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Proving Retaliation After Burlington v. White

Lauren LeGrand

PROVING RETALIATION AFTER *BURLINGTON v. WHITE*

INTRODUCTION

Title VII of the Civil Rights Act of 1964 seeks to eradicate employment discrimination by making two categories of employer conduct unlawful: discrimination based on an individual's race, color, religion, sex, or national origin, and discrimination based on an individual's efforts to enforce the Act's basic guarantees.[1] Because enforcement of the Act depends on employees reporting illegal practices, the protection of discrimination claimants is crucial.[2] Until recently, however, the level of protection varied across the nation, as the circuits were split over what types of retaliatory conduct violated Title VII. Some circuits applied the same standard to retaliation claims as to underlying discrimination claims;[3] some circuits limited actionable retaliatory conduct to "ultimate employment decision[s];"[4] and some held that employer conduct was actionable if it would have dissuaded a reasonable employee from making a discrimination claim.[5] The need for a uniform standard increased, and retaliation claims became more frequent after enactment of the Civil Rights Act of 1991, which allowed plaintiffs suing under Title VII to seek compensatory and punitive damages.[6] Of the 75,428 discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) in 2005, 25.8% were Title VII retaliation charges,[7] up from 14.5% in 1992.[8]

1. *See* 42 U.S.C. §§ 2000e-2(a), 3(a) (2000); Burlington N. & Santa Fe Ry. Co. v. White (*Burlington*), ____ U.S. ____ , 126 S. Ct. 2405, 2412 (2006).

2. *See Burlington*, 126 S. Ct. at 2414 ("[The] purpose of the anti-retaliation provision is to ensure that employees are 'completely free from coercion against reporting unlawful practices.") (citing NLRB v. Scrivener, 405 U.S. 117, 121–22 (1972)) (internal quotations omitted).

3. *E.g.*, Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001).

4. *E.g.*, Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).

5. *E.g.*, Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006).

6. *See* 42 U.S.C. § 1981(a) (1991); PATRICIA A. WISE, UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION 1, 4 (2000) (attributing the increase in retaliation claims to the fact that they "generally are easier to prove and result in larger damage awards than other discrimination claims").

7. EEOC, CHARGE STATISTICS: FY 1997 THROUGH FY 2006, *available at* http://www.eeoc.gov/stats/charges.html.

8. EEOC, CHARGE STATISTICS: FY 1992 THROUGH FY 1996, *available at* http://www.eeoc.gov/stats/charges-a.html.

In June of 2006, the Supreme Court resolved the circuit split in *Burlington Northern & Santa Fe Railway Co. v. White* and interpreted the statute broadly, holding that the anti-retaliation provision of Title VII forbids any employer action that would dissuade a reasonable employee from making a discrimination claim, including actions unrelated to employment or the workplace.[9] In *Burlington*, railroad employee Sheila White claimed that she was transferred from forklift operation to hard track labor and later suspended without pay in retaliation for filing a sexual discrimination claim against her supervisor.[10] "[T]he date that they took me off that forklift and put me in the yard to work with the mens [sic], I didn't know the first thing about it. And everything out there is hot and heavy. You could easily get killed or hurt out there[,]" White said.[11] And referring to her suspension, "[t]hat thirty-seven days were the worst days I want to think of. Two children in school, and I was the supporter, and no income coming in."[12] These details are important; consideration of White's particular circumstances is necessary to determine whether her employer's retaliatory conduct is actionable, according to the Supreme Court.[13] Writing for the majority, Justice Stephen Breyer stated that the significance of the employer's action depends on "the perspective of a reasonable person in the plaintiff's position."[14]

In a separate concurrence, Justice Samuel Alito agreed with the majority in the outcome of the case, that Burlington's actions were unlawful retaliation, but disagreed with the majority's analysis and test for retaliation.[15] Justice Alito would limit the scope of unlawful retaliation to adverse employment-related actions,[16] an interpretation more clearly supported by the statutory language than the majority's standard. Justice Alito argued that the anti-retaliation provision of Title VII should be interpreted consistently with the anti-discrimination provision, which is limited to preventing discrimination with respect to employment.[17] Furthermore, Justice Alito believed that the majority's standard of a *reasonable person in the plaintiff's position* will be difficult for courts to apply because it requires consideration of employees' individual characteristics, but does not specify which characteristics courts

9. Burlington, ___ U.S. ___, 126 S. Ct. 2405, 2409 (2006).

10. *Id*. at 2409–10.

11. Shaila Dewan, *Forklift Driver's Stand Leads to Broad Rule Protecting Workers Who Fear Retaliation*, N.Y. TIMES, June 24, 2006, at A1.

12. *Morning Edition: Supreme Court Sides with Worker in Retaliation Suit* (NPR radio broadcast June 23, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5505828.

13. *Burlington*, 126 S. Ct. at 2415.

14. *Id*. at 2416.

15. *Id.* at 2422 (Alito, J., concurring).

16. *Id*.

17. *Id.* at 2419–21.

must consider.[18] Justice Alito would instead apply the standard used by the Sixth Circuit below, which found that White's reassignment and suspension were materially adverse employment actions and thus prohibited under Title VII.[19]

This Note argues that the majority's test for retaliation will in fact prove unworkable, as Justice Alito suggested, and that the Sixth Circuit's standard is a more equitable and reasonable interpretation of Title VII and the anti-retaliation provision. Part II provides an overview of Title VII and its main provisions, with discussion of the elements necessary to establish discrimination and retaliation claims. That section also describes the circuit split and the competing retaliation standards. Part III describes *Burlington Northern v. White* in detail, discussing the facts of the case, the two Sixth Circuit decisions, the Supreme Court's ultimate holdings in the case, and Justice Alito's concurrence. Part IV provides an analysis of the majority's standard for retaliation and suggests that Justice Alito's interpretation of retaliation under Title VII is more consistent with the language and purpose of the statute. That section also discusses the difficulties courts are likely to have in applying the majority's standard and the practical problems the new standard will cause employers and, eventually, employees. Part V concludes that the standard for retaliation under Title VII should be the same objective standard used in discrimination cases, that this standard strikes the appropriate balance between the rights of employers and employees, and that this standard will be effective in securing individual civil rights under Title VII.

I. TITLE VII AND THE CIRCUIT SPLIT

A. Overview of Title VII

The Civil Rights Act of 1964 was enacted primarily to eliminate discrimination in public accommodations, public education, and employment, at a time when racial discrimination was the "[m]ost glaring."[20] Congress did not intend for the Act to breed litigation, but instead sought to encourage voluntary resolution of all but the most serious types of discrimination.[21] Accordingly, Title VII's primary purpose "is not to provide redress but to avoid harm"[22] through a system of formal and informal remedial procedures implemented by the EEOC.[23] For example, the EEOC encourages employers

18. *Burlington*, 126 S. Ct. at 2421.

19. *Id*. at 2422.

20. *See* H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393–94; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241–68 (1964).

