RETALIATION FOR VICTIMLESS DISCRIMINATION: NEW JERSEY DRAMATICALLY EXPANDS THE SCOPE OF PROTECTED CONDUCT

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I. INTRODUCTION

The recent New Jersey Supreme Court case, *Battaglia v. United Parcel Service, Inc.*,[1] effectively broadened protection against retaliation afforded to employees under New Jersey's Law Against Discrimination ("LAD").[2] This judiciary action is consistent with a predictable national trend, stemming from recent Supreme Court decisions interpreting employer retaliation liability based upon the "purpose" of the statute rather than the explicit language contained in the statute.[3] The Supreme Court's interpretation increases the protection afforded to employees by eliminating potential loopholes for employer liability that result from a more textualist reading. This new standard, however, also increases the risk of frivolous claims resulting in harm to judicial economy and creates issues of horizontal equity due to the malleability of a standard formulated based upon the purpose and spirit of a statute rather than its language.

In order to address these problems while effectively protecting the rights of employees, the New Jersey Supreme Court needs to clarify the good faith reasonable belief standard articulated in *Battaglia*. The *Battaglia* court held that as long as an employee can demonstrate a good-faith belief that the alleged conduct violated the LAD or that the conduct was simply inconsistent with the objectives of the LAD, he or she is not required to show actual discrimination against an identifiable victim.[4] This Note examines the good faith reasonable standard's evolution and application in federal courts, as well as its recent articulation in New Jersey state courts. While this Note approves of the protection afforded by such a standard in retaliation cases, it proposes a clarification of its application for New Jersey courts.

Part II discusses the LAD and the recent trend of rising retaliation claims across the nation. Part III analyzes Supreme Court cases interpreting the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 and other federal anti-retaliation statutes based on the purpose of the statutes, rather than the text. Further, Part III discusses cases in which the Court took a different approach in interpreting retaliation statutes. Part IV highlights the decisions of lower courts which have applied the Supreme Court's anti-retaliation standard differently

[1] 214 N.J. 518 (2013).

[2] *Id.*

[3] Robinson v. Shell Oil Co., 519 U.S. 337, 345–46 (1997).

[4] *Battaglia*, 214 N.J. 518.

than the New Jersey Supreme Court in *Battaglia.* Part V analyzes the New Jersey Supreme Court's holding in *Battaglia*. Part VI explores the potential interpretations and consequences of the *Battaglia* holding. Finally, Part VII concludes that while the holding in *Battaglia*, specifically the reasoning behind the holding, is consistent with the reasoning behind recent United States Supreme Court anti-retaliation cases, the actual implications of the decision remain unclear and will pose problems in application for lower courts in New Jersey.

II. HISTORY OF THE LAD AND RECENT TRENDS IN RETALIATION CLAIMS

A. New Jersey's Law Against Discrimination

New Jersey has one of the most comprehensive antidiscrimination statutes in the nation.[5] The LAD predates the state's constitution and was originally enacted in April of 1945.[6] The statute was enacted in recognition of the state's public policy against discrimination with an objective explained by the New Jersey Supreme Court as, "nothing less than the eradication of the cancer of discrimination."[7] To maximize its intended protection of victims of discrimination, the LAD explicitly provides that it be construed liberally.[8] New Jersey courts have acknowledged that the purpose of the LAD is to protect not only employees, but also the general public's interest in eradicating discrimination.[9]

As amended over the years, the LAD prohibits employment discrimination against any person based on race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affection or sexual orientation, marital status, familial status, liability for service in the Armed Forces, disability or nationality.[10] The LAD also makes it

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[5] 1945 N.J. Laws 169 (as amended N.J. STAT. ANN. § 10:5-1–42 (West 1945)).

[6] *Id.*

[7] Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993); Fuchilla v. Layman, 537 A.2d 652, 660 (N.J. 1988).

[8] *See* N.J. STAT. ANN. § 10:5-3 (West 2007) (stating that "[the harms of discrimination] have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by the Act and this Act shall be liberally construed in combination with other protection available under the laws of this state").

[9] Cedeno v. Montclair State Univ., 750 A.2d 73, 75 (N.J. 2000) ("The purpose of both the LAD and CEPA is deterrence of improper employer conduct to protect society from the vestiges of discrimination.").

[10] N.J. STAT. ANN. § 10:5-1.

illegal "[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act[.]"[11]

New Jersey courts have interpreted the LAD to require three elements for a retaliation claim: (1) the employee "engaged in a protected activity known to the [employer,]" (2) the employee was "subjected to an adverse employment decision," and (3) there was a causal link between the protected activity and the adverse employment action.[12] Additionally, to be protected, a plaintiff's opposition to alleged discrimination must be both reasonable and made in good faith.[13]

New Jersey courts often look to federal precedent when interpreting Title VII "as a key source of interpretive authority" in construing the terms of the LAD, but, as we will see, state courts are sometimes more protective of plaintiffs than federal courts.[14]

B. Title VII and the Nationwide Rise in Retaliation Claims

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964 ("Title VII"), makes it an unlawful employment practice to discriminate against an employee because (1) he has opposed any practice made unlawful by this subchapter, or (2) he made a charge, assisted, testified, or participated in an investigation, proceeding, or hearing under this subchapter.[15] The Supreme Court has described the "purpose" of the anti-retaliation provision as, "seek[ing] to secure [the] primary objective [of ending workplace discrimination] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[16]

According to the Equal Employment Opportunity Commission ("EEOC"), retaliation claims became the most common charges filed with the EEOC as of 2009.[17] The total number of charges filed decreased

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[11] N.J. STAT. ANN. § 10:5-12(d) (West 2014), *see* Bergen Commercial Bank v. Sisler, 723 A.2d 944, 958 (N.J. 1999) (discussing LAD); Abbamont v. Piscataway Twp. Bd. of Educ., 650 A.2d 958, 971 (N.J. 1994).

