University of Arkansas at Little Rock Law Review

Volume 29 | Issue 3 Article 5

2007

Employment Law—Title VII and the Anti-Retaliation Provision—Beyond Employment and the Workplace: The United States Supreme Court Resolves the Split and Shifts the Balance. Burlington Northern & Santa Fe Co. v. White, 126 S. Ct. 2405 (2006).

Kaylin Redman Hart

EMPLOYMENT LAW—TITLE VII AND THE ANTI-RETALIATION PROVISION—BEYOND EMPLOYMENT AND THE WORKPLACE: THE UNITED STATES SUPREME COURT RESOLVES THE SPLIT AND SHIFTS THE BALANCE. *Burlington Northern & Santa Fe Co. v. White*, 126 S. Ct. 2405 (2006).

I. INTRODUCTION

Employers have always known that it is foolish to take action against an employee following protected activity, and now, after the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[1] "employers should proceed with even greater caution."[2] In 2005, 29.5% of all illegal discrimination claims filed with the Equal Employment Opportunity Commission alleged retaliation.[3] Prior to *Burlington Northern*, the United States Courts of Appeals decided those retaliation claims on a case-by-case basis because "'unfortunately [the forms of discrimination] are as varied as the human imagination will permit.'"[4] Courts struggled to define the seriousness required of an employer's adverse action, and, as a result, a split among the circuits developed.[5]

In its recent decision in *Burlington Northern*, the Supreme Court resolved the split among the federal circuit courts by extending Title VII's anti-retaliation provision to retaliatory acts and harms that are unrelated to employment or that occur outside of the workplace.[6] The Court limited its holding by concluding that Title VII prohibits only those employer actions that would "dissuade a reasonable worker from making or supporting a charge of discrimination."[7] The Supreme Court's decision expanded the definition of retaliatory conduct, undoubtedly shifting the balance in favor of employees. The Court's decision will likely encourage more employees to file retaliation claims and may even make it easier for employees' claims to reach a jury; therefore, employers should think twice before taking any disciplinary actions against an employee who has engaged in protected activity.

---

1. 126 S. Ct. 2405 (2006).

2. Russell Adler, *Employers, Beware: Supreme Court Decision Changes the Playing Field*, 234 THE LEGAL INTELLIGENCER 40, Aug. 29, 2006, *available at* WL 8/29/2006 TLI 5.

3. Michael Starr, *Employment Law: Retaliation Reinvigorated*, 28 THE NAT'L L.J. 50, Aug. 14, 2006, *available at* WL 8/14/2006 NLJ 16, (Col. 1).

4. Marisa Williams & Rhonda Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, 28 COLO. LAW. 59, 60 (Jan. 1999) (quoting Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996)).

5. *Id.*

6. *Burlington Northern*, 126 S. Ct. at 2416.

7. *Id.* at 2409.

It should be noted that the Supreme Court's requirement that employers' actions be materially adverse under an objective standard does afford some protection to employers. However, employers will have to wait to see if the Court's limitations actually afford them any protection against the increasing number of retaliation claims likely to be filed under the Court's new standard.

This note examines the significance of the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White* to employers and employees in the United States. The note first summarizes the facts behind the *Burlington Northern* case and the procedural history that led it to the Supreme Court.[8] Next, the note explores the pertinent statutory language and the split among the federal circuits.[9] The note then examines the Court's analysis in its *Burlington Northern* decision.[10] The note concludes with a discussion of the decision's implications for employees and employers and the promises of the Court's new standard.[11]

II. FACTS

Burlington Northern and Santa Fe Railway Company ("Burlington Northern") hired Shelia White on June 23, 1997, as a track laborer at its Yard in Memphis, Tennessee.[12] The position required White to perform physically demanding tasks, such as "maintaining and oiling railway switches, and doing repairs."[13] Before hiring White, Burlington Northern's Human Resource Manager and the Tennessee Yard's roadmaster interviewed White, and she assured them that she had experience operating a forklift.[14] After White's hire, a need arose to fill the stationary forklift position at the Yard, and Marvin Brown, roadmaster of the Tennessee Yard, assigned White to the position.[15]

White complained that between July 2, 1997, and September 16, 1997, Burlington Northern employees treated her differently because she was a female, and her foreman twice made inappropriate comments.[16] White's immediate supervisor, Bill Joiner, did not have experience supervising a woman and "admitted at trial that he treated White differently because of

8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 310 F.3d 443, 446–47 (6th Cir. 2002).
13. *Id.* at 447.
14. *Id.*
15. *Id.*
16. *Id.*

her gender" and "that the Maintenance of Way department was not an appropriate place for women to work."[17] White alleged that Joiner "repeatedly expressed this belief to her while she was working under his supervision."[18] White reported these allegations to Joiner's supervisor, who, in turn, contacted Cathy McGee, Burlington Northern's Human Resources Manager.[19] After McGee's investigation, she suspended Joiner for ten days without pay and required that he attend a sexual harassment training session.[20]

On the same day White's foreman received his suspension, Brown reassigned White's forklift duties to a male employee because senior male employees complained that Burlington Northern gave White preferential treatment because of her gender.[21] On cross examination, Brown testified that the men's complaints were made before White's complaint of sexual harassment but that he did not transfer her until after she reported her allegations.[22] White's new assignment as a standard track laborer provided her the same pay and benefits as her forklift position, "but her new job was, by all accounts, more arduous and 'dirtier' than the forklift position."[23]

White filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on October 10, 1997, claiming that her reassignment to standard track laborer constituted "unlawful gender-based discrimination and retaliation for her having earlier complained about Joiner."[24] White filed a second charge of discrimination with the EEOC on December 4, 1997, alleging retaliation.[25] In her retaliation charge, White complained that Brown constantly observed and monitored her and her daily activities.[26] The EEOC mailed Brown notification of the second charge of discrimination and retaliation on December 8, 1997.[27]

Percey Sharkey, White's foreman, "removed White from service for insubordination" on December 11, 1997.[28] Sharkey testified at trial that after he directed one of the other employees to accompany him and help with the heavy lifting, White refused to ride in a different truck with another foreman.[29] White refused because she claimed that she had seniority over the

17. White v. Burlington N. & Santa Fe Ry. Co. (*White II*), 364 F.3d 789, 792 (6th Cir. 2004).
18. *Id.*
19. *White I*, 310 F.3d at 447.
20. *Id.*
21. *Id.*
22. *Id.*
23. *White II*, 364 F.3d at 792–93.
24. Burlington Northern & Santa Fe Co. v. White, 126 S. Ct. 2405, 2409 (2006).
25. *White I*, 310 F.3d at 448.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

employee directed to ride with Sharkey.[30] After Marvin Brown reviewed Sharkey's written description of the incident, Brown informed Sharkey that White's conduct constituted insubordination.[31] This decision to suspend White was made seven days after she filed her second EEOC charge and three days after the EEOC mailed Brown notification.[32]

Subsequently, White filed a grievance for her suspension, and in response to the grievance, Burlington Northern investigated the matter.[33] On January 16, 1998, Burlington Northern reinstated White to full service, after concluding that her conduct did not constitute insubordination.[34] White received all the backpay that she was entitled to during her thirty-seven-day suspension, including overtime pay and benefits.[35] After exhausting her administrative remedies before the EEOC,[36] White filed suit against Burlington Northern, claiming unlawful gender discrimination in violation of 42 U.S.C. § 2000e-2(a)(1) and unlawful retaliation in violation of 42 U.S.C. § 2000e-3.[37]

