claim is lower than that required for a discrimination claim.”¹³⁶ “The scope of the antiretaliation provision [of Title VII] extends beyond workplace-related and employment-related retaliatory acts and harm.”¹³⁷ As such, “a plaintiff must show only that the employer’s action would cause a ‘reasonable worker’ to be dissuaded from making or supporting a charge of discrimination.”¹³⁸

127. *Id.*

128. *Ferrill v. Oak Creek-Franklin Joint Sch. Dist.*, No. 13-cv-0858, 2015 U.S. Dist. LEXIS 79144, at *1 (E.D. Wis. June 18, 2015).

129. *Id.* at *1–2.

130. *Id.* at *2.

131. *Id.*

132. *Id.*

133. *Ferrill*, 2015 U.S. Dist. LEXIS 79144, at *2.

134. *Id.*

135. *Id.* at *13.

136. *Id.* (citing *Chaib v. Indiana*, 744 F.3d 974, 986–87 (7th Cir. 2014)).

137. *Id.* at *13.

138. *Ferrill*, 2015 U.S. Dist. LEXIS 79144 at *13–14.

The *Ferrill* court explained what it felt was the controlling rule in the Seventh Circuit – “[p]aid administrative leave . . . does not constitute an adverse employment action even in retaliation claims.”¹³⁹ “[T]he present case” presented more than the ordinary administrative leave situation, however, as the administrators “did more than simply place plaintiff on paid administrative leave; they surrounded this action with a number of others.”¹⁴⁰ Most notably, the administrators “notified the police that plaintiff was not welcome on school grounds; requested an extra police patrol in case she tried to enter the building . . . ; and sent letters to other District administrators, [school] teachers, and [school] parents indicating that plaintiff was placed on an indefinite leave of absence pending an investigation into conduct which might be detrimental to the interests of the school district”¹⁴¹ The court noted that “this led to community speculation, including a call from a local TV news reporter, that plaintiff had been ‘removed from the school in handcuffs by the police.’”¹⁴² Under such circumstances, “[a] reasonable juror could conclude that these combined actions, which had the potential to damage plaintiff’s reputation, would be enough to deter a reasonable worker from making a similar complaint and thus were adverse.”¹⁴³

B. *OWEN V. CITY OF OKLAHOMA CITY POLICE DEPARTMENT*

In *Owen*, the plaintiff officer had objected to his assignments to investigate an African American officer for misconduct on two separate occasions because the plaintiff felt that the investigations were racially motivated.¹⁴⁴ Two to three months after the second investigation conducted by the plaintiff, an investigation was opened into misconduct by the plaintiff himself.¹⁴⁵ The plaintiff was placed on paid administrative leave pending the completion of an investigation into a number of instances where the plaintiff had been tardy for work, pursued personal activities while on duty, been paid for hours not worked, or otherwise misused the department’s vehicle.¹⁴⁶

The *Owen* court acknowledged that the Tenth Circuit had “concluded that, in at least some circumstances, a suspension with pay does not constitute

139. *Id.* at *16 (citing *Nichols v. S. Ill. Univ.—Edwardsville*, 510 F.3d 772, 786–87 (7th Cir. 2007)).

140. *Id.*

141. *Id.*

142. *Id.* at *16.

143. *Ferrill*, 2015 U.S. Dist. LEXIS 79144, at *16–17.

144. *Owen v. City of Okla. City Police Dep’t*, NO. CIV-09-0557-HE, 2010 U.S. Dist. LEXIS 135711, *3–5 (W.D. Okla. Dec. 22, 2010).

145. *Id.* at *6.

146. *Id.* at *6–7.

adverse action,”¹⁴⁷ a position which was “consistent with the positions of several other circuits.”¹⁴⁸ “However, given the context specific nature of the determination, coupled with plaintiff’s evidence that his suspension prevented him from earning money from extra duty assignments during the suspension,” the *Owen* court concluded that “while the question [was] close, plaintiff has offered evidence sufficient to make out the necessary prima facie showing of adverse action” in relation to his Title VII retaliation claim.¹⁴⁹

C. *MONICO V. CITY OF CORNELIUS*

While the [*Dahlia*] court did not hold that placement on administrative leave is, as a matter of law, actionable retaliatory conduct, it explained that ‘*Dahlia*’s assertions—that administrative leave prevented him from taking the sergeant’s exam, required him to forfeit on-call and holiday pay, and prevented him from furthering his investigative experience—if proved, would constitute an adverse employment action’ because it was likely they would ‘deter employees from engaging in protected activity.’¹⁵⁰