21. H.R. REP. NO. 88-914.

22. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

23. H.R. REP. NO. 88-914, *reprinted in* 1964 U.S.C.C.A.N. at 2401.

to establish an internal complaint procedure for discrimination complaints which, if effective, can limit employer liability.[24] The Supreme Court has affirmed this preventative approach as consistent with Title VII's purpose, stating that employers deserve credit for making "reasonable efforts to discharge their duty" to prevent and remedy discriminatory conduct.[25]

Victims of discrimination must first file a complaint with the EEOC, which investigates claims and has the power to enjoin the employer from unlawful practices.[26] If the EEOC does not take action on a complaint within a certain period of time, the complaining party can bring a civil action against the employer.[27]

Title VII defines unlawful employment discrimination in two sections. Section 703(a) of the Act makes it unlawful 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.[28]

The Supreme Court in *Burlington* referred to this section as Title VII's "substantive anti-discrimination provision."[29] This provision prohibits "disparate treatment" of a protected class and also conduct that may be facially neutral but has a "disparate impact" on protected individuals equivalent to intentional discrimination.[30] To recover under a disparate treatment theory, the plaintiff must establish a discriminatory motive underlying the employer's action; disparate impact claims, however, do not require proof of a discriminatory motive.[31]

For a plaintiff to recover for disparate treatment, the challenged employer conduct must be either a tangible employment action resulting in a significant change in employment status or benefits,[32] or must be harassment so severe

24. *See, e.g.*, *EEOC Policy Guidance on Sexual Harassment*, No. N-915-050 (Mar. 19, 1990), *available at* http://www.eeoc.gov/policy/docs/currentissues.html.

25. *Faragher*, 524 U.S. at 806.

26. *See* 42 U.S.C. § 2000e-5 (2000).

27. *Id*.

28. *Id.* § 2000e-2(a).

29. Burlington, ____ U.S. ____ , 126 S. Ct. 2405, 2411 (2006).

30. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986–87 (1988).

31. *Id*. at 986.

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

that it effectively alters the conditions of plaintiff's employment and creates an abusive or "hostile working environment."[33]

Section 704(a) of Title VII, the "anti-retaliation provision,"[34] makes it unlawful for an employer "to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation, proceeding, or hearing under this subchapter."[35] To establish a prima facie case of retaliation, the plaintiff must show participation in an activity protected by Title VII, employer conduct adversely affecting the plaintiff, and a causal link between the protected activity and the employer conduct.[36] Plaintiffs do not need to prove the underlying discrimination claim to successfully claim retaliation; they need only a reasonable belief that discrimination occurred.[37] In addition, section 704(a) protects all individuals who oppose discriminatory practices, whether they participate in formal or in informal proceedings,[38] and whether or not they are a member of a protected class.[39]

Under both sections 703(a) and 704(a), if the plaintiff has no direct evidence of discrimination, she may present circumstantial evidence according to the burden shifting rules applied by the Supreme Court in *McDonnell Douglas v. Green*,[40] a disparate treatment case.[41] The plaintiff has the initial burden of establishing a prima facie case of discrimination or retaliation; the burden then shifts to the employer to show a legitimate justification for the challenged conduct; the burden then returns to the plaintiff to show that the

33. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

34. *Burlington*, 126 S. Ct. at 2411.

35. 42 U.S.C. § 2000e-3(a) (2000).

36. *See, e.g.*, White v. Burlington N. & Santa Fe R. Co. (*White II*), 364 F.3d 789, 796 (6th Cir. 2004).

37. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 187–88 (2005); Crumpacker v. Kan. Dept. of Human Res., 338 F.3d 1163, 1171 & n.5 (10th Cir. 2003) ("[A]n *actual violation* is not required to maintain a retaliation claim under Title VII.") (emphasis in original).

38. 42 U.S.C. § 2000e-3(a); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514 (9th Cir. 1989) (making an informal complaint to supervisor is a protected activity); *see also* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 77–78 (2005) (noting that without protection from retaliation at less formal stages, complainants could be discouraged from reporting altogether or forced into taking formal legal action).

39. 42 U.S.C. § 2000e-3(a); Ray v. Henderson, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000) (making a complaint about treatment of others is a protected activity even when the employee is not a member of the protected class).

40. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

41. *See, e.g.*, Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 38 (1st Cir. 2003) (applying *McDonnell Douglas* burden shifting rules to retaliation cases); *see also* Kari Jahnke, *Protecting Employees from Employees: Applying Title VII's Anti-Retaliation Provision to Coworker Harassment*, 19 LAW & INEQ. 101, 103–05 (2001) (discussing the burden shifting in retaliation cases).

employer's justification is a pretext to conceal a discriminatory or retaliatory motive.[42]

Both section 703(a) and section 704(a) make it unlawful for employers to "discriminate against" individuals, whether on the basis of their status or their participation in a protected activity.[43] The term "discriminate against" is used throughout Title VII but not defined in the statute,[44] although courts agree generally that it refers to some distinction or difference that harms protected individuals.[45] Section 703(a), however, explicitly prohibits discrimination with respect to the "compensation, terms, conditions, or privileges of employment,"[46] while section 704(a) does not specify what type of discrimination or conduct constitutes unlawful retaliation.[47] In addition, the Supreme Court has further clarified the meaning of discrimination under section 703(a) with concepts such as disparate treatment, hostile work environment, and tangible employment action.[48] However, until *Burlington*, the Court did not establish comparable precedent in the law of retaliation, nor indicate whether substantive discrimination concepts also applied under section 704(a).[49] Because of the lack of Supreme Court precedent and the ambiguous language of the statute, the federal courts of appeals developed conflicting interpretations of Title VII's anti-retaliation provision.

B. The Circuit Split

Even before *Burlington*, the circuits agreed on the elements necessary to establish a prima facie case of retaliation under Title VII, as stated above: plaintiff's participation in a protected activity, employer conduct adverse to the plaintiff, and a causal link between the protected activity and the employer

42. *See McDonnell Douglas*, 411 U.S. at 802–805.

43. 42 U.S.C. §§ 2000e-2(a)(1), 3(a).

44. *See id*. § 2000e.

45. *See* Burlington, ____ U.S. ____ , 126 S. Ct. 2405, 2410 (2006) (citing, inter alia, Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 (2005), and 4 OXFORD ENGLISH DICTIONARY 758 (2d ed. 1989)).

46. 42 U.S.C. § 2000e-2(a)(1).

47. *See id*. § 2000e-3(a).

48. *See supra* notes 25, 30, 32–33 and accompanying text.

49. Cathy Currie, *Staying on the Straighter and Narrower: A Criticism of the Court's Definition of Adverse Employment Action Under the Retaliation Provision of Title VII*, 43 S. TEX. L. REV. 1323, 1325–28 (2002) (discussing the application of § 703(a) concepts to § 704(a) claims); Linda M. Glover, *Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Towards Justice*, 38 HOUS. L. REV. 577, 610 (2001) (discussing the lack of Supreme Court precedent on retaliation).

conduct.[50] The circuits disagreed, however, over what types of retaliatory conduct were actionable, and three basic standards developed.

The First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits applied the broadest standard and interpreted Title VII to prohibit any adverse treatment based on a retaliatory motive that was reasonably likely to deter an employee from engaging in protected activity.[51] This standard encompasses any negative evaluation or reference, any change in duties, schedule, pay, or benefits,[52] and any transfer to a "more unfriendly working environment."[53] In addition, hostility from coworkers in response to an employee's discrimination charge can constitute unlawful retaliation.[54] Under this approach, an employer is liable for a retaliatory personnel action even if it is ultimately inconsequential; the severity of the act "goes to the issue of damages, not liability."[55] This standard is consistent with EEOC guidelines, which state that an adverse action does not need to be an "ultimate employment action," such as a discharge, or even be related to employment to qualify as unlawful retaliation.[56] The Supreme Court ultimately adopted a version of this standard in *Burlington*.[57]

The Fifth and the Eighth Circuits applied the most restrictive standard and limited actionable retaliation to "ultimate employment decisions" involving hiring, firing, demoting, or a loss in wages or benefits.[58] Under this standard, an employee suffering a retaliatory "intermediate employment action," such as a suspension or a negative evaluation, cannot recover unless the action resulted in a final employment decision, such as the denial of a promotion.[59] These circuits interpreted Title VII's substantive anti-discrimination provision more

50. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 570 (6th Cir. 2004); Roberson v. Alltel Info. Servs., 373 F.3d 647, 655 (5th Cir. 2004); Feingold v. New York, 366 F.3d 138, 156 (2d Cir. 2004); Rhodes v. Ill. Dept. of Transp., 359 F.3d 498, 504 (7th Cir. 2004).