A. United States District Court for the Western District of Tennessee

In the United States District Court for the Western District of Tennessee, the jury returned a verdict in favor of White on her retaliation claim against Burlington Northern and awarded her $43,500 in damages.[38] The jury found against White on her claims of sexual harassment and punitive damages.[39]

Burlington Northern argued in a motion for judgment as a matter of law that White did not establish retaliation "because her changed job duties and temporary suspension were not adverse employment actions within the meaning of Title VII."[40] Burlington Northern also claimed that White did not show that its "asserted legitimate, non-discriminatory reason for transferring her was pretextual" and that "the temporal proximity of White's EEOC charge and her suspension did not support an inference of retalia-

30. *Id.*
31. *White I*, 310 F.3d at 448.
32. *White II*, 364 F.3d at 794.
33. *White I*, 310 F.3d at 448.
34. *Id.*
35. *Id.*
36. *White II*, 364 F.3d at 794.
37. *White I*, 310 F.3d at 446.
38. *Id.*
39. *Id.*
40. *Id.*

tion."[41] In ruling for White, the court found that White's evidence of her reassignment sufficiently met the adverse employment action standard.[42]

The district court also found that White's thirty-seven-day suspension constituted an adverse employment action, even though Burlington Northern reversed its decision to suspend White and provided her with backpay.[43] The district court ruled that Burlington Northern's reliance on *Dobbs-Weinstein v. Vanderbilt University*[44] was misplaced because the employee in that case was not immediately suspended and because that case involved a tenured faculty member in an academic setting.[45]

In considering Burlington Northern's claim that White failed to prove that its legitimate, non-retaliatory reason for transferring her was pretextual, the district court held that the "jurors received conflicting evidence that the jury could properly resolve in White's favor."[46] The court further held that White presented sufficient evidence to allow the jurors to determine that her suspension was the result of her EEOC charge against Burlington Northern.[47]

B. The United States Court of Appeals for the Sixth Circuit

The United States Court of Appeals for the Sixth Circuit, sitting as a panel, considered whether Burlington Northern's actions were "sufficiently adverse employment actions to sustain a cause of action under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a)."[48] In reversing the decision of the district court, a divided Sixth Circuit panel held that White failed to establish a prima facie case of retaliation because neither her lateral employment transfer nor her temporary suspension constituted sufficient adverse employment action to support a Title VII retaliation claim.[49]

---

41. *Id.*
42. *Id.*
43. *White I*, 310 F.3d at 446.
44. 185 F.3d 542 (6th Cir. 1999). The Sixth Circuit granted summary judgment in favor of defendant Vanderbilt University because the plaintiff was unable to produce sufficient evidence of an "adverse employment action cognizable under Title VII." *Id.* at 543, 545. The plaintiff's evidence that the University's dean did not concur in the departmental decision to promote and tenure the plaintiff did not rise to the level of adverse employment action because the University employed an internal grievance procedure. *Id.* at 545.
45. *White I*, 310 F.3d at 446.
46. *Id.*
47. *Id.*
48. *Id.* at 445.
49. *Id.* at 445–46.

1. *Reassignment of the Forklift Responsibilities Issue*

Burlington Northern argued that White did not suffer an adverse employment action because her reassignment from forklift duty to track laborer constituted a non-actionable lateral employment transfer.[50] Burlington Northern also argued that White's reassignment did not materially disadvantage her because she maintained her track laborer position throughout her employment with the railroad, and "[she] never suffered a termination, a demotion evidenced by a wage or salary decrease, a less distinguished job title, a material loss of benefits, or significantly diminished material responsibilities."[51] White argued that the district court properly held that she presented sufficient evidence to show that her lateral transfer was an adverse employment action.[52] The court of appeals rejected White's argument, stating that one of White's explicit employment responsibilities included maintaining the railroad tracks, and the fact that forklift duty was less physically demanding than track maintenance work did not make her reassignment an adverse employment action.[53]

2. *Suspension from Service Issue*

Burlington Northern argued "that the district court erred when it found that White's suspension constituted adverse employment action" because Burlington Northern reinstated White to full service with back pay, including overtime pay and benefits.[54] The court of appeals rejected the district court's and White's distinguishment of *Dobbs-Weinstein* from the present case and concluded that White failed to establish a Title VII retaliation claim.[55] The court stated that the district court ignored the fact "that Burlington Northern ultimately reversed White's suspension and reinstated her with full back pay and overtime."[56] The court concluded that White's failure to show an adverse employment action precluded her from supporting a Title VII claim.[57] Therefore, the court reversed and remanded to the district court to set aside the jury verdict.[58]

50. *Id.* at 446.
51. *White I*, 310 F.3d at 451.
52. *Id.*
53. *Id.*
54. *Id.* at 451–52.
55. *Id.* at 453, 455.
56. *Id.* at 454.
57. *White I*, 310 F.3d at 455.
58. *Id.*

C. The United States Court of Appeals for the Sixth Circuit, En Banc

After the divided Sixth Circuit panel reversed the district court's decision and held in favor of Burlington Northern on White's retaliation claims, the full court of appeals heard the matter en banc and vacated the panel's decision.[59] The en banc court heard the case to address the meaning of "adverse employment action" for purposes of a Title VII retaliation claim.[60] In affirming the decision of the district court, the Sixth Circuit en banc held that a lateral job transfer and a thirty-seven-day suspension without pay, notwithstanding the employee's reinstatement with back pay, constituted adverse employment actions.[61]

The court of appeals first addressed the meaning of "adverse employment action" for purposes of a Title VII retaliation claim and then determined whether White's lateral job transfer and suspension rose to the level of adverse employment actions.[62] White and the EEOC, which filed an amicus curiae brief on White's behalf, argued for the adoption of the adverse employment action definition included in the EEOC Guidelines.[63] The EEOC interpreted "adverse employment action" as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity."[64] The court rejected this request and reaffirmed that it would continue to define the adverse-employment-action element narrowly, requiring "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."[65]

The court of appeals applied its definition to the thirty-seven-day suspension and held that suspending an employee without pay for a month was not trivial and might violate Title VII if motivated by discriminatory intent.[66] The court next considered White's lateral job transfer and held that the decision to transfer White was an adverse employment action because the standard track laborer job was "more arduous and dirtier" than the forklift operator position and because "the forklift operator position required more qualifications, which is an indication of prestige."[67] Finally, the court agreed

59. Burlington Northern & Santa Fe Co. v. White, 126 S. Ct. 2405, 2410 (2006).

60. *White II*, 364 F.3d at 791 (internal quotations omitted).

61. *Id.*

62. *See id.* at 795–800.

63. *Id.* at 798.

64. *Id.* (quoting EEOC COMPLIANCE MANUAL § 8, ¶ 8008 (1998)) (internal quotations omitted).

65. *Id.* at 798, 800 (citing Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998)) (internal quotations omitted).

66. *White II*, 364 F.3d at 802.