In *Monico*, the district court denied summary judgment against the plaintiff even though the record “did not establish what consequences [the plaintiff] experienced as a result of being placed on administrative leave or for how long he remained on such leave”¹⁵¹ The court simply believed that “*Dahlia* indicates that [the plaintiff] may be able to establish facts to support his position that placement on administrative leave was conduct reasonably likely to deter him from engaging in protected activity.”¹⁵²

147. *Id.* at *14–15 (citing *Juarez v. Utah*, 263 F. App’x. 726, 737 (10th Cir. Feb. 5, 2008) (“[A]ffirming a district court determination that placing a plaintiff on paid administrative leave pending completion of a sexual harassment investigation would not constitute a material adverse action to a reasonable employee.”)).

148. *Id.* at *15 (citing *Whitaker v. San Jon Schs.*, No. CIV 04-1237 JB/WDS, 2006 U.S. Dist. LEXIS 28786 (D. N.M. Apr. 19, 2006) (“[C]iting circuit cases concluding that placing an employee on administrative leave with pay pending an investigation is not an adverse employment act.”)).

149. *Owen*, 2010 U.S. Dist. LEXIS 135711, at *15.

150. *Monico v. City of Cornelius*, No. 03:13-cv-02129-HZ, 2015 U.S. Dist. LEXIS 44634, *43–44 (D. Or. Apr. 6, 2015).

151. *Id.* at *44.

152. *Id.*

D. *VERGES V. SHELBY COUNTY SHERIFF'S OFFICE*

In *Verges*, the federal district court explained that paid administrative leave could be the basis of a Title VII retaliation claim.¹⁵³ However, the court held in that case that an officer's two-month paid administrative leave to complete psychological testing was not a materially adverse action under *Burlington Northern's* standard because the testing took no longer than necessary and there was no evidence that other employees in the department were informed of the reason for the leave.¹⁵⁴

E. *CARRIO V. APOLLO GROUP*

In *Carrio*, the plaintiff was an executive and adjunct professor for the University of Phoenix.¹⁵⁵ The University of Phoenix held an employee appreciation day at its Atlanta campus, which was attended by the plaintiff.¹⁵⁶ At the beginning of this event, a "three to four minute clip" from the movie *Gone with the Wind* was shown in which white plantation owners and slaves were depicted.¹⁵⁷ A number of University of Phoenix executives then appeared before the audience of employees dressed in Confederate uniforms and announced that the "south had been reclaimed from the north."¹⁵⁸ There was some controversy from a number of employees that believed the skit to have been racially insensitive.¹⁵⁹ The plaintiff believed that the skit was "racially charged" and eventually emailed a human resources representative to express his opinion and stated that "[t]he leadership needed to be reconsidered and asked to step down from their roles."¹⁶⁰

Approximately two months later, an employee luncheon was held where two executives who had participated in the civil war skit asked employees how the Atlanta campus might be improved.¹⁶¹ The plaintiff responded by stating "that the skit from two months prior was inappropriate and racially driven and that he felt that [the executive who was present] and other top executives should attend a class on diversity."¹⁶² The plaintiff was confronted

153. *Verges v. Shelby Cty. Sheriff's Office*, 721 F. Supp. 2d 730, 748 (W.D. Tenn. 2010).

154. *Id.*

155. *Carrio v. Apollo Grp.*, No. 1:07-CV-1814-BBM-RGV, 2009 U.S. Dist. LEXIS 69032, *4-5 (N.D. Ga. July 13, 2009).

156. *Id.* at *7-8.

157. *Id.* at *8.

158. *Id.*

159. *Id.* at *9-10.

160. *Carrio*, 2009 U.S. Dist. LEXIS 69032, at *10-11.

161. *Id.* at *13.