[12] Woods-Pirozzi v. Nabisco Foods, 675 A.2d 684, 695 (N.J. Super. Ct. App. Div. 1996).

[13] Carmona v. Resorts Int'l Hotel, Inc., 915 A.2d 518, 522 (N.J. 2007).

[14] Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 452 (1993); Grigoletti v. Ortho Pharm. Corp., 570 A.2d 903, 906 (N.J. 1990).

[15] 42 U.S.C. §§ 2000e to 2000e-17 (2006); 42 U.S.C. § 2000e-3(a); David Long-Daniels & Peter N. Hall, *Risky Business: Litigating Retaliation Claims*, 28 ABA J. LAB. & EMP. L. 437 (2013).

[16] Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).

[17] EEOC, *Charge Statistics FY 1997 Through FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Sept. 18, 2014).

by over 500 from 2010 to 2012; however, during that same time period, retaliation charges increased by over 1,500.[18] This increase is consistent with a trend over the last decade in which the number of retaliation charges has more than doubled.[19] Beyond the statistical increase in claims filed, the EEOC itself has seemingly increased its focus on retaliation claims.[20] As the September 4, 2012 version of the EEOC's Strategic Enforcement Plan makes clear, "the EEOC views retaliation as a direct affront to its law enforcement obligations and an intolerable denial of access to courts for victims of discrimination."[21] The EEOC targets policies and practices that discourage individuals from exercising rights granted under employment discrimination statutes, including retaliatory actions.[22] The increase in retaliation claims does not demonstrate any signs of slowing in the near future, and, on both a federal and New Jersey state level, the law has recently shifted to favor plaintiffs who assert retaliation claims.[23]

Retaliation claims pose a major difficulty for employers.[24] If the employer allows the retaliation claim to proceed to trial, jurors are more likely to believe and sympathize with a plaintiff employee than with a plaintiff claiming status-based discrimination because an average juror has likely experienced some form of retaliation in his or her lifetime.[25] This is in part because New Jersey mandates that prospective jurors be excused from service if it will create a financial hardship.[26] Generally speaking, trials involving claims based on the LAD consume more time than routine motor vehicle accident cases and trip-and-fall cases.[27] As a

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[18] *Id.*

[19] EEOC, *Retaliation-Based Charges FY 1997-FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm (last visited Sept. 18, 2014).

[20] Long-Daniels & Hall, *supra* note 15, at 438.

[21] Long-Daniels & Hall, *supra* note 15, at 438.

[22] Long-Daniels & Hall, *supra* note 15, at 438–39.

[23] Long-Daniels & Hall, *supra* note 15, at 448. *But cf.* Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (holding that a plaintiff must prove retaliation causation using "but for" causation, not a lessened standard).

[24] Stuart W. Davidson & Scott M. Pollins, *Determining Employment Discrimination Case Merits Under State and Federal Law,* ASPATORE, *1, *6 (2012), *available at* 2012 WL 3058210.

[25] *Id.*

[26] State v. Biegenwald, 524 A.2d 130, 138 (N.J. 1987); Telephone Interview with Judge James P. Savio, J.S.C., Judge in the Civil Division of the Superior Court of New Jersey, Atlantic County (Sept. 24, 2013) (hereinafter "Judge Savio").

[27] Judge Savio, *supra* note 26.

result, the issue of juror bias is exacerbated because self-employed individuals, who would probably be more sympathetic to the position of an employer, are generally excused from jury service.[28] For the self-employed, jury service is a financial hardship as compared to employees who are typically paid their normal salaries by their employers while serving; thus, those employees do not experience any financial hardship.

Moreover, because of the fee-shifting provisions under the LAD, the employer in a best-case scenario is responsible for the payment of its own attorney's fees, but in the event the plaintiff is successful, the employer is also responsible for the counsel fees of the plaintiff.[29] Therefore, the longer the litigation process, the greater the financial burden on the employer for counsel fees.[30] As we will see, the Supreme Court's repeated expansion of employee protection poses a significant challenge to employers and increases the likelihood a jury will hear a given claim.[31]

III. SUPREME COURT'S ANALYSIS OF FEDERAL RETALIATION CLAIMS

The Supreme Court has justified recently broadening the scope of the anti-retaliation provision of Title VII in terms of the "purpose" of the statute rather than the text, noting that the provision, "seeks to secure [the] primary objective [of ending workplace discrimination] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[32] A discussion of several decisions illuminates the scope of the Supreme Courts' broadening, as well as the justification and purpose of the generous interpretation.

One of the earliest Supreme Court cases addressing Title VII's anti-retaliation provision was *Robinson v. Shell Oil Co.*,[33] which set the stage for a purposive approach to anti-retaliation provisions. In *Robinson*, the Court held that Title VII's anti-retaliation provision covered current employees, job applicants and former employees—although read literally, its language does not reach former employees.[34] The plaintiff in

[28] Judge Savio, *supra* note 26.

[29] N.J. STAT. ANN. § 10:5-27.1 (West 2002).

[30] Judge Savio, *supra* note 26.

[31] Judge Savio, *supra* note 26.

[32] Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006). *But see* Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2532–33 (2013).

[33] 519 U.S. 337 (1997).

[34] *Id.* at 345–46.

Robinson was fired and subsequently filed a complaint with the EEOC alleging race-based discrimination.[35] While the complaint was pending, the plaintiff applied for another job and received a negative job reference from his previous employer, which he believed was retaliation for his EEOC complaint.[36]

The language of Title VII's anti-retaliation provision grants protection to "employees" and "applicants for employment;" nevertheless, the *Robinson* Court concluded that this language was ambiguous and that former employees were also protected.[37] In explaining the holding, the Court began the trend of relying on the "purpose" of the anti-retaliation provision to broaden its scope.[38] The Court noted that a narrow interpretation of the term "employee" would contradict the purpose of the anti-retaliation provision, which is to maintain "unfettered access to statutory remedial mechanisms."[39]

In *Jackson v. Birmingham Board of Education*,[40] the Supreme Court addressed the relationship between discrimination and retaliation. In *Jackson*, a high-school girls basketball coach supported his team's Title IX right to equal treatment and consequently lost his coaching position.[41] Title IX explicitly prohibits discrimination based upon sex, but contains no explicit language addressing retaliation.[42] The Supreme Court nevertheless held that Congress' failure to include a retaliation provision was not dispositive.[43] More importantly, the Court held that retaliation for complaining about sex discrimination was a form of sex discrimination in and of itself.[44] It noted that the efficacy of the statute would be called into question if the protection did not extend beyond victims of discrimination to complainants like Coach Jackson.[45]

The United States Supreme Court next increased employee protection in the Title VII retaliation context with its 2006 decision in

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35 *Id.* at 339.