67. *Id.* at 803 (internal quotations omitted).

with the district court that there was sufficient evidence from which the jury could determine that Burlington Northern's asserted legitimate, nondiscriminatory reasons for transferring White were pretextual.[68]

III. BACKGROUND

This section will first explore the language of the anti-discrimination provision of Title VII,[69] the *McDonnell Douglas* burden-shifting analysis for intentional discrimination claims,[70] and the damages available to a successful plaintiff in an employment discrimination action.[71] Next, it will examine the anti-retaliation provision's language,[72] the scant legislative history available,[73] and the historical prima facie requirements of a retaliation claim.[74] Finally, it will explore the three primary approaches circuits have used to interpret the scope of the "adverse employment action" language contained in the anti-retaliation provision.[75]

A. Pertinent Statutory Provisions

1. *Anti-Discrimination Provision: What Title VII of the Civil Rights Act of 1964 Section 703(a), 42 U.S.C. § 2000e-3(a) Is Meant To Accomplish*

a. The statute's purpose and scope

In response to the depressed employment status of the American black community relative to other workers in the United States, Congress attempted to attack the "root of the problem" by enacting Title VII of the Civil Rights Act of 1964.[76] Congress's central objective in enacting Title VII was to improve minority employment statistics "by requiring employers to use colorblind standards in their hiring and promoting decisions."[77] Title VII effectively reached beyond black oppression and provided other groups,

68. *Id.* at 804.
69. *See infra* Part III.A.1.a.
70. *See infra* Part III.A.1.b.
71. *See infra* Part III.A.1.c.
72. *See infra* Part III.A.2.a.
73. *See infra* Part III.A.2.b.
74. *See infra* Part III.A.2.c.
75. *See infra* Part III.B.
76. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971).
77. *Id.* at 1116.

"whether defined in terms of race, religion, or national origin," powerful standing for obtaining equality in the job market.[78]

Congress enacted section 703(a) of Title VII to provide the following:

> 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.[79]

Although the Act explicitly provides broad protection against employment discrimination, Congress did include some limitations and exceptions to the Act's coverage.[80] For example, under Title VII, employers must "affect commerce" and employ a minimum of fifteen employees for coverage.[81] Any "person" in an industry affecting commerce is included under Title VII, meaning that an employer, a labor organization, or an employment agency are among the "persons" covered.[82] In addition, Title VII preempts state law if such law is inconsistent with federal anti-discrimination statutes.[83]

b. The *McDonnell Douglas Corp. v. Green* burden-shifting test

If an employer intentionally discriminates against an individual based upon that individual's "race, color, religion, sex, national origin, or age," the action is unlawful, absent a valid defense.[84] Plaintiffs claiming an intentional

---

78. *Id.* at 1111.

79. Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1994).

80. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 3.2, at 88 (1994).

81. 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.2, at 141 (3d ed. 2004) (internal quotations omitted); *see also* 42 U.S.C. § 2000e(b). Legislative history shows that the numerical restriction was a reflection of Congress's goal to not burden small businesses with federal requirements. ROTHSTEIN ET AL., *supra*, § 2.3 at 159.

82. *See* 42 U.S.C. § 2000e(a)–(d) (1994).

83. *See* 42 U.S.C. § 2000e-7 (1994). This section states as follows:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Id.

84. 1 ROTHSTEIN ET AL., *supra* note 81, § 2.6, at 182–83. The defense of "bona fide occupational qualification" allows employers to intentionally classify applicants or employees in narrow circumstances, such as is "reasonably necessary to the normal operation of

violation of the Act must "establish that the defendant acted intentionally to treat the plaintiff class or the individual plaintiff differently."[85] When direct evidence of intentional employment discrimination is unavailable, a plaintiff may establish her case by presenting circumstantial evidence.[86] In *McDonnell Douglas*, the Supreme Court first introduced the application of a three-part paradigm to cases in which individuals allege employment discrimination using circumstantial evidence.[87] First, the employee must carry the initial burden of establishing a prima facie case of racial discrimination.[88] If the employee is successful, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer's action.[89] The employer's "articulation of a legitimate reason for the decision has the effect of dispelling the inference of improper motivation created by the plaintiff's proof."[90] The third part of the paradigm allows the employee an opportunity to introduce evidence to show that the employer's stated reason was, in fact, pretextual.[91] The Supreme Court used this case to develop a general rule "designed to bring order to a chaotic situation that had developed within the lower courts."[92] The *McDonnell-Douglas* formula is applied to private, non-class-action suits challenging employment discrimination.[93]

---

that particular business or enterprise." *Id.* § 2.18, at 273–74 (internal citations omitted). This defense is limited to exclusion on the basis of gender, religion, and national origin, notably omitting race. *Id.*

85. *Id.* § 2.21, at 293.

86. *Id.* § 2.8, at 197.

87. *See* 411 U.S. 792, 793–807 (1973). The employee, Green, alleged race discrimination and discrimination resulting from his attempts to protest alleged discriminatory practices. *Id.* at 796. Green, a black man, "was laid off in the course of a general reduction in [his employer]'s work force." *Id.* at 794. Green actively protested against his employer's actions in discharging him and against its general hiring practices. *Id.* After Green's participation in a lock-in, the employer "publicly advertised for qualified mechanics, [Green]'s trade, and [Green] promptly applied for re-employment." *Id.* at 796. The employer rejected Green for employment, and Green filed a formal complaint with the EEOC, alleging that the employer's refusal to rehire him was predicated on his race and protesting activities in violation of 42 U.S.C. § 2000e-3(a). *Id.*

88. *Id.* at 802. A plaintiff establishes a prima facie case of racial discrimination showing the following:

> (i) that [the plaintiff] belongs to a racial minority; (ii) that [the plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, [the plaintiff] was rejected; and (iv) that, after his rejection, the position remained open[,] and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

89. *Id.* Green's participation in unlawful conduct was the employer's reasonable basis for its refusal to rehire Green. *Id.* at 803.

90. 1 ROTHSTEIN ET AL., *supra* note 81, § 2.8, at 197.

91. *McDonnell Douglas Corp.*, 411 U.S. at 804.

92. 1 LARSON, EMPLOYMENT DISCRIMINATION § 8.01[1], at 8-5 (2d ed. 2006).

93. *Id.* § 8.01[2], at 8-8.

c. Damages

Congress did not intend for employment discrimination disputes to be handled like other civil disputes, and therefore, it originally enacted Title VII to not provide for compensatory or punitive damages.[94] Because the Title VII remedies were equitable in nature, including hiring, reinstatement, and back pay, such actions were tried without a jury.[95] Congress extended compensatory and punitive damages to plaintiffs in the Civil Rights Act of 1991, which allowed employees who prevailed in actions brought for intentional discrimination to recover compensatory damages.[96] The 1991 Act further provided that "'if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual,'" plaintiffs can recover punitive damages against non-governmental defendants.[97]

2. *Anti-Retaliation Provision: What Title VII of the Civil Rights Act of 1964 Section 704(a), 42 U.S.C. § 2000e-3(a) Is Meant To Accomplish*

a. Statutory language

In addition to prohibiting employment discrimination on the grounds of race, sex, religion, or national origin, Title VII creates a remedy for retaliatory conduct under section 704(a), which provides that "it shall be an unlawful employment practice for an employer to discriminate against" an applicant for employment or any employee opposing "any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."[98]

---

94. 1 ROTHSTEIN ET AL., *supra* note 81, § 2.31, at 345.
95. *Id.* § 2.30, at 343.
96. *Id.* § 2.31, at 346.
97. *Id.* (citing 42 U.S.C.A. § 1981A).
98. Section 704(a), 42 U.S.C. § 2000e-3(a) (1982). Its full text states as follows:
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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.

b. Legislative history

Because a person claiming to be aggrieved by an alleged act of discrimination must first file a complaint with the Equal Employment Opportunity Commission (EEOC) and await the results of an EEOC investigation,[99] the drafters of Title VII must have realized the necessity of protecting individuals against hardships during the "waiting period."[100] Without some punishment against retaliation, individuals would be reluctant to oppose discriminatory practices, which would, ultimately, diminish Title VII's purpose and effectiveness.[101]

Little more is known of Congress's intention behind the enactment of section 704(a). No explanation of its meaning can be found in the committee reports on the Civil Rights Act of 1964 and the Equal Employment Act of 1963, which later became Title VII of the Civil Rights Act, because such reports simply repeat the language of the statute.[102] Furthermore, neither the proceedings nor the floor debates reveal anything concerning Congress's intended interpretation of section 704(a).[103] Some indication of congressional intent can be found, however, in the following statement: "[Management] prerogatives . . . are to be left undisturbed to the greatest extent possible. Internal affairs of employers . . . must not be interfered with except to the limited extent that correction is required in discrimination practices."[104]

Courts have attempted to discover the legislative intent behind the enactment of section 704(a) but have had little success.[105] In *Hochstadt v.*

Id.