51. *See* Ray v. Henderson, 217 F.3d 1234, 1240–43 (9th Cir. 2000) (stating the standard and describing the circuit split); *see also* Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006); Noviello v. City of Boston, 398 F.3d 76, 89–90 (1st Cir. 2005); Jeffries v. Kansas, 147 F.3d 1220, 1232–33 (10th Cir. 1998); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998); Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).

52. *Ray*, 217 F.3d at 1243; *Knox*, 93 F.3d at 1334.

53. *Knox*, 93 F.3d at 1334.

54. *E.g.*, Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997).

55. *Id*.

56. EEOC, 2 EEOC COMPLIANCE MANUAL, SECTION 8: RETALIATION 8–13 (1998), *available at* http://www.eeoc.gov/policy/docs/retal.html [hereinafter EEOC COMPLIANCE MANUAL].

57. Burlington, ___ U.S.___, 126 S. Ct. 2405, 2409 (2006).

58. *E.g.*, Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

59. *See* Okruhlik v. Univ. of Ark., 395 F.3d 872, 880–81 (8th Cir. 2005) (plaintiff's failure to appeal negative evaluation served as a withdrawal from the tenure-review process and therefore denial of tenure was not an ultimate employment decision).

broadly than the anti-retaliation provision; because section 704(a) refers only to "discrimination" and does not mention the specific harms listed in section 703(a), it "can only be read to exclude such vague harms, and to include only ultimate employment decisions."[60] For a hostile work environment to qualify as an ultimate employment decision, the plaintiff must claim that conditions were so abusive that he was constructively discharged.[61] The Sixth Circuit applied a version of the "ultimate employment decision" standard in its first decision in *White v. Burlington Northern*.[62]

The Second, Third, and Fourth Circuits took the most moderate approach and applied the same standard to retaliation claims as to substantive discrimination claims.[63] These circuits interpreted section 704(a) consistently with 703(a) and required discrimination plaintiffs under both sections to show an adverse action related to the "compensation, terms, conditions, or privileges of employment."[64] This standard is not limited to ultimate employment decisions, but covers any type of adverse action affecting employment.[65] The "adverse employment action" element incorporates the section 703(a) "tangible employment action" precedent;[66] retaliatory conduct and discriminatory conduct must meet the same test for materiality.[67] This standard likewise incorporates hostile work environment precedent,[68] and thus "unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action."[69] Sitting en banc, the Sixth Circuit applied this standard in *White v. Burlington Northern*.[70]

Each of these three standards was applied to Sheila White's claims against Burlington: The Sixth Circuit initially applied the "ultimate employment decision" test, and then, sitting en banc, applied the "adverse employment action" test; the Supreme Court resolved the case by finding that Burlington's actions were likely to deter an employee from making a discrimination charge.[71] The following discussion of the two Sixth Circuit decisions and the Supreme Court's resolution in *Burlington Northern & Santa Fe Railway Co. v.*

60. *Mattern*, 104 F.3d at 709.

61. *See id*. ("Hostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions.").

62. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 310 F.3d 443, 446 (6th Cir. 2002).

63. *See, e.g.*, Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001); Richardson v. N.Y. State Dep't of Corr. Servs., 180 F.3d 426, 446 (2d Cir. 1999); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300–01 (3d Cir. 1997).

64. *Robinson*, 120 F.3d at 1300–01.

65. *Von Gunten*, 243 F.3d at 865.

66. *See supra* note 32 and accompanying text.

67. *Robinson*, 120 F.3d at 1300–01.

68. *See supra* note 34 and accompanying text.

69. Richardson v. N.Y. State Dep't of Corr. Servs., 180 F.3d 426, 446 (2d Cir. 1999).

70. White I, 364 F.3d 789, 795–96 (6th Cir. 2004) (en banc).

71. *See generally infra* Part II.

White outlines the reasoning of each standard and exhibits each in practice as it applied to the facts of *Burlington*.

II. BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY V. WHITE

A. Facts

In June of 1997, Sheila White began working at Burlington Railroad as a forklift operator and as the only woman in the Maintenance of Way Department at Burlington's Tennessee Yard.[72] In September, 1997, White reported to Burlington officials that her supervisor, Bill Joiner, repeatedly expressed his belief that women should not work in the Maintenance of Way Department and insulted White in front of her coworkers.[73] After an investigation, Burlington suspended Joiner and required him to attend sexual harassment training.[74] After Joiner was suspended, Burlington's roadmaster, Marvin Brown, removed White from forklift duty and reassigned her to more arduous work as a track laborer.[75] Brown told her the transfer was in response to complaints that an employee with more seniority than White was entitled to the forklift position.[76]

White then filed a complaint with the EEOC, claiming that the reassignment was gender-based discrimination and retaliation for her complaint about Joiner.[77] A few months later, White filed a second complaint with the EEOC, claiming that Brown had placed her under surveillance in retaliation for her charges.[78] A few days after Brown received notice of this second complaint, White's supervisor reported that she had been insubordinate, and Brown immediately suspended White without pay.[79] White then filed a grievance with Burlington appealing her suspension and also a third retaliation complaint with the EEOC.[80]

While the grievance was pending over the Christmas holiday season, White had no job, no income, and no guarantee that she would ever be able to return to work.[81] She received treatment for emotional distress during this time period and incurred medical expenses.[82] After an investigation, Burlington concluded that White had not been insubordinate and should not have been

72. Burlington, ___ U.S. ___, 126 S. Ct. 2405, 2409 (2006).
73. *Id*.
74. *Id*.
75. *Id.*
76. *Id*.
77. *Burlington*, 126 S. Ct. at 2409.
78. *Id*.
79. *Id*.
80. White II, 364 F.3d 789, 794 (6th Cir. 2004) (en banc).
81. *Id*.
82. *Id*.

suspended.[83] On January 16, 1998, White was reinstated to her position and awarded full backpay for her thirty-seven day suspension.[84] Having exhausted administrative remedies with the EEOC, White filed a complaint against Burlington in United States District Court, alleging gender-based discrimination and retaliation under Title VII.[85]

In 2000, the case went to trial, and the jury found that Burlington was not liable on the discrimination claim but was liable for unlawful retaliation.[86] The jury awarded White $43,500 in compensatory damages, including her medical expenses, but no punitive damages.[87] After the verdict, Burlington unsuccessfully moved for judgment as a matter of law, or in the alternative, for a new trial.[88] After its motion was denied, Burlington appealed to the Sixth Circuit.[89]

B. The First Sixth Circuit Decision

On appeal, Burlington claimed that White had failed to state a claim for retaliation because neither her job reassignment nor her temporary suspension was an adverse employment action under Title VII.[90] Burlington asserted that removal from forklift duty did not disadvantage White; she was hired as a general track maintenance worker and maintained that position while operating the forklift and while performing the more physically demanding duties.[91] Burlington then argued that because White's suspension was temporary, it was not a "final employment decision" and so not an actionable adverse employment action.[92] Furthermore, Burlington noted that the suspension did not result in any permanent economic harm because White was reinstated to her position with full backpay and benefits.[93]

The Sixth Circuit agreed with Burlington, finding that neither White's reassignment nor her suspension was an adverse employment action sufficient to support a retaliation claim under Title VII.[94] In reaching its conclusion, the court relied on Sixth Circuit cases that required retaliation plaintiffs to show "a materially adverse change in the terms and conditions of . . . employment"[95]

83. *Id*.
84. *Id*.
85. *White II*, 364 F.3d at 794.
86. *Id*.
87. *Id*.
88. White I, 310 F.3d 443, 446 (6th Cir. 2002).
89. *Id*.
90. *Id*. at 449.
91. *Id*. at 451.
92. *Id*. at 452.
93. *White I*, 310 F.3d at 452.
94. *Id*. at 455.
95. *Id*. at 450.