36 *Id.*

37 42 U.S.C. § 2000e-3(a) (2012); *Id.* at 345–46.

38 *Robinson,* 519 U.S. at 345–46.

39 *Id.* at 346.

40 544 U.S. 176 (2005); Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 121 (2014).

41 *Jackson*, 544 U.S. at 172.

42 20 U.S.C.A. § 1681 (West 2014).

43 *Jackson*, 544 U.S. at 174–75.

44 *Id.* at 173–75, 178.

45 Brake, *supra* note 40, at 121.

Burlington Northern & Santa Fe Railway. Co. v. White[46] by broadly defining actions constituting retaliation. In that case, plaintiff Sheila White argued that she was retaliated against by being (1) reassigned to a dirtier, more difficult and less desirable job and, (2) suspended without pay for thirty-seven days, although she was eventually reinstated with back pay.[47] The Supreme Court expanded the reach of retaliation protection in two ways. First, the Court held that retaliation claims are not limited to workplace conduct, a somewhat surprising holding since the retaliatory actions taken against Sheila White were directly related to both her employment and workplace conduct.[48] Therefore, the case, did not require the Supreme Court to broaden the reach of retaliation claims to include out of work conduct. The Court nonetheless chose to broaden the definition of retaliation to include actions not directly related to employment and harm outside of the workplace, opening up employers to liability in a much broader set of circumstances.

Second, the Court rejected any requirement that retaliation is actionable only if it constitutes an "ultimate" employment action.[49] Instead, the Court determined that a plaintiff must show only "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.'"[50] While the "materially adverse" standard does not permit suit for "petty slights, minor annoyances, and simple lack of good manners," it does recognize a wide variety of workplace harms as retaliatory.[51] This test, while still requiring the employer to exhibit retaliatory intent, significantly changes the main focus of the retaliation analysis from the employer's actual conduct, to what the reasonable employee believes about the employer's action.[52]

The *Burlington Northern* Court analyzed the reasonable employee

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[46] 548 U.S. 53 (2006).

[47] *Id.* at 57, 59.

[48] *Id.* at 63 ("An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.").

[49] *Id.* at 67 ("The scope of the anti-retaliation provision extends beyond the workplace-related or employment-related retaliatory acts and harm.").

[50] *Id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)); Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions,* 60 S.C. L. REV. 917, 920 (2009).

[51] Burlington, 548 U.S. at 68–69 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)); *see* Zimmer, *supra* note 50, at 920–21.

[52] *See* Davidson, *supra* note 24, at 5.

standard when applying it to the facts of this case.[53] By using the phrase "reasonable employee," the Court intended the standard for judging harm to be objective; however, this objective standard has a subjective component and therefore must be judged "from the perspective of a reasonable person in the plaintiff's position."[54] The Court further clarified, the "significance of any given act of retaliation will often depend upon the particular circumstances."[55] In other words, "[c]ontext matters."[56] Applying these freshly-coined concepts to the facts of *Burlington Northern*, the Supreme Court concluded that White's reassignment may have been materially adverse to a reasonable employee.[57] Further, the Supreme Court held that White's suspension could act as a deterrent to a reasonable employee, even though White eventually received back pay in full.[58]

Two years later, in *CBOCS West, Inc. v. Humphries*,[59] a plaintiff sued his former employer alleging race discrimination and retaliation in violation of 42 U.S.C. Section 1981 ("Section 1981"), a post-Civil War Reconstruction Era statute prohibiting discrimination based upon race in the creation and enforcement of contracts.[60] The plaintiff, an African American employee, claimed that his employer discriminated against him because he complained about the discriminatory actions of his supervisor towards another African American employee.[61] Section 1981 provides, "[a]ll persons living within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as enjoyed by white citizens."[62] The Court concluded that Section 1981, while not explicitly addressing retaliation, does in fact protect employees who complain about race discrimination against retaliation.[63] The Court, however, did not explain the scope of this protection.[64] The

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53 *Burlington*, 548 U.S. at 68, 71.

54 *Id.*; *see* Zimmer, *supra* note 50, at 920–21.

55 *Burlington*, 548 U.S. at 68–69; *see* Zimmer, *supra* note 50, at 920–21.

56 *Burlington*, 548 U.S. at 69; *see* Zimmer, *supra* note 50, at 921.

57 *Burlington*, 548 U.S. at 70–72.

58 *Id.* at 70, 72–73.

59 553 U.S. 442 (2008).

60 *Id.* at 445.

61 *Id.*

62 Civil Rights Act of 1991 § 101, 42 U.S.C. § 1981 (2000); *see* Zimmer, *supra* note 50, at 922.

63 *See CBOCS West, Inc.*, 553 U.S. at 448–57 (limiting discussion of § 1981's scope to the effect of post-contract-formation conduct); *see* Zimmer, *supra* note 50, at 922.

64 *CBOCS West, Inc.*, 553 U.S. at 448–57; *see* Zimmer, *supra* note 50, at 922.