99. 42 U.S.C. § 2000e-5 (1994). The process is summarized as follows: A person claiming to be aggrieved by his or her employer's alleged unlawful employment practices may file a charge with the EEOC within 180 days after the alleged unlawful employment practice occurred. *Id.* The EEOC serves notice of the charge on the employer within ten days and conducts an investigation. *Id.* If, after the investigation, the EEOC determines that there is not reasonable cause to support the charge, dismisses the charge, and promptly notifies the employer and the person claiming to be aggrieved, who may then bring a private action within ninety days. *Id.* If the EEOC does find reasonable cause, it first attempts to eliminate any such alleged unlawful employment practice by informal methods. *Id.* If those methods fail, the EEOC may bring a civil suit against the employer in district court. *Id.*

100. Delbert L. Spurlock, *Proscribing Retaliation Under Title VII*, 8 IND. L. REV. 453, 459 (1975).

101. *Id.*

102. Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. REV. 391, 393 (1988); *see also* H.R. Rep. No. 914, 88th Cong., 2d Sess., pt. 7, at 27–28, as *reprinted in* 1964 U.S.C.C.A.N. 2391, 2403.

103. Walterscheid, *supra* note 102, at 393.

104. *Id.* (citing Additional Views on H.R. 7152, 1964 U.S.C.C.A.N. 2487, 2516) (internal quotation omitted).

105. *Id.* at 394.

Worcester Foundation for Experimental Biology,[106] the First Circuit stated that the legislative history is unclear as to the scope of Congress's intent to immunize employee activity.[107] Furthermore, the Court determined that the unrevealing proceedings and floor debates over Title VII would leave the courts to "develop their own interpretation of protected opposition."[108] In *Green v. McDonnell Douglas Corp.*,[109] the Eighth Circuit stated that the lack of legislative history provided no guidance as to the scope of section 704(a).[110]

The EEOC Compliance Manual sets forth the EEOC's position as to Congress's intended scope of section 704(a).[111] The EEOC opines that the provision is intended to provide "exceptionally broad protection" for those who protest discriminatory employment practices.[112] If an individual's assertion of discrimination under section 703(a) could "result in retaliatory action being taken against him or her," then the rights guaranteed under section 703(a) would be without substance.[113] Therefore, section 704(a) provides the complainant guaranteed protection against such a result. The EEOC desires such protection because "the filing of charges or complaints of discrimination and the information or assistance provided by witnesses and others in connection with an investigation" enables the EEOC to perform its duty of administering and enforcing Title VII.[114] The EEOC believes that allowing retaliatory conduct would produce a "chilling effect upon the willingness of individuals to speak out against employment discrimination."[115] Although section 704(a) protects individuals who oppose employment discrimination or participate in the Title VII process, the EEOC makes it clear that it is not meant to protect a protestor of employment discrimination from his or her employer's reasonable and nondiscriminatory disciplinary actions.[116]

c. Prima facie requirements of a retaliation claim

Historically, to establish a prima facie case of retaliation, a complaining party must have shown the following: (1) he or she has engaged in protected activity; (2) he or she has suffered discrimination by the respondent; and (3) a causal connection between the participation in the protected activi-

106. 545 F.2d 222 (1st Cir. 1976).
107. *Id.* at 230.
108. *Id.*
109. 463 F.2d 337 (8th Cir. 1972).
110. *Id.* at 341.
111. 2 EEOC COMPLIANCE MANUAL § 614, at 1 (1991).
112. *Id.*
113. *Id.* at 6.
114. *Id.* at 7.
115. *Id.*
116. *Id.*

ty and the adverse employment action exists.[117] If the plaintiff successfully establishes a prima facie case, the burdens of proof are allocated in the same manner as in employment discrimination cases.[118]

Courts and the EEOC have failed to make consistent findings with respect to each element of the anti-retaliation provision, and as a result, the parameters of the elements have remained blurred.[119] Particularly, the second prong of the test, requiring the complainant to suffer discrimination by the respondent, has generated the most controversy because no definition of "discrimination" is provided in the statute.[120] Courts have disagreed on which types of employer action are prohibited by the anti-retaliation provision and have struggled to determine the seriousness necessary to constitute adverse employment action.[121]

B. A Split Among the Circuits

1. *Narrow Interpretation: Ultimate Employment Decision Circuits*

The Fifth and Eighth Circuits have employed a narrow interpretation of the term "adverse employment action," requiring that the action reach the level of "ultimate employment decision" to support a retaliation claim.[122] These circuits have held that acts such as hiring, promoting, compensating, and granting leave constitute ultimate employment decisions.[123] The Fifth Circuit has stated that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."[124]

In *Mattern v. Eastman Kodak Co.*,[125] the Fifth Circuit held that the events about which the plaintiff complained, including "[h]ostility from fellow employees, having tools stolen, and resulting anxiety, without more,

117. 2 EEOC COMPLIANCE MANUAL § 614, at 8–9 (1991). In order to conclude that the employer has discriminated against the complainant, the complainant must show that he or she "was in some manner subjected to adverse treatment by the respondent because of the protest or opposition." *Id.* at 9.

118. R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. TEX. L. REV. 95, 99 (1994); *see also* Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 443 (2d Cir. 1999) (stating that retaliation claims are evaluated under the burden-shifting rules set forth in *McDonnell Douglas Corp. v. Green*).

119. Spurlock, *supra* note 100, at 465.

120. 2 LARSON, *supra* note 92, § 34.04[2], at 34–47.

121. Williams & Rhodes, *supra* note 4, at 60.

122. *Id.*

123. *Id.*

124. *Id.* (citing Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995)).

125. 104 F.3d 702 (5th Cir. 1997), *overruled by* Burlington N. & Santa Fe Ry. v. White, 126 S. Ct. 2405 (2006).