162. *Id.* at *13-14.

by the executive later on in the day and the two had a verbal altercation.¹⁶³ The executive later sent plaintiff home for the day on paid administrative leave.¹⁶⁴

A couple of days later, the executive met with the plaintiff and a human resources representative.¹⁶⁵ During this meeting, the plaintiff accused the executive and the University of Phoenix of harassment.¹⁶⁶ The plaintiff was told that he was being placed on paid administrative leave pending the investigation of the plaintiff's accusations at that meeting.¹⁶⁷ Approximately one month later, the University of Phoenix informed the plaintiff that no evidence of harassment or retaliation had been found and that plaintiff must return back to work in a week or else be considered to have voluntarily terminated his position.¹⁶⁸ The plaintiff responded with an email, which informed the University of Phoenix that he had filed a complaint with the Equal Employment Opportunity Commission and delivered further complaints about the university's failure to protect him from illegal treatment.¹⁶⁹ The plaintiff did not return to work on the designated day and was terminated.¹⁷⁰

The plaintiff brought retaliation claims under 42 U.S.C. § 1981.¹⁷¹ Though this was not a Title VII retaliation claim, the *Carrio* court referred to the *Burlington Northern* standard of describing the required action as a "materially adverse action" rather than an "adverse employment action."¹⁷² The court would apply the same standard announced by the Supreme Court in *Burlington Northern* – "a plaintiff must show that he suffered an action which a reasonable employee would find 'materially adverse,' that is, an action harmful to the point that it 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'"¹⁷³

The *Carrio* court analyzed the plaintiff's two notifications of placement on paid administrative leave separately.¹⁷⁴ The court held that the plaintiff's placement "on paid administrative leave for the remainder of the day [after the verbal altercation with the executive] cannot be viewed as an adverse action that would 'dissuade a reasonable worker from making or supporting

163. *Id.* at *14–15.

164. *Id.* at *15.

165. *Carrio*, 2009 U.S. Dist. LEXIS 69032, at *15.

166. *Id.*

167. *Id.*

168. *Id.* at *16–17.

169. *Id.* at *17–18.

170. *Carrio*, 2009 U.S. Dist. LEXIS 69032, at *18–19.

171. *Id.* at *19.

172. *Id.* at *24–25, n. 12 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)).

173. *Id.* at *26 (citing *Burlington N.*, 548 U.S. at 57).

174. *Id.* at *27–36.

a charge of discrimination.”¹⁷⁵ The court reached this conclusion in large part because the “[p]laintiff was fully compensated for the remainder of his time away from work and the leave had no impact on and did not alter his job, duties, or compensation in any way.”¹⁷⁶ The court further explained that this leave did not prevent the plaintiff from returning to campus to teach separately from his executive duties.¹⁷⁷ The court cited to a number of other cases to support its conclusion that, “[u]nder these circumstances, the Court cannot find that a reasonable employee would have been dissuaded from making a charge of discrimination because of the one-day period of paid administrative leave.”¹⁷⁸

The *Carrio* court then turned to the plaintiff’s approximate five-week paid administrative leave after the plaintiff had his meeting with the executive and human resources representative.¹⁷⁹ Though analyzed separately, apparently the difference in length was not crucial as the court again succinctly stated that “[c]ourts have consistently held that being placed on administrative leave pending an internal investigation is not an adverse employment action that would dissuade a reasonable employee from making or supporting

175. *Carrio*, 2009 U.S. Dist. LEXIS 69032, at *32 (citing *Burlington N.*, 548 U.S. at 57).

176. *Id.*

177. *Id.* at *32–33.

178. *Id.* at *33–34 (citing *McBride v. Medicalodges, Inc.*, No. 06-2535-JWL; 06-2536-JWL; 06-2538-JWL, 2008 U.S. Dist. LEXIS 51699 (D. Kan. July 3, 2008)) (plaintiff’s two one-day paid suspensions pending investigation into the events leading to suspensions “would not have dissuaded a reasonable employee from making or supporting a charge of discrimination”); *Solomon v. Philadelphia Newspapers, Inc.*, No. 05-05326, 2008 U.S. Dist. LEXIS 41978 (E.D. Pa. May 21, 2008) (nine-day suspension with pay pending prompt investigation into allegations of wrongdoing did not constitute materially adverse action within meaning of *Burlington N.*); *Walker v. Johnson*, 501 F. Supp. 2d 156, 172 (D.D.C. 2007) (finding 10-hour period of administrative leave not an adverse employment action); *Helmi v. Solvay Pharms., Inc.*, No. 5:05-CV-36, 2006 U.S. Dist. LEXIS 84562 (W.D. Mich. Nov. 21, 2006) (finding that a two-day suspension with pay did not constitute an adverse employment action for retaliation purposes) (internal citations omitted).