Court found that plaintiff, as a third party who did not personally experience discrimination, had a cognizable claim.[65] Carrying the opinion to its logical conclusions, the statute must at least protect employees from retaliation for having complained about race discrimination against another person and not just against the employee him or herself.[66]

In 2008, the Supreme Court addressed retaliation in the context of the Age Discrimination in Employment Act as applied to federal sector workers—the relevant language prohibits discrimination based upon age without explicitly mentioning retaliation.[67] In *Gomez-Perez*, the Court held that the prohibition includes protection from retaliation, relying on the broad ban on discrimination and the general language of the provision itself.[68]

More recently, the Supreme Court addressed Title VII retaliation in *Thompson v. North American Stainless, L.P.*[69] Here, Thompson's fiancée filed a discrimination charge with the EEOC.[70] Three weeks after the charge was filed, Thompson was fired.[71] The Supreme Court utilized a two-step analysis for Thompson's retaliation claim: (1) whether Thompson's termination constituted retaliation under Title VII and, if so, (2) whether such termination gave Thompson (as opposed to his fiancée) a retaliation claim.[72] In a unanimous 8–0 decision, the Court held that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[73] Consequently, the Court held that Thompson's fiancée did have a viable claim for retaliation based on Thompson's termination.[74] However, the Court cautioned that not every act of retaliation against a third party would meet the *Burlington Northern* standard.[75]

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65 *CBOCS West, Inc.*, 553 U.S. at 452; *see* Zimmer, *supra* note 49, at 922.

66 *CBOCS West, Inc.*, 553 U.S. at 452; *see* Zimmer, *supra* note 49, at 922.

67 29 U.S.C. § 633(a) (2006); Gomez-Perez v. Potter, 553 U.S. 474, 479 (2008).

68 *Gomez-Perez*, 553 U.S. at 468–88.

69 131 S. Ct. 863, 867 (2011) (recusing herself, Justice Kagan took no part in the consideration of this case).

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*; Jessica Fink, *Protected by Association? The Supreme Court's Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine,* 63 HASTINGS L.J. 521, 527 n. 123 (2011).

74 *Thompson*, 131 S. Ct. at 870.

75 *Id.* at 868 ("We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never

Next, the Court examined whether Thompson could bring a retaliation claim.[76] The Court noted that Title VII actions are limited to those brought "by the person claiming to be aggrieved."[77] The Court then adopted the "zone of interests" test used in the Administrative Procedure Act, which provides that a plaintiff "may not sue unless he falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[78] In terms of Title VII, the "zone of interests" test means that any employee with an interest "arguably [sought] to be protected by the statutes" may sue.[79] The Supreme Court held that Title VII intended to protect individuals, such as Thompson, harmed by the intentional and unlawful conduct of an employer.[80] Once again, the Court broadened the scope of Title VII, by relying not on the statutory language itself but, rather upon the "purpose" or "intent" of the statute.[81]

The *Thompson* holding dispensed any requirement that the plaintiff must engage in a statutorily protected activity.[82] In terms of the statutory text, Thompson did not qualify under either the "opposition clause" or the "participation clause."[83] Analyzing the importance of the *Thompson* decision, David Long-Daniels noted, "[i]n the end, the lesson of *Thompson* is that third-party retaliation creates two distinct claims for retaliation: one claim by the individual who engaged in the protected activity and a separate claim by the individual who suffered the brunt of the retaliation."[84]

Although the trend seems to be broadening employers' liability under Title VII and other federal discrimination retaliation statutes based upon the purpose or spirit of the statutes, the Court has taken a different approach in several cases. In *Clark County School District v. Breeden*,[85] a female plaintiff met with her male supervisor and another male

do so, but beyond that we are reluctant to generalize.").

[76] *Id.* at 870.

[77] *Id.* at 869 (quoting 42 U.S.C. § 2000e-5(f)(1) (2006)).

[78] *Id.* at 870 (citing 5 U.S.C. §§ 551–559 (2006)) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)).

[79] *Thompson*, 131 S. Ct. at 870 (quoting Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 495 (1998)).

[80] *Id.*; Long-Daniels, *supra* note 15, at 442.

[81] *Thompson,* 131 S. Ct. at 870; Long-Daniels, *supra* note 15, at 442.

[82] Long-Daniels, *supra* note 15, at 442.

[83] *See* 42 U.S.C. § 2000-e(3)(a) (2014).

[84] Long-Daniels, *supra* note 15, at 442.

[85] 532 U.S. 268, 269 (2001).

employee to review psychological evaluation reports of job applicants.[86] One of the reports disclosed that an applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon."[87] The supervisor stated that he did not know what the statement meant and the other employee present replied, "Well, I'll tell you later," and both men laughed.[88] Subsequently, the plaintiff complained about the comment to both the employee and the employee's supervisor and alleged that she was retaliated against for these complaints.[89]

The Court of Appeals for the Ninth Circuit held that Title VII protected employee opposition not only to actually unlawful practices, but also to practices that the employee could reasonably believe were unlawful.[90] The Supreme Court declined to address the propriety of this interpretation, positing, "even assuming it is correct, no one could reasonably believe that the incident recounted about violated Title VII."[91] In analyzing the plaintiff's Title VII retaliation claim, the Court noted, "'[a] recurring point in [our] opinion[s] is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[92] Accordingly, it would not be reasonable to believe such a comment was a violation, even if it reflected sex bias. The *Breeden* Court did not evaluate possible alternatives to the "reasonableness" requirement, offer any evaluation of the standard, or even justify its use by examining its effect on the purpose of the anti-retaliation provision.[93]

The Court most recently addressed the topic of Title VII retaliation claims in *University of Texas Southwestern Medical Center v. Nassar*.[94] There, the plaintiff, Dr. Nassar, was a physician of Middle-Eastern descent who claimed that one of his supervisors, Dr. Levine, was biased against him on account of his religion and ethnic heritage.[95] Dr. Nassar, a University of Texas faculty member, was offered a position at Parkland

86 *Id.*

87 *Id.* (quoting Brief in Opposition 3).

88 *Id.*

89 *Id.* at 269–70.

90 *Id.* at 270.