[did] not constitute ultimate employment decisions," and therefore did not meet the requirement of adverse employment actions.[126] The Fifth Circuit relied on the long-held rule that Title VII's anti-retaliation provision excludes reference to "interlocutory or mediate" decisions, which can lead to an ultimate decision and, therefore, applies only to employer actions constituting an ultimate employment decision.[127]

In *Manning v. Metropolitan Life Insurance*,[128] the Eighth Circuit rejected as insufficient plaintiffs' claims that hostility and personal animus directed toward them by their supervisors collectively established adverse employment action.[129] The court cited its decision in *Montandon v. Farmland Industries, Inc.*,[130] holding that "not everything that makes an employee unhappy is an actionable adverse action."[131] The court concluded that the employees did not provide evidence of a "tangible change in duties or working conditions that constituted a material employment disadvantage," and therefore did not establish retaliation in violation of Title VII.[132]

These cases demonstrate the restrictiveness of the Fifth and Eighth Circuits' approach to determining whether an adverse employment action supports an unlawful retaliation claim.[133] These circuits have limited adverse actions that will support a retaliation claim to those actions that reflect an ultimate employment decision.[134] As a result of the standard developed in these circuits, the decisions have reflected the difficulty of proving actionable retaliatory conduct.[135]

2. *Intermediate Approach: Term, Condition, or Benefit of Employment Circuits*

Some circuits have not restricted themselves to "ultimate employment actions" in defining adverse employment action but have, instead, insisted upon a close relationship between the employer's retaliatory action and employment. The Second, Third, Fourth, and Sixth Circuits have required plaintiffs asserting a retaliation claim to produce evidence that the adverse

126. *Id.* at 707.
127. *Id.* at 708.
128. 127 F.3d 686 (8th Cir. 1997).
129. *Id.* at 692.
130. 116 F.3d 355, 359 (8th Cir. 1997).
131. *Manning*, 127 F.3d at 692.
132. *Id.*
133. Williams & Rhodes, *supra* note 4, at 60.
134. *Id.*
135. *See, e.g.*, *Mattern*, 104 F.3d 702 (5th Cir. 1997); *e.g.*, *Manning*, 127 F.3d 686 (8th Cir. 1997).

employment action affected "the terms, conditions, or benefits" of employment.[136]

In *Garber v. New York City Police Department*,[137] the plaintiff, employed in a civilian capacity with the New York Police Department (NYPD), wrote "approximately 700 letters of complaint to police officials and the mayor."[138] In February 1995, the plaintiff's involuntary transfer to another section of the NYPD did not adversely affect his employment benefits or status in any way.[139] Nevertheless, plaintiff filed a complaint against the NYPD for retaliation in violation of Title VII.[140] The Second Circuit cited its decision in *Torres v. Pisano*,[141] holding that the plaintiff's transfer "must constitute a materially adverse change in the terms and conditions of employment."[142] Absent evidence that the transfer threatened his salary or benefits, the plaintiff's transfer did not constitute a materially adverse change in the terms and conditions of his employment.[143]

In *Robinson v. Pittsburgh*,[144] the Third Circuit held that the plaintiff's allegations of "unsubstantiated oral reprimands" and "unnecessary derogatory comments" did not constitute adverse employment action as required for a successful retaliation claim.[145] The Third Circuit held that the "adverse employment action" element of a plaintiff's prima facie case of retaliation must rise to the same level as that of a 42 U.S.C. § 2000e-2(a)(1) or (2) violation.[146] Retaliatory conduct falling short of discharge or refusal to rehire must alter the employee's "compensation, terms, conditions, or privileges of employment;" deny the employee employment opportunities; or adversely affect the employee's employment status.[147]

In *Von Gunten v. Maryland*,[148] the Fourth Circuit rejected all of an employee's claims that her employer's conduct constituted an adverse employment action.[149] The court held that withdrawing use of a state vehicle, "downgrading" plaintiff's year-end performance evaluation, reassigning plaintiff to shoreline survey work, "improper[ly] treat[ing] of various administrative matters," and "retaliatory[ly] harass[ing] creating a hostile work

136. Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001).
137. 159 F.3d 1346, *1 (2d Cir. 1998) (unpublished decision).
138. *Id.*
139. *Id.*
140. *Id.* at *2.
141. 116 F.3d 625, 640 (2d Cir. 1997).
142. *Garber*, 159 F.3d at *3.
143. *Id.* at *4.
144. 120 F.3d 1286 (3d Cir. 1997).
145. *Id.* at 1300.
146. *Id.* at 1300–01.
147. *Id.* at 1300.
148. 243 F.3d 858 (4th Cir. 2001).
149. *Id.* at 861.

environment" did not adversely affect the terms, conditions, or benefits of her employment.[150] The court stated that requiring plaintiffs to offer evidence of acts that adversely affected the terms, conditions, or benefits of their employment accurately reflected Congress's intended requisite for a section 2000e-3 retaliation claim.[151]

In *Hollins v. Atlantic Co.*,[152] an African-American employee sued her employer for disparate treatment on the basis of race because of her employer's application of its personal grooming standards to her hairstyle preferences, and for unlawful retaliation.[153] The Sixth Circuit concluded that threats of discharge and lowered performance ratings were not enough evidence to support a claim for retaliation under Title VII.[154] The Sixth Circuit supported its decision by citing the Seventh Circuit's holding in *Crady v. Liberty National Bank & Trust Co. of Indiana*,[155] which stated that "a materially adverse change might be indicated by a termination of employment, [a] demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."[156] Because Hollins could not produce evidence that the lowered performance ratings affected her wages, the Sixth Circuit could not conclude that there had been a materially adverse employment action.[157]

These cases reflect the Second, Third, Fourth, and Sixth Circuits' conclusions that the actions complained of met the same standard applied to a substantive discrimination offense, by holding that only actions having an "adverse effect on the 'terms, conditions, or benefits' of employment" will qualify as retaliation.[158] The standard applied by these circuits does not limit plaintiffs' successful retaliation claims to those adverse actions related to an "ultimate employment action[,]" but it does not accept plaintiffs' retaliation claims that do not allege conduct that materially affects a term, condition, or benefit of employment.[159]

---

150. *Id.* at 867.
151. *Id.* at 866.
152. 188 F.3d 652 (6th Cir. 1999).
153. *Id.* at 655–56.
154. *Id.* at 662.
155. 993 F.2d 132, 136 (7th Cir. 1993).
156. *Hollins*, 188 F.3d at 662.
157. *Id.*
158. Burlington N. & Santa Fe Co. v. White, 126 S. Ct. at 2405, 2410 (2006) (quoting Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)).
159. Williams & Rhodes, *supra* note 4, at 60.

3. *Broad Interpretation: Actions Falling Short of the Ultimate Employment Decision and Term, Condition, or Benefit of Employment Standards*

The remaining circuits have not found it necessary to so narrowly define the adverse employment action requirement of Title VII's anti-retaliation provision.[160] They have all rejected the "ultimate employment decision" standard applied by the Fifth and Eighth Circuits and have also accepted as sufficient actions falling short of adversely affecting "the terms, conditions, or benefits" of employment standard followed by the Second, Third, Fourth, and Sixth Circuits.[161]

In *Wyatt v. City of Boston*,[162] a teacher in the Boston public school system filed a complaint against the Boston School Committee and school personnel for retaliating against him for opposing what he viewed as sexual harassment.[163] The First Circuit vacated and remanded a dismissal of the retaliation complaint because, as the court explained, in addition to discharges, other adverse actions, such as demotions, unjustifiable negative job evaluations, and harassment by other employees, sufficiently satisfied the adverse action requirements of § 2000e-3(a) for a retaliation claim.[164]

The Seventh Circuit, in *Knox v. Indiana*,[165] held that evidence of fellow employee harassment and vicious gossip supported the plaintiff's claim of retaliation.[166] The court explained that "[n]o one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment," and thus, there was no indication why an employer permitting a complainant's co-workers to harass her does not fall within the statute.[167]