The court defined a "material adverse change" basically as an ultimate employment decision, such as a termination of employment, a demotion, a loss of wages or benefits, or other such "disruptive" changes in employment conditions.[96] Unlike these types of employment decisions, lateral reassignments like White's, without changes in pay or work hours, were generally not actionable.[97]

In support of this argument, the court cited *Darnell v. Campbell County Fiscal Court* in which an employee was transferred to a job with the same rank, duties, and pay, but required to commute an additional twenty minutes each way; this transfer was not an employment decision sufficient to constitute actionable retaliation.[98] The court also cited similar cases from the Fifth and Eighth Circuits which held that a transfer to a job with poor working conditions,[99] a transfer to a job perceived as less desirable by the employee,[100] and a transfer to a more stressful job[101] were all insufficient to satisfy the adverse employment action element of a retaliation claim.[102] The court also cited *Murphy v. Yellow Freight System, Inc.*,[103] which held there was no adverse employment action where a female employee received less than her expected pay raise, was placed on night and weekend shifts, and complained that her supervisor placed his notes of their conversations in her personnel file.[104] Relying on this precedent, the court concluded that reassigning White from forklift operation to more physically demanding work was not a "materially adverse change" in the conditions of employment.[105]

Likewise, the court also found that White's suspension was not an adverse employment action.[106] In holding that White's suspension was not actionable, the court relied primarily on *Dobbs-Weinstein v. Vanderbilt University*,[107] which concerned a professor's claim that she was denied tenure at Vanderbilt for discriminatory reasons.[108] After Vanderbilt conducted an internal investigation, the plaintiff was granted tenure and also received full backpay as of the date she should have been granted tenure.[109] Despite this relief, the

96. *Id*.

97. *Id*.

98. *White I*, 310 F.3d at 450 (citing Darnell v. Campbell Cty. Fiscal Court, 924 F.2d 1057 (6th Cir. 1991) (unpublished table decision)).

99. Bradford v. Norfolk S. Corp., 54 F.3d 1412, 1420 (8th Cir. 1995).

100. Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985).

101. Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994).

102. *White I*, 310 F.3d at 450.

103. 832 F. Supp. 1543 (N.D. Ga. 1993).

104. *White I*, 310 F.3d at 450 (citing *Murphy*, 832 F. Supp. at 1550–51).

105. *Id*. at 451.

106. *Id*. at 453.

107. 185 F.3d 542 (6th Cir. 1999).

108. *White I*, 310 F.3d at 452 (citing *Dobbs-Weinstein*, 185 F.3d at 544).

109. *Dobbs-Weinstein*, 185 F.3d at 544.

plaintiff sued Vanderbilt under Title VII for emotional distress, damage to her reputation, and interest on the backpay.[110] The Sixth Circuit held that the initial wrongful denial of tenure was not a final adverse employment decision because the plaintiff ultimately received tenure with backpay.[111] The court stated:

She has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII. To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.[112]

The court held that, like the professor in *Dobbs-Weinstein*, White suffered no materially adverse employment action with respect to her suspension because she was ultimately reinstated with backpay.[113] The court rejected White's claim that she endured unique hardships because her suspension occurred during the holiday season, stating that "[w]hile emotional injuries may be affected by the season, it does not make the suspension a sufficiently adverse employment action."[114] The court thus concluded that because neither White's lateral job transfer nor her temporary suspension were adverse employment actions within the meaning of Title VII, White had failed to make a prima facie case for retaliation.[115] The court reversed the trial court's decision and set aside the jury verdict in favor of White.[116] White then successfully petitioned the Sixth Circuit for a rehearing.[117]

C. The Sixth Circuit En Banc Decision

On rehearing, the Sixth Circuit, sitting en banc, readdressed the scope of the anti-retaliation provision and found that both White's reassignment to more difficult work and her suspension were adverse employment actions in violation of Title VII.[118] The court refused, however, to revise its definition of adverse employment action and adopt the standard of the EEOC, which filed an amicus curiae brief on White's behalf.[119] The EEOC Guidelines interpret Title VII as prohibiting "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from

110. *Id*.
111. *Id*. at 545.
112. *White I*, 310 F.3d at 453 (quoting *Dobbs-Weinstein*, 185 F.3d at 546).
113. *Id*. at 454–55.
114. *Id*. at 453.
115. *Id*. at 455.
116. *Id*.
117. *See* White II, 364 F.3d 789, 791 (6th Cir. 2004) (en banc).
118. *Id*. at 801–03.
119. *Id*. at 798, 800.

engaging in a protected activity."[120] The EEOC argued that this broad definition is supported by the language of Title VII; unlike the anti-discrimination provision, the anti-retaliation provision contains no language restricting its coverage to significant employment decisions.[121] The court disagreed, finding that such a literal reading of Title VII would authorize claims based on "petty slights and trivial annoyances."[122] The court held that not all employment discrimination is actionable; plaintiffs must show an "adverse" or "tangible" employment action beyond "trivial workplace dissatisfactions."[123] The court then discussed precedent in which it developed the adverse employment action element to prevent such trivial claims.[124]

The court cited *Geisler v. Folsom*[125] as the first Sixth Circuit case holding that Title VII's anti-retaliation provision required proof of an "adverse employment action."[126] In *Geisler*, the plaintiff claimed that the increased workplace tension that arose after she filed a sex discrimination charge amounted to unlawful retaliation.[127] Although the court found that Geisler's claim was too general, it held that such increases in tension could be evidence of adverse employment action and that "any discrete act or course of conduct which could be construed as retaliation must be examined carefully."[128]

The court then cited *Kocsis v. Multi-Care Management, Inc.*[129] as the primary case that developed the Sixth Circuit's definition of an adverse employment action.[130] In *Kocsis*, the plaintiff claimed she was transferred from her position as nursing supervisor to a "unit nurse" position for discriminatory reasons.[131] Although her salary and benefits were unaffected, the plaintiff claimed she suffered an adverse employment action because her patient-care duties as a unit nurse were much more physically demanding than her supervisor duties.[132] The court disagreed, holding that a change in job duties without a change in salary or work hours does not usually qualify as a materially adverse employment action.[133] The court also held, however, that such a lateral job transfer may be actionable if it corresponds to "a less

120. *Id*. at 798 (quoting EEOC COMPLIANCE MANUAL, *supra* note 56, at 8–13).
121. *Id*.
122. White II, 364 F.3d 789, 799 (6th Cir. 2004) (en banc) (internal quotation omitted).
123. *Id*. at 795.
124. *Id*.
125. 735 F.2d 991 (6th Cir. 1984).
126. *White II*, 364 F.3d at 796.
127. *Geisler*, 735 F.2d at 993.
128. *Id*. at 996.
129. 97 F.3d 876 (6th Cir. 1996).
130. *White II*, 364 F.3d at 797.
131. *Kocsis*, 97 F.3d at 879, 880.
132. *Id*. at 880.
133. *Id.* at 885 (citing Yates v. Avco Corp., 819 F.2d 630, 638 (6th Cir. 1987)).

distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."[134] The Supreme Court cited *Kocsis* in its landmark discrimination case, *Burlington Industries, Inc. v. Ellerth*,[135] when it held that an adverse employment action involves a significant change in employment conditions, such as a demotion or a substantial change in duties.[136]