91 *Clark Cnty. Sch. Dist.*, 532 U.S. at 270.

92 *Id.* at 271 (quoting Faragher v. Boca Raton, 524 U.S. 775, 788 (1998)).

93 Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1471 (2007).

94 133 S. Ct. 2517, 2517 (2013).

95 *Id.* at 2520.

Memorial Hospital.[96] Subsequently, he resigned from his teaching position at the University of Texas and sent a letter to his supervisor, Dr. Fitz, and others stating that he was leaving as a result of Dr. Levine's harassment.[97] Upon receiving the letter, Dr. Fitz expressed concern that Dr. Levine had been humiliated and protested to the Hospital, which subsequently withdrew its job offer to the plaintiff.[98] The Court drew a sharp distinction between retaliation claims related to the withdrawal of employment offers, and to status-based discrimination claims (the original harassment claim on the basis of national origin or religion). Here, Dr. Nassar's status-based discrimination claim was against Dr. Levine, while his retaliation claim was against Dr. Fitz.[99]

Prior to *Nassar*, the Court required proof of "motivating factor" causation for claims of status-based discrimination.[100] Under that standard, a plaintiff is only required to present sufficient evidence for a reasonable jury to conclude "race, color, religion, sex or national origin was a motivating factor for any employment practice."[101] Justice Kennedy, for the majority in *Nassar*, sought to define the proper standard of causation for Title VII retaliation claims.[102] The Court discussed the rising number of Title VII retaliation claims in recent years and noted that a lessened standard of causation for retaliation claims would only contribute to the filing of frivolous claims and, "siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment."[103] The Court continued, "[i]t would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent."[104] Justice Kennedy accordingly concluded that a plaintiff must prove retaliation in terms of "but-for" causation, not a lessened standard.[105]

This recent decision, while consistent with *Breeden*, may show a

96 *Id.*

97 *Id.*

98 *Id.* at 2524.

99 *Id.* at 2532.

100 Desert Palace, Inc. v. Costa, 539 U.S. 90, 95–101 (2003).

101 *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2538 (quoting 42 U.S.C. § 2000-e(2)(m) (2006)).

102 *Id.* at 2524.

103 *Id.* at 2531–32; 29 NO. 8 TERM. OF EMPLOYMENT BULL. NL 1 (2013).

104 *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2532.

105 *Id.* at 2533.

trend of the Supreme Court backing away from its broadened definition of retaliation under Title VII set out in *Burlington Northern*.[106] Through the heightened standard of causation, the Court now seems to be attempting to reduce the number of claims by making it more difficult to prove retaliation.[107]

IV. LOWER COURTS' APPLICATION OF THE GOOD FAITH REASONABLE BELIEF STANDARD

A discussion of lower court applications of the good faith reasonable belief standard articulated by the Supreme Court illuminates the similarities between that standard and the one the New Jersey Supreme Court articulated by the New Jersey Supreme Court in *Battaglia.* The varying applications of this standard highlight its malleability, due to its reliance on the broad purposes of a remedial statute rather than statutory language itself, and the problems it presents in terms of horizontal equity and judicial economy.

In *Little v. United Technologies, Carrier Transicold Division*,[108] the Eleventh Circuit addressed the question of whether a white employee who opposed the racially derogatory comment of a co-worker had a valid retaliation claim under Title VII.[109] Circuit Judge Birch held, as a matter of first impression, that the white employee reacting to the racially offensive comment of the co-worker alone did not constitute statutorily-protected activity so as to establish a prima facie case of retaliation under Title VII.[110] Plaintiff Bryan Little was a white male who worked with Willie Wilmot, also a white male employee.[111] According to Little, Wilmot approached him and stated, "[n]obody runs this team but a bunch of niggers and I'm going to get rid of them."[112] Evidently, Little informed several co-workers about the statement and communicated the slur at a team meeting; as a result Little's supervisor issued a "Record of Conversation" noting the occurrence.[113] Little contended that he was harassed continuously from that point forward in retaliation for having

106 Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 53 (2006).
107 29 NO. 8 TERM. OF EMPLOYMENT BULL. NL 1 (2013).
108 103 F.3d 956 (11th Cir. 1997).
109 *Id.* at 958.
110 *Id.* at 961.
111 *Id.* at 958.
112 *Id.*
113 *Id.*

complained about Wilmot's conduct.[114]

The Eleventh Circuit held that Little failed to show that he was engaged in a statutorily-protected activity.[115] Judge Birch acknowledged that a plaintiff can establish a prima facie case of retaliation under Title VII, "if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices."[116] The court further explained that a plaintiff must, "not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable," although a plaintiff need not prove the underlying conduct was actually unlawful.[117] Applying this standard, the court found Little's assertion that he reasonably believed the comment to be a violation of Title VII to be implausible at best.[118] Little did not have an objectively reasonable belief that he opposed an unlawful employment practice and, therefore, failed to set forth a prima facie case under Title VII.[119] This decision highlights the malleability of the "reasonable employee" standard, which in the application of the Eleventh Circuit more closely resembles a requirement of correctness in terms of the unlawfulness of the underlying conduct, rather than a context-based, employee-friendly analysis. Although the term used was racist and Little believed that it was unlawful, it was only spoken by a co-worker and was not severe or pervasive enough to contaminate the work environment.[120] These requirements, however, are nuances of the law and seemingly have little to do with the reasonableness of Little's belief.

The Ninth Circuit addressed the standard in *Silver v. KCA, Inc.*,[121] where the plaintiff objected to a racially derogatory remark uttered by a co-worker and was subsequently fired.[122] In finding that the plaintiff failed to establish a prima facie case of retaliation under Title VII, the Ninth Circuit held that an employee's opposition to a co-worker's own individual act of discrimination, "does not fall within the protection of

114 Little v. United Techs., 103 F.3d 956, 958 (11th Cir. 1997).
115 *Id.* at 959.
116 *Id.* at 960.
117 *Id.*
118 *Id.*
119 *Id.*
120 *Little*, 103 F.3d at 960.
121 586 F.2d 138 (9th Cir. 1978).
122 *Id.* at 140.