179. *Carrio*, 2009 U.S. Dist. LEXIS 69032, at *34.

a discrimination charge.”¹⁸⁰ The court again held that the plaintiff’s administrative leave did not apply to his teaching duties.¹⁸¹ In a final conclusion, the court explained that, “[b]ecause plaintiff has failed to show that he has been impacted in any way because of his placement on paid administrative leave pending the internal investigation into his complaint, this does not constitute an adverse action that provides a basis for his retaliation claim.”¹⁸²

VII. PRINCIPLES FOR POLICY AND PROCEDURE REGARDING ADMINISTRATIVE LEAVE

A number of important factors were consistently considered by these courts in determining whether a particular administrative leave constituted an adverse action under the Title VII retaliation provision. Employers should consider each of these factors to update or establish administrative leave policies and procedures to best ensure that administrative leave is being implemented in a manner that would not be considered an adverse action for the employee. This of course benefits the employee and the workplace in addition to managing liability under Title VII and other civil rights laws.

A. EFFECTS ON FUTURE OPPORTUNITIES AND COLLATERAL PAY

One of the primary areas of concern for the courts has been whether an employee’s future opportunities or pay would be effected by the administrative leave. In *Dahlia*, the court found that the administrative leave constituted an adverse action for retaliation principally because of the plaintiff’s “in-

180. *Id.* at *35–36 (citing *Lentz v. City of Cleveland*, 333 F. App’x. 42, (6th Cir. 2009)) (reversing in part the district judge’s ruling and finding that administrative leave pending an investigation was not an adverse employment action); *Scott v. Metro. Health Corp.*, 234 F. App’x 341, 349 (6th Cir. 2007) (finding that placing an employee on paid administrative leave was not a materially adverse employment action for purposes of a retaliation claim); *Nichols v. S. Ill. Univ.—Edwardsville*, 510 F.3d 772, 786–87 (7th Cir. 2007) (paid administrative leave pending investigation does not constitute materially adverse action under *Burlington N.*); *Peltier v. United States*, 388 F.3d 984, 988 (“[A] suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action.”); *Grice v. Baltimore Cty., Md.*, No. JFM 07-1701, 2008 U.S. Dist. LEXIS 91114 (D. Md. Nov. 5, 2008) (suspension with pay pending an investigation not an adverse employment action under *Burlington N.*); *Stewart v. Loftin*, No. 2:06cv137-KS-MTP, 2008 U.S. Dist. LEXIS 58991 (S.D. Miss. Aug. 4, 2008) (finding paid administrative leave pending an investigation into plaintiff’s claims where plaintiff’s position or salary was not impacted to not be a material adverse action)) (internal citations omitted).

181. *Carrio*, 2009 U.S. Dist. LEXIS 69032, at *36.

182. *Id.*

bility to take a promotional exam, loss of pay and opportunities for investigative experience.”¹⁸³ In *McCoy*, the court thought it important that “[i]nstances of administrative leave can also negatively affect [a police officer’s] chances for future advancement.”¹⁸⁴ The *Stewart* court reiterated this same concern.¹⁸⁵ And in *Owen*, the court found an adverse action through “plaintiff’s evidence that his suspension prevented him from earning money from extraduty assignments during the suspension”¹⁸⁶ In contrast, the *Carrio* court rejected an adverse action finding when the employee on leave from his executive duties was not prevented from continuing to pursue his teaching opportunities with the university.¹⁸⁷

Accordingly, employers should consider crafting administrative leave policies that would expressly maintain an employee’s opportunities for advancement when the employee is reinstated. In other words, policy should prohibit an administrative leave from making future advancement more difficult. For example, the employer could have a policy that a reinstated employee’s performance evaluations or retention/promotion reviews cannot take into consideration the employee’s past administrative leave. Or, if a certain amount of time on the job is necessary for a promotion opportunity, such policy could establish that time off for administrative leave should still be counted for such purposes.

Furthermore, to the extent possible, the administrative leave should only cover duties that are necessary to accomplish the purposes of an investigation or objective and should not affect corollary opportunities that could otherwise be preserved. The administrative leave might also be expressly crafted to allow the employee to be compensated for extraduty assignments that would have otherwise likely been earned by the employee based upon past practices.