Sitting en banc, the Sixth Circuit in *White* affirmed the definition of adverse employment action developed in *Kocsis* and *Ellerth* and held that plaintiffs must show such an action under Title VII's anti-retaliation provision.[137] In doing so, the court incorporated the concept of "tangible employment action" developed under the anti-discrimination provision and interpreted both sections to require a material change in the conditions of employment.[138] The court thus rejected the EEOC's argument that any type of retaliatory conduct is actionable, stating that requiring plaintiffs to show a tangible employment action accomplishes the statute's purpose while preventing trivial lawsuits.[139] The court also rejected the *Dobbs-Weinstein* requirement of an ultimate employment decision.[140] The court believed instead that the phrase "discriminate against" should be given the same meaning each time it appears in the statute, and thus that the adverse employment action requirement applied equally to all Title VII discrimination and retaliation claims.[141]

The court then applied its standard to the facts of *White*, first finding that White's thirty-seven day suspension without pay was an adverse employment action, not a trivial employment action causing a "mere inconvenience" or "bruised ego."[142] The court also held that reinstatement with backpay did not make White whole; she was entitled to interest, attorneys' fees, and damages for emotional suffering.[143] The court then found that White's reassignment to hard track labor was a demotion evidenced by the circumstances: the forklift position required more qualifications, the track labor was much more arduous, and Burlington employees considered forklift operation a more desirable position.[144] The court held that such a demotion was a material change in

134. *Id.* at 886.
135. 524 U.S. 742 (1998).
136. *Id*. at 762.
137. White II, 364 F.3d 789, 800 (6th Cir. 2004) (en banc).
138. *See id.* at 798–800.
139. *Id*. at 799.
140. *Id*. at 801 & n. 7.
141. *Id.* at 799.
142. *White II*, 364 F.3d at 802 (citing Kocsis, 97 F.3d 876, 886 (6th Cir. 1996)).
143. *Id*.
144. *Id*. at 803.

employment conditions and unlawful retaliatory conduct.[145] The court thus concluded that a jury could reasonably have found that both White's suspension and reassignment were adverse employment actions in violation of Title VII,[146] and it affirmed the district court's denial of Burlington's motion for judgment as a matter of law.[147] Burlington then petitioned the Supreme Court for certiorari, asking the Court to resolve the circuit split and determine which interpretation of Title VII governs retaliation claims.[148]

D. The Supreme Court's Majority Opinion

The Supreme Court granted certiorari to decide two issues: whether Title VII requires a link between retaliatory conduct and employment and how harmful the conduct must be to constitute actionable retaliation.[149] After examining the competing interpretations in the circuits, Justice Breyer, writing for the majority, concluded that Title VII's anti-retaliation provision is not limited to workplace conduct and that it prohibits all conduct serious enough to dissuade a reasonable worker from making a discrimination charge.[150]

The Court first rejected the standard, applied by the Sixth Circuit below, requiring retaliation plaintiffs to show a materially adverse employment action.[151] The Court refused to read section 704(a), Title VII's anti-retaliation provision, in conjunction with section 703(a), the anti-discrimination provision, and thus limited conduct affecting the terms, conditions, or status of employment.[152] The Court stated that Congress intended to omit that language from section 704 because the provisions serve different purposes: section 703 prevents discrimination based on an individual's status, while section 704 protects certain conduct.[153] The Court found that section 704's purpose could not be achieved by limiting its protection to the workplace because retaliatory conduct can cause harm outside the workplace.[154] In support of this argument, the Court cited *Rochon v. Gonzales*, in which the FBI retaliated by refusing to investigate death threats against an employee,[155] and *Berry v. Stevinson*

145. *Id*. at 804 (noting that the court had rejected Burlington Northern's argument that no adverse employment action was taken).

146. *Id*. at 804.

147. *White II*, 364 F.3d at 804, 808.

148. Petition for Writ of Certiorari, Burlington, 126 S. Ct. 2405 (2006) (No. 05-259), 2005 WL 2055901.

149. Burlington, ___ U.S. ___, 126 S. Ct. 2405, 2411 (2006).

150. *Id*. at 2410–11, 2414–15.

151. *Id*. at 2410, 2411.

152. *Id*. at 2411.

153. *Id*. at 2412.

154. *Burlington*, 126 S. Ct. at 2412.

155. Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006).

Chevrolet,[156] in which an employer retaliated by filing false criminal charges against an employee.[157]

The Court rejected Burlington's argument that it is "anomalous" to extend more protection to the victims of retaliation than to victims of discrimination, pointing again to the different purposes of section 703(a) and section 704(a).[158] Without examining the objectives of the anti-discrimination provision, the Court stated that section 704 protection must extend beyond employment-related retaliation so that employees will be willing to report unlawful practices.[159] Thus, the Court rejected the retaliation standards applied by circuits requiring an adverse employment action, as well as those requiring "ultimate employment decisions."[160]

The Court conceded, however, that not all retaliation is actionable under Title VII and that the judicial standard must filter out trivial complaints.[161] In concurrence with the Seventh and District of Columbia Circuits, the Court held that plaintiffs must show a "materially adverse" action, defined as conduct that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[162] This standard will be sufficient to prevent Title VII from becoming a "general civility code for the American workplace"[163] because "normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence."[164]

The Court emphasized the importance of the objective, "*reasonable* employee" standard for retaliation that avoids judicial inquiry into "a plaintiff's unusual subjective feelings."[165] The Court explained, however, that the standard actually refers to a reasonable employee in the plaintiff's position; in fact, whether retaliatory conduct is actionable depends on the unique "circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[166] The Court gave several examples of this variable "*reasonable* employee" standard: A schedule change may have a trivial impact on many workers, but will constitute retaliation against a "young mother with school age children"; a supervisor's refusal to invite an employee to lunch is usually a "petty slight," but exclusion from a weekly training lunch is actionable retaliation; the

156. 74 F.3d 980, 984, 986 (10th Cir. 1996).
157. *Burlington*, 126 S. Ct. at 2412.
158. *Id*. at 2414.
159. *Id*.
160. *Id*.
161. *Id*. at 2415.
162. *Burlington*, 126 S. Ct. at 2415 (internal citations omitted).
163. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).
164. *Id.*
165. *Id*. (emphasis in original).
166. *Id.* (quoting *Oncale*, 523 U.S. at 81–82).

average employee who is denied flexible hours after making a discrimination charge may not have a remedy, but an employee who needed the flexible schedule to care for a disabled child can file a retaliation claim.[167]

Applying this standard to White's retaliation claim, the Court found that both of Burlington's challenged actions were "materially adverse" to White and therefore prohibited under Title VII.[168] The Court first found that the reassignment to the less desirable track laborer position was "one good way to discourage an employee such as White from bringing discrimination charges," pointing to the same facts the Sixth Circuit considered in finding that the transfer was a demotion.[169] In finding that White's suspension was also a materially adverse action, the Court, like the Sixth Circuit, recognized the significance of living thirty-seven days without income and the failure of backpay to make White whole.[170] The Supreme Court, however, also found it relevant that White supported a family and that the suspension took place over the holidays; the Court quoted her testimony: "That was the worst Christmas I had out of my life."[171] Although it applied a much broader standard, the Supreme Court, like the Sixth Circuit, found sufficient evidence of retaliation and concluded that the jury verdict in favor of White should be upheld.[172]

E. Justice Alito's Concurrence

Justice Alito wrote a separate opinion concurring in the judgment.[173] While he agreed with the majority that both White's reassignment and her suspension were unlawful retaliation, Justice Alito disagreed with the majority's interpretation of Title VII.[174] He believed the majority's interpretation was inconsistent with the statutory language and feared that its application will cause practical problems.[175]

1. The Textual Argument

Justice Alito began by quoting sections 703(a) and 704(a),[176] emphasizing the language in section 703(a)(1) which makes it unlawful for employers to discharge, fail to hire, or "*otherwise to discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of

167. *See Burlington*, 126 S. Ct. at 2415–16.
168. *Id*. at 2416.
169. *Id.* at 2416–17; *supra* note 144 and accompanying text.
170. *See Burlington*, 126 S. Ct. at 2417; *supra* notes 142–43 and accompanying text.
171. *See Burlington*, 126 S. Ct. at 2417.
172. *Id*. at 2416; *supra* note 145 and accompanying text.
173. *Burlington*, 126 S. Ct. at 2418–22 (Alito, J., concurring).
174. *Id*. at 2418.
175. *Id*.
176. *See supra* text accompanying notes 28, 35.

employment" because of an individual's race, gender, or religion.[177] Describing section 704(a) as a "complementary and closely related provision," he pointed to that section's language forbidding an employer "to *discriminate against* any of his employees" for participating in an activity protected by Title VII.[178] He identified two possible interpretations of the term "discriminate against."