[Title VII]."[123] The court reasoned that, "[b]y the terms of the statute . . . not every act by an employee in opposition to racial discrimination is protected. The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual."[124] However, *Silver* was decided in 1978, and the Ninth Circuit has since clarified that a plaintiff "must only show that she had a 'reasonable belief' that the employment practice she protested was prohibited under Title VII" in order to establish that she was engaged in protected activity.[125] Therefore, plaintiffs in the Ninth Circuit are not required to show that the employment practice they are protesting actually violates Title VII.[126] The reasoning of the court in this case is illustrative of how a court applies an anti-retaliation statute if plaintiffs were required to be correct about the unlawfulness of the underlying conduct.

In *Harper v. Blockbuster Entertainment Corp.*,[127] the Eleventh Circuit held that a grooming policy allowing female employees to have long hair, but not permitting male employees to do so, was not actionable under Title VII.[128] Several male employees of Blockbuster alleged that the grooming policy of the employer discriminated against them based on sex, and that they were discharged in retaliation for protesting that policy.[129] The grooming policy prohibited men, but not women, from wearing their hair long.[130] The plaintiffs protested the policy by refusing to cut their hair and were subsequently terminated.[131] In analyzing the plaintiff's retaliation claim, the court noted that, while the conduct which the employee protests is not required to be actually unlawful, a plaintiff is still required to demonstrate that he or she had "a good faith, reasonable belief that the employer was engaged in unlawful employment practices."[132] Notably, the court explained, "the allegations and record must also indicate that the belief, though perhaps mistaken, was

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123 *Id.* at 142.

124 *Id.* at 141.

125 Trent v. Valley Elec. Ass'n, Inc., 41 F.3d 524, 526 (9th Cir. 1994); McZeal v. City of Seattle, No. C05-1965P, 2006 WL 3254504, at *7 (W.D. Wash. Nov. 9, 2006).

126 *Trent*, 41 F.3d at 526.

127 139 F.3d 1385 (11th Cir. 1998).

128 *Id.* at 1387.

129 *Id.* at 1385.

130 *Id.* at 1386.

131 *Id.* at 1386−87.

132 *Id.* at 1388 (quoting Little v. United Techs., 103 F.3d 956, 960 (11th Cir. 1997)).

objectively reasonable."[133]

Holding that the plaintiffs' belief that the grooming policy was illegal was objectively unreasonable, Judge Carnes took into account the fact that every circuit to consider grooming policies like Blockbuster's has declared them non-discriminatory.[134] Because the plaintiffs chose to protest a grooming policy despite long-standing precedent holding such policy was not discriminatory; the plaintiffs could not have had an objectively reasonable belief that the policy discriminated against them on the basis of their sex.[135] This holding, taken to its logical conclusions, seems to come closer to requiring an employee to be correct regarding the lawfulness of the complained of activity. Although the Eleventh Circuit paid lip-service to the lesser "good faith reasonable belief" standard, the court based it's finding of unreasonableness on the fact that a long-standing precedent holding such conduct was not discriminatory.[136] In other words, the plaintiffs were incorrect about the lawfulness of the conduct.

Similarly, in *Jordan v. Alternative Resources Corp.*,[137] the Fourth Circuit affirmed a dismissal of a complaint on the basis that the plaintiff lacked a reasonable belief that a coworker's single statement violated Title VII.[138] In *Jordan*, the plaintiff was an African American employee who was terminated after he complained to management about hearing a coworker state, "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them."[139] The Fourth Circuit held the comment, although racist, was not severe or pervasive enough to violate Title VII.[140] The court based its finding of unreasonableness on the substantive law of racial harassment rather than the subjective reasonableness of the employee, or even the fact that the employer had a policy which obliged employees to report racially discriminatory conduct to management.[141]

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133 Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir. 1998) (quoting *Little*, 103 F.3d at 960).

134 *Id.*

135 *Id.* at 1389.

136 *Id.* at 1388.

137 458 F.3d 332 (4th Cir. 2006).

138 *Id.* at 341.

139 *Id.* at 336.

140 *Id.* at 340.

141 *Id.* at 352−53 (King, J., dissenting); *see generally* Brake, *supra* note 40, at 121.

V. NEW JERSEY'S RECENT INTERPRETATION OF THE LAD IN BATTAGLIA

Despite the Supreme Court decisions broadening the basis for retaliation claims, scholars and commentators continually criticize the federal courts for failing to protect employee rights in the workplace, giving rise to a call for state laws and courts to fill the gaps in protection left by federal statutes and the judiciary.[142] The LAD and the New Jersey Supreme Court's recent decision in *Battaglia v. United Parcel Service, Inc.* may have filled one of the gaps.[143]

The Supreme Court of New Jersey effectively lowered the standard for establishing a claim of retaliation under the LAD in *Battaglia*, which held that as long as an employee can demonstrate a good-faith belief that the conduct complained of violated the LAD or possibly that the conduct was simply inconsistent with the objectives of the LAD, he or she is not required to show actual discrimination against an identifiable victim.[144] Michael Battaglia was an employee of defendant United Parcel Service, Inc. (UPS), in a supervisory position, and a subordinate to defendant Wayne DeCraine.[145] In September 2005, Battaglia was demoted.[146] He alleged that the demotion was retaliation for complaints he made about DeCraine's conduct.[147] According to the plaintiff, DeCraine made a number of sexually inappropriate comments about female employees of UPS.[148] DeCraine made those remarks only in the presence of male employees, and no comment was made to, or in front of, any female

142 *See* Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 193 (2008) (stating that after a series of Supreme Court decisions interpreting the Americans with Disabilities Act's definition of disability in a restrictive fashion, the focus of disability rights advocates shifted to "trying to change the definition of disability in state laws"); Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE J.L. 225, 225 (2008) (noting the "recent movement to . . . increas[e] states' power to regulate the workplace"); *see generally* Sandra F. Sperino, *Diminishing Deference: Learning Lessons from Recent Congressional Rejection of the Supreme Court's Interpretation of Discrimination Statutes*, 33 RUTGERS L. REC. 40 (2009) (arguing that "blind adherence to federal interpretations of discrimination principles on state employment discrimination claims is not only often inappropriate, but also has seriously impacted the development of employment discrimination law").