B. PREVENTION OF STIGMA

The second factor consistently mentioned by the courts was the stigma that can attach to an employee that is placed on administrative leave. The *McCoy* court provided that even if the leave was paid, “placement on administrative leave may carry with it both the stigma of the suspicion of wrongdoing and possibly significant emotional distress.”¹⁸⁸ The *Stewart* court explained that “depending on the circumstances, [administrative leave] may

183. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013) (en banc).

184. *McCoy v. City of Shreveport*, 492 F.3d 551, 561 (5th Cir. 2007).

185. *Stewart v. Mississippi Transp. Comm’n*, 586 F.3d 321, 332 (5th Cir. 2009).

186. *Owen v. City of Okla. City Police Dep’t*, No. CIV-09-0557-HE, 2010 U.S. Dist. LEXIS 135711, *15 (W.D. Okla. Dec. 22, 2010).

187. *Carrio*, 2009 U.S. Dist. LEXIS 69032, at *32–33.

188. *McCoy*, 492 F.3d at 561.

range from a completely benign measure to one that stigmatizes an employee and causes significant emotional distress.”¹⁸⁹ The *Dahlia* court specifically mentioned “the general stigma resulting from placement on administrative leave”¹⁹⁰ And most notably in *Ferrill*, the court found an adverse action when the administrators,

notified the police that plaintiff was not welcome on school grounds; requested an extra police patrol in case she tried to enter the building . . . ; and sent letters to other District administrators, [school] teachers, and [school] parents indicating that plaintiff ‘was placed on an indefinite leave of absence pending an investigation into conduct which might be detrimental to the interests of the school district,’
...¹⁹¹

The *Ferrill* court noted that this “led to community speculation, including a call from a local TV news reporter, that plaintiff had been ‘removed from the school in handcuffs by the police.’”¹⁹²

In contrast, the *Verges* court found that the administrative leave was not an adverse action because there was no evidence that other employees in the department were informed of the reason for the leave.¹⁹³ The potential stigma that comes with administrative leave pending an investigation cannot be avoided entirely. However, employers should consider policy and procedures that minimize *unnecessary* actions which can create a stigma of wrongdoing and ostracization. Employers should avoid informing other employees of such administrative leave that do not have a need to know and should otherwise have strict policies about communicating with outside parties regarding the leave or investigation unless necessary for the safety of others.

Employers could also implement policy and procedure to ensure that the employee that is being placed on administrative leave is fully informed of the process and its ongoing progress. This would include express explanations of why the administrative leave is important and how its parameters were carefully considered. Importantly, employers should consider explaining how the employment relationship is not severed with an administrative leave and how potential reinstatement would maintain future and corollary oppor-

189. *Stewart*, 586 F.3d at 332.

190. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013) (en banc).

191. *Ferrill v. Oak Creek-Franklin Joint Sch. Dist.*, No. 13-cv-0858, 2015 U.S. Dist. LEXIS 79144, at *16 (E. D. Wis. June 18, 2015).

192. *Id.*

193. *Verges v. Shelby Cty. Sheriff’s Office*, 721 F. Supp. 2d 730, 748 (W.D. Tenn. 2010).

tunities for the employee. To the extent it is possible and appropriate, employers may allow the employee to return to the work premises to benefit from events like trainings or work gatherings. Each workplace and situation requiring leave is different, and as such, employers should consider what opportunities for inclusion may be appropriate in a given circumstance which may reduce the employee's feelings of isolation from the workplace.

C. DURATION OF THE ADMINISTRATIVE LEAVE

The duration of the administrative leave was a factor for most all of the cases discussed herein. The time of the leave itself matters as the longer the leave lasts the more likely it is to be considered adverse.¹⁹⁴ However, perhaps even more important is the sentiment of the *Verges* court that the leave takes no longer than is necessary to accomplish the necessary investigation.¹⁹⁵ Employers must have policies and resources in place to ensure that the investigation begins immediately upon the beginning of the administrative leave and thereafter takes no longer than is necessary to gather information and make the appropriate decisions going forward.