Under one interpretation, if section 704(a) is read by itself, "discriminate against" takes its literal meaning, "to treat differently."[179] This interpretation provides more protection for victims of retaliation than for victims of discrimination based on race, gender, religion, or natural origin, those persons Title VII was primarily enacted to protect.[180] Moreover, this interpretation "makes a federal case" out of *any* distinction in the treatment of an employee who has participated in a protected activity.[181] A plaintiff could establish a prima facie case of retaliation by showing he was treated in a "less friendly manner" or subjected to more supervision after filing a discrimination charge.[182] The majority in *Burlington* rejected this interpretation of section 704(a) and found that the anti-retaliation provision does not protect against all types of retaliation, stating that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."[183]

The other possible interpretation of "discriminate against" reads sections 703(a) and 704(a) together so that discrimination in both sections means discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment."[184] Justice Alito believed that this is the most reasonable reading of the statute, although he conceded it is less straightforward.[185] The majority, however, also rejected this interpretation, finding that it denies a remedy to employees who suffered retaliation outside the workplace.[186] Justice Alito argued that "the majority's concern is misplaced"[187] for several reasons. First, an employee is much more likely to suffer retaliation on the job where the employer has the most opportunity to

177. *Burlington*, 126 S. Ct. at 2418 n.1 (Alito, J., concurring) (quoting 42 U.S.C. § 2000e-2(a)(1)) (emphasis in original).

178. *Id*. (quoting 42 U.S.C. § 2000e-3(a)) (emphasis in original).

179. *Id*.

180. *Id*. at 2418–19.

181. *Id*. at 2419.

182. Burlington, ___ U.S. ___, 126 S. Ct. 2405, 2419 (2006) (Alito, J., concurring).

183. *Id*. at 2415 (majority opinion).

184. *Id*. at 2419 (Alito, J., concurring) (quoting 42 U.S.C. § 2000e-2(a)(1)).

185. *Id*.

186. *See supra* notes 150–53 and accompanying text.

187. *Burlington*, 126 S. Ct. at 2419 (Alito, J., concurring).

retaliate.[188] Furthermore, many retaliatory acts outside the workplace are already prohibited under criminal or tort law,[189] as in the *Berry v. Stevinson Chevrolet* case cited by the majority in which an employer filed false criminal charges against an employee.[190] In any case, the materially adverse action test is not limited to retaliation that takes place at the workplace, but extends to action affecting any term, condition, or privilege of employment.[191] For example, Justice Alito pointed to the *Rochon v. Gonzales* case also cited by the majority, in which an FBI agent claimed that the Bureau retaliated against him by denying him off-duty security that would otherwise be provided.[192] In that case, off-duty security qualifies as a privilege of employment under Justice Alito's interpretation, and the agent would have a remedy under Title VII.[193]

However, as stated above, the majority rejected both of these interpretations and instead found that section 704(a) did not provide a remedy for all retaliatory differences in treatment, but only those that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[194] In refusing to adopt either a strict literal reading of section 704(a) which would apply to *all* differences in treatment or a reading which incorporates the limits of section 703(a), the majority rejected both interpretations of the statutory language that Justice Alito deemed reasonable.[195]

2. The Practical Application Argument

Justice Alito also argued that the "perverse" practical consequences of the majority's test are inconsistent with the purpose of Title VII and thus that the majority's interpretation is not what Congress intended.[196] Justice Alito broke down the majority's standard, turning first to the phrase "*a* charge of discrimination" and finding that it must refer to the particular charge which caused the employer to retaliate against the plaintiff, and not to some generic or average claim.[197] Justice Alito maintained that requiring the jury to consider a generic charge would be unworkable; the jury must consider the severity of the underlying discrimination in order to weigh the costs and benefits of filing a charge, as required by the majority's standard.[198] Thus, the nature of the

188. *Id*.
189. *Id*.
190. *See supra* notes 156–57 and accompanying text.
191. *See Burlington*, 126 S. Ct. at 2420 (Alito, J., concurring).
192. *See supra* notes 155, 157 and accompanying text.
193. *Burlington*, 126 S. Ct. at 2420 (Alito, J., concurring).
194. *Id.* (quoting majority opinion at 2415).
195. *Id.* at 2418–19.
196. *Id.* at 2420.
197. *Id.* (emphasis in original).
198. *Burlington*, 126 S. Ct. at 2420 n.2 (Alito, J., concurring).

underlying discrimination charge will determine whether the challenged conduct would dissuade a reasonable employee in the plaintiff's position from filing that particular charge.[199] Justice Alito believed that this test would have "perverse results," as the "degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination . . . ."[200] If a reasonable employee suffers the most severe discrimination, even very severe acts of retaliation will not deter her from filing a discrimination charge.[201] In contrast, for an employee who suffers a mild form of discrimination, the possibility of milder retaliation will more easily dissuade her from complaining.[202] To Justice Alito, "[t]hese topsy-turvy results make no sense."[203]

Justice Alito turned next to the majority's "reasonable worker" standard and found that it was unclear and subjective.[204] At first, the majority described the test as objective, but then indicated that certain individual characteristics of the retaliation plaintiff must be considered.[205] Justice Alito restated the majority test as "whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim."[206] In the majority's examples, Justice Alito found three such characteristics—age, gender, and family responsibilities—but the majority did not indicate which additional characteristics are significant or how courts should determine whether a characteristic is relevant.[207]

Finally, Justice Alito took issue with the majority's "loose and unfamiliar causation standard", which asks whether the challenged action "*well might have dissuaded* a reasonable worker" from engaging in a protected activity.[208] Justice Alito stated that especially in employment discrimination and retaliation law, "in which standards of causation are already complex, the introduction of this new and unclear standard is unwelcome."[209]

Justice Alito argued that, unlike the majority's standard, his interpretation of section 704(a) provides a clear, objective standard that will protect employees who have suffered real retaliation while preventing trivial claims

199. *Id.* at 2420–21.

200. *Id.* at 2420.

201. *Id.* at 2421.

202. *Id.*

203. *Burlington*, 126 S. Ct. at 2421 (Alito, J., concurring).

204. *Id.*

205. *Id.*; *see supra* notes 165–67 and accompanying text.

206. *Burlington*, 126 S. Ct. at 2421 (Alito, J., concurring).

207. *Id.*; *supra* note 167 and accompanying text.

208. *Burlington*, 126 S. Ct. at 2421 (Alito, J., concurring) (citing majority opinion at 2415) (emphasis in original).