Ray v. Henderson[168] provided the Ninth Circuit with its first opportunity to articulate a rule defining an adverse employment action, and the court determined that it would follow those circuits that had defined adverse employment action broadly.[169] The court stated that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."[170] The court held that the actions that the plaintiff complained of, including reduced pay, decreased amount of

160. *Id.*
161. *Id.*
162. 35 F.3d 13 (1st Cir. 1994).
163. *Id.* at 14.
164. *Id.* at 15–16.
165. 93 F.3d 1327 (7th Cir. 1996).
166. *Id.* at 1335.
167. *Id.* at 1334.
168. 217 F.3d 1234 (9th Cir. 2000).
169. *Id.* at 1240.
170. *Id.* at 1243.

time to complete work, and decreased ability to influence policy, constituted adverse employment actions because such actions were reasonably likely to deter the plaintiff and others from complaining about workplace discrimination.[171]

In *Taylor v. Board of County Commissioners*,[172] the Tenth Circuit held that reprimands, slanders, and a transfer to a job the plaintiff "could not physically perform and was not qualified for" were sufficient acts to support a claim of adverse action.[173] The court followed the Tenth Circuit's approach in defining adverse action liberally to remain consistent with Title VII's purpose and held that the court "takes a case-by-case approach to determining whether a given employment action is adverse."[174]

In *Wideman v. Wal-Mart Stores, Inc.*,[175] the Eleventh Circuit explicitly rejected the Fifth and Eighth Circuits' requirements of ultimate employment decisions and held that adverse employment actions include those actions falling short of ultimate employment decisions.[176] The plaintiff alleged that she began experiencing adverse employment actions following her EEOC charge against Wal-Mart.[177] The plaintiff complained of written reprimands, inaccurate attendance listings, a one-day suspension, and an unnecessary delay of authorization for medical treatment.[178] The court held that such evidence, when considered collectively, satisfied the adverse employment action requirement necessary to establish a prima facie retaliation claim.[179]

In *Rochon v. Gonzales*,[180] the District of Columbia Circuit held that a claim of retaliation will succeed if the plaintiff demonstrates that the "'employer's challenged action would have been material to a reasonable employee,'" meaning a reasonable employee might have been dissuaded from making or supporting a discrimination charge.[181] Accordingly, a reasonable FBI agent would be dissuaded from filing or supporting a discrimination charge if he knew that such action would leave him and his family unprotected by the FBI against potential harm.[182]

These cases demonstrate that the circuits applying a liberal approach to define adverse employment action have found actions sufficiently adverse to

171. *Id.* at 1244.
172. No. 05-CV-00372-WYD-BNB, 2006 WL 2092609 (D. Colo. July 27, 2006).
173. *Id.* at *3.
174. *Id.* (citing Jeffries v. Kansas, 147 F.3d 1220, 1232 (10th Cir. 1998)).
175. 141 F.3d 1453 (11th Cir. 1998).
176. *Id.* at 1456.
177. *Id.* at 1455.
178. *Id.*
179. *Id.* at 1456.
180. 438 F.3d 1211 (D.C. Cir. 2006).
181. *Id.* at 1219 (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)).
182. *Id.* at 1220.

support a retaliation claim that would undoubtedly fall short of the conduct required by "ultimate employment action" circuits and "term, condition[,] or benefit of employment" circuits.[183] These circuits have liberally interpreted the adverse action requirement to a retaliation claim in their decisions, and as a result, a broad range of employer actions have satisfied the requirement.[184]

IV. REASONING

In *Burlington Northern & Santa Fe Railway Co. v. White*,[185] the United States Supreme Court affirmed the en banc Sixth Circuit Court of Appeals, holding that Burlington Northern's thirty-seven-day suspension of White and her reassignment from forklift operator to track laborer constituted adverse employment actions in violation of Title VII.[186] The Supreme Court held that the actions and harms forbidden by Title VII's anti-retaliation provision are not limited to those that are employment-related or those that occur at the workplace.[187] However, the Act prohibits only those employer actions that a reasonable employee or job applicant would consider materially adverse, meaning that the employer's actions would "dissuade a reasonable worker from making or supporting a charge of discrimination."[188]

The Court began by acknowledging the split among the circuits regarding whether application of Title VII's anti-retaliation provision is limited to an employer's employment-related or workplace actions and regarding the level of seriousness necessary for these actions to constitute retaliation.[189] The Court then analyzed the linguistic differences between Title VII's substantive anti-discrimination provision and the anti-retaliation provision, ultimately determining that Congress intended that such differences have practical implications.[190] The Court next considered the standard it would adopt in assessing how harmful an act of retaliatory discrimination must be in order to fall within the anti-retaliation provision's scope.[191] The Court concluded its analysis by applying the standards it adopted to the facts of White's retaliation claim.[192]

---

183. Williams & Rhodes, *supra* note 4, at 60.

184. *See generally id.* at 60–61 (citing circuits employing the broad interpretation standard to the adverse action requirement of a plaintiff's retaliation claim).

185. 126 S. Ct. 2405 (2006).

186. *Id.* at 2416.

187. *Id.* at 2409.

188. *Id.*

189. *Id.* at 2410–11; *see also infra* Part IV.A.1.

190. *Burlington Northern*, 126 S. Ct. at 2411–12; *see also infra* Part IV.A.2.

191. *Burlington Northern*, 126 S. Ct. at 2414–16; *see also infra* Part IV.A.3.

192. *Burlington Northern*, 126 S. Ct. at 2416–17; *see also infra* Part IV.A.4.

Justice Alito's concurring opinion stated that the majority's interpretation of the anti-retaliation provision of Title VII had "no basis in the statutory language" and that the Court's standard would "lead to practical problems."[193] Justice Alito believed that Title VII's anti-retaliation provision reaches only those discriminatory actions covered by Title VII's anti-discrimination provision.[194]

A. Majority Opinion

In the opinion written by Justice Breyer, the Supreme Court held that Title VII's anti-retaliation provision is not confined to employment-related or workplace actions and that the provision contains a materiality requirement and an objective standard.[195] In reaching this decision, the Court looked at the split among the circuits,[196] the statutory language and its relationship to Congress's intent,[197] the level of seriousness necessary before actions become actionable retaliation,[198] and the objective standard for judging harm.[199] Ultimately, the Court affirmed the Sixth Circuit Court of Appeals's holding.[200]

1. *Split Interpretations Among the Circuits*

The Court began its analysis by acknowledging that most circuits accept the phrase "discriminate against" in Title VII's anti-retaliation provision as referring to "distinctions or differences in treatment that injure protected individuals."[201] The Court then focused on the circuits' failure to adopt a homogeneous approach to whether an employer's action must be employment or workplace related and what level of harm is necessary to prove retaliation.[202]

The Supreme Court recognized that the Sixth Circuit required a close nexus between the employer's retaliatory action and employment, and thus applied the same standard for retaliation as applied to a substantive discrimination offense under Title VII.[203] The Sixth Circuit adopted the approach