D. IT MUST BE PAID LEAVE

Though stated or otherwise assumed throughout this Article and its analysis of such case law, the employer must ensure that the administrative leave is paid and that the employee receives compensation in the usual manner. "While administrative leave, by itself, may not constitute an adverse employment action, being placed on administrative leave without pay does."¹⁹⁶ Employers should establish procedures to ensure that the employee is fully

194. *Cf. Akosile v. Armed Forces Ret.*, 938 F. Supp. 2d 76, 91 (D.D.C. 2013) ("Placement on administrative leave for a short period of time without loss in pay or benefits in order to investigate an allegation of wrongdoing generally does not constitute an adverse employment action."); *Lopez v. Miami-Dade Cty.*, No. 03-20943-Civ-Hoeveler/Bandstra, 2004 U.S. Dist. LEXIS 20687, at *13 (S.D. Fla. July 13, 2004) ("This Court recognizes the possibility that Plaintiff has suffered an adverse employment action based on the length of his paid administrative leave."); *Boykin v. England*, No. 02-950, 2003 U.S. Dist. LEXIS 13350, at *14 n. 5. (D.D.C. July 16, 2003) ("[Ca]se law suggests that an employee's placement on paid administrative leave for a limited period does not constitute an adverse employment action.") (citations omitted); *Dickerson v. SECTEK, Inc.*, 238 F. Supp. 2d 66, 79 (D.D.C. 2002) ("In similar circumstances, a number of courts have found that when an employee is placed on paid administrative leave or suspended pending an internal investigation, that decision does not constitute adverse employment action, at least when the suspension is relatively brief.") (citations omitted).

195. *Verges*, 721 F. Supp. 2d at 748.

196. *Maya v. Leprino Foods Co.*, No. 1:12-CV-1479 AWI GSA, 2014 U.S. Dist. LEXIS 35651, at *60 (E.D. Cal. March 18, 2014) (citing *Johnson v. Alice Indep. Sch. Dist.*, No. C-12-170, 2012 U.S. Dist. LEXIS 131350, at *9 (S.D. Tex. Sept. 14, 2012)).

informed of the paid nature of the leave and that necessary follow-up measures are taken so that the employee receives such pay on time and in the usual manner.

E. CONSIDERATION OF CONTEXT AND THE EMPLOYEE'S PERSPECTIVE

Again, these cases describe a vulnerability for retaliation claims. When crafting policy or procedures for administrative leaves generally, or for a specific administrative leave, employers should ask themselves the golden question presented by the Supreme Court in *Burlington Northern* – would this administrative leave have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”¹⁹⁷ As the *Stewart* court emphasized, this is a rule of context – “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.”¹⁹⁸ “[I]ndeed, depending on the circumstances, it may range from a completely benign measure to one that stigmatizes an employee and causes significant emotional distress.”¹⁹⁹

Employers should take an honest accounting of the dynamics of their given workplace, the parameters of the proposed leave, and the manner in which such leave is communicated and managed to determine if in that context such leave could be considered unduly intimidating. Since the concern is retaliation, employers should make entirely sure that the administrative leave is not connected in anyway with an employee’s past complaints about workplace practices. Employers should thoroughly document the legitimate business reason for the administrative leave as well as the assessment that the administrative leave has no connection to a past complaint by the employee. Indeed, even if the administrative leave is found to be an adverse action, such a retaliation claim will fail if the employer has shown a legitimate reason for the leave that is not susceptible to a showing of pretext.²⁰⁰

VIII. CONCLUSION

The current danger is that many employers may still view the potential liability which comes from placing an employee on paid administrative leave within the relative security that has come from the vast majority of courts finding that such leave does not constitute an adverse employment action for Title VII discrimination claims. *Dahlia* and the other cases described herein really should provide a wake-up call for employers and their attorneys to

197. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–68 (2006).

198. *Stewart v. Mississippi Transp. Comm’n*, 586 F.3d 321, 332 (5th Cir. 2009). (quoting *Burlington N.*, 548 U.S. at 69).

199. *Id.*

200. *See, e.g., McCoy v. City of Shreveport*, 492 F.3d 551, 561 (5th Cir. 2007).

acknowledge the much different (and in many senses lower) standard for finding a sufficient adverse action in a Title VII retaliation claim involving paid administrative leave. Based upon the current momentum of case law across the country, employers should specifically establish or update administrative leave policy to cover the following factors: 1) effects on future opportunities and collateral pay; 2) prevention of stigma; 3) duration of the administrative leave; 4) ensuring payment for the leave; and 5) consideration of context and employee perspective. Jurisprudence defining the complete analysis of administrative leave within the Title VII retaliation context is still young. Employers should be vigilant in keeping track of the continuing evolution of law in this area and adapt policies and procedures accordingly.