143 214 N.J. 518 (2013).

144 N.J. STAT. ANN. §§ 10:5-1 to 10:5-42 (West 2014); *Battaglia*, 214 N.J. at 547−51.

145 *Battaglia*, 214 N.J. at 526–27.

146 *Id.*

147 *Id.*

148 *Id.*

employee.[149] The comments included using the word "c***" in reference to several women; using the phrase "f***ing b****" in reference to one particular woman; discussing pornographic websites; referencing an administrative staff member's "big tits;" expressing a desire to engage in sexual activity with a female employee; and referencing an employee named "Regina" as "Vagina."[150] Plaintiff alleged that he spoke with DeCraine about the comments, met with the center's supervisors who heard the remarks concerning their inappropriateness, and wrote an anonymous letter to UPS's corporate Human Resources manager in January 2005 alleging that, "the leaders of the district used langu[age] you wouldn't use with your wors[t] nightmare[.]"[151]

The plaintiff claimed that his demotion violated the LAD because it was in retaliation for his complaints regarding DeCraine's offensive comments about female employees.[152] The appellate court overturned a jury verdict for the plaintiff on his LAD claim, holding that, absent an impact on a female employee, the plaintiff's complaints could not constitute protected activity under the LAD and consequently, were not protected.[153] The appellate court relied mostly on statutory interpretation, reasoning that the LAD prohibits an employer from discriminating against an employee based on sex and prohibits reprisals against a person who opposes practices forbidden under the statute.[154] The court concluded that without evidence of sex discrimination against women or a hostile work environment, there could be no recovery for retaliation.[155]

In overturning the appellate courts holding concerning the LAD claim, the New Jersey Supreme Court emphasized the "broad remedial purposes" of the LAD.[156] These purposes include not only protecting the rights of individual employees, but also protecting the public's strong interest in a discrimination free workplace.[157] The court noted, "the

149 *Id.* at 529.

150 *Id.*

151 *Battaglia*, 214 N.J. at 526–27.

152 *Id.* at 518. Plaintiff also alleged that his demotion violated the Conscientious Employee Protection Act ("CEPA"), N.J. STAT. ANN. Sections 34:19-1 to 34:19-14, as he was retaliated against for complaining about improper employee conduct in the company; the appellate division affirmed a jury verdict for the plaintiff on his CEPA claim and the New Jersey Supreme Court reversed. *Id.*

153 *Battaglia*, 214 N.J. at 529.

154 N.J. STAT. ANN. § 10:5-12(a), (d) (West 2014).

155 *Battaglia*, 214 N.J. at 546–49.

156 *Id.* (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603–04 (1993)).

157 *Id.* (quoting *Lehmann*, 132 N.J. at 600).

language attributed to DeCraine is particularly vile, demeaning and offensive, bespeaking attitudes and view [sic] about women that have no place in a work setting."[158] In explaining why the broad remedial purposes of the LAD would not be advanced if Battaglia was not protected, the court emphasized that, "[t]hese were not the occasional words of a low-level employee having a bad day, but were the words of a supervisor, uttered in meetings attended by managerial employees, both repeatedly and routinely."[159] Battaglia's allegations of offensive language concerning protected classes under the LAD supported a retaliation cause of action despite the fact that the language was not directed toward women and did not create an actionable claim for either disparate impact or hostile work environment.

The court was unclear as to whether it was articulating a new, lower standard for the LAD retaliation claims, or simply articulating a natural consequence of the good faith reasonable belief standard for complaints of retaliation already ingrained in New Jersey case law. For example, the court noted:

> [W]hen an employee voices a complaint about behavior or activities in the workplace that he or she thinks are discriminatory, we do not demand that he or she accurately understand the nuances of the LAD or that he or she be able to prove that there was an identifiable discriminatory impact upon someone of the requisite protected class.[160]

If a reasonable good faith complaint is all that is required for an employee to be protected from retaliation, it naturally follows that there can be no requirement of an identifiable discriminatory impact. The court has consistently looked at the attitude and mind of the complaining employee, not at the acts of the employer.

VI. ANALYSIS

The New Jersey's Supreme Court's interpretation of the LAD and application of the reasonable good faith standard appears to be in line with the reasoning in most recent Supreme Court retaliation cases, apart from *Nassar* and *Breeden*. The New Jersey Supreme Court overturned the appellate decision, which relied on strict statutory interpretation, and followed the lead of the United States Supreme Court by broadly interpreting this remedial anti-retaliation statute based upon its "purpose"

158 *Id.* at 547–48.

159 *Id.*

160 *Battaglia*, 214 N.J. at 545–49.

of eradicating discrimination in the workplace.[161]

The good faith reasonable belief standard, when correctly applied, furthers the goal and purpose of anti-retaliation provisions, especially when compared to the actual language of the statutes, which only protects conduct opposing actual violations.[162] If courts were to rely exclusively on statutory language, and not on the good faith reasonable belief standard, the loopholes in employee protection could allow a discriminatory and retaliatory employer to escape liability due to what seem to be technicalities in the law. In terms of interpreting retaliation provisions particularly broadly, there is also a strong public policy argument for courts to allow a retaliation claim to stand based on the good faith reasonable belief of the plaintiff, rather than the actual existence of discriminatory behaviors. If plaintiffs lost their jobs or faced some other form of retaliation because they misinterpreted the law, they may be dissuaded from reporting behavior they believe to be a violation of the statute.