209. *Id.*

from surviving summary judgment.[210] He therefore agreed with the circuits that required a materially adverse employment action,[211] meaning "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."[212] Believing this interpretation to be consistent with the statutory language and the purpose of Title VII, Justice Alito concluded that section 704(a) covers only those discriminatory acts prohibited under section 703(a).[213] Applying this standard to Sheila White's claims against Burlington, Justice Alito found that both her reassignment and her suspension were materially adverse actions and therefore unlawful retaliation.[214]

III. THE NEW RETALIATION STANDARD

The Supreme Court's expansion of Title VII's protection against retaliation in *Burlington* came as a surprise to many who did not expect such an employee-friendly decision from the conservative Roberts Court.[215] Employee rights groups approved of the Court's decision to adopt such a context-dependent test for retaliation: "Had they given a bright-line rule, it would have told employers how far they could go and not be liable for it."[216] On the other side, employers and their attorneys worried about increased litigation and a confusing standard; as one lawyer put it, "the standard is the reasonable person in the particular circumstances of the plaintiff, and that makes it difficult to advise my clients."[217] *Burlington*'s true impact, however, will not be apparent until the standard is interpreted in the lower courts and its effects are felt in the workplace. In any case, however, the soundness of the Court's standard will depend on whether it furthers the purposes of Title VII, whether it is judicially administrable, and whether it appropriately balances the interests of employees and employers. The following sections evaluate the Court's standard with

210. *Id.* at 2419

211. *Id.* (citing, inter alia, Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) and Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).

212. *Id.* at 2419 (quoting Ellerth, 524 U.S. 742, 761 (1998)).

213. *Burlington*, 126 S. Ct. at 2422 (Alito, J., concurring).

214. *Id*. at 2421–22.

215. *See, e.g.*, Keith Ecker, et al., *The Year in Review: 20 Stories That Shook the In-House Bar*, INSIDE COUNSEL, Dec. 2006, at 58; Debra S. Katz & Lisa J. Banks, *Victories for Workers*, NAT'L L.J., Aug. 2, 2006, at 10.

216. *Supreme Court Ruling on Bias Retaliation Creates "Reasonable Employee" Standard*, 26 Empl. Discrim. Rep. (BNA) 786, 787–88 (June 28, 2006) (quoting attorney Stephen Chertkof, whose firm filed an amicus brief on behalf of the National Employment Lawyers Association).

217. *Id.* at 787 (quoting attorney Allan H. Weitzman, who filed an amicus brief on behalf of the National Federation of Independent Business Legal Foundation).

respect to those inquiries, followed by a brief discussion of the importance of protection against retaliation.

A. The Majority's Retaliation Standard Contravenes the Purpose of Title VII

To begin, the majority's interpretation of Title VII does not comport with the language of the statute or principles of statutory construction.[218] Courts agree that the "discriminate against" language in section 704(a) is somewhat ambiguous; all the standards recognized *some* limit on what type of retaliatory conduct is actionable.[219] As a general rule of construction, ambiguous statutory language "must be read in the context of other laws pertaining to the same subject matter and should be interpreted in the manner which is most reasonable and logical in light of the aims and designs of the total body of law of which it is a part."[220] Thus, section 704(a) should be interpreted consistently with the other anti-discrimination provisions of Title VII and likewise limited to discrimination affecting employment. This interpretation is the most reasonable in light of Title VII's purpose of preventing harm and primarily protecting victims of status-based discrimination.[221] Rather than harmonizing the two discrimination provisions of Title VII, the majority in *Burlington* held that the two sections had entirely different purposes and refused to read them together.[222] In this way, as Justice Alito argued, the Supreme Court derived a retaliation standard with no grounding in the statutory language of Title VII.[223]

Furthermore, the standard directly conflicts with the primary purpose of Title VII by granting more protection to victims of retaliation than victims of discrimination based on race, gender, religion, or national origin. Title VII was enacted in response to "glaring" discrimination against minorities who were denied the "rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens."[224] The right to equal employment opportunities is a fundamental right which "must be, the birthright of all citizens"; the right to seek a remedy under section 704(a) is not. In addition, the framers of Title VII intended to encourage voluntary, informal resolution of discrimination complaints in all but the most serious forms of discrimination.[225] The Supreme Court's easily-met standard discourages

218. *See supra* notes 176–95 and accompanying text.
219. *See supra* Part II.B.
220. Cohen v. United States, 384 F.2d 1001, 1004 (Ct. Cl. 1967).
221. *See supra* Part II.A.
222. *See* Burlington, ___ U.S. ___, 126 S. Ct. 2405, 2412 (2006).
223. *See supra* notes 176–95 and accompanying text.
224. H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393.
225. *Id.*

informal resolution; plaintiffs have more incentive to file a retaliation claim seeking compensatory and punitive damages.[226]

It is true that enforcement of Title VII depends on employees reporting unlawful practices and "[m]aintaining unfettered access to statutory remedial mechanisms,"[227] so that protection of discrimination plaintiffs is necessary to guarantee civil rights. The majority's standard, however, expands protection beyond victims of real retaliation and therefore does not provide any additional security for fundamental rights. By focusing only on the subjective deterrent quality of an employer's action, the standard recognizes retaliation claims based on conduct that is harmless or even seemingly advantageous, so long as the particular plaintiff claims the action was adverse.[228] In contrast, the moderate standard that limits actionable retaliation to conduct affecting employment incorporates the materiality test of the substantive anti-discrimination provision.[229] This test is sufficient to ensure employees "unfettered access" to Title VII remedies while preventing insignificant claims.

In sum, the statutory language does not support the majority's standard for retaliation, and it directly conflicts with the purpose of Title VII by encouraging litigation and by providing more protection to discrimination claimants than to discrimination victims. In contrast, Justice Alito's standard logically interprets section 704(a) in light of the aims and designs of Title VII by protecting civil rights and those who enforce those rights to the same degree.

B. The Majority's Standard Is Not Judicially Administrable

Although the Court granted certiorari in *Burlington* to promote uniform application of the federal law against retaliation, its standard is too unclear and subjective to do so. Already, the district courts have varied in their application of the standard. In *Gilmore v. Potter*, the plaintiff claimed her employer retaliated against her by telling her she was "worthless," forbidding her from speaking to coworkers, and confining her to a small room by threatening to fire her if she came out into the workroom.[230] After finding that the majority's "reasonably likely to deter" standard was controlling, the court distinguished the plaintiff's facts from those in *Burlington*: White had presented considerable evidence that her reassignment was "more arduous and dirtier," less prestigious, and objectively considered a demotion.[231] However, the court in

226. *See supra* notes 6–7 and accompanying text (highlighting the increase in Title VII retaliation claims).

227. *Burlington*, 126 S. Ct. at 2407 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

228. *See* Glover, *supra* note 49, at 582–83.

229. *See supra* notes 63–70 and accompanying text.

230. No. 4:04-CV-1264 GTE, 2006 WL 3235088, at *10 (E.D. Ark. 2006).

231. *Id.* at *9–10 (citing *Burlington*, 126 S. Ct. at 2415–16).