193. *Burlington Northern*, 126 S. Ct. at 2418 (Alito, J., concurring); *see also infra* Part IV.B.
194. *Burlington Northern*, 126 S. Ct. at 2421 (Alito, J., concurring).
195. *Id.* at 2409 (majority opinion).
196. *Id.* at 2410–11.
197. *Id.* at 2411–12.
198. *Id.* at 2415.
199. *Id.*
200. *Burlington Northern*, 126 S. Ct. at 2418.
201. *Id.* at 2410.
202. *Id.*
203. *Id.*

used by the Fourth Circuit, requiring that the employer's action must have adversely affected the "terms, conditions, or benefits of employment."[204] The Supreme Court classified the Fifth and Eighth Circuits as "restrictive circuits" because they adopted an "ultimate employment decision standard" that confined prohibited retaliatory conduct to acts such as "hiring, granting leave, discharging, promoting, and compensating."[205] The Court next discussed the Seventh and District of Columbia Circuits' liberal approach that required the employer's challenged action to have been material to a reasonable employee, meaning it would likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[206] Finally, the Court addressed the Ninth Circuit's requirement that a plaintiff establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[207] The Court granted certiorari to resolve the split in the circuits, and therefore, had to decide whether the anti-retaliation provision extends beyond employment or workplace-related harms and how harmful an act of retaliation must be in order to constitute retaliatory discrimination.[208]

2. *The Statutory Language and Congressional Intent*

The Court pointed out that the wording of the anti-discrimination provision differs from the anti-retaliation provision, and therefore, one provision should not be read contemporaneously with the other.[209] The anti-discrimination provision's language—"hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee"—explicitly limits that provision's scope to employment actions or actions that alter workplace conditions.[210] However, such limiting words and phrases are not found in the anti-retaliation provision, leading the Court to consider whether Congress intended such linguistic differences to make a legal difference.[211]

The Court reasoned that Congress purposely created differences in the two provisions' languages because the provisions differ in purpose.[212] The anti-discrimination provision's objective was to provide employees with a

204. *Id.* (citing Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)).
205. *Id.* (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)).
206. *Burlington Northern*, 126 S. Ct. at 2410–11 (citing Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)).
207. *Id.* at 2411 (citing Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000)).
208. *Id.*
209. *Id.*
210. *Id.* at 2411–12.
211. *Id.* at 2412.
212. *Burlington Northern*, 126 S. Ct. at 2412.

workplace free of discrimination based on their "racial, ethnic, religious, or gender-based status."[213] The anti-retaliation provision sought to achieve a discrimination-free workplace by prohibiting "an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[214] The Court concluded that Congress's objective for the anti-retaliation provision could not be achieved if employers' prohibited actions were limited to employment and the workplace because retaliation may not relate directly to the employee's employment and may occur outside the workplace.[215]

The Court concluded that precedent and the EEOC's initial interpretations of the provision did not compel an interpretation contrary to its holding that the anti-retaliation provision was not limited to discriminatory actions that concern employment or the workplace.[216] First, *Burlington Industries, Inc. v. Ellerth*[217] did not address Title VII's anti-retaliation provision when the Court addressed the "Title VII requirement that violations involve 'tangible, employment action[,]' such as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[218]

Second, according to the Court, the petitioner's and the Solicitor General's contention that the EEOC's interpretation compelled the Court to reach a contrary conclusion was misplaced.[219] The Court conceded that the EEOC's 1991 and 1988 Compliance Manuals limited the anti-retaliation provision to "adverse employment-related action."[220] However, those manuals also suggested a broader interpretation for the provision by providing that a "complainant must show 'that (s)he was in some manner subjected to adverse treatment by the respondent because of the protest or opposition.'"[221] The EEOC's 1998 Manual provided its only direct statement of the activity prohibited by the anti-retaliation provision, stating that the anti-retaliation provision is not limited to the same workplace-related activity prohibited by the anti-discrimination provision.[222]

Finally, the Court did not consider it "anomalous" to interpret the anti-retaliation provision to provide broader protection for retaliation victims than victims of employment discrimination because such an interpretation

213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 2413.
217. 524 U.S. 742 (1998).
218. *Burlington Northern*, 126 S. Ct. at 2413 (quoting *Ellerth*, 524 U.S. at 761).
219. *Id.*
220. *Id.*
221. *Id.* (quoting EEOC COMPLIANCE MANUAL § 614.3(d), at 614-8 to 614-9 (1988)).
222. *Id.* at 2413–14 (citing 2 EEOC COMPLIANCE MANUAL § 8, at 8-13 (1998)).

encourages employees to file complaints and act as witnesses in Title VII actions.[223]

3. *Seriousness of the Harm and the Objective Standard*

The Court next focused on the seriousness of the harm necessary to constitute actionable retaliation and adopted the standard applied by the Seventh and the District of Columbia Circuits.[224] A plaintiff alleging retaliation "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.'"[225] Requiring a materially adverse action separates discriminatory conduct from trivial harms that all employees experience at work.[226] The Court adopted an objective standard because such a standard is judicially administrable and "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[227] The Court also noted that its legal standard was stated in general terms because the significance of an act of retaliation depends on its context.[228] The Court concluded that its standard would separate trivial harms from significant harms that are likely to dissuade a reasonable employee from making or supporting a discrimination complaint.[229] Thus, the Supreme Court affirmed the Sixth Circuit Court of Appeals, holding that a jury could reasonably conclude that White's reassignment to track laborer would have been materially adverse to a reasonable employee and that the thirty-seven-day suspension without pay could have dissuaded an employee from filing a complaint of discrimination and, therefore, was a materially adverse action.[230]

B. Justice Alito's Concurrence

Justice Alito wrote a concurring opinion in which he disagreed with the majority's interpretation because he believed that such an interpretation had no "basis in the statutory language" and would "lead to practical problems."[231] In his view, Congress did not intend to burden the federal courts

223. *Id.*
224. *Burlington Northern*, 126 S. Ct. at 2415.
225. *Id.* (citing Rochon v. Gonzales, 438 F.3d 1222,1219 (D.C. Cir. 2006)).
226. *Id.*
227. *Id.*
228. *Id.* at 2415–16 (citing Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)).
229. *Id.* at 2416.
230. *Burlington Northern*, 126 S. Ct. at 2417–18.
231. *Id.* at 2418 (Alito, J., concurring).

with claims of trivial harms, and therefore, Justice Alito favored a harmonious reading of sections 703(a) and 704(a).[232] Under this reading, section 704(a) "discrimination" would encompass the same discriminatory acts covered under section 703(a), namely "compensation, terms, conditions, or privileges of employment."[233]

Justice Alito rejected the majority's argument that the materially adverse standard was too narrow for two reasons.[234] First, there is a greater probability that an employer wanting to retaliate against an employee for making or supporting a charge of discrimination will do so at the workplace.[235] Second, the materially adverse standard is not restricted to workplace retaliation.[236] Justice Alito concluded that the majority's interpretation was not supported by the language of section 704(a) and, ultimately, would allow employers' retaliatory conduct as long as such conduct "[was] not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination."[237]

In Justice Alito's view, the majority's standard would lead to practical problems not intended by Congress.[238] First, Justice Alito stated that "the majority's interpretation logically implied that the degree of protection afforded to a victim of retaliation was inversely proportional to the severity of the original act of discrimination that prompted the retaliation."[239] For example, an employee enduring severe acts of discrimination would not easily be dissuaded from filing a discrimination charge because the probability of retaliation must be extremely high to outweigh the benefits of ending the severe discriminatory acts.[240] Second, the majority's objective standard of a reasonable employee was unclear because the Court asserted that the surrounding circumstances of a retaliatory action merit consideration.[241] Finally, the Court's test of whether a retaliatory act might dissuade a reasonable employee from engaging in protected activity produced an ambiguous standard.[242]

Applying the materially adverse employment action standard, Justice Alito would have affirmed the court of appeals's decision because White's

232. *Id.* at 2419.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Burlington Northern*, 126 S. Ct. at 2420.
237. *Id.*
238. *Id.*
239. *Id.* at 2420–21.
240. *Id.* at 2421.
241. *Id.*
242. *Burlington Northern*, 126 S. Ct. at 2421.

reassignment to track laborer and suspension without pay would have sufficiently satisfied the materially adverse employment action test.[243]

V. SIGNIFICANCE

Burlington Northern & Santa Fe Railway Co. v. White has been called "an important victory not only for White but also for employment discrimination plaintiffs nationwide."[244] *Burlington Northern* is important to the federal circuit courts because it finally resolves the split among them as to how harmful an employer's prohibited action must be to constitute retaliation and whether that action must be related to employment.[245] Many commentators believe the Supreme Court's decision will increase the number of retaliation claims being filed and surviving summary judgment, but others believe the decision's impact on corporate America will be minimal.[246] This section will explore *Burlington Northern*'s significance by discussing all of these issues.