For example, if the *Little* court applied the *Battaglia* reasoning to the facts of that case, Little's good faith belief in the unlawfulness of the racially derogatory statement made by his co-worker would have been sufficient to support his claim for retaliation, regardless of whether or not the statement violated substantive law. Therefore, Little would have been protected against the retaliatory action of his employer.

There is a danger, however, in broadening statutory interpretation too much and relying solely on judicial discretion in retaliation cases. The possibility of frivolous claims brought by those who simply had their feelings hurt in the office or those who legitimately lost their jobs based on bad performance poses a real judicial economic threat. Arguably, the protection against frivolous claims using the good faith reasonable belief standard is the reasonableness requirement. However, the court in *Battaglia* focused almost entirely on the good faith of the plaintiff's complaints, rather than on the reasonableness of his complaints. This aspect of the opinion may open the door for frivolous claims and creates

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[161] *Id.* at 560–62.

[162] *But cf.* Richard Moberly, *The Supreme Court's Anti-retaliation Principle*, 61 CASE W. RES. L. REV. 375, 375 n. 437 (2010); Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision,* 39 ARIZ. ST. L.J. 1127, 1130–31 (2007) (arguing that Title VII's anti-retaliation provision should protect employees who report on an employer in subjective good faith, even if the employee is wrong or the employee's belief is unreasonable).

a problem of precedent for lower courts to rely on in interpreting the reasonableness of a plaintiff's belief.

General issues exist in the interpretation of the good faith reasonable belief standard, as lower federal courts have applied the reasonable belief standard in different ways.[163] Some treat it like a requirement that an employee report actual violations of the law, while others ignore the reasonableness requirement altogether.[164] One of the major reasons for the adoption of the reasonable good faith standard is the fact that it is unfair to require a layperson to know the nuances of anti-discrimination statutes.[165] According to the Eleventh Circuit in *Harper*, however, a layperson should be required to know the precedent in the jurisdiction before voicing his or her complaints in order to remain objectively reasonable.[166] Applying the standard and reasoning of *Battaglia*, however, the plaintiff's claims in *Harper* would have been better received by the court, unless the employer could have shown bad faith or that their belief in the unlawfulness of requiring male employees to be well groomed was so unreasonable that it bordered upon bad faith.

Just as the application of the Supreme Court's good faith reasonable belief standard varies in lower courts, the actual impact of the New Jersey Supreme Court's holding in *Battaglia* is unclear. The decision could simply be looking to the guidance of federal court decisions on Title VII and applying a good faith reasonable standard, which is sensitive to the fact that most lay people are unaware of the nuances of an expansive anti-discrimination statute such as the LAD. Although not explicitly, the decision may also have eliminated the reasonable belief requirement entirely, as it focuses almost exclusively on the good faith of Battaglia's belief. This interpretation would mean the New Jersey Supreme Court has taken employee protection a step further than the United States

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[163] Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1385 (11th Cir. 1998); Little v. United Techs., 103 F.3d 956, 956 (11th Cir. 1997); Moberly, *supra* note 163, at 375 n. 438; Rosenthal, *supra* note 163, at 1162–63 ("[M]any courts . . . do not seem to be taking into account the 'limited knowledge' most Title VII plaintiffs have about the contours of Title VII, and the courts have consistently ruled against employees after concluding that their belief of a Title VII violation was not objectively reasonable.").

[164] *Battaglia*, 214 N.J. at 526; *Harper*, 139 F.3d at 1385; *Little*, 103 F.3d at 956; Moberly, *supra* note 163, at 375 n. 438; Rosenthal, *supra* note 159, at 1162–63 ("[M]any courts . . . do not seem to be taking into account the 'limited knowledge' most Title VII plaintiffs have about the contours of Title VII, and the courts have consistently ruled against employees after concluding that their belief of a Title VII violation was not objectively reasonable.").

[165] Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 53 (2006).

[166] *Harper*, 139 F.3d at 1385.

Supreme Court—a step that may not apply under the federal anti-discrimination laws in light of the Supreme Court's recent narrow interpretation in *Nasser*.

There has been criticism from legal scholars who argue that the reasonable belief doctrine is simply a "poor proxy for addressing weaknesses in the plaintiff's proof of causation."[167] If that were the case, the removal of such a requirement would force courts to address the causation issue transparently and straightforwardly, which may clear confusion in its application.[168] Further, a reasonableness standard without further clarification allows courts to continue to measure the reasonableness of a plaintiff's belief based on the substantive underlying law, which is contrary to the broad remedial purposes of anti-discrimination statutes.

Finally, and most radically, the *Battaglia* decision focuses so much on the "purpose" and "values" of the statute, that it may in fact be used by lower courts to support a claim of retaliation when plaintiffs oppose any action that is contrary to the "spirit" of the LAD. This interpretation would significantly broaden the scope of the statute and allow for a great deal of judicial discretion in determining what actions offend the general purpose of this expansive statute.

VII. CONCLUSION

The New Jersey Supreme Court must clarify the good faith reasonable belief standard as it was articulated in *Battaglia*. Although the standard has had some success in Title VII and other federal retaliation cases, and allows for some needed discretion to eliminate protection loopholes afforded by the statute alone, some interpretation problems exist. Frivolous claims may pass muster under a test that pays little attention to reasonableness or is based entirely on the "spirit" of a statute. Furthermore, the lack of horizontal equity bound to occur when lower courts are asked to implement a standard that arguably has three rational interpretations and offers little guidance will prove to be an issue in New Jersey courts.

Interpreting the LAD with sensitivity to the fact that lay people are unaware of the nuances of the law, while still requiring that the plaintiff's belief be reasonable, would not only be in line with the plaintiff-friendly

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167 *See* Brake, *supra* note 40, at 156.

168 Brake, *supra* note 40, at 156.

purpose of the LAD, but would also allow courts to guard against frivolous claims. Finally, a plaintiff-friendly reasonableness standard would provide adequate guidance to lower courts, ensuring that courts do not continue to require plaintiffs to be correct about the underlying substantive law.