Gilmore went on to apply a version of the adverse employment action test, first finding that the plaintiff had not suffered any loss of pay or benefits.[232] The court then concluded that no jury could reasonably find that the employer's actions "constituted an adverse employment action" and granted the employer's summary judgment motion.[233]

The court in *Reis v. Universal City Development Partners, Ltd.*, similarly declined to consider the perspective of a reasonable employee in the plaintiff's position.[234] Although the court found *Burlington* to be controlling, it applied the standard articulated by the Eleventh Circuit in *Doe v. Dekalb County School District*,[235] because it found "no appreciable difference" in the two standards.[236] The court chose to apply the *Doe* test, however, because it "subsumed a requirement of materiality within its reasonable person standard for adversity."[237]

These two cases illustrate that the majority's test for retaliation is too subjective for lower courts to apply without referring to another, now obsolete, standard; as the primary finders of fact, the district courts need a clear retaliation standard with an objective test for materiality. So far, the federal appellate courts have applied the majority's standard consistently with *Burlington*.[238] However, as of yet, courts have not attempted to determine which individual characteristics of a retaliation plaintiff are relevant; resolution of this issue will likely vary throughout the circuits.[239] In addition, if the lower courts continue to deviate from the majority's standard out of necessity, the inconsistencies will eventually be replicated in the appellate courts. If the Supreme Court wants to ensure uniform application of the law of retaliation, it will need to articulate a clear, objective test that district courts can apply directly to concrete facts.

C. Are the Benefits of Broad Protection Against Retaliation Worth the Cost?

The majority's broad interpretation of Title VII's protection against retaliation benefits plaintiffs more than employees; this standard makes it easier for plaintiffs to prove retaliation, but does not meaningfully increase

232. *Id.* at *10.

233. *Id.* at *10.

234. 442 F. Supp. 2d 1238, 1253 (M.D. Fla. 2006) (Though the court does find it "cannot say that a reasonable person would have found the denial of the request to transfer to be materially adverse.").

235. 145 F.3d 1441, 1448–49 (11th Cir. 1998) ("An ADA plaintiff must demonstrate that a reasonable person in his position would view the employment action in question as adverse.").

236. *Reis*, 442 F. Supp. 2d at 1253.

237. *Id.* (citations omitted)

238. *See, e.g.*, Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 19–20 (1st Cir. 2006); Argo v. Blue Cross and Blue Shield of Kan., Inc., 452 F.3d 1193, 1202–03 (10th Cir. 2006).

239. *See supra* notes 203–05 and accompanying text.

protection for employees.[240] In fact, the standard increases uncertainty and employer liability under Title VII, a cost that may be revisited upon the employees. Already, the average cost of defending against an employment discrimination claim is $250,000.[241] This cost will have the largest impact on small businesses that are less likely to have employment practices insurance.[242] Moreover, the number of claims against small businesses has risen while claims against large corporations have dropped, most likely because big corporations can utilize counsel and human resource departments to follow the "minutiae of employment law."[243] In any case, the majority's standard for retaliation confuses experienced employment lawyers, making it difficult even for large corporations to prevent liability under the new test.

Ultimately, employees will pay for this increased employer liability. Employers must now devote more resources to defending lawsuits and compensating retaliation plaintiffs; as a result, both employee wages and company profits will suffer.[244] Businesses will be forced to hire fewer employees and may subject applicants to more thorough evaluations or even unlawful discrimination to prevent potential claimants from being hired, resulting in a less fluid job market. On the whole, employees may find that the unpredictable, context-dependent definition of retaliation results in fewer employment options and less desirable employment practices than the more moderate standard.

D. *Preventing Retaliation is Essential to Preventing Discrimination*

The enforcement of Title VII and all statutes seeking to eradicate discrimination depend on individuals being willing to come forward and report discrimination. If the law against retaliation is not enforced, individuals will not come forward, and the law against discrimination will also be un-enforced. Retaliatory conduct serves to punish those who enforce their civil rights and to threaten others into remaining silent.[245] Those most vulnerable to discrimination, like women and minorities, are most likely to refrain from filing a discrimination claim out of fear of retaliation.[246] In recognition of the importance of preventing retaliation, the Supreme Court in *Burlington* refused

240. *See supra* notes 224–29 and accompanying text.

241. Jeff St. John, *Insurance Helps Protect Against Suits*, TRI-CITY HERALD (Kennewick, Wash.), Mar. 2, 2006, at B6, *available at* http://www.tri-cityherald.com/tch/business/story/7492846p-7402962c.html.

242. *See id.*

243. *Id.*

244. *See* Timothy D. Terrell, *In Defense of Firing*, 19 FREE MARKET 1, 1 (Mar. 2001), *available at* http://www.mises.org/freemarket_detail.asp?control=343&sortorder=articledate.

245. *See* Brake, *supra* note 38, at 20.

246. *See id.* at 32–42 (discussing sociological studies).

to limit its scope to conduct affecting employment.[247] Those who agree with the majority's standard argue that such a subjective standard for retaliation is necessary; the objective, privileged perspective of a judge is irrelevant in evaluating the harms caused by retaliation.[248]

That argument fails to recognize, however, that the more moderate standard adopted by Justice Alito constitutes a total incorporation of all substantive discrimination law.[249] The requirement of a tangible employment action involves a consideration of the totality of the circumstances; for example, in *White II*, the court held that a lateral job transfer was actionable retaliation under those specific conditions.[250] The court applying the moderate standard to determining whether a hostile work environment constitutes actionable retaliation would also consider the unique circumstances, including characteristics of the plaintiff.[251] Furthermore, as Justice Alito pointed out, retaliatory conduct serious enough to deter an employee from filing a discrimination claim will almost always have some effect on the conditions of employment, or is already unlawful.[252] Retaliatory conduct is in part a threat to other employees to prevent them from reporting discrimination;[253] employers have much less motivation to retaliate against an employee in some private setting. The moderate standard is, thus, effective in preventing retaliation and, by incorporating the discrimination precedent, provides courts and employers with clear guidelines.

CONCLUSION

In *Burlington v. White*, the Supreme Court articulated a broad, uncertain standard for retaliation, expanding the scope of Title VII further than the framers of the Civil Rights Act intended and leaving district courts and employers without clear guidance. The Court's interpretation provides more protection to those who file discrimination claims than to those who suffer discrimination. In addition, the standard's ambiguities are likely to result in inconsistent application throughout the circuits. As Justice Alito asserted in his concurrence, the Court should have adopted instead the same standard for retaliation as it applies to substantive discrimination claims. This moderate standard is grounded in the language of the statute, strikes a just balance

247. *See* Burlington, ___ U.S. ___, 126 S. Ct. 2405, 2407 (2006).

248. *See* Brake, *supra* note 38, at 98–99.

249. *See Burlington*, 126 S. Ct. at 2419 (Alito, J., concurring); *supra* notes 173–212 and accompanying text.

250. White II, 364 F.3d 789, 803 (6th Cir. 2004).

251. *See, e.g.*, Richardson v. N.Y. State Dep't of Corr. Servs., 180 F.3d 426, 446 (2d Cir. 1999).

252. *See supra* notes 184–95 and accompanying text.

253. *See* Brake, *supra* note 38, at 19.

between the interests of employers and employees, and still provides unfettered access to the remedies of Title VII. Furthermore, adoption of the moderate standard would finally resolve the circuit split: Its consistent application by district courts to substantive discrimination law demonstrates that the standard is judicially administrable and capable of uniform interpretation. Most importantly, the moderate standard enforces equal rights through protecting all victims of discrimination equally, thereby, serving the purpose of the Civil Rights Act.

The Civil Rights Act was enacted to prevent discrimination based on race, gender, or religion, not to provide compensation for the victims of discrimination. The standard announced in *Bulington v. White* contravenes the Act's prospective purpose; it will have the greatest effect in litigation contexts by providing retaliation plaintiffs a better chance at recovery while failing to provide clear guidance for employers seeking to avoid retaliatory conduct. Discriminatory conduct by an employer should be held to violate Title VII if the conduct is related to employment, whether the plaintiff is alleging status-based discrimination or retaliation. Title VII guarantees the right to equal employment opportunities and should provide equal opportunities to victims of discrimination to enforce that right, regardless of the basis for that discrimination.

LAUREN LEGRAND*

* Lauren, insert bio.