A. The Balance Has Shifted: An Employee-Favoring Standard

Retaliation claims constituted 29.5% of all charges filed with the EEOC in 2005, and as a result, many federal appellate courts applied strict standards in an effort to decrease the number of retaliation claims they were forced to hear.[247] However, the unanimous decision in *Burlington Northern*, forbidding all employer retaliatory actions, even those actions unrelated to employment or outside the workplace, "is a major victory for employees from a court that historically has not been favorable to plaintiffs in employment discrimination cases."[248] By lowering the standard for plaintiffs alleging retaliation, the Court shifted the balancing test in favor of employees. This shift will likely encourage more employees to file a retaliation claim, and more retaliation claims should survive summary judgment.[249] The Court's statement that "context matters" should also persuade more employees to file retaliation claims because "'[a]ny time a court needs to weigh factual issues, it is an invitation for employees or former employees to sue[]

243. *Id.* at 2421–22.

244. Martha Neil, *Supreme Court Sets Broad Retaliation Test: Employees Win Big; More Claims Expected*, ABA J. E-REPORT, June 23, 2006, *available at* WL 5 No. 25 ABAJEREP 1.

245. *See generally Burlington Northern*, 126 S. Ct. at 2410.

246. *See infra* Part V.

247. *See generally* Starr, *supra* note 3.

248. Barbara L. Jones, *Employee Retaliation Claims Have More Teeth Now*, ST. CHARLES COUNTY BUS. REC., Aug. 9, 2006, *available at* 2006 WLNR 13920054 (quoting Minneapolis attorney Marshall Tanick).

249. *See generally* Adler, *supra* note 2.

because 'context' questions are factual and raise a matter for the jury.'"[250] *Burlington Northern* should thus promote the purpose of the anti-retaliation provision by protecting individuals who attempt to "secure or advance" Title VII's basic guarantees and by punishing employers who retaliate against those individuals.[251]

B. Not All Is Lost for Employers

While the *Burlington Northern* standard is undoubtedly more beneficial to employees than employers, the Court provided some protection to employers by requiring that an employer's actions be materially adverse under an objective standard.[252] The objective standard entitles an employer to argue that "no reasonable employee would have been dissuaded from filing a charge because of the employer's alleged adverse action," and if the employer's argument is successful, the plaintiff will be unable to survive summary judgment.[253] The Court's "materially adverse" limitation will also dissuade plaintiffs who want to file a retaliation claim against an employer for "petty slights or minor annoyances"[254] because such actions will not meet the materiality requirement.[255]

C. The Practical Effects of the Court's Decision: Only Time Will Tell

As previously stated, the United States Supreme Court's decision in *Burlington Northern* resolves a long-standing split among the federal circuits as to whether the challenged employer's action must be "employment or workplace related and about how harmful that action [must] be to constitute retaliation."[256] According to the Supreme Court, Congress intended Title VII's anti-retaliation provision to protect those individuals opposing unlawful discrimination against retaliation from their employers or potential employers.[257] To accomplish Congress's goal, it seems imperative that federal courts uniformly interpret and apply the anti-retaliation provision. The Court's decision in *Burlington Northern* should ensure that all federal courts

250. Jathan Janove, *Retaliation Nation: A Recent United States Supreme Court Ruling Will Stir up a New Wave of Retaliation Claims* (Burlington Northern and Santa Fe Ry. Co. v. White), HRMAGAZINE, Oct. 1, 2006, *available at* WL 10/1/06 HRMAG 62 (quoting Corbett Gordon, senior counsel with Fisher & Phillips LLP in Portland, Or.).

251. Burlington N. & Santa Fe Co. v. White, 126 S. Ct. at 2405, 2412 (2006).

252. *Id.* at 2415.

253. Gary D. Friedman & Jonathan A. Shiffman, Burlington*: Setting Standard to Cut out Weak Retaliation Claims*, 236 N.Y. L.J., Aug. 4, 2006, *available at* WL 8/4/2006 NYLF 4.

254. *Burlington Northern*, 126 S. Ct. at 2415.

255. *Id.*

256. *Id.* at 2410.

257. *Id.* at 2412.

interpret the scope of the anti-retaliation provision as extending beyond employment or workplace-related retaliatory harms and should require such action to be materially adverse to a reasonable person.

Although uniformity in interpretation and application is desired, lower courts will ultimately be responsible for interpreting and applying the *Burlington Northern* decision to the cases before them.[258] Historically, many federal judges have been unfavorable to employment discrimination cases, granting summary judgment before the cases reach a jury.[259] Time will tell whether *Burlington Northern* will actually make it easier for plaintiffs to have their retaliation claims heard by a jury.

The Court's ruling broadens the definition of employer retaliation, and many plaintiff-oriented employment lawyers are applauding the new standard. The potential aftereffects, however, may be more minimal than expected. Justice Alito, in his concurrence, suggested that most retaliatory conduct does not occur beyond the workplace for fear of criminal prosecution.[260] Because most retaliation occurs during employment hours, the Court's decision to expand the definition of retaliation beyond the workplace may not affect the majority of employers. However, the *Burlington Northern* decision so heavily favors employees that the benefits of the decision for employers are merely potential and possibly illusory, meaning that employers will have to wait to find out whether the Supreme Court actually afforded them protection in its decision. In the meantime, *Burlington Northern* should encourage employers to take prompt action to "document and discipline employees" for underperforming or for misconduct because the *Burlington Northern* decision has given employees a voice.[261]

Kaylin Redman Hart[*]

258. E.J. Graff, *Striking Back the Supreme Court Recently Handed Workers a 9-0 Victory in a Pivotal Workplace Discrimination Case. But Will the Lower Courts Turn Victory into Defeat?*, BOSTON GLOBE, Sept. 3, 2006, *available at* WL 9/3/06 Boston Globe D1.

259. *Id.*

260. *Burlington Northern*, 126 S. Ct. at 2419.

261. Thomas Flaherty, *United States Supreme Court Expands Employer Liability for Retaliation*, MONDAQ, Aug. 7, 2006, *available at* WL 8/7/06 MONDAQ.

* J.D. expected May 2007; B.A. in Psychology, May 2003, Rhodes College. The author would like to extend her gratitude to Jeff Bell, Erika Brock, Brian Pipkin, and the editorial board for providing her with knowledge and assistance in the preparation of this note. The author thanks her family for their patience and support during this phase of her life.